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What's Hot in Workers' Comp

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2017

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

1. On remand from the Supreme Court, the Board finds the employer met the burden of proof on its termination petition by showing the claimant is capable of working and there is work available as the evidence established a prevalence of undocumented workers employed in the jobs listed on the Labor Market Survey.

Magdalena Guardado v. Roos Foods, (IAB No. 1405006 – Decided May 18, 2017)

At the remand hearing held before the Board on April 27, 2017, the employer presented testimony from an Assistant Professor of Economics at the University of Delaware, whose testimony established that the industries represented by the jobs listed in the Labor Market Survey collectively employed 15,000 unauthorized immigrants in Delaware. The professor concluded that, based on this data—established by his research—the unauthorized immigrant population was well represented in the positions set forth in the Labor Market Survey.

The Board accepted this testimony and concluded that the employer had provided reliable and relevant evidence of the prevalence of undocumented workers in the specific occupations and industries listed in the Labor Market Survey. Therefore, the employer was successful in showing the appropriate nexus between the actual jobs available in the Labor Market Survey and the prevalence of undocumented workers in those job categories in Delaware. Thus, it was concluded the employer successfully rebutted the claimant's assertion that she is a prima facie worker by presenting evidence of the availability of jobs within her capabilities. The Board ordered that the claimant's total disability benefits be terminated.

2. Superior Court holds that a claimant receiving partial disability benefits who has a recurrence of total disability is eligible for those benefits since he has not voluntarily removed himself from the labor market merely because he did not seek employment while partially disabled.

State of Delaware v. Darren Archangelo, (C.A. No. N16A-09-004 JAP – Decided August 9, 2017)

The issue raised in the employer's appeal was whether, as a matter of law, the claimant had voluntarily removed himself from the labor market and was not eligible for total disability benefits following a recurrence since he had not sought employment while receiving partial disability benefits The relevant law provides that, in a voluntary retirement situation, where a claimant does not look for any work or does not contemplate working after retiring and is content with the retirement lifestyle, the claimant is then not eligible for compensation wage benefits thereafter.

As applied to this case, the court reasoned that it is not enough to simply show the claimant does not look for work. Rather, the employer must also show that the claimant is content with the retirement lifestyle. The court did agree that the absence of a job search by a claimant on partial disability status is an appropriate factor to consider in the voluntary removal from the workforce evaluation, but it is not dispositive as a matter of law. The court relied on evidence showing that the claimant, rather than undertaking light-duty work while partially disabled, had spent time undergoing rehabilitation, which he believed was necessary to enable him to return to his career as a professional educator. Therefore, since the overwhelming evidence supported the fact that the claimant did not voluntarily remove himself from the workforce, the court affirmed the Board's decision finding that the claimant suffered a recurrence of total disability.

3. New workers' compensation rates.

The Department of Labor announced that the new workers' compensation rates effective July 1, 2017, establish a maximum average weekly wage of $1,030.49. Accordingly, the maximum weekly compensation rate is now $686.99, and the minimum weekly compensation rate is $229.00.

4. Superior Court finds that the Board applied the incorrect legal standard when finding the claimant's injury, sustained while playing on the employer's softball team, to be within the course and scope of his employment.

Morris James LLP v. William Weller, (C.A. No. N16A-05-006 FWW – Decided March 16, 2017)

The claimant was a paralegal for the employer, and he participated on their softball team, competing against other law practitioners in the Wilmington

Lawyers' Softball League, and did so for many years. The claimant was injured in a game and filed a petition to determine compensation due, but the employer contended he was not within the course and scope of employment.

Applying a four-factor standard from Larson's Workers' Compensation Law Treatise, the Board determined that the claimant's injury was compensable and occurred within the course and scope of his employment. On appeal, the Superior Court reversed and remanded the decision based on their determination that the Board had applied the incorrect legal standard. Specifically, the standard applied by the Board was for an employee injured during off-the-job activities sponsored by the employer, whereas the correct standard to use here was the one set forth in *State v. Dalton* for recreational events that are not sponsored by the employer but by another organization.

