

# CONNECTICUT WORKERS' COMP UPDATE

The law firm of Strunk Dodge Aiken Zovas provides you with our February 2017 workers' compensation update. Please feel free to share this update with your colleagues. If someone inadvertently has been left off our email list and would like to receive future updates they can contact Jason Dodge at [jdodge@ctworkcomp.com](mailto:jdodge@ctworkcomp.com)

## STRUNK DODGE AIKEN ZOVAS NEWS

SDAZ is pleased to announce that Katie Abel was married to Jim Dudack on Saturday January 14, 2017. Katie has changed her name to Attorney Dudack and her email is now [kdudack@ctworkcomp.com](mailto:kdudack@ctworkcomp.com) Best wishes to Katie and Jim!

Six attorneys from SDAZ attended the Barristers Ball for the Hartford County Bar Association at the Bond Ballroom on February 4. Anne Zovas, in her role as co-chair of the Bar Association scholarship committee, presented two UConn Law students with scholarships. Another highlight of the evening was the silent auction with proceeds all for the benefit of the Hartford County Bar Foundation. Anne Zovas is a board member and past president of the foundation which provides funding to local food shelters and the needy and disadvantaged in the Hartford community.

Lucas Strunk was recognized by *Best Lawyers*<sup>™</sup> as the 2017 Workers' Compensation Law-Employers "Lawyer of the Year" in the Hartford, Connecticut region. Attorneys Richard Aiken and Jason Dodge have been recognized by *Best Lawyers in America*<sup>™</sup> in 2017 in the area of Workers' Compensation Law-Employers. Strunk Dodge Aiken Zovas has been named by *U.S. News-Best Lawyers* in its "Best Law Firms" ranking, Tier Two for 2017.

All of the partners in SDAZ have been AV rated by Martindale-Hubbell. Attorney Philip Markuszka has been named by *Super Lawyers*<sup>™</sup> as a "Rising Star." Phil joins Attorneys Aiken, Strunk and Dodge in *Super Lawyers*.

When referring new files to SDAZ for workers' compensation defense please send them to one of the partners' email: [azovas@ctworkcomp.com](mailto:azovas@ctworkcomp.com), [raiken@ctworkcomp.com](mailto:raiken@ctworkcomp.com), [lstrunk@ctworkcomp.com](mailto:lstrunk@ctworkcomp.com), [jdodge@ctworkcomp.com](mailto:jdodge@ctworkcomp.com) or by regular mail. We will respond acknowledging receipt of the file and provide you with our recommendations for defense strategy.

## RECENT CASE LAW

### ***David Garthwait v. AT&T (January 17, 2017)***

This was a Finding and Dismissal issued by Commissioner Goldberg. The claimant suffered an acute disc herniation at L4-5 on November 5, 2008, which injury was accepted by the respondents. The claimant underwent surgery for the disc herniation. Later, in 2014, the claimant developed symptoms at the L5-S1 level for which he underwent surgery. The respondents denied responsibility for problems at the L5-S1 level and maintained that the claimant suffered from a preexisting degenerative disc disease and that any symptoms or problems were not triggered or aggravated by the 2008 work injury. The claimant insisted that the L5-S1 level had been accepted by virtue of payment for medical expenses and because the claimant's first surgery also involved the L5-S1 level. The trial commissioner, relying upon testimony and opinion from Dr. Mushaweh, the respondents' evaluator, dismissed the claim for compensability of the L5-S1 level as well as lost time and medical bills associated with the claimant's surgery. The commissioner found that the initial surgery only involved the L4-5 level. The commissioner also found no basis to support a claim for penalties for undue delay. **The case was defended by Attorney Anne Zovas of SDAZ.**

