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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

The joint compact between Pennsylvania and New Jersey that established the Delaware River Port Authority did not confer jurisdiction to Pennsylvania authorities under the Act for injuries occurring in New Jersey.

Zachary Kreschollek v. WCAB (Commodore Maintenance Corp); 297 C.D. 2018; filed Jan. 7, 2019; by Judge McCullough

The Delaware River Port Authority began work on the Benjamin Franklin Bridge project in mid-2014. The employer was hired as a subcontractor, and the employer hired the claimant out of the claimant's local union hall. The claimant resided in Philadelphia.

On the date of the injury, the claimant had been working on both the Pennsylvania and New Jersey sides of the bridge. While working on the ground underneath the PATCO rail line on the New Jersey side, the claimant was struck on the back of his left arm by a blast of sand. While trying to escape the blast, the claimant broke his fall with his right hand, causing his wrist to snap. The employer accepted a New Jersey workers' compensation claim and paid benefits to the claimant under New Jersey law. Later, the claimant filed a claim petition in Pennsylvania. The employer raised a jurisdictional defense since the claimant was injured in New Jersey, not Pennsylvania.

The Workers' Compensation Judge dismissed the claim petition, concluding that Pennsylvania did not have jurisdiction under the Act. Although the claimant was a Pennsylvania resident and performed some work on the Pennsylvania side of the bridge, at the time the injury occurred, he was not on the bridge, but on the ground in the state of New Jersey. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that both Pennsylvania and New Jersey jointly owned the bridge as well as adjacent land and structures. Therefore, any injury on the joint territory occurs in both Pennsylvania and New Jersey. The court analyzed the joint compact entered into between Pennsylvania and New Jersey and noted that it did not make any reference to jurisdiction for purposes of workers' compensation claims, let alone confer jurisdiction to Pennsylvania authorities under the Act for injuries occurring in New Jersey. According to the court, the claimant's injury simply did not occur in the Commonwealth of Pennsylvania. Therefore, under § 101 of the Act, the claim was not compensable. In addition, the court said that the § 305.2 extraterritorial provisions of the Act did not apply. The court affirmed the decisions below and dismissed the claimant's appeal. II

News from Marshall Dennehey

Ashley Talley (Philadelphia, PA) was successful in substantially limiting the claimant's treatment costs by way of a Utilization Review Determination and, subsequently, in litigation. The claimant suffered significant work injuries to the left elbow, lumbar spine, cervical spine and left shoulder on February 16, 2016. As a result, the carrier was on the risk for considerable treatment, including chiropractic modalities, which in total comprised a significant portion of the money being paid on the claim each year. Ashley was successful in limiting that treatment by way of a favorable Utilization Review Determination, which was then challenged by the claimant in litigation. However, the judge found that the treatment was not reasonable or necessary, nor could it be justified. The petition was denied and the Utilization Review Determination was upheld in its entirety.

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Delaware Workers' Compensation

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

Paul V. Tatlow

In a case of first impression, the Superior Court holds that the Delaware Medical Marijuana Act is not preempted by federal law and it also allows for a private right of action by a medical marijuana user to enforce its non-discrimination provision.

Jeremiah Chance v. Kraft Heinz Foods Co., (C.A. No. K18C-01-056 – Decided Dec. 17, 2018)

In this civil suit filed against his employer, the plaintiff alleged he was terminated after testing positive for marijuana, in violation of the Delaware Medical Marijuana Act (DMMA), and also in retaliation for his complaint of violations under OSHA. The plaintiff had been employed by the defendant as a warehouse employee and was eventually promoted to a yard equipment operator. The plaintiff suffered from ailments, including back problems, and in 2016 he obtained a medical marijuana card for these medical issues. On August 9, 2016, the plaintiff submitted an incident report to his manager regarding unsafe conditions on the railroad ties in the railroad yard. Later that same day, the plaintiff was operating a shuttle wagon on the railroad tracks when it derailed. He was then required to undergo a drug test, and he tested positive for marijuana. The plaintiff then informed his employer that he possessed a medical marijuana card and showed it to them. Nevertheless, the employer terminated his employment for failing the drug test.

In response to the law suit, the defendant filed a motion to dismiss, arguing that federal law preempted the DMMA to the extent that it authorized the use of marijuana and required employers to accommodate that use. The court noted that the issues were of first impression and were whether: (1) the DMMA, and specifically its anti-discrimination provision, was in conflict with the federal Controlled Substances Act (CSA) and is thus preempted; and (2) a private right of action to enforce the non-discrimination provision is implied in the DMMA. Delaware is noted to be one of only nine states that explicitly bars employers from firing or refusing to hire an employee who uses medical marijuana in compliance with the requirements of state law.

On the first issue, the CSA regulates the possession and use of certain drugs, including marijuana, and provides that it is unlawful to manufacture, distribute, dispense or possess any controlled substance except in a manner authorized by that law. The CSA classifies marijuana as a Schedule I substance and does not currently allow any exceptions for medical use. In contrast, the DMMA expressly authorizes the distribution, possession and use of marijuana for medical purposes. Furthermore, the DMMA explicitly prohibits employers from disciplining employees who use marijuana for medical reasons and who fail drug tests because of it. On this point, the DMMA specified:

> An employer may not discriminate against a person in hiring, termination, or any term or condition of employment … if the discrimination is based upon either the following: a. The person's status as a cardholder; or b. A registered qualifying patient's positive drug test for marijuana … unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment.

