MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

VOLUME 24 | NO. 6 | JUNE 2020

Florida Workers' Compensation

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Judge of Compensation Claims stresses that under the occupational disease statutory provision, it is the disability, not the disease, that determines compensability.

Andrew Wilkes v. Palm Beach County Fire Rescue and Preferred Government Claims Solutions, OJCC# 19-019645, West Palm Beach District, JCC Stephenson; Decision Date Apr. 23, 2020

The claimant, a firefighter EMT for Palm Beach Fire Rescue, was called to assist with the drowning death of a young boy in 2015. At the time, he believed that the victim looked like his son.

In the spring of 2019, the claimant went diving with friends, which brought back the drowning incident. In May, he woke up one night in a sweat with his heart racing after dreaming that he was the diver pulling his own son out of the water. He then sought care on his own for what he thought might be ADHD, as he was having difficulty focusing. He underwent a PTSD assessment on May 30, 2019, and was formally diagnosed with PTSD, which he reported to the employer in June 2019.

The employer contended that the qualifying event—the drowning in 2015—occurred prior to the statutory amendment in 2018 that now provides compensability of PTSD without an accompanying physical injury. The employer also asserted that the claimant failed to provide notice within 52 weeks of the qualifying event.

The claimant's IME physician testified that the triggering event was the drowning incident in 2015 and that this event was the major contributing cause of the claimant's PTSD.

Fla. Stat. 112.1815(5)(d) states: "The time for notice of injury or death in cases of compensable post-traumatic stress disorder under this subsection is the same as in s. 440.151(6) and is measured from one of the qualifying events listed in subparagraph (a)2, or the manifestation of the disorder, whichever is later. A claim under this subsection must be properly noticed within 52 weeks after the qualifying event."

Fla. Stat. 440.151(6) deals with occupational diseases and requires that notice be provided within 90 days. The judge of compensation claims held that the claimant's manifestation occurred in May 2019, after the effective date of the amendment. The judge also analyzed the occupational disease statutory provision and pointed out that it is the disability, not the disease, that determines compensability.

Judge Stephenson found that the claimant met the clear and convincing burden of proof, that he suffered PTSD by a qualifying event with a disability date of May 30, 2019, and that notice was timely. Compensability was granted.

Pennsylvania Workers' Compensation

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Francis X. Wickersham

The Commonwealth Court holds that § 406.1 of the Act does not sanction conversion of a Notice of Temporary Compensation Payable to a Notice of Compensation Payable for failure to file a Notice Stopping Temporary Compensation within five days of stopping payment of temporary compensation.

Communication Test Design v. WCAB (Simpson); 1196 C.D. 2019; filed Apr. 22, 2020; Judge Covey

The claimant allegedly sustained work injuries on December 5, 2016. On January 4, 2017, the employer issued an amended Notice of Temporary Compensation Payable (NTCP), paying the claimant disability benefits. On February 7, 2017, the employer issued a Notice Stopping Temporary Compensation Payable (NSTC), indicating that it ceased paying compensation as of January 19, 2017. A Notice of Compensation Denial (NCD) was also issued.

The claimant then filed a claim petition, as well as reinstatement and penalty petitions. In connection with the reinstatement and penalty petitions, the claimant argued that, because the employer failed to issue an NSTC within five days after the last payment of temporary compensation, under § 406.1 of the Act, the NTCP converted to an NCP and, therefore, wage loss benefits should be reinstated. The judge agreed and granted the claimant's reinstatement and penalty petitions. In doing so, the judge concluded that a conversion of the amended NTCP to an NCP occurred by operation of law since the employer failed to timely file an NTSC and NCD. The employer appealed, but the Workers' Compensation Appeal Board affirmed.

The employer appealed to the Commonwealth Court, which held that § 406.1 of the Act does not sanction conversion of an NTCP to an NCP for failure to file an NSTC within five days of stopping payment. According to the court, no such remedy is included in § 406.1(d)(5). It pointed out that § 406.1(d)(5) states that if an employer does not file an NSTC within the 90-day period during which temporary compensation is paid or payable, the employer shall be deemed to have admitted liability and the NTCP converts to an NCP. The court noted that the employer filed its NTSC within 90 days from the date of its NTCP; therefore, the NTCP could not convert by operation of law.

The court further reversed the judge's decision granting a penalty petition since there was no evidence presented that the employer violated the Act.

Whether a claimant's presence at a long-term acute facility was reasonable or necessary was an issue directly related to the reasonableness or necessity of the treatment under review and, therefore, Utilization Review requests filed with the Bureau should have been assigned to a Utilization Review Organization.

James Burgess v. WCAB (Patterson-UTI Drilling Company LLC); 778 C.D. 2019; filed May 1, 2020; Judge Covey

The claimant sustained a work injury on December 28, 2012. The employer accepted the claim under a Notice of Temporary Compensation Payable that later converted to a Notice of Compensation Payable. Two years after the injury, the claimant was residing at a long-term acute care (LTAC) facility.

The employer filed a Utilization Review request regarding the reasonableness and necessity of the claimant's continued presence at the LTAC facility. The Bureau returned the request because the treatment to be reviewed was not a health care service. The employer filed a second UR request, and it was again returned by the Bureau without assigning it to a Utilization Review Organization (URO). The employer then filed a third UR request, this time asking for a review of the reasonableness and necessity of the treatment the claimant was receiving from providers at the LTAC facility. A URO determined that the medical treatment was reasonable and necessary. The employer then filed a Utilization Review petition.