### ***Balloli v. New Haven Police Department, 324 Conn. 607 (2016)***

Peter Balloli is a City of New Haven police officer who alleged that he sustained a back injury which arose out of and in the course of his employment. The injury occurred at the claimant's home in Southington while the claimant was bending over to pick up keys that he dropped near his car before entering the car to go to work. His car was parked in front of his home in the street; earlier in the morning the claimant had moved his automobile to the street from his driveway in order to allow his son to get his car out of the driveway. The claimant contended that his injury was compensable pursuant to Section 31-275(1)(A)(1) since he was on the public street and had started his commute to work. The employer asserted that the injury was not compensable since the claimant had not departed his "place of abode." The statute states that workers' compensation coverage is provided to a police officer from his "departure from such individual's place of abode." The statute's definition of place of abode is: "the inside of the residential structure, the garage, the common hallways, stairways, driveways, walkways and yard." After a formal hearing the workers' compensation commissioner concluded that the plaintiff did not sustain a compensable injury "as he had not departed from his "place of abode...." The compensation review board affirmed the dismissal. Oral argument was held before the Supreme Court of Connecticut in October 2016 before six Justices. On November 22, 2016 the Court added Justice Vertefeuille to the Panel; the reason for this was due to the fact that the Justices that had heard the case originally were "tied" 3-3 regarding their decision in the case. On December 27, 2016 the Supreme Court issued a 4-3 decision reversing the board decision below and finding the injury compensable, *Balloli v. New Haven Police Department*, 324 Conn. 14, (2016). The

majority decision concluded that the claimant had departed his place of abode at the time of the injury, contrary to the finding of the commissioner and the compensation review board. **The case was defended by Attorney Jason Dodge of SDAZ.**

**Donald Filosi, et al. v. Electric Boat Corporation, 05998-CRB-02-15-03 (1-30-17)**

The Compensation Review Board upon review of a finding and dismissal entered by the commission acting for the Eighth District found error in the trier's conclusion not to apply the doctrine of collateral estoppel and therefore precluded the respondents from defending the claim in the state jurisdiction. In a case previously tried to an administrative law judge under the Longshore and Harbor Workers' Compensation Act, the Board determined that the expert testimony presented as evidence in the federal proceeding indicated that the administrative law judge applied a standard of review that would comport with analysis of causation under the Connecticut Act. Notwithstanding the Supreme Court's direction in Bernie v. Electric Boat Corporation, 288 Conn. 392 (2008), the Board, while acknowledging that the administrative law judge did not articulate the standard of causation applied in the federal forum, reviewed the evidence as the best indication of the administrative law judge's analysis of causation. A motion for reconsideration has been filed. **The case is defended by Attorney Lucas D. Strunk.**

**Thomas Gaudreau v. Electric Boat Corporation, (1-17-17)**

In this case the commissioner acting for the Eight District dismissed the claim for a 20% lung impairment as untimely under Section 31-294c(a) noting that the medical records contemporaneous with the onset of treatment reflected a diagnosis of asbestosis (among other asbestos-related lung difficulties) and that same was communicated to the claimant by two physicians. While the claimant testified that he had no precise recollection of being told he had asbestosis and that he was primarily concerned about having had developed a cancer, the trier credited the contemporaneous records that contradicted that testimony noting that the claimant was aware at the time of his earlier treatment that his other pleural disease and effusions were related to asbestos exposure. **This claim was defended by Lucas D. Strunk.**

***McGrath v. City of Waterbury*, file 500165074, 500163944 (January 5, 2017)**

The decedent, Joseph McGrath, was a former City of Waterbury fireman who had sustained a heart attack that was found compensable under General Statutes Section 7-433c. Permanency benefits were paid. When Mr. McGrath died his widow filed a form 30D claiming widow's benefits; the widow asserted that the notice of claim was not timely denied and that a Motion to Preclude should be granted. The defendants raised various defenses including constitutional issues. The commissioner denied the Motion to Preclude and determined that where the underlying claim was compensable no notice of claim was required to be filed by the widow. He also ruled that no disclaimer was required to be filed if such a notice of claim for death benefits was issued. The commissioner cited affirmatively the case of *McCullough v Swan Engineering, Inc.*, 320 Conn. 299 (2016). No appeal was taken from the decision. **The case was defended by Attorney Jason Dodge of SDAZ.**

***Diaz v. State of Connecticut, Department of Social Services*, 6072 CRB-3-16-1 (December 22, 2016)**

The CRB affirmed a dismissal of a claim for cervical surgery. The claimant had prior non-occupational injuries to the spine but also had an accepted 2010 accident at work and was paid 30% of the neck and 5% of the back on a voluntary agreement. After the permanency was paid the claimant sought surgical authorization. The State presented the testimony of Dr. Mushaweh that the claimant's need for surgery was unrelated to the accepted 2010 claim. The commissioner gave credit to the State's examiner and dismissed the claim for surgery notwithstanding the high permanency previously paid. Based on this case, even if a claim had previously been accepted an employer does have the ability to contest causation regarding medical treatment if you have solid medical support. Just because an employer has paid permanency this does not mean the employer has to accept all medical treatment in the future.