5. Personnel changes at the Industrial Accident Board during the past year.

Marilyn Doto and Mitchell Crane retired in 2017. The new Board members are Idel Wilson and Mark Murowany. They join current members John Daniello, who remains the Chair of the Board, Mary Dantzler, William Hare, John Brady, Robert Mitchell, Patricia Maull, Gemma Buckley and Peter Hartranft.

6. Petition to determine compensation due denied because the employer successfully established there was no compensable injury; rather, claimant either intentionally injured herself by staging the fall or totally disregarded the object she tripped over.

Vinette Fisher v. State of Delaware, (IAB No. 1449967 – Decided July 24, 2017)

The claimant filed a petition to determine compensation due, alleging she was injured because of a fall at work. The employer was represented by my colleague, Jessica L. Julian, Esquire, who disputed the occurrence of the alleged work injury and raised a defense, pursuant to Section 2353(b), that the claimant's alleged injury was the result of deliberate and reckless indifference to danger or because of her willful intention to bring about the injury. The claimant was employed as a court case processor, having formerly retired as a Philadelphia Police Officer. The claimant testified that on the day in question, she was walking back into the Courthouse when a painter was walking towards her, and the claimant tripped and fell over a metal pipe, sustaining injuries to her low back, left hip and left knee.

Importantly, there was video of the alleged injury, which the Board found to be compelling. Contrary to the claimant's assertion, it did not show her falling in any violent way but, rather, what appeared to be more of a hop or jump and not an accidental fall at all. The Board concluded that the video supported the finding that the incident was a staged event, not a work accident. The evidence further showed that shortly before the alleged fall, the claimant had a disciplinary discussion with her supervisor. The Board found that the timing of the incident shortly after that meeting to be "mildly suspicious." Furthermore, the Board found it incredible that the claimant could work at a location for over a year, regularly entering and exiting a building, directly in the path where the metal stump was located, and not be aware of the metal pipe that had allegedly tripped her. In dismissing the petition, the Board concluded that the evidence supported the finding that the claimant either exercised total disregard of the metal pipe or intentionally injured herself by staging the fall.

7. Interesting statistics from the Department of Labor.

The 19th Annual Report on the Status of Workers' Compensation Case Management shows, according to the most recent data, there were 7,446 petitions filed in 2016, an increase of over 400 petitions from the number filed in the previous year. During 2016, there were 4,580 petitions heard by the Board and/or the Hearing Officers.

As far as Utilization Review requests challenging medical treatment, the Office of Workers' Compensation received 372 such requests in 2016. This was a decrease of 6% from the number filed the previous year. Once again, the chronic pain treatment guidelines and, in particular, the issue of pain medication continued to be the most challenged type of treatment.

8. The Board dismisses petition to determine compensation due, finding the alleged injury from a slip in a hallway at work did not occur and that there was no spoliation of evidence by the employer.

Cathleen Kappel v. State of Delaware, (IAB No. 1441829 – Decided August 1, 2017)

The claimant filed a petition to determine compensation due, alleging a work-related slip and fall during the course of her employment as a math teacher, which caused an injury to her back. This case was defended by my colleague, Keri L. Morris-Johnston, Esquire, based on whether the alleged work injury actually occurred and on causation grounds. The Board dismissed the petition, finding that the claimant lacked credibility and that the evidence did not establish that she actually had a slip in the hallway at work. The Board further found that, even if the claimant had shown that a work accident had occurred, her medical testimony was deficient in establishing causation.

A key issue at the hearing was the request by claimant's counsel for an adverse inference against the employer based on the assertion that there had been spoliation of evidence because the employer did not preserve certain video evidence of the alleged injury. The evidence showed that, in fact, the employer had produced as discovery video footage based upon the claimant's initial representation as to the time and location at her work place where the alleged slip occurred. When the claimant was made aware that this video showed no work incident, she then changed the time of the injury to a later time, but the video from that particular period was no longer available. The Board agreed with the employer that there had been no spoliation of evidence since there was no indication that any evidence had been destroyed, let alone destroyed with intent or recklessness. The Board reasoned that the claimant could not obtain an adverse inference instruction regarding the security video not retained by the employer when the primary reason for any delay in obtaining it was that the claimant changed her story as to when the injury occurred. The employer had no duty to preserve evidence that it had no way of knowing could possibly be relevant. In this situation, the Board ruled that the claimant is not entitled to an adverse inference. In dismissing the petition, they went on to discuss other evidence showing that the claimant was simply not a credible witness.

