

Vecchione, Vecchione, Connors & Cano LLP

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Case Law Update

The Appellate Division recently decided three cases that are beneficial to workers' compensation carriers and self-inured employers. In one case because of *ex parte* communications between the claimant's counsel and the doctors who were to be deposed in the case the Board Panel gave no weight to their opinions and the death claim in which they testified was disallowed. The Appellate Division also upheld a Board Panel decision which requires the claimant to live through the 10 day waiting period after a §32 agreement is deemed submitted to the Workers' Compensation Board. The last case held that when a claimant discontinues a lawsuit, with prejudice, without the consent of the workers' compensation carrier all benefits can be suspended unilaterally and that there is no penalty for the suspension of indemnity benefits without seeking approval for the suspension at a hearing from the Workers' Compensation Board.

Talking with Treating Doctors and Consultants

Questions have arising for about the last 15 - 20 years about how much contact any side can have with the medical witnesses in a compensation claim. The enactment of Workers Compensation law §137 limits how a carrier or claimant's counsel can contact their IME. However, there are also restrictions upon contact with doctors concerning their testimony and reports under Workers' Compensation Law §13-a(6)(a).

That second provision of the law prohibits anyone from doing anything that would be an improper influence on the medical opinion of any physician who treated a claimant. In 2003 the Board issued [Subject Number 046-124](#) on the issue. They indicated that all efforts are to be to avoid even the appearance of attempting to influence the report or testimony of a doctor. The issue was first dealt with by the Appellate Division in *Knapp v. Bette & Cring LLC*, 166 A.D. 3d 1428 (2018). In that case the Court held that an attorney who advised the doctor the issue for which they were going to be deposed via a text message had not violated the law or the guidance in the Subject Number.

In this case the doctors on behalf of the claimant had *ex parte* communications with claimant's counsel. One doctor spoke with the claimant's attorney for an hour the day before the deposition to go over his testimony and review the relevant records. A second doctor had also spoken with claimant's counsel for 15 minutes in order to prepare the C-64 form, giving causal relationship for the claimant's demise. As a result of these communications, the Board gave no weight to the report or testimony of either doctor on behalf of the claimant resulting in the disallowance of the death claim.

If it can be shown that claimant's counsel had extensive *ex parte* communications with the treating doctor(s) or a claimant's IME, the reports of the doctors can be found to be of no value to supporting the claim. This will lead to a greater likelihood that the claim will be disallowed or limited by the improper contact.

This is two way street. So, any *ex parte* communications between the claimant's treating doctor or IME and the carrier can result in the reports and opinion of the IME to be greatly reduced.

[Goutermout v. County of Oswego](#), 2021 NY Slip Op. 03357 (May 27, 2021)

The Claimant Must Survive the §32 10 Day Waiting Period

The claimant and carrier had reached an agreement to resolve a case under §32. The papers were filed with the Workers' Compensation Board to have the agreement approved. The Board sent out a notification that they planned to approve the agreement by a desk decision. The letter indicated that the agreement would be deemed submitted on July 3, 2018, and that if no objection was received by July 13, 2018, the agreement would become final and approved.

The claimant died unrelated to the claim on July 5, 2018. The carrier learned of the death on July 16, 2018. The workers' compensation carrier then asked the Board to rescind its approval of the agreement. The Board did so but eventually restored the matter for a hearing before a Law Judge on the issue. The Law Judge ruled that the death of the claimant during the waiting period made the §32 agreement a nullity and would not make the award payable to the estate.

On appeal the Board Panel affirmed the Law Judge, and an appeal was taken to the Third Department. The Appellate Division affirmed the Board and upheld their determination that the death of the claimant during the ten day waiting period made the agreement “unfair, unconscionable or improper as a matter of law”. The Workers' Compensation Board as a matter of law cannot approve any §32 agreement that is unfair, unconscionable or improper as a matter of law.

For a §32 agreement to be finally approved the claimant must live through the waiting period. Although the Board waits a number of days beyond the tenth day after the agreement is deemed submitted to make sure a last second filing to withdraw from the agreement was not sent to the Board, before filing the Notice of Decision approving the settlement, any death after the tenth day will likely result in the agreement being found to be approved, even if the notice of decision has yet to be filed.

[Weishar v. Don Tait, Inc.](#), 193 A.D. 3d 1197 (April 8, 2021)

Discontinuance of Third Party Action

Once a claimant commences a third-party action anything that is done to end the case other than taking the matter to trial, without any limitations on the amount of damages must be consented to by the carrier. If the claimant does not get the carrier's consent, they will be barred under §29 from any further benefits under the Workers' Compensation Law.

In this case the claimant signed a stipulation of discontinuance with prejudice without the consent of the carrier. When the carrier learned of what they claimant did they immediately suspended all benefits to the claimant, including the weekly payments, which had been directed to be paid to the claimant. After several hearings and appeal about whether or not a penalty was due the claimant for the unilateral suspension of benefits the Workers' Compensation Board

found that no penalty was due and that benefits could be suspended as of when the carrier learned of the discontinuance of the lawsuit.

On appeal the Appellate Division held that the carrier was within their rights to unilaterally suspend benefits to the claimant without being subject to a penalty and that the claimant was permanently barred from further indemnity and medical benefits as soon as the claimant discontinued his lawsuit.

Because of the potential penalties involved in this matter, prior to taking this unilateral action you should reach out to counsel to review the basis of the suspension and decide whether to unilaterally suspend or to take the issue to a hearing at the Board for the Law Judge to decide if there was a settlement without consent. This would avoid the risk of penalties and if the request was denied allow a suspension of benefits while the ruling is appealed.

[*Djukanovic v. Metropolitan Cleaning, Inc.*](#), 2021 NY Slip Op 03225 (May 20, 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 vyccnews@vecchionelaw.com.

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