***Shults v. D.J. Hall Roofing, LLC*, 6071 CRB-5-16-1 (January 13, 2017)**

The claimant sustained a specific injury in 2009 for which low back permanency was assigned. ESIS was the carrier on the risk. He also had a twisting incident involving the low back in 2010. The claimant returned to the employer from 2010 to 2013 and engaged in what he described as "heavy work" that worsened his low back pain. Meadowbrook Insurance defended with regard to the repetitive trauma claim. The claimant's treating doctor and the RME doctor for ESIS concluded that the claimant's repetitive job/heavy occupation was the cause of his lower back problems whereas the RME doctor for Meadowbrook opined that the claimant's back pain was due to pre-existing annular tears. The trial commissioner concluded the claimant sustained a compensable repetitive trauma injury as a result of his work as a roofer but did not determine the claimant's last date of injurious exposure. Meadowbrook, who believed Travelers was the responsible party to administer the claim under Section 31-299b, argued on appeal to the CRB that it was prevented from establishing another carrier was the responsible party and the commissioner's failure to establish a date of injury constituted reversible error. The CRB agreed and remanded the matter for further proceedings to determine the date of injury for the claimant's repetitive trauma injury

and to reach factual findings as to what insurance carrier was responsible under Section 31-299b to administer the claim.

### ***Clark v. Middlesex Corporation, 6041 CRB-1-15-10 (January 30, 2017)***

The claimant sustained a compensable accident but had no children at the time of injury. The claimant died subsequently due to consequences of the injury. Between the time of the accident and the claimant's death he conceived a child who was born after his death. The CRB affirmed a dismissal of the child's dependency claim since the child was not "in utero" at the time of the accident, citing the "date of injury" rule. The board noted that if the child had been conceived before the accident then it would have had a viable dependent's claim.

### **PRACTICE TIP**

If a claimant has been paid permanency under Section 31-308(b) and her treating physician then totally disables the claimant do you have to then put the claimant back on total disability benefits? The answer is: not necessarily. In *Marandino v. Prometheus Pharmacy*, 294 Conn. 564 (2010), the Connecticut Supreme Court held that "...a claimant is not precluded from receiving total disability benefits under Section 31-307 for a subsequent disability **if it is distinct from and due to a condition that is not a normal and immediate incident of the loss for which she received permanent partial disability** under Section 31-308(b)." Based on this test, the claimant must show his total disability is not what normally would be expected from the permanency that had been paid. In *Marandino* total disability benefits were allowed because the claimant had developed CRPS from her arm injury and that was not a normal result for the injury for which she had been paid permanency. If permanency has been paid in a case that you are handling and a subsequent request is made for TT then the above test should be applied to determine if TT benefits are due. We generally take the position that after permanency has been paid the only indemnity benefit that you are entitled to claim is 31-308a.

### **COMMISSION NEWS**

Commissioner Goldberg will be retiring as of May 2017. A retirement party will be held in his honor on May 4, 2017. More information will be given on this as it is received. With the retirement of Commissioner Goldberg there will be two commissioner positions that remain unfilled. Commissioner Delaney retired more than one year ago and Governor Malloy has not nominated a replacement yet. It is uncertain when and if the Governor will nominate someone to these commissioner jobs.

SEE BELOW OUR “WORK-COMP-AT-A-GLANCE” REPORT; PLEASE CONTACT US IF YOU WOULD LIKE TO RECEIVE A LAMINATED VERSION OF THIS THAT IS HANDY TO KEEP AT YOUR DESK

**CONNECTICUT WORKERS’ COMPENSATION (post 7/1/93)**

**AT A GLANCE**

**MAXIMUM/MINIMUM COMPENSATION RATES**

|         | Maximum Temporary Total (§31-307) (wages all) | Maximum Permanent/ Temporary Partial (§31-308) (APW) | Minimum Temporary Total* (§31-307) (*20% of maximum rate capped at 75% AWW) | Minimum Permanent/ Temporary Partial (§31-308(b)) |
|---------|---|--|---|---|
| 10/1/16 | \$1,292.00                                    | \$1,063.00   | \$258.40  | \$50.00   |
| 10/1/15 | \$1,256.00                                    | \$998.00   | \$251.20  | \$50.00   |
| 10/1/14 | \$1,175.00                                    | \$991.00   | \$235.00  | \$50.00   |
| 10/1/13 | \$1,184.00                                    | \$985.00   | \$236.80  | \$50.00   |
| 10/1/12 | \$1,172.00                                    | \$1,001.00   | \$234.40  | \$50.00   |