9. The Board issues an important ruling on how frequently an employer can file a petition seeking to terminate total disability benefits.

Michael Sweeny v. Rocla Concrete Tie, Inc., (IAB Hearing No. 1444476 – Decided July 10, 2017)

The claimant filed a motion seeking to dismiss the employer's termination petition as having been filed in violation of Section 2347 of the Act. Section 2347 provides that on "[t]he application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6 months, review any agreement or award."

In dismissing the claimant's legal motion, the Board clarified that the prohibition contained in Section 2347 refers to Board actions, not the actions of a party in filing a petition. The Board also addressed the issue of whether the six-month period should be measured from the date of the Board's hearing or from the date of the Board's award. They cited a prior decision which clarified that the hearing itself is the actual "review" and, therefore, the six months must be measured between hearings. The implication of this is that the Board cannot hold a hearing to "review" an award more than twice a year or once every six months.

10. Statistics on appeals from Board decisions show that reversal rates continue to be extremely low.

The Annual Report from the Department of Labor gives the five-year cumulative summary of appeals from Board decisions. For the five-year period from 2012 through 2016, the Board rendered 1,985 decisions on the merits. From that number, only 219 were appealed, an average of 43.8 appeals per year. From that number of appeals, 186 have been resolved and only 14 of the Board decisions have been reversed and/or remanded in whole or in part. This means that from the total number of decisions issued by the Board in those five years, the reversal rate is only 0.705%. Thus, it continues to be extremely difficult to overturn Board decisions on appeal. ||

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2017

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Dario J. Badalamenti

1. The Appellate Division addresses the notice provision of N.J.S.A. 34:15-40(f) requiring an insurance carrier seek permission from the injured worker before initiating a third party action on his behalf.

Hartford Underwriters Insurance Co. v. Salimente, Docket No. A-3687-14T2, 2017 N.J. Super. Unpub. LEXIS 275 (App. Div. decided February 6, 2017)

N.J.S.A. 34:15-40(f) provides that, "When an injured employee . . . fails within one year of the accident to either effect a settlement with a third person of his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, 10 days after a written demand on the injured employee, can . . . institute proceedings against the third person for the recovery of damages[.]"

2. The Appellate Division affirms a granting of a motion for medical and temporary benefits based on a finding that the petitioner's disability was the result of the occupational stresses of his later employment, not simply a worsening of his prior work injury.

Hendrickson v. United Parcel Service, Docket No. A-3267-15T2, 2017 N.J. Super. Unpub. LEXIS 1706 (App. Div., decided July 11, 2017)

In granting the petitioner's motion, the Judge of Compensation likened his claim to *Singletary v. Wawa*, 406 N.J. Super. 558 (App. Div. 2009), where the Appellate Division held that the determinative issue in finding an employer liable is whether the subsequent employment materially contributed to his or her disability.

3. The Appellate Division addresses the burden of proving an increase in disability when a petitioner seeks additional compensation benefits following an earlier award.

Kalucki v. United Parcel Service, Docket No. A-3486-15T3, 2017 N.J. Super. Unpub. LEXIS 2077 (App. Div., decided August 15, 2017)

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Perez v. Pantasote, Inc.*, 95 N.J. 105 (1984), which held that a claimant must satisfy the general principle of workers' compensation law requiring that disability be established by appropriate objective evidence, that disability cannot be based solely upon a claimant's subjective complaints of a present level of incapacity.

4. The Appellate Division revisits *Laidlow* and the intentional wrong exception to the exclusive remedy provision of the New Jersey Workers' Compensation Act.

