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PENNSYLVANIA WORKERS' COMPENSATION



Claudio J. DiPaolo

Claudio J. DiPaolo, Chair of the Workers' Compensation Group, recently received a favorable opinion from the Commonwealth Court of Pennsylvania in *Brignol vs. Workers Compensation Appeal Board (US Airways and AIG Claims Services, Inc.)*.

Brignol (claimant) petitioned the Commonwealth Court after the Workers' Compensation Appeal Board (WCAB) affirmed the Decision and Order of the Workers' Compensation Judge (WCJ). In the underlying proceedings, the WCJ found the claimant to be fully recovered from her work injury, and ordered a termination of her workers' compensation benefits.

The operative Bureau of Workers Compensation (BWC) document, governing the claimant's entitlement to benefits, was a Notice of Compensation Payable (NCP). The NCP acknowledged that on April 2, 2006, the claimant sustained a "lumbar sprain" during the course and scope of her employment. Accordingly, the claimant began to receive workers' compensation benefits. Based upon an independent medical evaluation (IME), the employer filed a Termination Petition with the BWC, alleging that the claimant had fully recovered from her injury. In response, the claimant filed a Review Petition, seeking to amend the NCP to include "L4-L5 and L5-S1 herniated discs with radiculopathy and an aggravation of degenerative joint disease."

At a hearing before the WCJ, the claimant disputed the contention that she had recovered from her injuries, or that she could return to work as a customer service agent for U.S. Airways. Based upon a number of inconsistencies and admissions, the WCJ rejected the claimant's veracity in this regard, as well as any corroborating testimony from her treating physician. In doing so, the WCJ fully credited the employer's medical expert, who testified that the claimant had fully recovered from her work injury and could resume work, unabated.

On appeal, the claimant asserted that it was incongruous for the WCJ to reach such a conclusion given that she had granted the claimant's Review Petition *in part*, finding that claimant had suffered from a "radiculopathy" as a result of her work injury.

In the context of a Termination Petition, it is axiomatic in Pennsylvania workers' compensation law that the employer must prove that either the claimant's work-related disability has ceased, or that an intervening or superseding cause has arisen to a degree which deems same as the substantial contributing factor to any ongoing disability. In this latter regard, the WCJ concluded that the employer had indeed satisfied its burden of proof relative to the Termination Petition. Thus, notwithstanding the disposition of the claimant's Review Petition, the WCJ terminated benefits, reasoning that any purported ongoing disability was solely attributable to and an underlying and insidious pathology. The WCJ dismissed the remaining allegations of the Review Petition, which purported to establish a causal nexus between the claimant's degenerative disease and her work injury.

In affirming the decisions of the WCJ and WCAB, the Commonwealth Court concluded that the WCJ's findings of fact were wholly supported by substantial and competent medical evidence. The Court reasoned that the Judge acted well within her province as trier of fact, in finding that the claimant had fully recovered from her work related injury, as well as from any sequela therefrom. The Court properly noted that the Judge had not committed an error of law in retroactively expanding the description of the work injury, while concurrently terminating benefits.

Finally, the Court easily disposed of the claimant's alternative argument relating to whether the WCJ had authored a "reasoned decision", noting that the WCJ's decision fully comported with Section 422(a) of the Act, as it adequately explained the reasons for discrediting conflicting evidence, and in so doing, allowed for adequate appellate review. 77 P.S. § 834

The Commonwealth Court thereby affirmed the WCAB Opinion, which had affirmed the WCJ's decision and order, granting a termination of benefits under the Act.

Claudio J. DiPaolo, Chair of Rawle & Henderson's Workers' Compensation Group, has practiced employment law and insurance defense litigation for over 15 years, with a concentration in workers' compensation matters. He has defended workers' compensation claims on behalf of self-insured corporations, insurance carriers, and various political entities. Claudio has spoken about workers' compensation topics to various groups and clients throughout the country, and has written extensively on workers' compensation law. He earned his J.D. from the Delaware campus of the Widener University School of Law in 1993. Claudio is admitted to practice in Pennsylvania and New York, as well as before the U.S. Court of Appeals for the Third Circuit, the U.S. District Court for the Western District of Pennsylvania, and the Supreme Court of the State of New York.

