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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

Testimony given by the insurer's repricing manager regarding the use of a database to determine the usual and customary charges for trauma care was not substantial evidence to support use of the database.

Allegheny General Hospital v. Bureau of Workers' Compensation Fee Review Hearing Office (SWIF); 1945 C.D. 2015; filed July 6, 2016; by Judge Simpson

The claimant suffered serious injuries in the course and scope of his employment as a plumber when a trench he was in gave way and he was crushed under 200 to 300 pounds of dirt. An air ambulance transported the claimant to the medical provider's trauma bay, where he was admitted to the trauma ICU. Surgeries were performed on the claimant, and he was released from the hospital a little over one week after the work incident. Thereafter, the provider submitted a bill to the insurer for charges totaling $120,948 and requested payment in full for the services rendered in an accredited trauma center.

The insurer repriced the bill and made payment of $88,106.32, citing the "usual, customary and reasonable rates for the geographic area." The provider filed an application for fee review, and the Medical Fee Review Section concluded that the insurer owed the provider an additional $34,861.68, finding that the provider was entitled to be reimbursed at 100% of the bill charges. In response, the insurer requested a hearing to contest this determination. At the hearing, the insurer submitted the deposition of the repricing manager. The Fee Review Hearing Officer found the repricing manager's testimony credible and concluded that the insurer had properly reimbursed the provider in the amount of $88,106.32.

On appeal to the Commonwealth Court, the provider argued that the Hearing Officer erred in overruling an objection made that the repricing manager's testimony was not relevant. According to the provider, the Statement of Purpose relied on by the repricing manager was wholly irrelevant in determining the proper payment amount under § 127.128 of the Medical Cost Containment Regulations, which relate to the exemption from fee caps for trauma centers and burn facilities. The court agreed and concluded that the repricing manager's testimony had no application to the payment for charges exempt from the fee caps.

The court also pointed out that, although they concluded in a recent decision that a comparison to other medical providers' charges could be made to reprice the cost of trauma care, they, nevertheless, questioned the use of a database for that purpose. *See Geissinger Health System and Geissinger Clinic v. Bureau of Workers' Compensation Fee Review Hearing Office*, ___ A.3rd ___ (Pa. Cmwlth. 1627 C.D. 2015, filed April 21, 2016, 2016 WL 1592957). The court held that the Hearing Officer erred in concluding that the insurer properly reimbursed the provider.

However, the court agreed with the Hearing Officer that the provider need not be reimbursed at 100% of actual charges. The charges can be compared to those by other accredited trauma centers in the same geographic region in order to arrive at the "usual and customary charge" for trauma care. Reimbursement is then made at 100% of such charges. Therefore, the court reversed the Hearing Officer's decision and remanded the case for a determination of the "usual and customary charge." ||

New Jersey Workers' Compensation

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

Dario J. Badalamenti

The Appellate Division addresses the high burden of proof necessary to overcome the exclusive remedy provision of the New Jersey Workers' Compensation Act.

Lassandro v. The Pep Boys, Docket No. A-1897-15T1, 2016 N.J. Super. Unpub. LEXIS 1334 (App. Div., decided June 10, 2016)

In May 2011, while operating a car lift, the petitioner sustained tears of both the ACL and medial meniscus of his right knee when the lift he was operating unexpectedly fell. The petitioner filed a claim with the Division of Workers' Compensation for medical and indemnity benefits, as well as a personal injury action against the respondent.

At his deposition, the petitioner testified that the lift on which he was injured had a portion of its safety mechanisms disabled. He testified that the lift was designed with safety mechanisms on either side that would lock in place once a vehicle was raised. The safety mechanisms would then need to be manually disengaged in order to lower. According to the petitioner, following his accident, he learned that the safety mechanisms on this particular car lift had been disabled because the garage floor beneath it was uneven, making it difficult for mechanics to disengage the safety mechanism once a vehicle was lifted.

The petitioner's liability expert concluded that the defendant's failure to properly train its management staff, inspect its shop equipment and maintain its shop equipment in a safe operating condition evidenced a "reckless disregard for the safety of their employees." This expert further concluded that, by allowing an unsafe equipment modification and the intentional defeat of the safety feature to go unchecked, the respondent created "a substantial certainty of serious injury" to the petitioner given that he and other workers would use the unsafe lift to repair vehicles on any given day.

At the conclusion of discovery, the respondent filed a motion for summary judgment based on the Workers' Compensation Act's so-called "exclusivity provision," N.J.S.A. 34:15-8, which provides, in relevant part, that, "[i]f any injury ... is compensable under the Act ... a person shall not be liable to anyone at common law or otherwise on account of such injury ... except for an intentional wrong." The respondent's motion for summary judgment was denied, and this appeal ensued.

In reversing the Superior Court's ruling, the Appellate Division relied on the seminal case of *Millison v. E.I. Du Pont de Nemours & Co.*, 101 N.J. 161 (1985) and its progeny. Under *Millison*, two conditions must be satisfied for the intentional wrong exception to apply. The first condition calls for an evaluation of the conduct of the employer, requiring that the employer must know that his actions are substantially certain to result in injury or death to the employee. The second condition calls for an evaluation of the context of the employer's conduct, requiring proof that the resulting injury and the circumstances of its infliction on the worker must be more than a simple fact of life of industrial employment and plainly beyond anything the legislature intended the Act to immunize.

