MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

VOLUME 24 | NO. 1 | JANUARY 2020

Florida Workers' Compensation

By Linda Wagner Farrell, Esquire | 904.358.4224 | lwfarrell@mdwcg.com

Linda Wagner Farrell

Injury sustained while participating in "recreational activity" held during working hours and of benefit to employer found compensable.

Karen Reynolds v. Anixter Power Solutions and Travelers Insurance Company, DCA#: 19-0231, Decision date Dec. 10, 2019

The claimant appealed an order by the judge denying the claim for compensability of an ankle injury sustained while bowling with co-workers. The judge concluded that the bowling event was a "recreational activity" and denied compensability under 440.921, Fla. Stat. The First DCA reversed. The court noted that while there is no dispute that bowling, like many other activities, may constitute a recreational activity, in this case, the activity was an expressly required incident of employment and it produced a substantial and direct benefit to the employer beyond improvement in employee health and morale. Here, the event was held during regular work hours, employees were paid for attending, and one purpose of the event was to discuss goals for the upcoming year. Furthermore, the claimant was not told she could have remained at work or taken a vacation day rather than attend the event.

First DCA held that the claimant failed to meet the clear and convincing standard of proof in a workplace toxic exposure case.

School District of Indian River County/Ascension Benefits v. Edward Cruce, deceased, DCA#: 17-3342, Decision date Nov. 27, 2019

The employer appealed a final order of the judge, who found that the deceased employee's death resulted from a workplace exposure to Cryptococcus Neoformans fungus that led to meningitis. In finding for the claimant, the judge determined that the heightened standard for toxic exposure under § 440.02(1), Florida Statutes (2014), did not require proof, by clear and convincing evidence, of the quantitative level of exposure. The judge substituted the alternative standard for exposure under *Festa v. Teleflex, Inc.*, 382 So.2d 122, 123 (Fla. 1st DCA 1980) for that of § 440.09(1), which requires that the employee show a causal connection between the employment and the alleged exposure injuries. Just as § 440.02(1) dictates that the substance and level of exposure be "specifically" proven, § 440.09(1) likewise requires proof of occupational causation with specificity by clear and convincing evidence. Because the judge improperly applied the statutory provisions, the First DCA reversed, holding that the claimant failed to meet the clear and convincing standard of proof.

Claimant must establish, by clear and convincing evidence, that exposure was work-related and provide quantifiable proof of level of exposure.

City of Titusville and Johns Eastern Company v. Robert Taylor, DCA#: 17-3814, Decision date Nov. 27, 2019

The employer appealed the judge's order. While they did not dispute that the claimant was exposed to Cryptococcus gattii (C. gattii), which resulted in fungal meningitis, the employer argued that the judge erred in excusing the claimant from establishing, by clear and convincing evidence, that the exposure was work related and from providing quantifiable proof of the level of exposure. The First DCA reversed, finding that the claimant failed to satisfy the burden of proof regarding occupational causation.

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire | 973.618.4122 | djbadalamenti@mdwcg.com

Dario J. Badalamenti

The Appellate Division affirms dismissal of the petitioner's claim for work-related injury as the injuries occurred during a recreational activity not within the scope of the petitioner's employment.

Goulding v. NJ Friendship House, Inc., 2019 N.J. Super. Unpub. LEXIS 2285 (App. Div., decided Nov. 7, 2019)

The petitioner was employed as a cook with the respondent, preparing and cooking meals for the respondent's members during lunchtime and for afterschool programs from Monday to Friday. On Saturday, September 23, 2017, the respondent hosted a "Family Fun Day" event in the rear parking lot of its premises. The event was planned to provide recreational and social services to the respondent's members and their families, and included food, music, games, prizes and other recreational activities. The respondent sought volunteers from its pool of employees to service the event. Volunteers were not compensated for their time. Some employees agreed to volunteer their time and others declined. The petitioner chose to volunteer as a cook, and while returning from a bathroom break, she stepped into a pothole, injuring her right foot and ankle.

