MARSHALL DENNEHEY
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Special Law Alert

LEGISLATION IMPOSING LIMITS ON DIRECT DISPENSING OF MEDICATIONS TO INJURED WORKERS BY PHYSICIANS BECOMES LAW IN PENNSYLVANIA

PA Workers' Compensation • November 3, 2014

On October 27th, Governor Tom Corbett signed into law House Bill 1846, which will limit the practice of physicians dispensing drugs directly to injured workers. A recent front page article in *The Philadelphia Inquirer* by Don Saptkin highlighted the significant costs Pennsylvania employers were bearing from this practice. (http://articles.philly.com/2014-09-24/news/54244407_1_comp-law-comp-expenses-workers-compensation-research-institute). According to the Workers' Compensation Research Institute, physician-dispensed medications accounted for 29% of all prescriptions in workers' compensation, about 48% of all prescription costs. The Drug Enforcement Administration found that nine of the top 25 practitioner purchasers of Oxycodone products who dispensed them directly to patients nationwide were located in Pennsylvania. Medications, such as Oxycontin and Oxycodone, are being prescribed to injured workers for pain. The addictive nature of opioids has contributed to a substantial rise in overdose deaths nationally.

The bill will limit dispensing of medications to 20 days, or seven days for more serious drugs, from an injured worker's first treatment with a health care provider. This limitation is longer than the period allowed for in states such as New York, where the period is three days, and New Jersey, where the period is seven. The law will not limit prescriptions by a physician, nor prohibit dispensing of drugs by an outpatient provider. Immediate access to medication will be available to the injured worker if deemed necessary by the treating physician.

Governor Corbett described the bill as an equitable one that preserves the doctor/patient relationship and, at the same time, protects employers from paying a higher cost for drugs dispensed by a physician compared to the same drugs dispensed at a pharmacy. It is projected that the bill will save employers $13 million annually.

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This *Law Alert* has been prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects.

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HOUSE BILL 1846 EFFECTIVE DECEMBER 25, 2014

PA Workers' Compensation • November 11, 2014

Many of our subscribers have called asking about the effective date of House Bill 1846, which was signed into law the last week of October by Governor Tom Corbett. Just to clarify this point, the bill becomes effective on December 25, 2014.

We originally reported that the bill would limit dispensing of medications to 20 days, or seven days for more serious drugs, from an injured worker's first treatment with a health care provider. This was incorrect. *The bill limits dispensing of medications to **30 days**, or seven days for more serious drugs, from an injured worker's initial treatment with a health care provider.*

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VOLUME 18 | NO. 11 | NOVEMBER 2014

What's Hot in Workers' Comp

25th Year in Publication!

OSHA ALERT

By G. Jay Habas, Esquire (814.480.7802 or gjhabas@mdwcg.com)

G. Jay Habas

New reporting requirements for workplace injuries.

Recently, the United States Department of Labor's Occupational Safety & Health Administration (OSHA) announced new requirements for the reporting of workplace injuries that are slated to take effect on January 1, 2015. These new regulations apply to all workplaces that fall under federal OSHA requirements.

Additionally, OSHA has revised the list of employers partially exempted from OSHA reporting requirements to include certain industries to which reporting requirements did not previously apply, but also provides partial exemptions for the first time to certain industries that were previously not exempted.

Under the current OSHA regulations, employers are required to report only work-related fatalities and in-patient hospitalizations when three or more employees are involved. However, under the new rules, employers must report all work-related fatalities to OSHA within eight hours of the occurrence. Additionally, under the new rules, all work-related, in-patient hospitalizations, amputations or losses of an eye must be reported to OSHA within 24 hours. This differs significantly from the current OSHA regulations that do not require any reporting of individual hospitalizations, amputations or losses of eyes.

Recognizing the increased reporting that will follow implementation of the new regulations, OSHA has also developed a web portal for employers to use in electronically reporting workplace injuries. The web portal for online reporting of injuries will be located at https://www.osha.gov/report_online/.

