NUZZO & ROBERTS NEWSLETTER

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WORKERS' COMPENSATION UPDATE FIRST QUARTER 2016

In recent months, the courts and the Compensation Review Board have issued several important decisions regarding workers' compensation law.

SUPREME AND APPELLATE COURT DECISIONS

Timeliness of Notice for Death Benefits

In ***McCullough v. Swan Engraving, Inc.***, 320 Conn. 299 (2016), the issue for appeal was whether the decedent employee's widow was required to file a separate timely notice of claim for survivor's benefits (Connecticut General Statutes §31-306) when the decedent employee had previously filed a timely Form 30C claim for disability benefits during his lifetime.

The Connecticut Supreme Court reinstated the trial commissioner's ruling (and overturned the Compensation Review Board) that the decedent employee's widow "was not required to file a separate notice of claim for survivor's benefits because the timely filing of any claim for benefits under the act satisfies the limitation period for all potential claims under the act."

The respondents had argued that pursuant to Connecticut General Statutes §31-294c(a), a claim for survivor's benefits needed to be filed within one year of the date of death, which did not occur in this matter.

Connecticut General Statutes §31-294c(a) provides in relevant part: ''No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. . . .''

The Supreme Court pointed out that as the claimant's death did not occur within 2 years of the manifestation of a symptom of the occupational disease, the plain language of the statute does not apply to

this matter. Specifically, the claimant was diagnosed in February 2000 and he died on March 31, 2005.

The Calculation of the Average Weekly Wage When Vacation Pay is Included

In a case handled by this office, ***Menard v. Willimantic Waste Paper Co.***, 163 Conn. App. 362 (2016), the Connecticut Appellate Court affirmed the trial commissioner and Compensation Review Board decisions that the claimant's compensation rate should include the vacation pay received during weeks the claimant did not work and the gross wages should be divided by the number of weeks during which the claimant either worked and/or received vacation pay. In short, the commissioner calculated the compensation rate by including all the wages/vacation pay and dividing by 52 weeks.

The claimant argued that all the wages, including vacation pay received during weeks he did not work, should be divided by 50 weeks. Specifically, he wanted the vacation pay included in the calculation, but he wanted to exclude the vacation weeks from the divisor. The Appellate Court essentially stated it would be unfair to include the vacation pay, but not the vacation weeks in the average weekly wage calculation.

On April 20, 2016, the Connecticut Supreme Court issued an order denying the claimant's Petition for Certification to Appeal.

Qualifying for Heart and Hypertension Benefits

In ***Staurovsky v. Milford Police Department***, 164 Conn. App. 182 (2016), the Connecticut Appellate Court affirmed that the claimant brought a timely action for benefits pursuant to Connecticut General Statutes §7-433c. "Although the defendant argues that the mere fact that [the primary care physician] offered the plaintiff the option of going on medication during his January 30, 2008 visit strongly suggests that the plaintiff received a diagnosis of hypertension, we conclude that [the primary care physician's] offer of the medication option to the plaintiff was not tantamount to a diagnosis of hypertension for purposes of §§31-294c (a) and 7-433c."

However, the Appellate Court reversed the trial commissioner and Compensation Review Board and found the claimant was "ineligible for heart disease and hypertension benefits because he did not suffer 'any condition or impairment of [his] health caused by hypertension or heart disease'." In this matter the claimant did not suffer any impairment caused by hypertension or heart disease while employed as a police officer that resulted in death or disability, and instead first suffered the impairment following his retirement from the police department.

"Proof of heart disease or hypertension during a claimant's period of employment as a police officer or firefighter alone is insufficient to satisfy the statutory criteria of §7-433c. Rather, to qualify for benefits pursuant to §7-433c, the claimant must establish the existence of a "condition or impairment of health caused by hypertension or heart disease" during that time period, which results in the claimant's death or disability, as the plain language of §7-433c requires."

Apportionment of Liability

In ***Hadden v. Capital Region Education Council***, 164 Conn App. 41 (2016), the claimant suffered a compensable injury. She also had a naturally progressing injury to the same body part. The Appellate Court affirmed the conclusion of the trial commissioner and Compensation Review Board that forbids apportionment of the prior injury if it is a preexisting condition that was non-occupational.