The petitioner filed a claim with the Division of Workers' Compensation, along with a simultaneous motion for medical and temporary total disability benefits. The respondent denied the claim based on its assertion that the petitioner was not in the course and scope of her employment at the time of the accident. At the conclusion of a motion hearing, the judge determined that the petitioner's injury did not arise out of and in the course of her employment. In the analysis, the judge noted the two-prong test established for determining compensability for an injury sustained during recreational or social activity. Under N.J.S.A. 34:15-7, an employer must compensate an employee for accidental injuries arising out of and in the course of employment. However, the statute excludes any injuries that arise from "recreational or social activities," unless those "recreational or social activities are a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale." The judge found that the "Family Fun Day" in which the petitioner participated was a recreational activity, not a regular incident of her employment, and that the respondent derived no benefit from it beyond the health and morale of its members. Accordingly, the judge dismissed the petitioner's claim. This appeal ensued.

In affirming the judge's dismissal of the petitioner's claim, the Appellate Division relied on *Lozano v. Frank DeLuca Constr.*, 178 N.J. 513 (2004), where the New Jersey Supreme Court held that if an employer requires or compels participation in a recreational or social activity, that activity should be viewed as would any other compensable work-related assignment. However, if an employer merely sponsors or encourages a recreational or social activity, such activities are excluded from compensability under the Act. Based on the *Lozano* holding, the Appellate Division reasoned:

> [Petitioner] contends . . . that she was not engaged in a recreational or social actively at the time of her injury because the activity

she was participating in was cooking—her job. We disagree. [Petitioner] volunteered her time to participate at an event designed by her employer to celebrate its members. The Family Fun Day included food, games, music and other recreational activities. Respondent's employees were not compelled to attend or help. Many declined to volunteer without ramification. We are satisfied that the Family Fun Day, held on a Saturday for which employees chose whether to offer their time, was a recreational or social activity.

Accordingly, the Appellate Division found that the petitioner's accident did not arise out of and in the course of her employment, and as such, her injuries were not compensable.

Side Bar

As the petitioner failed to establish the first prong of the statutory test for determining compensability, i.e., is the recreational or social activity a regular incident of employment, the Appellate Division did not address the second prong of the statutory test, i.e., did the recreational or social activity produce a benefit to the employer beyond improvement in employee health and morale. The petitioner claimed that "Family Fun Day" was a public relations event designed to increase the respondent's profile in the community. Although the Appellate Division did not specifically address the issue, it did indicate in passing that it found no evidence in the record that "Family Fun Day" produced any public relations benefit to the respondent.

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire | 302.552.4035 | pvtatlow@mdwcg.com

Paul V. Tatlow

On remand from the Delaware Superior Court, the Board finds that the claimant's stroke was causally related to the work accident as the stroke occurred when the claimant was in the hospital emergency room being treated for a work injury.

Robert Edge v. Enterprise Masonry, (IAB Hearing No. 1463402 - Decided Oct. 22, 2019)

This case was back before the Board following a decision by the Delaware Superior Court, which had reversed and remanded the Board's initial decision in favor of the claimant, since it had failed to sufficiently articulate the findings on causation to allow the reviewing court to engage in a meaningful appellate review. The claimant was erecting scaffolding at the jobsite when he fell off the back of the scaffold, sustaining injuries to his left hip and a laceration under his left eye. He was taken to the emergency room where, during the course of his treatment, he sustained a transient ischemic attack, or mini-stroke. The claimant, who was a long-term smoker and had a pre-existing history of high blood pressure, sustained complications while being treated for the mini-stroke—two of his cerebral arteries were substantially occluded—and the complications from the stroke were such that the claimant became completely disabled.

The Board's initial decision found that, while the claimant's hypertension was a pre-existing condition, it did not matter since he was in the hospital being treated for injuries related to the fall at work. The Board found that, but for the work injury, the claimant would not have been in the emergency room that day getting treated for the hypertension. Therefore, they concluded that the stroke was a work-related injury and awarded compensation. The Superior Court, in reversing and remanding the Board's decision, stated that it was not acceptable for the Board to essentially side-step the causation question by finding in the broadest terms possible that the work injury caused the claimant to go to the hospital where he was treated for high blood pressure and sustained the stroke. The court stated that, in essence, the Board was broadening the liability of the employer to that of a general insurer and ignoring the basic question of causation of the stroke.