Until the implementation of the web portal, employers should continue reporting workplace injuries by either calling OSHA's hotline at 1-800-321-OSHA(6742) or by calling or visiting the nearest OSHA area office during regular business hours. II

RECENTLY PUBLISHED ARTICLES

- "Let It Snow! Let It Snow! Let It Snow! There Is No Bad Weather Exception to the Coming and Going Rule for NJ Workers' Compensation," *Defense Digest*, Vol. 20, No. 3, September 2014.
- "It Payes To Be Abnormal—Is the Law Really Changing for Mental/Mental Claims in PA Workers' Comp?," *Defense Digest*, Vol. 20, No. 3, September 2014.
- "Workers' Compensation Benefits and Unemployment Compensation Benefits ... Are Injured Workers Entitled to Both?," *Defense Digest*, Vol. 20, No. 3, September 2014
- "Tooey—The Impact on the Employer Exclusivity Protection Long Afforded by the Act," *Defense Digest*, Vol. 20, No. 2, June 2014.

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What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with more than 470 attorneys residing in 20 offices in the Commonwealth of Pennsylvania and the states of New Jersey, Delaware, Ohio, Florida and New York. Our firm was founded in 1962 and is headquartered in Philadelphia, Pennsylvania.

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Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

A claimant who has returned to regular-duty work with restrictions is entitled to a presumption of causation when filing a reinstatement petition; a reinstatement of benefits is warranted even in a case of discharge from employment, unless the employer can establish the claimant committed bad faith.

Thomas Dougherty v. WCAB (QVC, Inc.); 386 C.D. 2014; filed October 14, 2014; Judge Simpson

The claimant worked for the employer as a video producer. He suffered an injury to his Achilles tendon in January of 2009 and returned to his pre-injury job in June of 2009 with restrictions. In April of 2010, the employer eliminated the claimant's position, and the claimant was transferred to another position without a loss in pay. The new job was less physically demanding. Approximately one year later, the claimant was discharged for unsatisfactory work performance. The claimant then filed a petition to reinstate his benefits.

The Workers' Compensation Judge dismissed the claimant's reinstatement petition, finding that the testimony did not establish that the claimant's earning power was adversely affected by his disability. The claimant appealed to the Workers' Compensation Appeal Board (Board), which affirmed, reasoning that the claimant was not entitled to a presumption that his loss of earnings was caused by his work injury.

On appeal to the Commonwealth Court, the claimant argued that both the judge and the Board erred in concluding that he was not entitled to a presumption that his loss of earnings was due to his injury since he originally returned to his pre-injury job with restrictions. The court pointed out that this scenario is distinguishable from one in which a claimant returns to his pre-injury position without restrictions and is then laid off, in which case, a claimant must affirmatively establish the work injury that caused the loss of earnings. The court held that, based on the judge's findings, the claimant returned to his pre-injury job with restrictions and that his injury continued. Therefore, the claimant was entitled to a presumption of causation. The judge did not afford the claimant a presumption of causation but, rather, concluded that the claimant did not sustain his burden, which the court found misplaced. Therefore, the court vacated the decision and remanded the case to the judge to apply the presumption. The court also noted that when a claimant is terminated from a modified or light-duty position, a loss of earnings is presumed to relate to the work injury. The employer must then show that the claimant committed bad faith or misconduct. II

Side Bar

In a reinstatement case such as this one, where causation is presumed by virtue of a claimant's return to work under a suspension with restrictions, the burden shifts to the employer to prove that a claimant's loss of earnings was not caused by the work injury. Similarly, when a claimant is laid off or terminated from a modified or light-duty position for unsatisfactory work performance, loss of earnings is presumed to relate to the work injury, and the employer, at that point, then has the burden to show bad faith or misconduct on the part of the claimant.

A claimant is not entitled to an award of benefits for injuries sustained in a motor vehicle accident that occurred while the claimant was driving to work to attend an employer meeting.

Joseph Simko v. WCAB (United States Steel Corp.-Edgar Thomson Works); 829 C.D. 2014; filed October 17, 2014; Senior Judge Friedman

The claimant filed a claim petition alleging that he sustained a brain injury as a result of an automobile accident while commuting to the employer's premises for a meeting. The claimant had worked for the employer for 15 years. The employer held two types of safety meetings: monthly safety meetings and stand down meetings. The monthly safety meetings were held on a consistent basis. The stand down meetings were held when serious accidents or fatalities occurred and were more infrequent than the monthly meetings. The claimant admitted that the meetings were part of his regular work duties.