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NEW YORK MEDICAL MALPRACTICE



Robert Fitch

New York Partner Robert A. Fitch recently defended an oral surgery malpractice case which resulted in a defense verdict in Supreme Court in Brooklyn, New York. Plaintiff had elective oral surgery. The oral surgeon performed a bilateral sagittal

split of the plaintiff's mandible to advance her lower jaw as part of orthodontic treatment. This surgery placed plaintiff's jaw in a position intended to maximize the efficacy of the orthodontic treatment used to correct plaintiff's bite. Per standard oral and maxillofacial procedure, the plaintiff's jaw was wired shut after the procedure to allow for sufficient healing time, and a splint was wired to the upper jaw to position the teeth.

Plaintiff was non-compliant with her orthodontic treatment and removed the splint placed by the surgeon soon after he unwired the jaw. Plaintiff remained dissatisfied with the alignment of her teeth, and two years after the operation, she elected to undergo a second bilateral sagittal split of her mandible, this time under the care of another non-party oral surgeon. The second surgery left plaintiff with numbness in her lower lip and chin, and was also unsuccessful in properly aligning her teeth, all of which she blamed on our client's surgery. Plaintiff's expert, a nationally recognized oral surgeon from

Michigan, opined that the original surgery was done improperly and doomed the orthodontic treatment to failure.

Plaintiff also claimed that our client departed from good practice by failing to adequately communicate to the orthodontist about the planned position of the teeth before the operation, which, she alleged, constituted an additional, substantial cause of her two failed surgeries.

Plaintiff's settlement demand was \$650,000, and \$3.5 million was demanded in plaintiff's counsel's closing to the jury. The case was defended by explaining how and why our client did the surgery, and asserting that plaintiff's failure to comply with post-operative treatment plans was the actual cause of the failed surgery. At trial, we offered substantial evidence, including testimony from experts in the fields of orthodontics and oral surgery, as well as testimony from plaintiff's treating orthodontist and the non-party surgeon who performed plaintiff's second surgery, to establish that plaintiff's alleged injuries arose as the sole result of her non-compliance with post-operative treatment and the risks of the procedure. After a three-week trial, the jury unanimously concluded that the surgery did not cause plaintiff's injuries, and even though they found a departure for the failure to properly communicate with the orthodontist, the jury

determined it was not the cause of any injury.

Robert Fitch also defended an oral surgeon in a malpractice case against the surgeon, a pathologist and a local hospital for missed diagnosis that resulted in catastrophic injuries.

The plaintiff was a 10-year-old girl when she came to our client for the removal of what appeared to be a benign cyst. This cyst was submitted to the codefendant hospital's pathologist, who confirmed it was a benign cyst and thus, no further treatment was rendered. Eight years later, plaintiff developed a much more aggressive and destructive lesion in the same area of her jaw that resulted from the previous cyst being misdiagnosed and not more aggressively treated. At age 20, she had her entire left mandible removed and replaced with a titanium plate and a full flap transplant from her fibula. This resulted in extensive facial scarring, leg scarring, loss of teeth, and the need for multiple future surgeries to

complete the reconstruction with replacement of the implants and dental appliances every 10 to 15 years for the rest of her life.

Special damages were stipulated to be \$180,000 and there was a \$10 million demand at the start of trial. The co-defendant hospital and pathologist settled in the seven figure range during trial, and the case continued against the oral surgeon for his alleged failure to properly diagnose the lesion before removing it, performing an improper surgery since he did not know the true nature of the lesion, and failing to properly follow-up with treatment which could have resulted in discovery of the newly growing lesion. A \$6 million demand was made in plaintiff's closing to the jury and there was no offer made on the oral surgeon's behalf.

The jury returned a defense verdict for the oral surgeon in Queens County, New York, which is well-known for large plaintiff verdicts.

Robert Fitch, a partner in the New York office, concentrates his practice in the defense of product liability, professional and medical malpractice and commercial motor vehicle litigation. He is admitted to practice in the state and federal courts of New York as well as the U.S. Court of Appeals for the Second Circuit. Bob has tried over 70 cases to verdict in the state and federal courts of New York. He has been rated AV by Martindale-Hubbell.

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