Following the remand hearing, the Board concluded that the claimant met his burden of proving by a preponderance of the evidence that the stroke suffered in the emergency room was causally related to the work

injury of May 11, 2017. In so finding, the Board accepted the testimony of the claimant's expert over the employer's expert.

Claimant's expert provided a multi-faceted opinion on causation, testifying that the claimant had essentially an asymptomatic condition that predisposed him to having a stroke and that the trauma from the fall rendered that condition symptomatic. The expert further testified that the claimant's fall at work caused a pre-existing arteriosclerosis (plaque) to move or break off, ultimately resulting in the stroke. Claimant's expert further opined that the medical evidence showed that the claimant had old plaque, but also some newly-formed plaque, evidence that something happened to the claimant earlier that day that ultimately resulted in a new occlusion at the bifurcation causing the massive stroke.

The Board accepted the opinion of claimant's expert, holding that the claimant's fall may have caused an injury to the artery. Combined with the fact that the claimant was not having any symptoms related to the hypertension and carotid artery prior to the work injury, the Board found the claimant's expert opinion rose above the minimum evidentiary threshold for the claimant to meet his burden of proof that the stroke was causally related to the work accident. The Board concluded that the claimant's stroke was causally related to the compensable work injury and awarded compensation for ongoing total disability and medical expenses.

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire | 610.354.8263 | fxwickersham@mdwcg.com

Francis X. Wickersham

A flight attendant's injury while riding an airport shuttle bus to an employee parking lot after her shift ended was compensable; the injury occurred on the employer's premises, even though the employer did not own the shuttle bus or the employee parking lot.

US Airways Inc. and Sedgwick Claims Management Services, Inc. v. WCAB (Bockelman); 35 WAP 2018; decided Nov. 20, 2019; Justice Wecht

After returning to Philadelphia from a flight from Miami, the claimant, a flight attendant, slipped in a puddle while lifting a suitcase onto a luggage rack while boarding a shuttle to the employee parking lot. The parking lot was owned and operated by the City of Philadelphia Division of Aviation, not the employer. Employees could access the lot by swiping a special badge, for which the employer paid a one-time fee at the time of an employee's hire. Division shuttle buses—not owned or controlled by the employer—transported employees from the lot to an airport terminal. The employer did not require employees to use the Division's lots or shuttle service.

The claimant filed a claim petition, alleging a disabling left foot injury as a result of her slip and fall. The employer argued that the claimant was not in the course and scope of her employment at the time of her injury. The workers' compensation judge granted the petition, concluding that the claimant's injury occurred on the employer's premises, the claimant's presence on the premises was required by the nature of her employment and the claimant's injury was caused by a condition of the premises. The employer appealed to the Workers' Compensation Appeal Board, which affirmed. The employer then appealed to the Commonwealth Court, and they affirmed as well.

The Pennsylvania Supreme Court also affirmed the underlying decisions. They held that the workers' compensation judge correctly concluded that the lot where the claimant parked her vehicle was "integral" to the employer's business operations. They noted that as part of the employer's business relationship with the airport, they were aware that the Division would make employee parking available to their employees. They further noted that, according to the evidence, had the Division not done so, the employer would have been obligated under its collective bargaining agreement with flight attendants to reimburse flight attendants for airport parking. Additionally, the employer was required to and did obtain the badge, which gave her access to the Division's parking lots.

An employer's appeal is frivolous when it asks the Commonwealth Court to reassess credibility determinations made by a workers' compensation judge and reweigh the evidence. Under Rule of Appellate Procedure 2744, reasonable counsel fees can be assessed against the employer for a frivolous appeal.

Bryn Mawr Landscaping Company v. WCAB (Cruz-Tenorio); 1268 C.D. 2018; filed Oct. 18, 2019; President Judge Leavitt

The claimant sustained a work injury on May 15, 2015, while performing tree trimming for the employer. He filed claim and penalty petitions. The employer filed a termination petition, alleging the claimant had fully recovered from his work injuries, as well as a suspension petition, seeking a change in the claimant's status to partial disability on the basis that the claimant could not lawfully work in the United States. In litigating the petitions, the claimant testified he was a citizen of Mexico and had come to the United States to work for the employer every year since 2012. The employer confirmed sponsor workers are authorized to work in the United States pursuant to an H-2 visa from April to December. The employer testified that he was unaware of the claimant's immigration status after his date of injury.