The court concluded that the federal law did not preempt the DMMA since employers in Delaware were not required to participate in an illegal activity, such as the unauthorized manufacture, dissemination, dispensing or possession of controlled substances, but, instead, it merely prohibited them from discriminating based upon medical marijuana use.

On the second issue, the court took note that the DMMA does not provide any agency or commission with the task of enforcing the anti-discrimination provision. The court reasoned that no remedy other than a private right of action is available to cardholders and qualifying marijuana patients who are terminated or discharged from employment for failing drug tests. Therefore, the court concluded that the language of the statute creates an implied right of action for medical marijuana users to file suit alleging a violation of the non-discrimination provision.

Even though the plaintiff in this case was not a workers' compensation claimant, this case is very likely to have applicability to workers' compensation cases given the increasing number of claimants who are becoming medical marijuana users under the DMMA. ||

News from Marshall Dennehey

Judd Woytek (Allentown, PA) obtained a termination of benefits on a claim involving a lumbar sprain/strain injury that occurred on January 14, 2017. Judd presented credible and persuasive expert medical evidence that the claimant was fully and completely recovered from his work injuries and able to work full duty without restrictions. The judge found that our medical expert offered a detailed discussion of his examination findings and granted a termination of benefits as of January 18, 2018, only one year after the injury had occurred.

Michele Punturi (Philadelphia, PA) is speaking at the 2019 CLM Annual Conference in Orlando, Florida, which will be held from March 13 through March 15, 2019. In "Driven to Distraction—Mitigating Distracted Driving Claims," Michele joins other industry professionals to discuss the importance of developing a roadmap to minimize the impact and effect of distracted driving by limiting exposures, reducing costs, and mitigating workers' compensation claims. By identifying potential sources of distracted driving, employers can take the necessary steps to help curb behaviors and control risks and exposures. The CLM Annual Conference is the premier annual event for professionals in the claims and litigation management industries. For more information, click here. ||

Florida Workers' Compensation

By Linda Wagner Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

Recent evidentiary order limits parties' ex parte doctor conferences, finding discussions cannot suggest, direct or instruct provider as to what treatment or care to recommend.

Lyne Bien-Aime v. Correct Care Recovery Solutions/ESIS, Inc., OJCC 17-022305DAL, Ft. Lauderdale District, Order Jan. 2, 2019

The judge of compensation claims granted the claimant's emergency motion to prohibit and/or limit the employer *ex parte* communication with the transfer of care physician. The judge's opinion indicated he was confronted with determining whether the the employer/servicing agent conducted an impermissible *ex parte* "mini-trial" or deliberately undermined the doctor-patient relationship, thereby abusing its statutory right to conduct such conferences pursuant to § 440.13(4)(c).

The judge held that, although the attorney for the employer may discuss the claimant's medical condition with the claimant's provider on an *ex parte* basis, the employer or its representative shall not suggest to or instruct the doctor as to what treatment he or she may provide or recommend. The judge held that if the employer wishes to challenge a doctor's treatment or recommendations, it must do so at a conference where the claimant or his legal representative has the opportunity to be present, otherwise, a deliberate undermining of the doctor-patient relationship would occur. ||

Side Bar

Be careful in drafting conference summary opinion letters as claimants could cite this case to limit the admissibility of a change in provider's opinions after conferences by alleging the employer abused its right to conferences with providers.

First District Court of Appeals reverses Judge of Compensation Claims on jurisdictional issue after maximum medical improvement.

Marraffino v. Stericycle/Sedgwick CMS, 1D18-2639 (Fla 1st DCA Nov. 30, 2018)

In a prior order that was pending on appeal, the Judge of Compensation Claims determined the claimant was at maximum medical improvement. The instant order on appeal concerned claims for temporary partial disability benefits, which the judge dismissed, specifically finding that he lacked jurisdiction to consider such claims because of the previous maximum medical improvement finding on appeal. The claimant conceded that any temporary partial disability claims for periods prior to the disputed maximum medical improvement date were properly dismissed. However, for periods after that improvement date, the claimant argued the judge continued to have jurisdiction. The First District Court of Appeals agreed and reversed the judge's finding. The court held that jurisdiction over benefits concerning a different time frame remained with the judge, notwithstanding the appeal of the disputed maximum medical improvement date. The judge had erroneously relied on the faulty premise that once a claimant reached maximum medical improvement, he would forever stay at maximum medical improvement.

New Jersey Workers' Compensation

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

Dario J. Badalamenti

Respondent exercised control over petitioner, who was economically dependent on his work relationship with respondent, and there was a functional integration between petitioner's work and the nature of respondent's business.

