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## Legal Update on Employer Liability

2004 – Issue IV

### Workers' Compensation & Employment Law

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## **“Medical Only” NCP**

### **“Darrall Denials” are Recommended as an Alternative**

#### **Background - Lemansky:**

Ever since Lemansky<sup>1</sup> was decided in 1999, we claims that did not involve any compensable wage loss (“medical only” claims) placed employers in a quandary. If no bureau documentation was issued on a medical only claim, the employer ran the risk of incurring unreasonable contest attorney’s fees and/or penalties. If the employer issued a Notice of Compensation Payable (“NCP”), the employer thereby incurred the risk of having waived potential defenses such as causation, notice, course and scope, and disability if the employee claimed disability / wage loss at any later time.

#### **The “Darrall Denial”:**

The Commonwealth Court gave some guidance in the Darrall<sup>2</sup> Decision in 2002, when it addressed the use of a relatively commonly procedure: the issuance of a Notice of Denial, indicating thereon that while the employer is denying indemnity / liability for wage benefits, it is accepting liability for reasonable, necessary and related medical treatment, with a description of the specific body part and injury on the Denial. The Court in Darrall approved of this method, as the employer did file one of

<sup>1</sup> Lemansky v. WCAB, 738 A.2d 498 (Pa. Cmwlth. 1999), appeal denied, 759 A.2d 389 (Pa.).

<sup>2</sup> Darrall v. WCAB, 792 A.2d 706 (Pa. Cmwlth. 2002).

the required Bureau documents within 21 days of notice of the injury. The employer there was found not liable for attorney’s fees.

Since that Decision, the popularity and use of the Notice of Denial to document medical only claims appears to have increased, based on anecdotal evidence only. This method protects employers from unreasonable contest and attorney’s fees, since the required Bureau documentation is satisfied, claimants are able to use the form to get medical treatment, and it at least attempts to preserve the employer’s potential defenses if a claimant later requests wage loss benefits.

#### **New “Medical Only NCP”:**

The Bureau amended the NCP this year to include a box that the employer can check, indicating that the employer is accepting liability for medical benefits only. Employers are required to use this updated and amended NCP in place of the prior version as of June 1, 2004. **Note, however, that the Bureau does not require the use of this “Medical Only NCP” on “medical only” claims.** (See discussion below.)<sup>3</sup>

While this is an improvement over the prior naked NCP, in that the employer can specifically deny disability and preserve its right to challenge same if necessary, this new form does not address the risk of waiver of any defenses other than disability. If an employer issues an NCP, indicating that only medical treatment is accepted, is the employer thereby waiving issues such as

<sup>3</sup> A copy of the new version of the NCP is attached for easy reference. Note: The Bureau requests that an original, rather than a photocopy of Bureau forms, be using in Bureau filings.

causation, notice, and course and scope? A cost-benefit analysis often precludes an employer from spending the resources to investigate fully all of the potential defenses of a medical only claim, especially where only minimal medical bills are expected. If the claimant simply leaves work on a "Medical Only NCP," alleging that he is now disabled, is the employer limited to disputing only the single remaining issue of disability? The implication is that the employer has waived all other issues.

Bureau Director John Kupchinsky advised at the June 2004 Pennsylvania Self-Insurers' Association meeting in Hershey that all employers are required to use the new NCP form when issuing an NCP. However, he confirmed that the Bureau does not require the use of the medical only NCP on medical only cases; The Bureau will continue to accept Denials that describe the work injury and deny liability for wage benefits. (the form of Denial that was described in the Darrall case.) Penny Zimmerman, Supervisor of Records Management at the Bureau has confirmed that this continues to be the position of the Bureau as of the week of publishing of this Update.

**Recommendation: Darrall Denial**

We cannot guess the legal interpretation that the Courts will eventually give to Medical Only NCPs. In the meantime, the use of that form poses a risk to the employer. A Darrall Denial is calculated to decrease that risk: The document itself is a denial, rather than acceptance, which at least implies by its nature that any liability not explicitly identified would be deemed denied.

Further language can be added to the Denial, expressly limiting the scope of liability

accepted and preserving the employer's right to raise defenses to any claim for disability or more significant medical conditions. While there is no guarantee of the effectiveness of the language, it is calculated to increase the chance that the employer's scope of liability will be limited, and that the availability of such defenses will be preserved.<sup>4</sup>

The Darrall Denial satisfies the Bureau's 21-day filing requirement, and provides the employee with the documentation that he needs in order to get medical care. If the health care provider will not accept the Darrall Denial in order to provide treatment, a short letter from the employer's claim handler to the health care provider simply advising that reasonable, necessary treatment will be paid for treatment that is related to the described injury and body part should resolve such issues.