The claimant sustained his injuries while commuting to what was a dual meeting, meaning that the stand down meeting was incorporated into the scheduled monthly safety meeting.

The Workers' Compensation Judge issued an interlocutory order concluding that the claimant was in the course and scope of his employment when he was injured, finding that the claimant met the "special mission" exception to the coming and going rule. On appeal, the Appeal Board reversed, concluding that the claimant was not in the course and scope of his employment at the time of his injury.

The Commonwealth Court affirmed the Board. They disagreed with the claimant's argument that he was on a special mission since the employer replaced the monthly safety meeting with a stand down meeting, which the claimant described as more compulsory. The court also rejected the claimant's argument that the "special circumstances" exception to the coming and going rule applied,

finding that commuting to work early for a stand down meeting and work place safety meeting was not in furtherance of the employer's safety goals. II

Evidence from a claimant contesting an employer's impairment rating evaluation (IRE) must be competent evidence of a similar character.

Commonwealth of Pennsylvania / DEW/Loysville Youth Center v. WCAB (Slessler); 99 C.D. 2014; filed October 30, 2014; Judge Brobson

Following the claimant's work injury, the employer filed a modification petition based on the results of an IRE. In opposition to the testimony given by the employer's IRE physician, the claimant offered into evidence the deposition testimony of a psychologist who said that he was familiar with the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) but was not certified to perform IREs, was not licensed to practice medicine, and was not certified by any American medical or osteopathic board. Over the employer's objection, the testimony of the psychologist was received into evidence. The Workers' Compensation Judge dismissed the employer's modification petition, concluding that the testimony of the IRE physician was incompetent based on his own observation that the IRE physician did not demonstrate that he considered all relevant guidelines and tables in the AMA Guides. The judge also concluded, however, that the claimant failed to establish that his impairment rating was between 53% and 58%, as per the testimony of his psychologist. The Board affirmed the judge's dismissal of the employer's modification petition.

On appeal to the Commonwealth Court, the employer argued that the judge erred in concluding that the IRE physician did not provide competent testimony. The employer further argued that if the IRE physician's opinion was competent, then the judge erred in relying upon the opinion of the claimant's psychologist to refute the IRE physician's opinion since the psychologist's opinion was not competent. The court found that the judge erred, as a matter of law, in finding that the IRE physician's opinion was not competent since the judge based this decision on his own understanding of the means in which the IRE physician applied the AMA Guides to the facts and not on the IRE physician's alleged lack of understanding of the facts of the claimant's condition The court further held that the judge and the Board erred in concluding that the testimony of a non-medical expert regarding the rating of the claimant's condition was competent for the purpose of rebutting the IRE of evidence submitted by the employer. The court concluded that where the claimant seeks to rebut competent IRE evidence, the General Assembly intended that evidence of a similar character be presented—*i.e.*, evidence of rating evaluations performed by those persons the General Assembly has deemed qualified to engage in rating evaluations. Therefore, the court remanded the case to the Workers' Compensation Judge with instructions to not consider the testimony of the claimant's psychologist and to issue new findings regarding the IRE physician's credibility and competency. II

News from Marshall Dennehey

Tony Natale (Philadelphia) successfully defended a major Philadelphia federal credit union in the litigation of a claim petition involving issues of alleged workplace racial harassment leading to mental and physical injuries. The case was litigated over a two-year period before two separate workers' compensation judges. The initial judge chose to recuse himself after the claimant wrongfully accused the judge as biased. The second judge allowed the claimant to present her case, despite being met with the same type of accusations by the claimant. Based on Tony's cross examination of the claimant (among other things), the judge ultimately found that there was not sufficient evidence to establish a work-related injury or work-related disability. The claim petition was dismissed in its entirety.

Michele Punturi (Philadelphia) was successful in limiting exposure on a claim petition and a penalty petition based upon three strong factual witnesses from the employer. These witnesses were able to provide evidence to support the fact that the claimant executed an Employee Rights and Duties form at the time of hire and time of injury, yet failed to treat with the panel physician for 90 days. Based on that evidence, the judge found that the employer was not liable for medical expenses for a period of time up until the denial. Further strong medical evidence from an IME physician, who had the opportunity to review all the medical records past and subsequent to the work injury, as well as the diagnostic study films, persuaded the judge to accept that the claimant had fully recovered from the work injury. As a result, the claim was limited to two months.

