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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

The Supreme Court holds that an employer is not obligated to issue a Notice of Ability to Return to Work before offering alternative employment when the injured employee has not yet filed a claim petition and, thus, has not yet proven an entitlement to workers' compensation benefits.

School District of Philadelphia v. WCAB (Hilton); 34 EAP 2014; decided May 26, 2015; by Mr. Justice Baer

A Workers' Compensation Judge granted the claimant's claim petition and awarded benefits; however, he limited the claimant's benefits to a closed period. Finding that there was work available that the claimant was capable of performing, the Judge suspended her benefits. On appeal, the Workers' Compensation Appeal Board reversed, in part. The Board affirmed the Judge's award of benefits but reversed the suspension on the grounds that the employer never provided the claimant with a Notice of Ability to Return to Work before making another position available to the claimant. The Commonwealth Court then reversed the Board, holding that the employer had no duty to issue a Notice of Ability to Return to Work because a § 306 (b)(3) notice is part of the earning power assessment process that is required when an employer seeks to modify or suspend benefits on the basis of medical evidence. According to the court, the purpose of the notice provision is to require employers to share new medical information about a claimant's physical ability to work and its possible impact on ***existing*** benefits.

The Pennsylvania Supreme Court affirmed the Commonwealth Court, holding that § 306 (b)(3) notice is required when the employer is seeking to modify existing workers' compensation benefits based on medical evidence establishing that the injured employee is able to return to work in some capacity. Because the injured employee in this case had not yet received workers' compensation benefits when the offer of alternative employment was tendered, the employer had no duty to provide a § 306 (b)(3) notice. **II**

When the parties cannot agree on an IRE physician, the date the insurer requests a physician be designated to perform an IRE is the determinative date as to whether the IRE request is timely under § 306 (a.2)(1).

Village at Palmerton Assisted Living v. WCAB (Kilgallon); 334 C.D. 2014; filed June 12, 2015; by Judge Cohn Jubelirer

The claimant sustained a work injury on March 3, 2007, and began receiving temporary total disability benefits as of September 27, 2007, and had received 104 weeks of temporary total disability as of November 28, 2009. The employer filed a Request for Designation of a Physician to Perform an IRE (LIBC-766) on September 21, 2009. The claimant advised the employer that she would not attend an IRE, and the employer filed a petition for physical examination. The claimant challenged this petition by arguing that the initial IRE request was premature since it was filed at a time when the claimant had not yet received 104 weeks of benefits. While proceedings were pending, the employer filed form LIBC-765 (IRE appointment) with the Bureau of Workers' Compensation, scheduling an IRE for November 16, 2009. Later, the employer realized that its initial IRE request was premature and, in December 2009, began extended efforts to correct the situation directly with the Bureau. The employer also withdrew its petition, conceding that its initial IRE request was premature, and filed another IRE request in February 2010.

On March 25, 2010, a designation of a new IRE physician was made. The employer then filed an IRE appointment form on April 13, 2010, stating that the claimant's 104 weeks of total disability ended on October 3, 2009, and that the IRE was scheduled for May 18, 2010. The employer also filed another petition for physical examination to compel the claimant to attend the IRE, which was granted by the Workers' Compensation Judge. The claimant did submit to the IRE on July 27, 2011.

On September 14, 2011, the employer issued a Notice of Change of Workers' Compensation Disability Status (notice of change), indicating that the claimant's impairment rating was 11% and that the date of the claimant's disability status change was May 18, 2010—the IRE date. The claimant then filed a review/reinstatement petition, alleging that the employer was not entitled to an automatic change in status because the IRE request and resulting IRE were untimely. The claimant also filed a penalty petition, and the employer filed modification and review petitions, seeking an IRE change in status date of November 28, 2009. The Judge found that the February 2010 IRE request was untimely and that the employer was not entitled to an automatic change in status. The employer appealed to the Appeal Board, and they affirmed. According to the Board, in order for an IRE request to be timely under §306 (a.2)(1) of the Act, the insurer must file both the IRE request and the IRE appointment forms within 60 days of the expiration of the claimant's receipt of 104 weeks of temporary total disability benefits.

The employer appealed to the Commonwealth Court, which reversed the Board. According to the court, when the parties cannot agree on an IRE physician, the date the insured requests a physician be designated to perform an IRE is the determinative date as to whether the IRE request is timely under §306(a.2)(1) of the Act. The court held that there was no requirement that the employer file both the IRE request and the IRE appointment forms within the 60-day window following payment of 104 weeks of benefits in order for an IRE request to be timely and allow for an automatic change in benefit status.

The Commonwealth Court also agreed with the employer's argument that it made a timely IRE request when they wrote a letter to the Bureau on December 16, 2009, requesting designation of an IRE physician—18 days after the claimant received 104 weeks of temporary total disability benefits—and the Bureau acknowledged the request by letter dated December 24, 2009. In that letter, the Bureau stated that it would consider the previous assignment of the IRE physician to be effective as of the date of the employer's most recent request. The court concluded that the employer's December 2009 letter was filed within the required 60-day time period for an automatic change in the claimant's disability status. ||

Side Bar

The numerous dates and forms referenced in this opinion made it a challenging one to read and summarize. Bottom line—for an IRE to be deemed timely for taking an automatic change in status based on an IRE that is less than 50%, only the IRE request form (LIBC-765) needs to be filed within the "60-day window."