**CONCURRENT EMPLOYMENT**  
§31-310

1. Must be employed with both employers on date of accident
2. Only wages for simultaneous weeks included
3. Out-of-state, federal, U.S. military, self-employment or casino employment does not qualify
4. Request reimbursement Second Injury Fund within 2 years of payment

**COST OF LIVING ADJUSTMENTS (COLA)**  
§31-307a

1. Only after 5 years of temporary total or
2. Permanent total/death
3. Reimbursement from Second Injury Fund for COLA paid D/A 7/1/93 and before 10/1/97 (requested within 2 years of payment)

**MILEAGE PER DATE OF INJURY**

§31-312

|          |            |
|----------|------------|
| 1/1/2017 | 53.5 cents |
|----------|------------|

|          |            |
|----------|------------|
| 1/1/2016 | 54 cents   |
| 1/1/2015 | 57.5 cents |
| 1/1/2014 | 56 cents   |
| 1/1/2013 | 56.5 cents |

**DEATH BENEFITS**  
**§31-306**

- \$4,000.00 burial fee (§31-306(a)(1))
- Benefits paid to surviving spouse until death or remarriage (§31-306(a)(3), §31-275(19))
- If no spouse, paid to the dependent children until age 18, or 22 if fulltime student, or for life if incapacitated from earning (§31-306(5))
- Dependent-in-fact capped at 312 weeks, limited to extent of actual support (§31-225(7))

**STATUTE OF NON-CLAIM**

- **Accidental Injury:** One year (tolled if medical bill paid by employer or request for hearing within one year) (§31-294c)
- **Repetitive trauma:** One year from date of last injurious exposure
- **Occupational disease:** Three years from date when doctor tells claimant disease due to work

**FORMS**

- **Form 36** (certified mail) (§31-296(b)):
  - Filed to seek discontinuation or reduction in benefits or to establish maximum medical improvement (MMI)
  - Filed to seek suspension of benefits for non-compliance with medical care
- **Form 43** (certified mail) (§31-294c):
  - Filed to contest claim, extent of disability, extent or nature of medical care or to seek suspension of benefits for failure to attend treatment or evaluation
  - Copy to physician in cases in which medical care questioned
  - Commission medical protocols can be basis for Form 43
- **Form 42:**
  - Sent to doctor for MMI and PPD rating(s)
- **Employee Medical & Work Status Form:**
  - Sent to doctor for outline of restrictions in detail

**SCHEDULED LOSS OF PERMANENT IMPAIRMENT**

|                 |     |                |     |               |     |              |
|-----------------|-----|----------------|-----|---------------|-----|--------------|
| BACK            | 374 | BLADDER        | 233 | THIRD FINGER  | 21  | SMELL        |
| MASTER ARM      | 208 | SPEECH         | 163 | FOURTH FINGER | 17  | TASTE        |
| NON-MASTER ARM  | 194 | LUNG           | 117 | GREAT TOE     | 28  | SPLEEN       |
| MASTER HAND     | 168 | CERVICAL SPINE | 117 | OTHER TOES    | 9   | GALL BLADDEF |
| NON-MASTER HAND | 155 | KIDNEY         | 117 | HEART         | 520 | TOOTH        |

|  |              |     |          |        |                  |     |                               |
|--|--------------|-----|----------|--------|------------------|-----|-------------------------------|
|  | LEG          | 155 | RIB CAGE | 69     | BRAIN            | 520 | PELVIS                        |
|  | FOOT         | 125 | OVARY    | 35     | LIVER            | 347 | STOMACH                       |
|  | HEARING      |     | TESTIS   | 35     | CAROTID ARTERY   | 520 | DRAINAGE DUCT EYE             |
|  | BINAURAL     | 104 | MAMMARY  | 35     | PANCREAS         | 416 | DRAINAGE DUCT EYE UNCORRECTED |
|  | ONE EAR      | 35  | NOSE     | 35     | NON-MASTER THUMB | 54  | VAGINA                        |
|  | ONE EYE      | 157 | JAW      | 35     | FIRST FINGER     | 36  | PENIS                         |
|  | MASTER THUMB | 63  | UTERUS   | 35-104 | SECOND FINGER    | 29  | COCCYX                        |

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**Any questions? Feel free to give us a call 860-785-4500 or at the direct dial extensions below.**

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