Vecchione, Vecchione, Connors & Cano LLP

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Case Law Update

There have been three recent court decisions impacting the day administration of the Workers' Compensation Law before the Workers' Compensation Board. Two of the decisions from the Appellate Division deal with the medical marijuana within the Medical Treatment Guidelines and the power of a Law Judge at hearing or in a reserved decision. The third case is from the Court of Appeals and applies to the payment of a posthumous scheduled loss of use award.

POSTHUMOUS SCHEDULED LOSS OF USE AWARDS REMAIN LIMITED

Prior to 2009 all scheduled loss of use awards that were worth more weeks than the amount of time that has passed since the date of the accident had to be paid into the future. If a claimant sought to have the award paid at once, the award was subjected to a reduction to the present value of the future compensation due. For example, if a claimant were awarded a 75% scheduled loss of use of the arm (worth 234 weeks) one year after the accident they would receive payments up to the date of the award and 182 weeks paid out into the future on a biweekly basis. *LaCroix v. Syracuse Exec. Air Service, Inc.*, 8 N.Y. 3d 348 (2007).

In the wake of *LaCroix* the Workers' Compensation Law was amended in 2009 to allow a claimant, at their option, to have the entire scheduled loss of use award paid at once in a lump sum. Amendments were made to §15(3)(u) and §25(1)(b) to allow the entire scheduled loss of use to be paid when the award was made,

regardless of how much time had passed since the date of accident. When those amendments were made, no amendments were made to Workers' Compensation Law §15(4)(d) which governed the payment of a scheduled loss of use award, when a claimant dies unrelated to the claim, was not amended.

The claimant in this case passed away without a spouse, minor children or any other person who could take the award under Workers' Compensation Law §16 before awards for a total of 335 weeks had passed since the date of accident. The Law Judge awarded the claimant's estate the entire award. The Board Panel limited the amount payable to the reasonable funeral expense. The Appellate Division modified the award to allow the scheduled loss of use to be payable until the date of death plus the funeral bill.

On appeal to the Court of Appeals the estate argued that they should entitled to the entire scheduled loss of use as awarded by the Law Judge. The Court of Appeals affirmed the decision of the Appellate Division and stated that the Estate can only be paid for the value of the award until the date of death plus the reasonable funeral bill subject to the maximum funeral bill limits.

The court reached this conclusion based upon the fact that in 2009 the legislature did not make any amendments to Workers' Compensation Law §15(4)(d). The plain language of §15(4)(d) mandates that the full scheduled loss of use award cannot be paid under the facts of this case. To allow the Estate to be paid the full value of the scheduled loss of use would have the effect of making §15(4)(d) of the Workers' Compensation Law meaningless. If the Legislature had wanted to allow an estate to collect the entire value of the scheduled loss of use award it could have chosen to do so. Since it did not, the payable amount of a scheduled loss of use award is limited to the value due between the date of accident and the date of death plus the reasonable funeral bill.

The Court also seemed to indicate that if the claimant had passed away with survivors who were entitled to receive the balance of the scheduled loss of use that they would not be able to have the entire award payable in a lump sum. This because when the amendments to Workers' Compensation Law §15(3)(u) and §25(1)(b) were enacted the right to request that the award be payable at once was only granted to the claimant and not their survivors.

The court did indicate that the issues raised by the Estate are better directed to the Legislature rather than the courts.

Estate of Youngjohn v. Berry Plastics Corporation, 2021 NY Slip Op 02017 (April 1, 2021)

MEDICAL MARIJUANA VARIANCES APPROVED

There are many issues with the payment for the use of medical marijuana in New York State. Although its use has been approved by the legislature, marijuana remains a Schedule I drug under federal law and the manufacture, distribution and possession of it a criminal offense, except in limited situations that do not apply to its use as a medication.

