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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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


Francis X. Wickersham

A claimant who fails to establish a valid common law marriage to the decedent is not entitled to widow's benefits under §307 (3).

Brett Cooney (deceased) – Amanda Cerrano v. WCAB (Patterson UTI, Inc.); 1681 C.D. 2013; filed 6/12/14; by Judge Simpson

The decedent sustained a traumatic brain injury as a result of a drilling rig accident while working for the employer. The decedent passed away six days following the injury. After the decedent's death, the employer and the claimant entered into an agreement to pay dependency benefits to the decedent's two minor children under §307 (1) (b) of the Act. In the agreement, the claimant reserved the right to file a fatal claim petition for widow's benefits. The claimant did so, but the Workers' Compensation Judge denied the petition.

The claimant was a native of Wyoming and met the decedent in her home town in 2002. The decedent had moved to Wyoming to work in the oil and gas industry. The claimant and the decedent lived together. They combined their income to pay bills. They opened a joint checking account. They bought vehicles together, and the titles to the vehicles were placed in the claimant's name. They had two children together. Although never formally married, one year before the birth of their first child, the decedent gave the claimant a ring and said to her, "You're my wife." The claimant and the decedent also introduced themselves as husband and wife. Later, the decedent, the claimant and their two children moved to Pennsylvania. They continued to introduce themselves as husband and wife.

In denying the claim petition, the Judge recognized that the Supreme Court abolished the Doctrine of Common Law Marriage prospectively from the date of a September 17, 2003, decision in the case of *PNC Bank Corp. v. WCAB (Stamos)*, 831 A.2d 1269 (Pa. Cmwlth. 2003). In addition, by Act of November 24, 2004, §1103 of the Marriage Law was amended to invalidate common law marriage contracted after January 1, 2005. The Judge concluded that, although the claimant and the decedent exchanged words recognizing they were husband and wife when they lived in Wyoming in 2003, Wyoming did not recognize common law marriage as valid. The claimant and the decedent did not move to Pennsylvania until 2009, after Act 144 abolished common law marriage. Therefore, benefits were denied.

On appeal, the Workers' Compensation Appeal Board affirmed. The Commonwealth Court affirmed as well. According to the court, §1103 of Act 144 includes a consideration of where the parties resided when they entered into a common law marriage prior to 2005. The parties resided in Wyoming, which did not recognize common law marriage. As such, the claimant and the decedent were never lawfully married prior to January 1, 2005, even assuming the decedent was not aware that Wyoming did not recognize common law marriage. II

Work-related medical expenses are not payable directly to the claimant where a subrogation lien of a health care carrier had been established by the parties prior to the Judge's decision.

John Evans v. WCAB (Highway Equipment and Supply Co.); 2552 C.D. 2013; filed 6/30/14; by Judge McCullough

A Workers' Compensation Judge granted a claim petition for an injury sustained by the claimant while working for the employer. The Judge awarded ongoing total disability benefits and payment of medical expenses. After this decision, claimant's counsel submitted a subrogation lien from the claimant's personal health care insurer

(Company A) for payment of medical expenses in the amount of $29,995.59. Later, the claimant filed a penalty petition against the employer for failure to pay the January 2009 award in a timely and accurate manner. The claimant submitted to the Judge documentation regarding Company A's subrogation lien. The Judge granted the penalty petition and directed the employer to pay the medical expenses to the "health care provider," less a 20% counsel fee. On appeal to the Appeal Board, the claimant argued that the amount incurred in medical expenses plus interest should be paid directly to the claimant. The Board remanded the case to the Judge on this issue, and the Judge found that the submission of an October 2008 letter proved that a subrogation lien was established prior to the Judge's January 2009 decision. Thus, medical expenses were not payable directly to the claimant. The claimant appealed to the Board again, and the Board affirmed.

The Commonwealth Court affirmed the decisions below. The claimant argued that Company A did not preserve its subrogation lien and, therefore, medical expenses were directly payable to him. The claimant argued that in accordance with the case of *Frymiare v. WCAB (D. Pelliggi & Sons)*, 524 A.2d 1016 (Pa. Cmwlth. 1987), the Judge wrongly ordered payment of the medical expenses to the health care provider because Company A did not seek to protect its subrogation lien before the Judge awarded benefits. According to the Commonwealth Court, however, in this case, the claimant submitted into evidence a letter stating that Company A had a subrogation lien for the awarded medical expenses and the Judge properly found that the letter established that an agreement for the subrogation lien was in place before the claim petition was decided. II

An employer does not violate any provision of the Act or accompanying regulations by failing to serve the claimant with a copy of a utilization review determination.

Richard Marrick v. WCAB, 2128 C.D. 2013; filed 7/16/14; by Judge McCullough

The claimant filed a penalty petition alleging the employer violated the Act by unilaterally ceasing payment of medical bills for a 1995 work injury. According to the claimant, the bills were denied because of a utilization review (UR) that was filed. The claimant was requesting penalties because the carrier was advising that they would not pay because of a favorable UR which the claimant was unable to locate. At a hearing on the penalty petition, the employer submitted into evidence a UR packet which included a UR request, a UR determination face sheet and a UR report. The UR request properly identified counsel for the claimant. The UR determination face sheet identified the name and address of the claimant, but not the claimant's counsel. The UR report and face sheet also suggested the claimant had notice of the UR request, since the claimant submitted a statement to the URO regarding the treatment in question.

