NUZZO & ROBERTS NEWSLETTER

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WORKERS' COMPENSATION UPDATE: THIRD QUARTER 2022

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

SUPREME COURT AND APPELLATE COURT DECISIONS

The Claimant Provided Timely Notice Under the Totality of the Circumstances

In ***Fieldhouse v. Regency Coachworks, Inc.***, 213 Conn. App. 662 (2022), the Connecticut Appellate Court affirmed the Compensation Review Board's reversal of the Trial Judge's ruling. Specifically, the Trial Judge ruled the claimant had not filed a timely notice of claim by failing to comply with Connecticut General Statutes §31-294c(a). However, the Compensation Review Board and the Connecticut Appellate Court concluded under the "totality of the circumstances" the claimant substantially complied with the notice requirements by providing constructive notice.

Ms. Fieldhouse was injured on November 27, 2015, when she fell down several stairs. After the fall, her supervisor, Robert Charland, helped her off the floor. At some point following the incident, the claimant informed Mr. Charland she was considering filing a workers' compensation claim and the supervisor advised her to file the claim. Ms. Fieldhouse then contacted the employer's workers' compensation insurance agency, Paradiso Insurance Agency (agency), also telling them she needed to file a claim. On November 16, 2016, an agency employee incorrectly told her she had two years to file a claim. The agency employer then had her complete a First Report of Injury and stated she would file the workers' compensation claim for Ms. Fieldhouse.

Significantly, on November 22, 2016, the claimant received a call from the workers' compensation insurer, BerkleyNet Underwriters, LLC, and she gave a twenty-five-minute recorded statement. Ms. Fieldhouse also received correspondence from BerkleyNet, dated November 22, 2016, indicating they had opened a claim and assigned a claim number for the date of injury of November 27, 2015. On March 27, 2017, the claimant received a letter stating: "In accordance with your [w]orkers' [c]ompensation claim from Friday, November 27, 2015, BerkleyNet . . . has arranged for you to be examined . . . ."

These communications led Ms. Fieldhouse to believe she had a valid open workers' compensation case.

At the formal hearing, the respondents stated that as the claimant failed to file a Form 30c and there was no request to pay indemnity benefits or for medical treatment within one year of the date of injury, Ms. Fieldhouse had not filed a timely notice of claim. The claimant argued that under the totality of the circumstances she had filed a timely claim.

In overturning the Trial Judge's ruling, the Board concluded the Trial Judge misapplied "the totality of circumstances standard" and "[t]he actions taken by [BerkleyNet] on and after November 22, 2016, serve[d] to demonstrate that the claimant's interactions with her immediate supervisor, coupled with her personal appearance at the workers' compensation insurance agency with the express intention of filing a workers' compensation claim, reflect that the claimant substantially complied with the statutory notice provisions such that the respondent was provided with constructive notice of this claim."

In affirming the Board's ruling, the Appellate Court noted that case law has recognized "an employee satisfies the notice of claim requirement of §31-294c(a) if, under the totality of the circumstances, he or she provides written notice that is in substantial compliance with the notice content requirements of [§ 31-294c(a)]."

In essence, Ms. Fieldhouse attempted to file a claim, she was incorrectly told she had two years to file the claim, the insurance agency representative stated she would file the claim, the insurer seemed to subsequently inform her the claim had been filed, and they took her recorded statement.

Please note the Appellate Court states that in reaching this ruling they are not carving out a new exception to the notice requirements of §31-294c(a). Furthermore, if the insurance agency representative had told Ms. Fieldhouse she needed to file a claim on her own within one year, the subsequent actions of the insurance company may have been deemed to be nothing more than investigative acts and not evidence of the existence of a timely filed case.

COMPENSATION REVIEW BOARD DECISIONS

Form 36 Approval

In ***Brown v. Coca Cola Bottling Company***, 6456 CRB-1-21-12 (September 23, 2022), the claimant had a severe pre-existing knee injury. He suffered a new knee injury on June 3, 2020. On September 14, 2020, the treating physician issued a report stating the pre-existing patella femoral disease is the claimant's number one symptom generator and the reason he remains out of work. Based on this report, on October 1, 2020, the respondents filed a Form 36 stating the claimant was no longer disabled because of

the June 3, 2020 workers' compensation injury.

