NUZZO & ROBERTS NEWSLETTER

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WORKERS' COMPENSATION UPDATE: FOURTH QUARTER 2021

In recent months, the Connecticut Supreme Court, Connecticut Appellate Court, and the Compensation Review Board have issued several important decisions regarding workers' compensation law. Additionally, CMS has issued a new memorandum affecting Medicare Set-Asides.

SUPREME COURT AND APPELLATE COURT DECISIONS

Motion to Preclude

In ***Reid v. Speer***, 209 Conn. App. 540 (2021), the Connecticut Appellate Court affirmed the Administrative Law Judge and the Compensation Review Board rulings that the claimant was an employee of the respondent and the respondents are precluded from contesting the case because they failed to file a timely Form 43 within 28 days of receiving notice of the Form 30c.

The claimant filed a Form 30c on May 5, 2010, alleging he sustained a right shoulder injury when shoveling snow as an employee for the respondent at one of the respondent's properties. The respondent did not file a Form 43 contesting the claim. The Administrative Law Judge concluded that although the claimant was originally hired as an independent contractor, the relationship evolved into one of an employee-employer. The Administrative Law Judge then granted the Motion to Preclude.

In affirming the Administrative Law Judge's decision, the Court noted evidence exists supporting the finding the claimant was an employee and he was injured while working.

The respondent also argued she could not have filed a timely Form 43 because she knew the claim was fraudulent, and the filing of a Form 43 would have constituted a criminal act punishable pursuant to Connecticut General Statutes §31-290c. Specifically, the respondent believed if she filed a Form 43 she would have "intentionally aided, abetted and facilitated fraudulently obtained payments," for the claimant.

Connecticut General Statutes §31-290c "criminalizes the behavior of a person who makes a claim or obtains an award based in whole or part on a material mis-representation or intentional nondisclosure of material fact." The statute also "applies to an employer that prevents or attempts to

prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits based on a material misrepresentation or intentional nondisclosure of a material fact."

Aside from there being no legal support for the respondent's allegation on this issue, the purpose of a Form 43 "is to contest an employer's liability for employee's injury. It would not, therefore, fall within the language of §31-290c that criminalizes conduct by a claimant for workers' compensation benefits." Instead, if the employee made a material misrepresentation or an intentional nondisclosure of a material fact, the claimant, and not the respondent, would have committed the criminal act.

Commutation of Benefits

In ***Diaz v. Bridgeport***, 208 Conn. App. 615 (2021), the Appellate Court affirmed the Administrative Law Judge and Compensation Review Board's decision to convert the first 122 weeks of permanent partial disability benefits to temporary total disability benefits after the benefits had been paid by a commutation. Connecticut General Statutes §31-302 contains no express limitation upon reclassification of benefits following a commutation.

Furthermore, although the statutory cap applied in this matter because the claimant was receiving benefits pursuant to Connecticut General Statutes §7-433c and a retirement pension, the commutation order complied with the statutory cap imposed by Connecticut General Statutes §7-433b because the claimant's commutation lump-sum payments are excluded, and the weekly benefits plus the pension payment did not exceed statutory guidelines.

COMPENSATION REVIEW BOARD DECISIONS

Claimant's Intentional Act Resulted in a Non-Compensable Injury

In ***Bassett v. East Haven***, 6410 CRB-3-21-1 (October 22, 2021), the Compensation Review Board affirmed the Administrative Law Judge's conclusion the claimant's injury was not compensable because it did not arise out of his employment.

The claimant was supervising a crew cleaning outside of an elementary school when he came upon a "small brown sphere with paper wrapped around it, foil stuck on it, and a wick attached." Mr. Bassett picked up the item and lit the wick with his lighter. The sphere exploded causing a traumatic amputation to the left hand.

The "claimant's intentional act of lighting the wick broke the chain of proximate cause between the employment and the injury" and thus the injury did not arise out of the course of employment.

MEDICARE UPDATE

CMS's Change to the MSA Reference Guide Concerning Non-CMS-Reviewed MSAs

On January 10, 2022, the Centers for Medicare & Medicaid Services (CMS) released Version 3.5 of its Workers' Compensation Medicare Set-Aside Arrangement (MSA) Reference Guide. The most significant change in Version 3.5 is found in Section 4.3 regarding the use of non-CMS-approved MSAs in workers' compensation settlement.

The January 10, 2022 change by CMS was made to address the proliferation of alternative options to the "traditional" MSA, most commonly known as "evidence-based" or "non-submit" MSAs, which it views as an attempt to avoid the parties' obligations to Medicare regarding workers' compensation settlements. Specifically, "evidence-based" or "non-submit" MSAs typically result in a lower amount being set aside for future medical treatment than the "traditional" MSA generated using Medicare's algorithms, possibly resulting in Medicare's interests not be adequately protected in accordance with their interpretation of federal regulations.

To avoid the possibility of circumventing the parties' obligations to Medicare by using non-CMS-approved MSAs, CMS is now taking the stance it "will deny payment for medical services related to the WC injuries or illness requiring attestation of appropriate exhaustion equal to the total settlement less procurement costs before CMS will resume primary payment obligation for settled injuries or illnesses." The result is that for any settlement including a non-CMS-approved MSA, the claimant must show he or she fully exhausted the net settlement proceeds (the amount of the settlement minus the attorney's fee and any costs) before Medicare becomes liable for medical treatment.

There is uncertainty how this new stance will be applied for settlements that do not meet the threshold for CMS to review the MSA in advance (less than $25,000 for a Medicare enrollee or less than $250,000 for someone who is not yet enrolled in Medicare but who has a reasonable expectation of becoming eligible within the next 30 months). One interpretation is the CMS intends for its new approach to apply only when the parties could have sought CMS approval of the MSA but opted to not submit the MSA. The other interpretation is CMS is applying this change to all MSAs CMS does not approve, regardless of the review threshold.

Pending further guidance from CMS on how the new stance will be applied, best practices are to seek CMS approval when a settlement meets the criteria to do so and to obtain and incorporate into the settlement an MSA evaluation from a vendor when the MSA does not meet the review thresholds. We will provide updates on this issue and how best to address it as additional guidance becomes available.

EIGHTH DISTRICT UPDATE

The Eighth District Workers' Compensation office has moved to 649 South Main Street Middletown, Connecticut 06457. The telephone number (860-344-7453) and facsimile number (860-344-7487) remain the same.

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, Kim R. Small at ksmall@nuzzo-roberts.com or Brandy M. Parry at bparry@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

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