The Judge denied the penalty petition, concluding that the employer did not violate the Act because there was no evidence of any statutory or regulatory provision requiring an employer or its insurance carrier to serve a copy of a UR determination on a claimant and/or a claimant's counsel. The Appeal Board affirmed on appeal, and so did the Commonwealth Court. The court held that §127.476 of the Medical Cost Containment Regulations imposes no service requirement on the employer and that the plain language of the section imposes the requirement on the URO to serve the determination on all parties. II

Side Bar

The court points out that, although the employer was relying on the UR determination to excuse its obligation to pay the claimant's medical bills, the UR determination at issue was actually in the claimant's favor. However, the claimant limited his argument before the Judge and the Board to the service issue only.

A decision from a Workers' Compensation Judge dismissing the claimant's utilization review petition on the sole basis that the claimant's medical provider's opinions were not convincing does not constitute a "reasoned decision" as required under the Act.

Joe Cucchi v. WCAB (Robert Cucchi Painting, Inc.); 108 C.D. 2014; filed 7/17/14; by Senior Judge Friedman

Following the claimant's work injury, the employer filed a utilization review request. The UR reviewer determined that the claimant's treatment was unreasonable and unnecessary. The claimant then filed a UR petition. The Workers' Compensation Judge appointed a physical therapist to conduct an independent UR. The Judge later dismissed the UR petition, crediting the opinions of the UR reviewer and the independent reviewer. The Judge also discredited the opinions of the claimant's treating provider as "not convincing." The claimant appealed to the Appeal Board, which affirmed.

The Commonwealth Court vacated, agreeing with the claimant that the Judge failed to issue a reasoned decision. According to the court, the Judge failed to articulate any objective bases for deeming the opinions of the UR reviewer and the independent reviewer more credible and persuasive then those of the claimant's treating physician. In the decision, the Judge simply stated that the treating provider's opinions were not convincing, with no explanation as to why. Because the Judge failed to issue a reasoned decision under §422 (a) of the Act, the Board's order was vacated with instructions to remand to the Judge to explain in detail the bases for his prior credibility findings. II

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

The Appellate Division interprets the definition of "employment" under N.J.S.A. 34:15-36 of the Act in the context of off-premises employment.

Ford v. Durham D&M, LLC, Docket No. A-2071-13T4, (App. Div., decided 7/11/14)

The petitioner was employed by the respondent as a school bus aide and was responsible for helping children on and off the bus, assisting them with their seatbelts and ensuring that they remained well-behaved on the way to and from school. The petitioner was paid "by the run" and usually had a number of runs per day. Typically, the petitioner obtained a ride from a friend to and from the bus yard each morning and evening where all runs began and ended. That notwithstanding, the petitioner had made arrangements with the respondent for the bus driver to drop her off at home if the last run ended near her residence. On January 26, 2012, this particular run was the petitioner's last run. After all of the children had been dropped off, the bus driver drove the petitioner to her home. As the petitioner was stepping from the bus, she fell onto the pavement and was injured.

The petitioner filed a claim with the Division of Workers' Compensation seeking medical and indemnity benefits. The respondent denied that the petitioner's accident arose out of and in the course of her employment and invoked *N.J.S.A. 34:15-36* of the Workers' Compensation Act. This so-called "premises rule" provides that:

> Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer.

The respondent argued that, because all of the children had already been dropped off, and the petitioner was being driven home rather than to the bus yard, her work day had ended prior to her fall. At the conclusion of a bifurcated trial as to the issue of compensability, the Judge of Compensation rejected the respondent's argument and found that the petitioner's injuries did indeed arise out of and in the course of her employment. The respondent appealed.

In affirming the Judge of Compensation's ruling, the Appellate Division characterized the respondent's contention that the petitioner's injuries did not arise out of and in the course of her employment as inconsistent with N.J.S.A. 34:15-36. As the Appellate Division reasoned:

> The most logical interpretation of N.J.S.A. 34:15-36 in this instance . . . is that petitioner's employment commenced when she arrived at the bus yard to start the day and ended when she returned there or to an otherwise authorized location. The fact that she was given permission to get off the bus at home as opposed to the bus yard does not detract from the fact that she had to get off the bus as an incident of employment.

Accordingly, the Appellate Division concluded that the Judge of Compensation properly determined that the petitioner's work day began when she arrived at the bus yard in the morning and ended when she exited the bus at night. II

Side Bar

In order to illustrate that the definition of "employment" under the Act includes situations in which the employee is physically away from the employer's premises but, nevertheless, engaged in performing duties directed by the employer, the Appellate Division utilized the following analogy:

> The analogy of petitioner leaving one's office is appropriate. The bus, in essence, is petitioner's office. There was no increased risk by the petitioner descending the bus step where she did as opposed to at the bus yard. In fact, in this case, getting off at her home actually lessened the time she was on the bus in that the location of her home was close to the last drop off. She, thus, left the bus sooner than she would have if she went to the bus yard.

News from Marshall Dennehey

Niki Ingram, **Tony Natale** and **Jim Pocius** will be featured speakers at the Workers' Compensation Summit sponsored by the Pennsylvania Chamber of Business and Industry. The purpose of the Summit is to provide a basic understanding of workers' compensation and remove confusion from the "gray areas" of the law, explain the relationship between Medicare and workers' compensation, cover new and hot topics, and provide solutions to companies' biggest mistakes. Niki and Tony will presented "Social Media and Workers' Compensation, and Handling Unusual WC Situations," and Jim will present "Workers' Compensation and Medicare Update and the Top 10 Mistakes Companies Make in Complying." For detailed information, visit the Event Listings page of our website at www.marshalldennehey.com.

WE ARE MOVING!

Effective Monday, August 25, the Bethlehem office will be relocating to the address below:

4905 WEST TILGHMAN STREET | SUITE 300
ALLENTOWN, PA 18104

Our main number will remain the same: 484.895.2300
Our new fax number is: 484.895.2303
All direct dials will remain the same.