A stipulation was filed with the workers' compensation judge in which the employer accepted the claimant's injuries. The stipulation specified that only the claim petition was being resolved and the other petitions would be decided by the judge. The judge denied the employer's termination and suspension petitions, finding that the claimant was authorized to work pursuant to the visa. Additionally, the judge found that the claimant was unable to work because of his injuries. Furthermore, the judge granted the penalty petition and awarded attorney's fees, finding that the employer failed to present a reasonable contest from the date of the injury through the date of the IME. The judge's decision was affirmed on appeal to the Appeal Board, except for the granting of the claimant's penalty petition.

The employer then appealed to the Commonwealth Court, raising a number of issues with the judge's decision. The claimant countered, arguing that the employer's appeal was frivolous, and requested an award of counsel fees.

The Commonwealth Court rejected the employer's main argument, which was that the claimant did not sustain his burden of proving his entitlement to benefits since he offered no evidence that he could lawfully work in the United States. The court also dismissed the employer's argument that, even if the claimant was entitled to benefits, the workers' compensation judge erred in denying the suspension petition since the evidence showed the claimant's work visa had expired and he was physically capable of working. According to the court, the employer did not establish that the claimant was an unauthorized alien or that his loss of earning power was caused by his immigration status. The court noted that at the time of injury, the claimant was legally working pursuant to his H-2 visa and that the employer was unaware of the claimant's immigration status, post injury.

Ultimately, the court determined that the employer's appeal was frivolous since it was merely a request to reassess credibility determinations made by the workers' compensation judge and to reweigh evidence. A frivolous appeal is defined as one that is devoid of merit and has little prospect of success. Consequently, the court awarded counsel fees under Pennsylvania Rule of Appellate Procedure 2744.

When an employer seeks to reduce claimant's benefits based on an opinion of residual earning power, it need not show claimant had obtained employment in order to establish that jobs in a labor market survey were open and available.

Fedchem LLC and the State Workers' Insurance Fund v. WCAB (Westco.); 1641 C.D. 2018; filed Nov. 18, 2019; President Judge Leavitt

Following the claimant's 2011 work injury, the employer filed a modification petition, pursuant to a labor market survey that was performed. During litigation of the petition, testimony was presented from the employer's medical expert, the employer's vocational expert, the claimant, the claimant's vocational expert and the claimant's medical expert. The claimant testified that he applied for jobs that were located for him by the vocational counselor, but no offers were made. He also testified that he had no job experience with respect to the positions that were sent to him.

The workers' compensation judge dismissed the petition. Focusing on whether the jobs in the labor market survey were open and available for the claimant, he found they were not because the claimant was never given the opportunity to perform the jobs. The employer appealed to the Appeal Board. Although they agreed that the judge erred by not addressing the testimony of the vocational experts, because the judge credited the claimant's testimony that he lacked the skills or experience to do the jobs, the

Board held that the employer did not prove the existence of employment opportunities that were vocationally suitable for the claimant.

The Commonwealth Court reversed the Board's decision. In doing so, the court held that the claimant did not have to be offered a job in order for his disability benefits to be modified. The court further held that the judge erred in not addressing the conflicting testimony of the vocational experts. According to the court, it was incumbent upon the judge to resolve the conflict; therefore, they remanded the matter for further proceedings.

Court holds that for future utilization review procedures where a UR request is made, a provider that is not a "health care provider," as defined in the Act, must be afforded notice and an opportunity to establish a right to intervene.

Keystone Rx, LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (CompServices Inc./AmeriHealth Casualty Services); 1369 C.D. 2018; filed Dec. 12, 2019; Senior Judge Leadbetter

Keystone Rx, LLC argued that a Utilization Review process determining the reasonableness and necessity of treatment, but in which it could not participate, should not defeat its applications for fee review where only the amount and timeliness of payment from the insured or the employer may be determined. Following the claimant's August 2014 work injury, Keystone dispensed medications to the claimant in 2017 and billed the insurer. The insurer then filed a UR request. According to an August 2017 UR determination, all treatment rendered by the physician was unreasonable and unnecessary. Two UR petitions were filed, but both were withdrawn, pursuant to a compromise and release agreement.