Soto v. ICO Polymers, Docket No. A-3858-14T4, 2017 N.J. Super. Unpub. LEXIS 2551 (App. Div., decided October 11, 2017)

In *Laidlow*, the court delineated a two-prong test to be utilized as an analytical guide for judges who must consider and decide summary judgment motions based on the workers' compensation exclusivity provision. This test requires not only that the conduct of the employer be examined, but also the context of the event in question: "[T]he trial Court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar."

5. The Appellate Division affirms interpretation of N.J.S.A. 34:15-13 as limiting dependency benefits for an incapacitated adult child to 450 weeks.

Apperman v. Visiting Nurse Ass'n of Westfield, Docket No. A-5446-15T3, 2017 N.J. Super. Unpub. LEXIS 2721 (App. Div., decided October 30, 2017)

In effectively terminating benefits to the decedent's incapacitated adult child, the Appellate Division did express a level of empathy. It stated, "We are not insensitive to the fact that [decedent's dependent] remains incapacitated, and the result we reach effectively terminates his dependency benefits. We are sympathetic, but the judiciary is not at liberty to subordinate the requirements of the law to the . . . influences of sentiment and benevolence. Thus, any gap or omission in N.J.S.A. 34:15-13 . . . is best left to the Legislature to address."

6. The Appellate Division affirms award of permanent and total disability, finding there was sufficient credible medical evidence to support the judge's findings.

D'Angelo v. Archdiocese of Newark/Christ The King Preparatory School, Docket No. A-1690-15T3, 2017 N.J. Super. Unpub. LEXIS 2728 (App. Div., decided October 30, 2017)

The Appellate Division found no merit in the respondent's claims that the petitioner's expert medical testimony should have been stricken as inadmissible net opinions. The doctrine barring the admission at trial of net opinions is a corollary of N.J.R.E. 703, which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data. As the Appellate Division noted, "[B]oth of petitioner's experts testified as to the factual basis for their opinions and the causal relationship between the gunshot wound and petitioner's current complaints. Indeed, the judge's decision is replete with references to testimony that supported each expert's opinion. The experts gave the 'why and wherefore' of their opinions, and as such, they were not 'net.'"

7. The Appellate Division vacates assessment of the petitioner's permanent disability as unsupported by competent, relevant and reasonably credible evidence.

Van Artsdalen v. Fred M. Schiavone Construction, Docket No. A-3392-15T1, 2017 N.J. Super. Unpub. LEXIS 2516 (App. Div., decided October 5, 2017)

The Appellate Division reversed and remanded for reconsideration, stating, "[A]s there was no evidence to support the findings that respondent's injury was inoperable. While these findings were central to the Judge of Compensation's decision, as demonstrated by her conclusion that respondent's disability rating was construed as worse because his injuries were inoperable, neither respondent nor the experts stated these facts or opinions, nor was there any other evidence presented from which the judge could have logically inferred them."

8. The Appellate Division affirms denial of motion for medical and temporary disability benefits based on a finding that the petitioner's lay and expert witnesses did not support her claim.

Linzmayer v. Keyport Board of Ed., Docket No. A-3315-15T2, 2017 N.J. Super. Unpub. LEXIS 2470 (App. Div., decided September 29, 2017)

The Judge of Compensation rejected the testimony of the petitioner's two expert witnesses, explaining that their opinions were based on the petitioner's version of the details of her accident alone, without proper testing or an appropriate review of the medical records. Rather, the Judge of Compensation accepted the testimony of the respondent's two medical experts. As the Appellate Division concluded, "[T]he Judge of Compensation's findings were not against the weight of the evidence. Instead, the finding was supported by the testimony of two experts who the Judge of Compensation found to be credible based on their examination of petitioner, the tests they conducted and their review of petitioner's medical records."

9. The Appellate Division reverses award of temporary disability benefits due to insufficient evidence in support of the court's finding that the petitioner was the respondent's employee.