Pendola v. Milenio Express, Inc. d/b/a/ Classic, Docket No. A-0225-17T2, 2018 N.J. Super. Unpub. LEXIS 2374 (App. Div., Decided Oct. 26, 2018)

Mr. Pendola, a cab driver, fractured his ankle in 2014 while picking up a customer. Although the facts of the incident were not in dispute, the parties agreed to bifurcate the trial to address whether Pendola was an employee of Classic or an independent contractor. Pendola testified that he had worked exclusively as a driver for Classic since 2003. Upon his hire, Classic required Pendola to paint his car silver, the color assigned the company by the City of Newark, and affix the Classic logo and telephone number to the sides and front of his car. Classic also required that Pendola purchase and install a two-way radio in his car.

Pendola paid for these expenses, as well as the costs of his taxi medallion, automobile insurance, vehicle maintenance and fuel. Classic told Pendola where to pick up customers and supplied him with business cards, receipts and vouchers, all bearing the Classic logo. Pendola was not allowed to pick up passengers off the street but, rather, was permitted only to pick up those passengers dispatched through Classic. Pendola chose his own work hours and paid Classic a weekly flat fee. However, he kept all of his fares. Pendola testified that Classic had rules for drivers that were strictly enforced, including proper grooming and dress, courteousness towards customers and cleanliness of vehicles. Pendola testified that he had been suspended on a number of occasions for violations of these rules.

At the conclusion of trial, and after applying the framework set forth in *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998) for assessing a worker's employment status, the Judge of Compensation concluded Pendola was not an employee of Classic. The judge found that Classic "exercised very little control over the means and manner of Pendola's performance." He noted that, although Pendola was required by the Taxi Division to paint his vehicle silver and to place the name 'Classic' and the company's phone number on it, "he was otherwise left on his own to drive and pick up fares, and was unaccountable to Classic." The judge noted that Pendola set his own schedule, was provided no vacation or other type of paid leave, and was free to accept and reject the fares dispatched to him by Classic. Further, the judge found that Pendola's work was not an integral part of Classic's business. The judge found Classic was not dependent on Pendola, reasoning that, were he "not available to transport a fare, another cab driver was waiting to do so. No one driver was essential to the effective functioning of the business." Accordingly, the Judge of Compensation found that, based upon the arrangement of the parties, there was no intention that the petitioner was an employee of Classic. This appeal ensued.

In reversing the Judge of Compensation's holding, the Appellate Division relied on *D'Annunzio v. Prudential Insurance Co. of America*, 192 N.J. 110 (2007), where the court held that, in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor, the trial court should consider three factors of the *Pukowsky* framework as most pertinent: (1) employer control; (2) the worker's economic dependence on the work relationship; and (3) the degree to which there has been a functional integration of the employer's business with that of the person doing the work at issue.

The Appellate Division found that it was undisputed that Pendola was economically dependent on Classic because he had been driving for Classic for eleven years as his sole source of income. As to the issue of control, the Appellate Division found that drivers were subject to Classic's rules—which drivers would receive a dispatched fare, drivers were not free to pick up passengers based on how long the driver had waited since his last fare, and customer complaints about the condition of a vehicle immediately triggered suspension which could be lifted only by inspection of the vehicle by a Classic supervisor.

Of greatest significance, the Appellate Division found that the Judge of Compensation erred in finding that Pendola's work was not an integral part of Classic's business. As the Appellate Division concluded:

> It cannot be seriously disputed that Pendola was one of the "cogs" in Classic's operation. His work as a driver, willing to provide the rides Classic arranged, was essential to the success of its business. The work of the drivers was certainly continuous, Classic operated twenty-four hours a day, and thus needed many drivers day and night to carry out its operations. Drivers such as Pendola could not use their own silver Classic car to pick up fares dispatched from competitors of Classic or those attempting to call them directly. The drivers were thus prohibited from using their own cars to further any business but Classic's. And although a driver's passengers or hours might vary, the daily routine of picking up Classic's customers and delivering them to their destinations throughout Newark did not change.

Accordingly, the Appellate Division concluded that application of the *Pukowsky* framework established Pendola as an employee of Classic under New Jersey Workers' Compensation Law. ||

Side Bar

Interestingly, the Appellate Division mentioned in its opinion that it was not the first judicial panel to conclude that Classic's drivers were its employees and not independent contractors. In 1999, another judicial panel considering the same question concluded that:

> According to the criteria of the 'relative nature of the work' test, each of Classic's taxicab drivers was an integral part of its total operation and they were therefore 'employees' for purposes of workers' compensation. *Santos v. Classic Sedan Limo, Inc.*, Docket No. A5356-97 (App. Div., Decided July 2, 1999).

The Appellate Division noted that in the instant case Classic made no attempt at oral argument to explain why the Appellate Division's prior opinion should no longer be binding on the company. Classic's only response was the one relied on in its brief, that *Santos* was a 1999 decision and that things had changed considerably in the taxicab business since the rendering of that decision. In rejecting Classic's assertion, the Appellate Division in the instant case concluded: "Perhaps [the taxicab business has changed], but it is nevertheless apparent that at the time of Pendola's accident, the relationship between Classic and its drivers remained remarkably constant."