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What's Hot in Workers' Comp

Delaware Workers' Compensation

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Paul V. Tatlow

Following a remand hearing ordered by the Superior Court, the Board rules that claimant does not have standing to bring a motion to assess a fine against the employer's medical expert on the basis that his expert fee exceeded the amount permitted under the Practice Guidelines.

Carole Streifthau v. Bayhealth Medical Center, (IAB Hearing No. 1432002 – decided Jul. 12, 2019)

The employer has been successfully represented by my colleague, Keri Morris-Johnston, Esquire. In the earlier proceedings, the claimant had filed a legal motion to assess a fine against Dr. Fedder, as the employer's medical expert, on the basis that he violated the Act by charging an expert fee in excess of the amount permitted under the Practice Guidelines, which specifies that deposition testimony by a physician shall not exceed $2,000. The employer's evidence showed that the expert fee of $5,000 included not only the deposition testimony, but also charges for reviewing medical records and conducting a pre-deposition conference. The Board agreed with the employer's argument that the regulation in question—capping expert fees—was meant to limit the amount an employer can be required to pay for a claimant's medical witness fees, which routinely occurs when the decision is in favor of the claimant. This provision states that the Board is not meant to limit the amount an employer can choose to pay for its medical expert testimony. Following the claimant's appeal, the Superior Court issued a decision on March 21, 2019, remanding the case back to the Board in order to address the standing issue.

At the May 29, 2019, remand hearing, claimant's counsel argued that the claimant did meet the requirements for standing since there was an injury in fact that impacted the case, a causal connection, and the issue is redressable. The claimant argued that the employer had paid a large expert fee to Dr. Fedder for his testimony, meaning that employers can, in effect, buy testimony at any price, whereas a claimant's expert is limited to a $2,000 deposition fee. The claimant contended that this is unfair and prejudicial to all claimants, but could be corrected by a proper ruling from the Board. The employer countered that argument by contending that the claimant had not even testified at the remand hearing in order to show how she was allegedly injured by the testimony from Dr. Fedder. The employer also argued that the issue of the expert's deposition fee was moot since the claimant had succeeded on the petition in which the testimony was given.

The Board stated that the claimant had the burden of proving she had standing to bring the motion against Dr. Fedder. They found that the claimant failed to meet that burden. The Board further pointed out that the claimant's allegation that there was an injury in fact to her was disproven by the outcome in this case—the Board had not ultimately been persuaded by the testimony of Dr. Fedder but, rather, had ruled in favor of the claimant on the petition seeking surgical authorization and payment for medical expenses. Therefore, the Board ruled that, since the claimant had not suffered an injury in fact related to the deposition fee charged by Dr. Fedder, she did not have standing to bring the motion seeking sanctions and it was being denied. II

Florida Workers' Compensation

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

Linda W. Farrell

Originally authorized physician must be "in the same specialty as the changed physician."

Marie Lafleur v. The Arbor Holding Co., LCC and United Wisconsin Ins. Co., No. 1D18-0381, decision date 6/12/19, On appeal from Judge Clark (Ft. Myers), D/A 11/23/14

The First District Court of Appeals reversed and remanded the judge of compensation claim's ruling that allowed the employer to select an anesthesiologist for the claimant's one-time change request from a physical medicine and rehabilitation specialist. The court found that, pursuant to 440.13(2)(f), the originally authorized physician must be "in the same specialty as the changed physician." II

First DCA affirms the claimant as an independent contractor.

Norman Platt, Jr. v. Four Fountains, Inc. and PMA Companies, No. 1D18-2570, decision date 6/26/19, On appeal from Judge Clark (Ft. Myers), D/A 9/20/17

This case was bifurcated on the issue of compensability, specifically to determine whether the claimant was working as an independent contractor or as an employee of the condominium association at the time of his accident. The judge of compensation claims found that the claimant was essentially a sole proprietor, as he was able to perform work for any entity in addition to or besides the employer and received compensation for work or services rendered at completion of a task. The judge also held that, because the claimant worked for an hourly wage, his testimony supported that he "[received] compensation for work or services performed ... on a per job basis." He was assigned specific tasks, completed them one at a time, and had the option (exercised on several occasions) to receive his pay upon the completion of each task. Therefore, the claimant was deemed an independent contractor on the date of his accident and not entitled to workers' compensation benefits. The First District Court of Appeal per curiam affirmed. II

The claimant's mention of an expert medical advisor during opening and closing arguments did not constitute a timely request.