Calix v. A2Z Universal Landscaping, Docket No. A-3978-15T2, 2017 N.J. Super. Unpub. LEXIS 2223 (App. Div., decided September 7, 2017)

On appeal, the respondent argued that the obligation to pay disability benefits can only be imposed upon an employer and that the court erred by awarding temporary disability benefits because there was no evidence of an employer-employee relationship. In reversing the Judge of Compensation's ruling, the Appellate Division found, "[T]he record before the judge was bereft of any evidence A2Z employed Calix. Instead, Calix testified he had no knowledge of the identity of his employer beyond having been hired by "Steve and Roger West [."] There was no evidence supporting the judge's implicit finding that A2Z was Calix's employer and, therefore, no basis upon which the judge could properly award temporary benefits under N.J.S.A. 34:15-15.

10. The Appellate Division affirms finding of compensability as the parking lot where the petitioner was injured was controlled, though not owned, by the employer.

Gould v. Corizon Health of NJ, Docket No. A-0438-15T1, 2017 N.J. Super. Unpub. LEXIS 2022 (App. Div., decided August 7, 2017)

The Judge of Compensation found that the parking lot in which the petitioner was injured, although owned by the county in which the parking lot was located, was under the control of the employer as it was the only lot available for its employees. As such, the petitioner's workplace included the parking lot, and her workday commenced when she arrived in her car at the parking lot. **II**

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2017

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

1. The Pennsylvania Supreme Court pronounces the impairment rating provisions of the Workers' Compensation Act unconstitutional.

Protz v. WCAB (Derry Area School District), 161 A.3d 827 (Pa. 2017)

The mandate set forth in § 306(a.2) of the Workers' Compensation Act (IREs) violates the requirement that all legislative power be vested in the General Assembly. The General Assembly unconstitutionally delegated lawmaking authority to the American Medical Association. The Supreme Court held that § 306(a.2) violated the non-delegation doctrine and was unconstitutional in its entirety.

2. *Protz II* prompts Commonwealth Court to reverse decision to modify benefits based on an IRE performed in 2005 using the Fifth Edition of the AMA Guides.

Debra Thompson v. WCAB (Exelon Corporation), 168 A. 3d 408 (Pa. Cmwlth. 2017)

Because the Pennsylvania Supreme Court held that the entirety of § 306(a.2) of the Workers' Compensation Act had to be stricken as unconstitutional in *Protz*, and in so doing essentially struck the entire IRE process from the Act, the court was compelled to reverse the Workers' Compensation Appeal Board's affirmance of the Workers' Compensation Judge's modification of the claimant's benefits from full to partial because no other provision of the Act allowed for modification of benefits based on an IRE.

3. Commonwealth Court orders the claimant's counsel to refund unreasonable contest attorney's fees to the employer.

County of Allegheny v. WCAB (Parker), Parker v. WCAB (County of Allegheny), 151 A.3d 1210 (Pa. Cmwlth. 2016)

The Appeal Board erred in affirming a Workers' Compensation Judge's denial of an employer's petition to direct the claimant's lawyer to refund unreasonable contest attorney fees as such fees were not reimbursable from the Supersedeas Fund under the Act. The judge had the authority to order the refund because the employer was erroneously ordered to pay the fees.

4. Claimant was in course and scope of employment at time of motor vehicle accident during commute to work because he intended to take a sick day but was urged by his employer to report to work.

Lutheran Senior Services Management Company v. WCAB (Miller), 154 A.3d 892 (Pa. Cmwlth. 2017)

But for a problem with the security cameras at the employer's facility and the direction from his supervisor that the problem needed to be fixed, the claimant, the director of maintenance for the employer, would not have come in on the day in question due to an illness. The special circumstances surrounding the claimant's injuries in the motor vehicle accident while driving to work fell within an exception to the coming and going rule because the claimant was "on the clock" from the moment he picked up his phone at home and fielded his supervisor's specific request to fix the security cameras.

5. Claimant's deviation from her employment to obtain feminine hygiene products was a temporary departure and injuries she sustained were compensable.