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**Internal Anti-Harassment Procedure**

**Effective Protection Against Constructive Discharge Claims?**

An employer is liable for the harassment of an employee by a supervisor, where the employee was subjected to a tangible employment action, such as demotion or discharge. Where there is no such tangible

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<sup>4</sup> A Notice of WC Denial is attached, with sample language that might afford an employer the preservation of its defenses to any claim for wage benefits or for a more serious medical condition. NB: the checks next to numbers 4 & 6 on the form will not apply in every claim, and the claim handler should make the appropriate checks under the facts of the specific claim. Note: The Bureau requests that an original, rather than a photocopy of Bureau forms, be using in Bureau filings.

employment action, an employer's internal anti-harassment procedure can protect the employer from liability for the acts of that supervisor if the employee fails to utilize those procedures to report and resolve the alleged sexual harassment (the "Ellerth / Faragher affirmative defense")

The U.S. Supreme Court here addressed the issue of whether an employer can use this affirmative defense in constructive discharge harassment claims. Here, Plaintiff Nancy Drew Suders sued her employer, alleging in part sexual harassment and constructive discharge in violation of Title VII. Employer attempted to use the affirmative defense that the plaintiff unreasonably failed to avail herself of the employer's internal anti-harassment procedures in response to the alleged harassment of her supervisors.

The U.S. Supreme Court held that this affirmative defense can be used by employers in constructive discharge claims. However, the Court clarified that an employer cannot use the defense where the constructive discharge is due to an employer-sanctioned significant change in a plaintiff's employment status or situation. Examples given by the Court of such significant changes included "humiliating demotion", "extreme" pay cut, or creation of "unbearable working conditions" for the employee.

Pa. State Police v. Suders, 124 S. Ct. 2342 (2004)

## **Claimant Attorney Fee Requests Can Include Paralegal, Law Clerk Time**

### **Justice Castille Dissent: Will the Janitor be Filling out a Timesheet as Well?**

When an employer cannot prove that it had a "reasonable contest" to a wc claimant's Petition, the Court will order that the employer pay the claimant's attorney's fees in addition to the claimant's wage benefits, instead of being deducted from the benefits. The Pennsylvania Supreme Court has held that those "attorney's fees" awarded can include reasonable fees for legal services rendered by paraprofessionals, law clerks and recent law graduates.

The Court noted that since the General Assembly did not specify what falls under the umbrella of "attorney's fee", it was free to perform its own statutory "interpretation" of just what was intended by the very clear term "attorney's fees". The Court reasoned that "paraprofessionals" law clerks and recent law graduates make up part of the claimant's attorney's overhead. Accordingly, under the reasoning of the Court, the reimbursement of these additional "attorney's fees" [for non-attorneys] would promote "efficient lawyering," as claimant's attorneys will not have to increase their hourly rate to pay for the attorney's office staff.

Justice Castille was the lone dissenting vote on the Supreme Court panel. His opinion was that the term "attorney's fee" means just that: the fee of an "attorney," and only an attorney. Taking the reasoning of the majority opinion to its absurd conclusion, he argued that a janitor's salary could be

included in a claimant attorney's fee paid by the employer.

Accordingly, we can expect claimant's attorneys to begin submitting timesheets of their paralegals, law clerks, and recent law graduates in litigation in hopes that the Judge will Order the employer to reimburse these costs. The jury is still out on whether claimant attorneys will be submitting timesheets of their janitors as well.

Vitac Corp. v. WCAB (Rozanc), 854 A.2d 481 (Pa. 2004)

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### **Work-Related Sleepiness**

#### **Not an Exception to the Coming and Going Rule in WC**

This employee was seriously injured when he fell asleep while driving home in his tractor trailer from work. While the "coming and going rule" would ordinarily preclude this claimant from wc benefits during this commute home from work, this claimant made the rather unique argument that he should receive wc benefits because his motor vehicle accident was caused by work-related exhaustion. He contended that the employer knew he had been working for 48 hours before the injury.

The court noted that while the truck driver employee could have slept in the bed in his own tractor trailer, he chose instead to drive home. The Commonwealth Court disagreed with the employee, and declined to make work-related sleepiness an exception to the coming and going rule. The court denied wc benefits, holding that an employee cannot carve out an exception to the coming and

going rule when he is injured by his own self-induced exhaustion by "pushing himself beyond his endurance by refusing to rest or sleep".

Fonder v. WCAB (Fox Integrated), 842 A.2d 512 (Pa. Cmwlt. 2004)

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### **No Reverse Discrimination in ADEA**

#### **Supreme Court Permits Discrimination Against Younger Workers**

40 to 49 year old employees sued this employer asserting a reverse age discrimination claim under the ADEA. This was based on a collective bargaining agreement that gave older employees (ages 50 and over) preferential treatment on health benefits. This brought up the issue for the very first time as to whether the ADEA permits claims for reverse discrimination / discrimination against younger employees based on age. The issue was further complicated by the fact that the complaining employees were over 40, and accordingly covered under the explicit language of the ADEA.

After a very lengthy review of the text, structure, purpose and history of the ADEA, along with its relationship to other federal statutes, the United States Supreme Court held that the ADEA does not prohibit favoring the old over the young, even when the "younger" workers are over 40 years old. The Supreme Court accordingly held that the employees here could not bring a reverse discrimination claim under the ADEA.

General Dynamics Land Systems, Inc. v. Dennis Cline et al., 2004 U.S. Lexis 1623 (2004).