Frances Wilcox v. Publix and Publix Risk Management, No. 1D19-0076, decision date 7/3/19, Claimant appealed ruling of Judge Walker (Panama City), D/A 8/24/09

The judge of compensation claims held that the claimant's mention of an expert medical advisor (EMA) during opening and closing arguments did not constitute a timely request. Florida case law instructs that such requests must be made on a timely basis once a disagreement among the providers becomes known. In this case, a conflict in the medical evidence involving the claimant's hand and wrist occurred as of April 9, 2018, when Dr. Smith, the claimant's IME doctor, disagreed in his deposition testimony with the February 1, 2018, deposition opinions of the authorized treating physician, Dr. Hoxie. With regard to the claimant's shoulder, notwithstanding unequivocal opinions made by the authorized treating physician, Dr. Klassen, contained in the medical records, a disagreement with Dr. Smith was known as of October 24, 2018, when Dr. Klassen was deposed. This final medical deposition was taken three weeks before the final hearing, which the judge of compensation claims found to be sufficient time for a motion to appoint an EMA to have been filed. On appeal, the First District Court of Appeals per curiam affirmed. II

News from Marshall Dennehey

Niki Ingram (Philadelphia, PA) is a recipient of the *Philadelphia Business Journal*'s "Minority Business Leader Awards." The award is given in recognition of the Philadelphia region's top minority business leaders, based on professional accomplishments, community leadership, philanthropy, and awards and milestones. She will be featured in the *Philadelphia Business Journal*, along with the other recipients, in a special supplement to publish on August 16, 2019, and she will be recognized at an awards dinner on August 15. Congratulations, Niki!

New Jersey Workers' Compensation

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Dario J. Badalamenti

Appellate Division affirms a judge of compensation's denial of petitioner's application for reconstruction of wages based on the holding in *Katsoris*.

Lawson v. N.J. Sports and Exposition Auth., Docket No. A-4058-17T1, 2019 N.J. Super. Unpub. LEXIS 1462 (App. Div., Decided Jun. 16, 2019)

The petitioner was employed part-time by the respondent as a stadium usher. She also worked full-time stocking shelves for employer B, a large box store. On August 14, 2009, she suffered a compensable accident at her part-time job, breaking her left femur and bruising her right knee. The petitioner filed a claim with the Division of Workers' Compensation seeking permanent partial disability benefits and made an application for reconstruction of wages pursuant to *Katsoris v. South Jersey Publishing Co.*, 131 N.J. 535 (1993). In *Katsoris*, The New Jersey Supreme Court instructed that reconstruction of wages is appropriate when a "petitioner has demonstrated that her injuries, which disable her from engaging in part-time employment, have disabled or will disable her with respect to her earnings capacity in contemporary or future full-time employment."

The petitioner testified that she had been unable to obtain another full-time job following her termination from employer B, despite applying for retail sales positions with several big box stores, because her injuries made it impossible for her to stock shelves as these jobs required. She also testified that from July 2010 to December 2012, she collected unemployment benefits for which she certified that she was ready, willing and able to work. The petitioner admitted to doing a lot of physical work around her family's rural home, including mowing the grass and cutting wood with what she described as a small electric chainsaw. She further testified that she daily walked a mile and swam for exercise.

The petitioner's medical expert, Dr. Arthur Tiger, opined that the petitioner could not return to full-time work due to limitations caused by her injuries. However, at the time of his testimony, he was unaware that, upon the conclusion of her treatment, the petitioner had returned to work part-time as an usher with the respondent, were she had to walk up and down the stadium steps routinely. Nor was Dr. Tiger aware that the petitioner had gone back to daily walking a mile and swimming, and performing strenuous household duties at home.

Dr. Carl Mercurio, who testified on the respondent's behalf, was aware of the petitioner's return to work and her routine of strenuous household chores. He found that the petitioner was capable of full-time employment.

The judge of compensation found the petitioner to be "a very sturdy woman with a high level of physical strength and endurance and energy." The judge took into consideration the petitioner's admitted physical activities—swimming, walking, lawn care and shoveling snow—and her admission that she had received unemployment benefits for two and one-half years, based on her certification that she was "ready, willing and able to return to the work force on a full-time basis." Accordingly, the judge concluded that the petitioner had failed to prove that she lacked the potential for full-time employment under *Katsoris*. This appeal ensued.

On appeal, the Appellate Division affirmed the lower court's granting of summary judgment, finding that the record supported the judge of compensation's factual findings. As the Appellate Division concluded:

> As the judge of compensation recognized, where an employee suffers a permanent injury while working at a part-time job, but the injury will also permanently affect the employee's ability to perform full-time work, the employee is entitled to benefits calculated as though she was employed full-time. However, where a worker such as petitioner with both part-time and full-time employment is permanently partially disabled from the part-time employment but is able to return to her full-time employment, reconstruction of the wages is improper under *Katsoris*. II