Starr Aviation v. WCAB (Colquitt), 155 A.3d 1156 (Pa. Cmwlth. 2017)

Under the personal comfort doctrine, the claimant was injured in the course of her employment while driving an airport "tug" to meet her mother, who was bringing feminine products to her after the claimant realized that she had started her menstrual period and did not have these items. The claimant's departure, for which she had permission, was for the purpose of attending to her personal comfort so that she could continue to serve the employer's interest.

6. A tractor driver hired to move bins during the apple picking season was not a seasonal employee but an itinerant agricultural laborer and entitled to a higher average weekly wage and compensation rate.

Toigo Orchards, LLC and Nationwide Insurance Company v. WCAB (Gaffney), 156 A.3d 407 (Pa. Cmwlth. 2017)

The Appeal Board's order, which determined the claimant was not a seasonal employee under the Act and applied an alternative average weekly wage calculation, was affirmed because the claimant was engaged in itinerant agricultural labor in his position as a temporary tractor driver for the apple harvest. He only worked and earned wages for five weeks before he was injured, did not have a long-term employment relationship with the employer and did not have a specific number of hours he worked per week. The court reversed a portion of the order that awarded the claimant benefits for a 10-week healing period because the employer rebutted the presumption that the claimant's specific loss entitled him to a healing period since he did not file his claim petition until after he had returned to Florida and his retirement.

7. An employer that refuses to pay for work-related medical treatment on the basis that a different entity was the actual provider of the billed medical services is subject to penalties for violating the Pennsylvania Workers' Compensation Act.

Derry Township Supervisors and Selective Insurance Company of America v. WCAB (Reed), 158 A.3d 194 (Pa. Cmwlth. 2017)

The Workers' Compensation Judge did not err in granting a claimant's penalty petition, due to the employer's failure to promptly pay for work-related medical treatment as required by the Act, since the judge correctly found that a joint venture between two physical therapy providers was lawful, thereby enabling one of them to bill the employer. The employer did not contest that the treatment was necessary and submitted no evidence that anything was illegal about the providers' leasing arrangement. Therefore, the Workers' Compensation Judge did not abuse his discretion in imposing a 50% penalty. As the employer received no indication from any federal or state authority that the providers' billing arrangement was impermissible in any way, the judge did not err in finding that the employer lacked a reasonable basis to contest the matter and ordering it to pay the claimant's attorney's fees.

8. A claimant, working in a modified duty position at her regular wages with her pre-injury employer, who later voluntarily accepts a lower paying job created for her by her pre-injury employer, suffers a loss of earning power caused by the work injury.

Holy Redeemer Health Systems v. WCAB (Lux), 163 A.3d 498 (Pa. Cmwlth. 2017)

The Appeal Board properly granted claimant's petition alleging she was partially disabled under § 306(b) of the Act because the employer created and offered the claimant a permanent light-duty position within her restrictions at a loss of earnings for which it claimed no liability. The claimant suffered a loss of earning power attributable to her work-related injury when she returned to work in a modified-duty position with her pre-injury employer and thereafter accepted a permanent position specifically created and offered to her but at a loss of wages.

9. An employer is entitled to subrogation under the Act even if the employer was contesting a claim petition at the time third party settlement funds were distributed.

Anthony Kalmanowicz v. WCAB (Eastern Industry, Inc.), 166 A.3d 508 (Pa. Cmwlth 2017)

There was no evidence to be discerned that would support a conclusion that the employer acted in bad faith or failed to exercise due diligence in enforcing its subrogation rights. Thus, the employer did not waive its right to subrogation pursuant to § 319 of the Act by contesting the claimant's claim petition.

10. Permanency is a required element for the claimant's burden of proof in a claim for specific loss benefits for the loss of use of the right index finger.

Morocho v. WCAB (Home Equity Renovations, Inc.), 167 A.3d 855 (Pa. Cmwlth. 2017)

An order of the Appeal Board reversing a Workers' Compensation Judge's order granting a claim petition for a specific loss of use of the right index finger under the Act was proper because the claimant failed to present medical evidence to support a finding that his loss of function in his index finger was permanent and, thus, was not able to meet his burden of proof. A doctor's records and report described the claimant's diagnoses, but they failed to detail whether the injuries were expected to be permanent. ||