Marshall Dennehey Warner Coleman & Goggin has been named a "2015 Best Law Firm" in multiple practice areas, both nationally and across numerous regions of the country. The rankings, which are presented in tiers, are compiled annually by *U.S. News & World Report* and *Best Lawyers*, and recognize firms for professional excellence and consistently impressive ratings from both clients and peers. Awards were given in 74 national practice areas and 120 metropolitan areas.

The *Philadelphia Business Journal* has named Marshall Dennehey Warner Coleman & Goggin one of its 2014 Best Places to Work award recipients in the Philadelphia region. The award recognizes the company's achievements in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions and company culture. Marshall Dennehey was also recognized in 2013. Hundreds of companies submitted nominations to the program, which ranks the top employers according to scores given to the companies by their own workers. Marshall Dennehey's Delaware Valley locations, including its Philadelphia headquarters and offices in King of Prussia, Doylestown and Cherry Hill, were included in the survey. II

Delaware Workers' Compensation

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

Paul V. Tatlow

The Industrial Accident Board denies the claimant's motion for payment of medical bills since the employer was entitled to have the bills submitted in a "clean claim" format, which includes having the provider submit the bills on the proper forms.

Jeffrey Evick v. Cutting Edge Lawn Care Service, (IAB No. 1386464 – Decided October 17, 2014)

This case came before the Board on a legal hearing filed by the claimant on a motion to compel the employer to pay medical bills. The claimant was on an open agreement for total disability and had undergone low back surgery on January 28, 2014. Thereafter, a defense medical exam indicated that the surgery was necessary and reasonable treatment. As a result of that DME, the employer withdrew a pending termination petition. Claimant's counsel submitted to counsel for the employer medical bills for the surgery in question. A few months later, by letter dated July 2, 2014, claimant's counsel made a Huffman demand for payment of those medicals on the basis that there was a prior agreement to pay them.

The employer disputed that there was a specific agreement to pay the surgery bills but, rather, conceded only that the termination petition had been withdrawn. On the other hand, the claimant asserted that payment of the surgery bills was implied since the employer's DME expert had agreed the treatment was reasonable and necessary. The Board, as its starting point, stated that the applicable principle was that a general agreement to pay for surgery is not an agreement to pay for specific medical bills. They further noted that under the provisions of the Act, an obligation to pay bills is not triggered until a proper "clean claim" is submitted to the employer.

The Board then addressed the question of what data is required in order to constitute a "clean claim." In authorizing the development of the Healthcare Payment System and the regulations adopted along with it, the Act clarifies what is needed for a proper "clean claim." In analyzing that issue, the Board concluded that the employer is within its rights to demand that the charges be submitted on a HCFA form. The Board noted that under the current fee schedule Guidelines, the CMS-1500 form is the same as the previous HCFA form 1500.

The Board concluded that the employer was acting properly by delaying payment until the providers had submitted the medical charges on the required forms. The evidence showed that once the employer had received the proper forms from the providers, those charges were paid. There were some remaining charges that were being disputed on the basis of billing codes and bundling issues. The Board suggested that the parties attempt to resolve that issue, but that if they could not, then the appropriate DACD petition could be filed. In the meantime, the Board denied the claimant's motion for payment of the medicals.

Side Bar

This case is important since it defines the commonly used term "clean claim" in regards to the obligation to pay medical bills. In many cases, the payment of medicals is handled by a vendor on behalf of the employer; therefore, the workers' compensation carrier and the actual claim handler, as well as defense counsel, are not always certain as to what information has been provided to the bill payment vendor. Since the request by claimant's counsel to pay medical bills is often accompanied by a Huffman demand, it is important to ascertain whether the bills were, in fact, submitted in a "clean claim" format, which, as shown by this case, requires submission on the appropriate billing forms. Until the providers satisfy that requirement, the employer's obligation to pay the medical bills is not triggered.