In this case the carrier raised all the issues that could be raised concerning violating federal law by a workers' compensation carrier paying for medical marijuana. Among the issues raised by the carrier was the Supremacy Clause of the United States Constitution and commission of a crime by reimbursing the claimant for their purchase of medical marijuana. Both issues were summarily dismissed by the court, with the court stating that if there was a violation of federal law, the crime ended when the claimant purchased the marijuana. The court also held that reimbursing the claimant for the purchase was in not a crime by the workers' compensation carrier. The court concluded that it is not possible to aid a crime that has already been committed. That may or may not be true, but is the workers' compensation carrier giving the claimant money to make their next purchase, which would be providing the funding for the next crime?

Under the New York law that allows for the use of medical marijuana neither a private health insurer nor a health plan need allow for coverage for medical marijuana. The law did not exempt a workers' compensation carrier or a self-insured employer from being required to reimburse for the expenses involved in obtaining medical marijuana under the Workers' Compensation Law. Therefore, based upon the plain meaning of the statute a workers' compensation carrier cannot use that option to avoid paying for the marijuana.

The Appellate Division also affirmed the approval of the variance request because the treating doctor indicated in the variance request that history of chronic pain, the functional limitations from the injury, prior treatments had “limited therapeutic effect” and the fact that the claimant wanted to use medical marijuana to limit his opiate intake. Based upon this the court found that the granting of the variance by the Workers' Compensation Board was appropriate.

No where in either the decision of the Appellate Division nor the underlying Board Panel decision was there any mention that the Workers' Compensation Board’s Medical Treatment Guidelines specifically do not allow the Workers' Compensation Board to approve any treatment requested by a variance that has not been approved by the FDA or is experimental. Both restrictions cover medical

marijuana. Based upon the decision by the Appellate Division, this remains as the only viable defense to a variance requesting medical marijuana.

This decision still preserved a workers' compensation carrier not being liable to reimburse the claimant for the of any purchase of medical marijuana prior to the granting of the variance under *Kluge v. Town of Tonawanda*, 176 A.D. 3d 1370 (2019).

The employer and workers' compensation carrier are seeking leave to appeal the decision of the Appellate Division to the Court of Appeals. If leave to appeal is not granted or granted and the Court of Appeals affirms the Appellate Division, the case is one that is appropriate to seek review by the Supreme Court of the United States because of raising the Supremacy Clause and the court's interpretation of federal statutes.

Also unknown is the impact of the recent approval of the use of recreational marijuana in New York State. Although, this should not impact the liability of workers' compensation carriers to be responsible to reimburse the cost of medical marijuana, when approved by the Workers' Compensation Board.

Quigley v. Village of East Aurora, 2021 NY Slip Op 01174 (February 25, 2021)

On April 13, 2021, the Supreme Court of New Jersey had their own case on this same issue. The Supreme Court upheld a direction to the employer and workers' compensation carrier to reimburse the claimant for his expenses for purchasing medical marijuana as well.

Hager v. M&K Construction, No. A-64-9 (Supreme Court April 13, 2021)

POWER OF LAW JUDGES LIMITED

On occasion a Law Judge will unilaterally modify one of their prior decisions or that of another Law Judge. Whether or not the Law Judge had the authority to do so under Workers' Compensation Law §123 was questionable.

The Appellate Division has resolved that question in the negative. Although the Workers' Compensation Board has broad authority under Workers' Compensation Law §123 to modify prior decisions, that power is limited to the Workers' Compensation Board, itself. A Law Judge does not have the authority to make such a ruling.

Left unanswered by this decision is if the parties stipulate to an amendment of a prior a decision, does the Law Judge has the authority to approve the stipulation. This type of action should still be possible, especially if it would resolve a pending appeal or avoid the necessity of an appeal being filed at all.

King v. City of New York Parks and Recreation, 191 A.D. 3d 1048 (2021).

We welcome your feedback and look forward to providing information on topics that are of interest to you. If you have any questions about the information provided, or if you have a workers' compensation matter that you need assistance with, we are available to speak with you. Please contact us at vvccnews@vecchionelaw.com.