One month prior to the August 2017 UR determination, Keystone filed two applications for fee review. The Medical Fee Review Section concluded that Keystone was due payment in two September 2017 administrative determinations. The insurer challenged the determinations by requesting a hearing, where they argued the treatment was unreasonable and unnecessary. The Fee Review Hearing Office vacated the determinations.

On appeal to the Commonwealth Court, Keystone argued that due process mandated that it be paid for filling a prescription even where a UR has found it to be unreasonable and unnecessary. The court disagreed and held that the UR determination was binding as it was determined that the medications were unreasonable and unnecessary. According to the court, Keystone was attacking the validity of the UR process and the Hearing Office correctly held that such a question was beyond its scope.

However, the Commonwealth Court acknowledged that there are due process issues for providers, such as Keystone, that are precluded from participating in the UR process but nonetheless bound by the results that follow them to the fee review process. Therefore, the court held that for UR procedures occurring after the date of their opinion (December 12, 2019), where a UR is requested, a provider that is not a "health care provider" as defined in the Act—such as a pharmacy, testing facility or provider of medical supplies—must be afforded notice and an opportunity to establish a right to intervene.

News

As of the first of this year, **Niki Ingram** stepped down from her position as Director of our Workers' Compensation Department. We are pleased to announce she has handed over that responsibility to **Michele Punturi.** Please join us in both congratulating Michele and thanking Niki for her years of extraordinary service.

During the annual shareholder meeting, **Michele Punturi** was elected to serve a three-year term on the Board of Directors effective January 1, 2020.

Many of you may already know, **Jim Pocius**, long-time shareholder and leader of our Medicare Set-Aside Practice Group, retired at the end of 2019. We thank Jim for his years of outstanding service and counsel on all things Medicare, and we wish him well as he begins his next chapter!

Moving forward, we are pleased to announce that **Anthony Natale** and **Ross Carrozza** will now lead the Medicare Set-Aside Practice Group. Anthony and Ross have worked with Jim for years, and they look forward to providing you with the knowledge and

guidance necessary to effectively navigate the complexity of Medicare set-asides. Please contact Anthony or Ross with your Medicare-related questions.

At the firm's annual shareholder meeting held on December 12, 2019, **Ida Fuda** (Roseland, NJ) and **Rachel Ramsay-Lowe** (Roseland, NJ) were elected as shareholders of the firm to be effective January 1, 2020. These attorneys have made outstanding contributions to the success of our firm and richly deserve this enhanced status.

This past November 2019, Marshall Dennehey was the recipient of the **2019 Diversity & Inclusion Award from Liberty Mutual Insurance**. The award recognized the law firm's service to the community and legal profession. "We are deeply honored and gratified to receive this award recognizing our commitment to increasing minority representation within our legal ranks, as well as our dedication to supporting under-represented populations in our community," said G. Mark Thompson, Marshall Dennehey President & CEO. "Such client recognition reinforces our mission to build a diverse and inclusive workforce that is is reflective of all of the communities where we provide legal services." ▸

Outcomes

Tony Natale successfully defended a Philadelphia-based lithographic company by having a UR Determination, with regard to opioid and non-opioid treatment, set aside by the workers' compensation judge as void ab initio. The claimant had been treating with an orthopedic surgeon who prescribed an inordinate amount of medication for a work-related knee injury. The physician's office was raided by the FBI for other issues, and the treatment to the claimant was ultimately found unreasonable and unnecessary by the URO and the judge. The claimant then side-stepped the Act and began to treat with a new physician who prescribed the EXACT same medications. A second UR was filed regarding this physician's treatment, and the UR reviewer indicated in the body of the UR report that there were no records to support the ongoing medication. However, the UR reviewer did not "want to be the one who cut off medication," so he ultimately found the treatment reasonable and necessary. This UR decision was appealed to the workers' compensation judge, who found that the treatment was unreasonable from the outset.