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division addresses the requirements for motions for temporary disability and/or medical benefits filed with the Division of Workers' Compensation as set forth in N.J.A.C. 12:235-3.2

Thomas Amadeo v. United Parcel Service, Docket No. A-1013-13T2, 2015 N.J. Super. Unpub. LEXIS 753 (App. Div., decided April 8, 2015)

The petitioner sustained a work-related injury while in the employ of the respondent in 2009. The petitioner filed a claim with the Division of Workers' Compensation and ultimately received an award for his injuries. In 2012, the petitioner reopened his claim, requesting additional medical treatment. Based on the opinion of its medical expert, who found that the petitioner was in need of no further medical care, the respondent denied the petitioner's request.

In 2013, the petitioner filed a motion for medical and temporary disability benefits based on the opinion of his own medical expert. The respondent opposed the motion based on its expert's report. The Judge of Compensation found that the petitioner's expert's report failed to state the specific type of treatment being sought, as required by N.J.A.C. 12:235-3.2 et seq. Absent a precise description of the type of medical treatment necessary, the Judge concluded that the petitioner failed to establish a *prima facie* basis for relief and dismissed the petitioner's motion. The petitioner appealed.

In affirming the Judge's dismissal, the Appellate Division relied on its review of N.J.A.C. 12:235-3.2(a), which sets forth the requirements for motions for temporary disability and/or medical benefits filed with the Division of Workers Compensation. N.J.A.C. 12:235-3.2(a) through (f) provides in relevant part:

> Motions for temporary disability and/or medical benefits shall evidence that petitioner is . . . in need of current medical treatment. In support of the motion, [a]ffidavits or certifications made on personal knowledge by the petitioner or the petitioner's attorney, as well as the report(s) of a physician(s) stating the medical diagnosis and the specific type of diagnostic study, referral to specialist, or treatment being sought shall be submitted. Such affidavits, certifications and medical reports . . . may constitute a *prima facie* case . . . unless respondent files supporting affidavits or certifications to oppose said motion on a legal or factual basis, or files medical reports if there is a medical basis to oppose said motion.

The Appellate Division concluded that the petitioner failed to provide evidence adequate to present a *prima facie* case in support of his motion. As the Appellate Division explained, the plaintiff's doctor's report "did not recommend a definite course of treatment, state that petitioner needed a particular medical treatment, or sufficiently support a referral to a specialist. Rather, [the doctor's] report merely suggested several options for other specialists to try. These suggestions are not sufficient to satisfy the regulation which requires specificity in order for the compensation judge to evaluate and appraise the validity of such motions." ||

Side Bar

It should be noted that the Appellate Division defers to the "expertise of the Judge of Compensation" in its ruling. This is a reference to the well-established legal principle that Judges of Compensation are to be regarded as experts with respect to weighing the testimony of competing medical experts and appraising the validity of compensation claim[s]. See *Ramos v. M&F Fashions, Inc.*, 154 N.J. 583 (1998).

Delaware Workers' Compensation

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Paul V. Tatlow

Delaware legislature passes House Bill 166 allowing injured workers to obtain medical care from out-of-state, non-certified providers.

The Delaware legislature has now passed House Bill 166, which allows claimants to seek medical care from out-of-state, non-certified health care providers in the payment of their medical expenses. The synopsis to the bill comments that it was meant to correct a flaw in the current statute exposed by the Delaware Supreme Court in *Wyatt v. Rescare Home Care*, 81 A.3d 1253 (Del. 2013) and *Vanvliet v. D & B Transportation*, 105 A.3d 390 (Del. 2014). These cases dealt with the problem of treatment by non-certified providers and there being no practical way to compel non-Delaware physicians to become certified.

The newly enacted bill removes the certification requirement for health care providers who are not licensed in Delaware rather in another state. It also changes the allowable payment for these non-certified, out-of-state providers to the lesser of the usual and customary fee, the other state's maximum fee reimbursement, the Delaware maximum fee reimbursement, or the rate in a negotiated contract with the employer or its carrier. The bill also gives these providers recourse to the utilization review process for payment issues. ||

News from Marshall Dennehey

Tony Natale (Philadelphia) successfully prosecuted a termination petition on behalf of the Educational Commission for Foreign Medical Graduates. The claimant sustained an injury in her role as a standardized patient for the Commission. A student rigorously examined her, causing injuries to her abdomen among other areas. The claimant treated for years while collecting partial disability payments for reduced work hours, allegedly due to the injury. Tony presented a Board Certified internal medicine expert who specializes in traumatically induced abdominal injuries and sports injuries, including sports hernias. Tony then cross examined the claimant and established that her current treatment regimen for the injury was basically non-existent except for two doctor visits after the termination petition was filed. The judge found the claimant to be fully and completely recovered from the work injury and terminated her right to all benefits.

Niki Ingram (Philadelphia) authored an article in the April/May Edition of *Workers' Compensation* magazine, published by the CLM. Her article, "Three Things We Can Count On," can be viewed here.

Michele Punturi (Philadelphia) received a favorable decision in a Workers' Compensation claim petition case before Judge Lawrence Beck. The claimant alleged work-related injuries to the neck and left shoulder. The claimant's testimony was taken by deposition and also live, and was submitted with the deposition testimony of their medical expert, Dr. Lieberman. Michele presented three fact witnesses from the employer who were very familiar with the claimant's job duties and interacted often with the claimant, along with the testimony from Dr. Handle, the Independent Medical Expert (IME) for the defense. The judge found their testimony credible and noted the lack of complaints made to them by the claimant as well as the claimant's lack of reporting a work injury. Further, the testimony of Dr. Handle was found more credible than the testimony of Dr. Lieberman on the basis that he clearly addressed all of the prior medical records. Dr. Lieberman did not have the opportunity to review and analyze all of the medical records and relied upon the claimant's present history which was inconsistent with the prior medical records. This decision emphasizes the importance of submitting medical records and diagnostic films to the IME for review and analysis. ||