Before the workers' compensation judge, the employer clarified that they were asking the judge to address the reasonableness and necessity of the claimant's continued residency at the LTAC facility, as opposed to a skilled nursing facility. The judge concluded that the employer sustained its burden of showing that the stay was not reasonable and necessary, and that the claimant should be

moved to a skilled nursing facility. The claimant appealed to the Appeal Board, which affirmed the judge's decision.

On appeal to the Commonwealth Court, the claimant argued that the judge lacked jurisdiction to determine whether the claimant's care should be transferred from an LTAC facility to a skilled nursing facility because the determination was beyond the scope of the permissible Utilization Review consideration. According to the claimant, § 127.406 (b)(7) of the Department Regulations prohibited the URO from considering whether the claimant's receipt of care at the LTAC facility was reasonable and necessary because the claimant's presence there did "not directly relate to the reasonableness or necessity of treatment under review."

The court disagreed and found that the critical question was whether the claimant's presence at the LTAC facility was reasonable or necessary for the reviewed provider's treatment to be effective; an issue directly related to the reasonableness or necessity of the treatment under review.

Because the URO never conducted a Utilization Review with respect to the claimant's LTAC facility stay, the court concluded the workers' compensation judge did not have jurisdiction to render a decision on that issue. The court held that the employer's original Utilization Review requests regarding the reasonableness and necessity of the claimant's stay at the LTAC facility were not prohibited by the Department's regulations and should have been referred for a Utilization Review determination. The court also held that the judge should have remanded the issue to the Bureau, with a direction that the employer's requests be assigned to a URO.

The court, therefore, vacated and remanded with instructions to the judge to direct the Bureau to assign the employer's original Utilization Review request to a URO for a Utilization Review determination.

Hot Tips – Delaware

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Keri L. Morris-Johnston

- If an injured worker's average weekly wage is lower than the state minimum rate, the injured worker should receive the average weekly wage as the compensation rate. The injured worker does not receive the benefit of a higher compensation rate.
- If a claim is accepted as compensable, the carrier should send an Agreement as to Compensation to the injured worker for signature and then file with the Industrial Accident Board. The body parts or injuries accepted should be detailed on the agreement.
- An injured worker has the right to rely on his treating physician when the provider totally disables him or her. Total disability benefits must be continued until the Board issues an order terminating the benefits, the injured worker agrees to terminate the benefits, or the injured worker dies. If the injured worker returns to work, a receipt for compensation must be signed and filed with the Industrial Accident Board.

Hot Tips – New Jersey

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Kiara K. Hartwell

- Certain pleadings, including claim petitions, re-openers, and answers to claim petitions and re-openers, must be filed electronically through COURTS on-line.
- An answer to a motion for medical/temporary benefits must be filed within 21 days of service of the motion or within 30 days of service of the claim petition, whichever is later.

News

Kelly M. Scifres (Jacksonville, FL) will present a webinar on the "Five Hour-Law & Ethics CEU for Adjusters" on June 4, 2020, from Noon-5 p.m. Enrollment is free. Please email KMScifres@mdwcg.com to sign up. Space is limited to the first 100 entrants. ▸

Outcomes

Ashley Eldridge (Philadelphia, PA) obtained a defense verdict on a claim petition that alleged significant cognitive, spine and orthopedic injuries following a fall at work. The claimant fell from the second level of a mushroom house. There was no dispute as to the fall, nor that the claimant required hospitalization for multiple transverse process fractures in the lumbar spine. However, after approximately three months of treatment, the claimant was released to full-duty work, at which point, the claim was denied. A claim petition was filed, alleging total disability and a multitude of additional cognitive, spine and orthopedic injuries. Ashley presented the testimony of the claimant's treating physician (a neurosurgeon), an orthopedic surgeon, fact witness testimony from the insured, and an SIU investigator. Ultimately, although granting the claim petition for the time claimant was in the hospital, the judge suspended benefits from a few weeks after the injury and granted a termination based upon the medical evidence presented by the employer. The decision was the best possible outcome and an outright win for the employer.

Michele Punturi (Philadelphia, PA) successfully defeated the claimant's appeal on behalf of a worldwide youth adult development organization in a case involving claim, penalty, and termination petitions. A Medical Only Notice of Compensation Payable acknowledged liability for a skull contusion and denied any associated disability. The claimant alleged injuries to the cervical spine, head, eyes, and post concussive syndrome, resulting in total disability. It was the claimant's position that the judge failed to render a well-reasoned decision because he should not have credited the opinions of the three defense experts—a board certified orthopedic surgeon, a board certified neurologist and a board certified neuro-ophthalmologist—or the seven fact witnesses, who challenged the mechanism of injury and disability. The Appeal Board emphasized that determinations of credibility may only be overturned where they are arbitrary or capricious which was not found here. Further, the Board noted that, although a judge may give a treating provider more credence than a physician who examines a claimant solely for litigation, it does not require the judge to do so provided the judge's analysis is well-reasoned. The Appeal Board concluded that the judge summarized the relevant evidence, rendered credibility determinations, and provided objective explanations for those credibility determinations. The judge's decision was well-reasoned and supported by substantial competent evidence. The judge did not err in denying and dismissing the claimant's claim petition, in not awarding a penalty, and in granting the termination petition. This case demonstrates the impact of a thorough investigation and the importance of strong factual and medical witnesses. ▸