However, on November 5, 2020 the treating physician wrote a second report in which he clarified his conclusion, stating the claimant was able to work with no problems for 12 years after the original knee injury, but he had been substantially out of work only since June 3, 2020 and the current course of treatment was related to the new injury.

Finally, on February 5, 2021, the Respondent's Examiner concluded the claimant's June 3, 2020 injury was mild and self-limiting and the claimant was capable of full duty work related to the 2020 injury. The treating physician returned the claimant to full duty as of February 22, 2021.

After a formal hearing, the Trial Judge granted the Form 36 for full duty, effective February 22, 2021, and the respondents appealed. The Compensation Review Board affirmed the Trial Judge's ruling stating it was based on a reasonable interpretation of the medical conclusions and it is supported by the treating physician's conclusions. Furthermore, "when a medical witness offers divergent opinions, . . . a trier of fact is permitted to choose the opinion he or she believes to be more reliable." The Board also noted that none of the medical providers were deposed and when a party chooses not to depose a medical witness, the Trial Judge may rely on their reports "as is" and draw any reasonable inferences from the evidence.

When is Out of State Care Appropriate

In ***Caye v. Thyssenkrupp Elevator***, 6442 CRB-1-21-9 (September 16, 2022), the claimant suffered an injury that led to the amputation of his right lower extremity and the need for a custom-made prothesis. The treating physician, Dr. Michael Leslie, referred Mr. Caye to A Step Ahead Prosthetics (A Step) in Hicksville, New York for prosthetic care. The stated need for the care from the New York company was because the length of the residual stump made it difficult for the claimant to be fitted for the prosthesis and a Connecticut company with the proper expertise could not provide that service.

The respondent initially paid for this treatment, and when problems arose with the prothesis, the claimant would drive to Hicksville, New York to have the prothesis fixed. However, early in the COVID-19 pandemic, Mr. Caye needed repairs to both his protheses, but he was unable to travel to New York. Therefore, he was instructed by A Step to send the protheses by UPS, which also required him to insure the protheses for a cost of $847.16.

The respondents objected to the cost of the insurance, the use of UPS without authorization, the continued use of an out-of-state provider, and the failure of A Step to comply with the Connecticut Workers' Compensation Fee Schedule. The Trial Judge ruled for the claimant and also

awarded attorney's fees totaling $16,862.50 at rate of $475.00 an hour (based on claimant's counsel's affidavit) pursuant Connecticut General Statutes §31-300.

In their appeal, the respondents argued the Trial Judge, in allowing the claimant to continue to treat in New York with A Step, erroneously applied the "reasonable or necessary standard" codified in §31-294(a)(1) rather than the "availability of equally beneficial in-state treatment" as required by ***Cummings v. Twin Mfg., Inc.***, 29 Conn. App. 249 (1992).

However, in ***Melendez v. Home Depot, Inc.***, 61 Conn. App. 653 (2001), the Connecticut Appellate Court stated the "test for determining whether the commissioner can order payment of out-of-state medical treatment is whether the treatment is reasonable and necessary." In finding the Trial Judge properly used the "reasonable or necessary standard", the Board also referenced a letter from Dr. Leslie stating that after surgery had to be performed because a Connecticut made protheses failed, the claimant needed to go to New York to find company with the proper skill set to repair and/or make the protheses.

The Board also found the Trial Judge ruled within her discretion that "under the circumstances" of the matter, the mailing and insuring the protheses did not require pre-authorization and the claimant should be reimbursed.

However, the Board remanded the matter to the Trial Judge to address the issue of A-Step adhering to the Connecticut Fee Schedule. Although there was a clear inference in the Trial Judge's Finding that the protheses provider will be required to comply with the fee schedule, further clarification from the Judge is needed. Please note the Board pointed out the disagreement of the amount paid for medical treatment is an issue between the provider and the insurer which should not affect the claimant's care.

Finally, although the Judge was within her discretion to award attorney's fees, that issue is also remanded "to afford the respondents the opportunity to investigate the validity of the affidavit relative to the amount of attorney's fees awarded by the administrative law judge."

WHEN IN DOUBT, CALL US

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

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