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## **Employers Can Compel Diagnostic Testing as Part of IME**

### **Court Limits Intrusiveness, Not Invasiveness of Tests**

The Pennsylvania Supreme Court considered here for the first time whether an employer can compel a wc employee to undergo diagnostic testing as part of the employer's Defense/Independent Medical Examination ("IME"). Here, a wc employee had undergone nerve blocks and two surgeries on her right shoulder. The IME physician requested an MRI and triphasic bone scan in order to complete his evaluation, and the employee refused.

The Supreme Court held that diagnostic tests can be part of a court-ordered IME. To have the tests included in such a court-ordered IME, an employer must show that the tests are:

- (1) necessary,
- (2) involve no more than minimal risk, and
- (3) are not unreasonably intrusive.

Importantly, the Court chose the term "intrusive" rather than "invasive". This is an important distinction, and the Court went on to clarify (and infer, in some instances) that the following – although invasive – would not be unreasonably intrusive:

- piercing the skin with a needle;
- x-rays;
- collection of a blood sample;
- CAT Scan;
- injections.

The Court even implied that the injection of a radiotracer for a bone scan might be reasonable, in spite of its obvious invasiveness.

Coleman v. WCAB (Ind. Hosp.), 842 A.2d 349 (Pa. 2004)

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## **Is Funded Employment Viable?**

### **Court Focuses on Change in Job Duties rather than the Source of Wages**

This employer attempted to reduce its wc liability through a Modification Petition, based on the claimant's refusal to return to a subsidized light duty position for another employer. The employer funded the wages for the first 90 days, after which it was anticipated that the other employer would then begin to pay the claimant's wages.

The Judge granted the Petition, and reduced the employer's wage liability according to the wages available at the funded employment light duty position. That reduction, however, was limited to 90 days, since the funding for the employment was available for only 90 days.

The Supreme Court of Pennsylvania affirmed the Judge's Decision, finding that the position was available only for the 90 days that it was funded by the employer. Important in the Court's decision was the fact that after 90 days, the employee would have been asked to change his duties, work for less pay, move to another location, and reduce his hours. This led the Court to determine that the position after the expiration of the 90 days of funding was not

the same position as that first offered to the employee.

Importantly, the Court stated in a footnote that if the only substantial change in the relationship was the party who paid the wages, then the Court would anticipate that a Judge would find the light duty position to continue uninterrupted beyond the 90 day funding period. This would imply that any reduction in the claimant's wc wage benefits for the claimant's bad faith failure to return to work would not be limited as it was in this case, but that the Employer would gain an ongoing reduction in weekly wage benefit liability.

GE v. WCAB (Myers), 849 A.2d 1166 (Pa. 2004)

### **Cumulative Trauma Injuries**

#### **Last Day of Work is the "Date of Injury" for Purposes of the 120 Day Notice Requirement**

One absolute defense that employers can use in wc claims is an employee's failure to give notice to the employer of a work-related injury within 120 days of that injury. Here, the Pennsylvania Supreme Court addresses when that 120 day deadline begins to run, when dealing with cumulative trauma claims.

Although this claimant was diagnosed with work-related carpal tunnel syndrome in January 1996, she did not give notice to her employer of this work-related condition until her last day of work in March 1997. Important to the Pennsylvania Supreme Court's determination was the fact that in

cumulative trauma injuries, such as carpal tunnel syndrome, medical evidence can establish that each day of work caused an aggravation of the work-related injury. The Court held that where there is such medical evidence of a daily aggravation, the "date of injury" for purposes of the 120 day deadline for employee's notice will be the last day that a work-related aggravation injury is suffered, which will normally be the last day of work.

Here, since the Claimant provided notice to her supervisor on her last day of work, the Court affirmed the Judge's finding that her notice was given within the required 120 days of the "date of injury."

City of Philadelphia v. WCAB (Williams), 851 A.2d 838 (Pa. 2004)

### **Retaliatory Discharge Claim**

#### **6 Months Too Long for Inference of Improper Motive**

Plaintiff sued her former employer for alleged retaliatory discharge under Title VII, the Age Discrimination in Employment Act ("ADEA") and the Pennsylvania Human Relations Act ("PHRA"). She alleged that employer was retaliating against her for giving favorable deposition testimony in support of a co-worker's discrimination claim against employer, for filing her own charge of discrimination with the EEOC against employer, and for filing several workers' compensation claims against Employer.

Plaintiff argued that there was sufficient evidence to infer the requisite causal link

between her protected actions and her termination. Employer argued that Plaintiff was fired for various acts of insubordination. The district court agreed with the employer and dismissed plaintiff's claims on Employer's motion for summary judgment.

The 3<sup>rd</sup> Circuit Court of Appeals agreed with the grant of summary judgment by holding that Plaintiff failed to raise an inference of causation between her protected actions and

her termination. Plaintiff's protected acts all occurred six months to a year before her termination for insubordination. The Court held that such a temporal link is too attenuated to support any inference of improper motive.

Urey v. Grove City College, 2004 U.S. App. Lexis 7188 (3<sup>rd</sup> Cir. 2004)

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**Kunz & Associates defends employers and their insurance carriers against workers' compensation and employment law claims throughout Pennsylvania.**

**Questions? Please call or email.**

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