

NUZZO & ROBERTS

NEWSLETTER

February 2021

WORKERS' COMPENSATION UPDATE: FOURTH QUARTER 2020

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

COMPENSATION REVIEW BOARD DECISIONS

Drug Use Defense

In *Galinski v. Beaver Tree Services, L.L.C.*, 6361 CRB-1-19-12 (December 9, 2020), the trial commissioner ruled the claim was not compensable because Mr. Galinski was intoxicated when he was injured. The Compensation Review Board reversed the trial commissioner's ruling and concluded the respondents did not meet their burden of proof for the affirmative defense of intoxication, as required by Connecticut General Statutes §31-284(a).

On December 27, 2017, Mr. Galinski was struck in the head by a falling tree limb while working as part of a tree removal crew. As a result of this incident, the claimant suffered a traumatic brain injury and multiple cervical spine fractures, rendering him a quadriplegic.

During emergency surgery at Baystate Medical Center following the incident, a urine drug screen identified high levels of an inactive metabolite of marijuana in Mr. Galinski's system. The claimant admitted to using marijuana recreationally about "once or twice a week during the weekends," but he denied using marijuana or alcohol on the day of or the day before the incident. The claimant's co-workers testified they did not observe any use of alcohol or drugs.

The respondents argued the claimant's injuries were the direct result of Mr. Galinski's intoxication and not compensable pursuant to Connecticut General Statutes §31-284(a). The respondents' expert concluded the claimant's marijuana intoxication resulted in cognitive deficit and impairment that prevented Mr. Galinski from "sustaining attention, following directions, and affected his decision-making ability." The expert concluded the deficits "were substantial contributing factors that caused the accident on December 27, 2017."

The expert also believed the claimant's chronic use, and not whether he had used marijuana in the hours before the incident, was the key issue. Furthermore, the high levels of the metabolite of active THC in the claimant's system contradicted the claimant's testimony he had not used

marijuana that day or the day before accident.

The claimant's expert testified the inactive metabolite of THC in Mr. Galinski's system was proof he did not smoke marijuana on the date of injury. Furthermore, a "gas chromatography/mass spectroscopy test was not conducted, which test he described as 'the gold standard' for assessing the actual impact of THC."

The trial commissioner concluded the claimant's injuries were sustained "as a direct result of his intoxication," and Mr. Galinski "was knowingly intoxicated due to longstanding and chronic use of marijuana." This led to the claimant being functionally impaired so that he could not understand directions or process information. Therefore, the trial commissioner ruled the respondents met their burden of proof of the affirmative defense in Connecticut General Statutes §31-284(a) and the claim was not compensable.

The statute requires the respondent to prove "the worker was intoxicated at the time of injury and the intoxication was a substantial factor in the claimant's injury." The respondents do not need to prove intoxication as the sole proximate cause of injury, "but only that the intoxication was a substantial factor in causing the accident."

However, the respondent's expert testified that he was unable to confirm Mr. Galinski had used marijuana on the date of injury. Furthermore, the "inactive metabolite of

marijuana . . . does not equate to evidence of impairment caused by the use of marijuana on the day of injury."

Based on the evidence in this matter, the Board concluded it could not affirm the trial commissioner's decision because they were not persuaded the expert's opinion "provided sufficient basis for the reasonable inference that the claimant was under the influence of marijuana at the time he sustained his injuries." Therefore, the Board reversed the trial commissioner's finding.

Motion to Preclude

In *Beel v. Ernst & Young, LLC*, 6352 CRB-7-19-10 (December 16, 2020), the trial commissioner ruled, and the Compensation Review Board affirmed, the respondents were precluded from contesting the claim.

The claimant was injured on May 17, 2018. A Form 30c was received by the Workers' Compensation Commission on August 31, 2018 and by the employer on September 4, 2018.

The claimant received short-term disability benefits from July 23, 2018 to December 20, 2018, and she underwent cervical spine surgery on September 20, 2018. No benefits were requested from the insurer until at least October 5, 2018, and on that date the Workers' Compensation Commission received a Form 43 contesting the case. The respondents started paying indemnity benefits on December 21, 2018,

but the Form 43 was filed more than 28 days after the Form 30c was received, and thus, was not in compliance with Connecticut General Statutes §31-294c(b).

The trial commissioner found the respondents did not qualify for the “safe harbor” provision permitted in *Dubrosky v. Boehringer Ingelheim Corp.*, 145 Conn. App. 261, *cert. denied*, 310 Conn. 935 (2013). In that matter, the Court held it was “impossible for a respondent to commence payment within the statutory time under §31-294c(b),” and thus, the respondents could not be precluded from contesting the extent of disability. In *Dubrosky*, no medical bills were generated within the statutory time period after the filing of the written notice of claim for payment to be issued and the claimant did not miss any time from work. Therefore, it was “impossible for the respondents to comply with that part of §31-294c(b) permitting them to make compensation payments within the statutory period.”

In this matter, although short-term disability benefits were paid, they did not constitute the payment of compensation under the statute. Additionally, in *Dubrosky*, the Form 43 contested the extent of disability and not compensability. In this claim, there is no evidence the respondents intended to accept the claim.

FIRM NEWS

We welcome Attorney Erik Mastriano as our newest attorney. Erik is a graduate of the Roger Williams University

School of Law and he has been a member of the Connecticut Bar since 2019.

Attorney Kristin Mullins has accepted a job with a new firm, and we wish her well.

WHEN IN DOUBT, CALL US

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

Contact David J. Weil at dweil@nuzzo-roberts.com, Jason K. Matthews at jmatthews@nuzzo-roberts.com, James P. Henke at jhenke@nuzzo-roberts.com, Michael D. Randall at mrandall@nuzzo-roberts.com, Erik F. Mastriano at emastriano@nuzzo-roberts.com or Kim R. Small at ksmall@nuzzo-roberts.com

NUZZO & ROBERTS, L.L.C.
P.O. Box 747, One Town Center
Cheshire, CT 06410
Phone: (203) 250-2000
Fax: (203) 250-3131
or www.nuzzo-roberts.com