In this matter the claimant had pre-existing multiple sclerosis. The traumatic brain injury arising out of and in the course of her employment was made worse by the multiple sclerosis. However, as the multiple sclerosis was non-occupational, the trial commissioner could not apportion the brain injury and the respondent was responsible for the full amount of the claimant's total disability benefits.

REVIEW BOARD DECISIONS

Moratoriums Against Future Benefits for Third Party Recoveries

In ***Callaghan v. Car Parts International, LLC***, 5992 CRB-1-15-3 (March 2, 2016), the Compensation Review Board affirmed the trial commissioner's ruling regarding the respondents entitlement to a moratorium against future benefits.

In 2011 the Connecticut Legislature amended Connecticut General Statutes §31-293(a), reducing the entitlement to reimbursement of the workers' compensation lien from proceeds of a third party case from 100% to two-thirds. In this matter the workers' compensation lien was $74,226.04 and after a $100,000 settlement the claimant netted $66,062.00 from a third party settlement. The employer was reimbursed $44,041.33 from the third party proceeds and the claimant retained $22,020.67 as prescribed by the 2011 legislative amendment. Thereafter, the employer sought a moratorium for $22,020.67 and the trial commissioner agreed the moratorium was appropriate.

The trial commissioner cited to the cases of ***Enquist v. General Datacom***, 218 Conn. 19 (1991) and ***Love v. J. P. Stevens & Co.***, 219 Conn. 46 (1991), that Connecticut General Statutes §31-293(a) as amended does not eliminate the

respondents right to a moratorium from the amount the claimant is left with after reimbursing two-thirds to the employer. Specifically, both the 2011 amendment to the statute and the legislative history are silent regarding the right to a moratorium of the one-third the claimant retains from the third party settlement or judgment.

Dependent in Fact

In ***Sneed v. PSEG Power LLC of CT***, 5988 CRB-3-15-12 (February 18, 2016), the Compensation Review Board affirmed the trial commissioner's finding that an unmarried domestic partner of a deceased worker, as a matter of law, may qualify as a dependent in fact and receive Connecticut General Statutes §31-306 dependency benefits.

On the date of injury, the decedent and the claimant were not married, but the claimant alleges she was living with the decedent in a domestic relationship and she was wholly or partly dependent upon the decedent's income. The claimant is not arguing she was in a common law marriage, which is not recognized in Connecticut. Furthermore, this ruling is limited to a finding that a trial commissioner can determine there is an entitlement to dependency benefits to the unmarried domestic partner, and not whether dependency benefits are appropriate in this matter.

The Granting of a Motion to Preclude Does not Prevent an Appeal

In ***Geraldino v. Oxford Academy of Hair Design***, 5968 CRB-5-14-10 (January 20, 2016), a Motion to Preclude for failing to contest the case in a timely matter was approved. Based on the approval of the Motion to Preclude the claimant also argued that as a matter of law the respondents were barred in perpetuity from appealing legal errors. The Compensation Review Board concluded that despite the previously approved Motion to Preclude the respondents retained the right to raise issues on appeal that were not sufficiently supported by the evidence and remanded this matter to the trial commissioner for further proceedings.

In this matter the respondents argue on appeal that the claimant's had failed to sustain their burden at the formal hearing that she sustained compensable bilateral carpal tunnel injuries or compensable bilateral leg injuries and the claims should be dismissed. The claimant's argue that once the Motion to Preclude was granted the respondents had no right to file a post formal hearing brief or Motion to Correct.

In finding that the Motion to Correct and appeal were appropriate, the Compensation Review Board stated the respondents retain the right to challenge applications of law even though the Motion to Preclude had been approved.

Furthermore, the Board found the respondents can appeal whether "the claimant's evidence was inadequate on a legal basis to sustain the relief the trial commissioner ordered after a formal hearing." Please note that pursuant to the approved Motion to Preclude at the formal hearing only the claimant was allowed to present evidence. The respondents are simply arguing the claimant did not present sufficient evidence to support the trial commissioner's finding.

WHEN IN DOUBT, CALL US

We are only a phone call away. If you have any questions, call us!!

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