The Appellate Division opined that, although the respondent's failure to prohibit the modification of the lift's safety mechanism did create a risk of injury to its employees, this risk did not rise to a level of danger sufficient to find that the respondent knew its conduct was "substantially certain to result in injury or death to the employee." Further, the Appellate Division found fatal to the petitioner's cause the absence of any evidence that would support the conclusion, as a matter of law, that the petitioner's injury was "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Act."

As the evidence put forth by the petitioner failed to support a finding that the defendant committed an intentional wrong under the Workers' Compensation Act, the Appellate Division concluded that the exclusivity provision of the Act barred the petitioner's personal injury claim against his employer. **II**

Side Bar

A fairly recent New Jersey Supreme Court case, *Van Dunk v. Reckson Assocs. Realty Corp.*, 210 N.,J. 449 (2012), demonstrates in its use of fairly strong language just how high the burden of proof is to overcome the exclusive remedy provision of the Act. The *Van Dunk* court stated that the standard for proving the intentional wrong exception is "formidable." It is interpreted very narrowly "to further these underlying *quid pro quo* goals, so that as many work-related disability claims as possible be processed exclusively within the workers' compensation system."

New Workers' Compensation Rates in Delaware Effective July 1, 2016.

The Secretary of Labor has announced that the average weekly wage in Delaware for calendar year 2015 was $1,034.18. Accordingly, the maximum compensation rate effective as of July 1, 2016, will be $689.45, and the minimum compensation rate will be $229.82.

Delaware Workers' Compensation

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

Paul V. Tatlow

The Superior Court holds that the Board did not abuse its discretion in allowing limited testimony about the severity of the claimant's work-related auto accident when denying the claimant's petition for additional compensation.

Alethea Davis-Moses v. Keystone Human Services, (C.A. No. N15A-10-013 AML – Decided June 24, 2016)

The claimant was involved in a work-related auto accident on November 3, 2014, and received total disability benefits from November 19 through December 16, 2014. The claimant later filed a DACD petition, alleging a recurrence of total disability as of December 17, 2014, and on-going. The claimant also filed a second DACD petition, seeking payment for cervical spine surgery that she had undergone on May 11, 2015.

The evidence before the Board included the claimant's testimony that in the auto accident she did not really know what happened but was "shook up." The claimant's medical expert testified that the claimant jarred her neck significantly, with her head whipping back and forth. The claimant's testimony to the contrary suggested that her neck did not go back and forth and that the car she was riding in was not going very fast when it jumped the curb and hit a pole.

The Board's decision concluded that the claimant's cervical spine surgery was not causally related to the work injury and that she had failed to show that her condition had resulted in a recurrence of total disability. The Board reasoned that the testimony of the claimant's medical expert was inconsistent with the claimant's own testimony. One of the legal issues noted by the Board was the nature and seriousness of the auto accident. Claimant's counsel had objected to the efforts by defense counsel to focus on the nature of the auto accident. However, the Board found that the claimant could not object to the defense using the minor nature of the accident to argue against injury while claiming through her medical expert that the violent nature of the accident had caused her serious injuries.

The sole issue before the Superior Court in the claimant's appeal was whether the Board had committed a legal error by initially failing to exclude testimony of the damage to the vehicle, only to finally exclude such evidence at the close of the hearing, but then to improperly rely on that evidence in the decision. Counsel cited the Delaware Supreme Court case of *Davis v. Maute*, 770 A.2d 36 (Del. 2001), which stands for the proposition that a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlate to the extent of damage to the car unless the party can produce competent expert testimony on that issue. The court concluded that the Board did not run afoul of the holding in *Davis v. Maute* and did not abuse its discretion by allowing limited testimony regarding the severity of the auto accident's impact. The court reasoned that the employer had never argued before the Board that there was any correlation between the minor nature of the claimant's auto accident and her injuries. Rather, it was the claimant's medical expert who relied on the severity of the accident's impact to support his causation opinion and justify the need for cervical spine surgery. Once the claimant's medical expert had opened the door with that testimony, the court said it was entirely reasonable for the Board to allow the employer to offer contradictory evidence questioning the severity of the accident, especially when that evidence came from the claimant's own testimony. ||

Side Bar

This case illustrates the important point that a medical expert can be found not credible by the Board when it is shown that the basis for the medical opinions being given are not supported by the factual record. This lack of support can be either through having the medical records themselves contradict the opinion or, as in this case, the testimony of claimant being inconsistent with the opinion of her medical expert as to the severity of the impact of the auto accident. Therefore, it is critical for a party to make certain that the opinions being given by its medical expert are supported by the record in order for there to be a likelihood of those opinions being found credible by the Board.

News from Marshall Dennehey

The Pennsylvania Chamber of Business and Industry is hosting its annual Workers' Compensation Summit on Friday, September 30, 2016. **Niki Ingram** (Philadelphia, PA) and **Tony Natale** (Philadelphia, PA) are presenting "Pennsylvania's Workers' Compensation Law: Best Practices for Complying with Benefits, Understanding the Flow of a Workers' Compensation Claim, and Tips to Prevent Workers' Compensation Fraud." For more information and to register, click here.

Ross Carrozza (Scranton, PA) secured a favorable decision in a highly contested claim and penalty petition case involving an employer/owner who was alleged to have assaulted the claimant over a work-related issue. The employer testified that she had a romantic relationship with the claimant and that it was the claimant who assaulted her at their shared apartment on the date in question. The judge found the claimant's testimony not credible, based upon Ross's cross-examination of the claimant concerning the fact that the Philadelphia Police Department Domestic Violence report indicated that the altercation had nothing to do with the employer's business but, rather, with a personal altercation over an alcohol issue. As such, the claimant was not in the scope and course of employment. ||