Tony also successfully defended a machine shop in the litigation of a claim petition involving post-concussion syndrome. The claimant was struck in the head with a modified wrench while repairing a machine for the employer. The carrier accepted a head laceration by way of medical only Notice of Compensation Payable. The claimant was treated for a laceration to the side of his head and released to return to work. Several months later, he was taken out of work by his treating neurologist for symptoms allegedly related to post concussive syndrome. The claimant then returned to work to modified duties within new work release restrictions. He abandoned that job several weeks later, alleging he was totally disabled due to post concussive syndrome. Tony presented surveillance evidence demonstrating the claimant's ability to perform all activities of daily living. A nationally renowned neurologist testified that, while the claimant suffered a mild concussion at the time of injury, he did not suffer from post concussive syndrome and was fully recovered. The claimant's co-workers testified that they observed the claimant after the injury and he was able to continue working with no signs of post concussive problems. Tony cross examined the claimant, and it was discovered that he was performing work duties on his own in the carpentry field despite alleging he was totally disabled. The judge opined that the claimant's injuries were limited to the head laceration and mild concussion and then concluded that those injuries fully recovered. The claimant was due no additional workers' compensation benefits other than what he had already received. The claim petition for disability was dismissed.

Michele Punturi successfully dismissed a claim petition, with prejudice, on behalf of a national retailer. The claimant filed the petition, testified at the hearing, and then failed to attend two independent medical examinations. He also failed to attend other hearings and did not present medical evidence. When claimants fail to prosecute their claims, the claim petition is often dismissed without prejudice, leaving open the opportunity to refile within the statute of limitations. Michele adamantly argued that the motion should be dismissed with prejudice. Based on the record—which showed a lack of diligence on the part of the moving party and

failure to attend hearings without sufficient reason—the judge granted the dismissal of the claim, with prejudice, as appropriate and not an abuse of the judge's discretion.

Michele Punturi also successfully defended against a claimant's appeal, thereby affirming the workers' compensation judge's prior decision and order denying the claimant's claim petition. The claimant argued that: (1) the overwhelming factual medical evidence supported his claim; (2) the judge disregarded testimony; and (3) the judge failed to give appropriate consideration to prior diagnostic studies supporting a lack of lumbar radiculopathy and annular tears and post-diagnostic studies revealing the existence of such conditions. Michele's oral argument and defense appellate brief outlined the substantial competent evidence supporting the judge's well-reasoned decision. The claimant, who had a long-standing history of back problems, failed to advise the employer of a work injury or even having physical difficulties, both of which contributed to the rejection of the claimant's testimony as not credible. The judge emphasized that the employer's fact witnesses corroborated each other and supported the claimant's own admission that he never reported a work injury. It was also significant that the judge did consider the diagnostic studies in specific findings addressing the testimony of claimant's and the defense's medical experts. The judge further noted the defense medical expert had the opportunity to review all the medical records and diagnostic studies dating back to 2004, which were not reviewed by the claimant's medical expert. The defense expert also supported that any findings on the MRIs were not post-traumatic and not related to any work injury or an aggravation of a pre-existing condition. This case demonstrated the critical nature of presenting factual testimony when questioning the mechanism of injury and lack of notice, along with having the defense expert review all medical records and diagnostic study films and make comparisons post- and pre-injury.

Michele Punturi successfully prosecuted a termination petition for a well-known international automobile manufacturer. Michele secured an IRE evaluation of a zero percent impairment and two independent medical examinations by a Board-certified orthopedic surgeon, who had the opportunity to review all of the medical records and diagnostic study films and perform comprehensive physical examinations, which were consistent. An aggressive and detailed cross-examination of the claimant's medical expert—who was extremely elusive on cross-examination—established that this expert could not and did not offer any detailed explanation for an opinion that the claimant was not fully recovered. The defense questioned the expert's understanding of the mechanism of injury, the nature and extent of medical treatment, and the lack of causation to the work injury. Also, based upon effective cross-examination of the claimant, the workers' compensation judge did not find credible the ongoing symptoms/restrictions and the need for treatment as related to the accepted work injury. The judge further found the defense was not liable for the claimant's extensive litigation costs given his findings of full recovery. The judge granted the termination petition based upon competent, credible and persuasive evidence presented by the defense. ▸