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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Summer 2018 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 or 860-785-4503.

STRUNK DODGE AIKEN ZOVAS NEWS

On July 16 the founders meeting of **Kids' Chance of Connecticut** was held in Clinton. Kids Chance of Connecticut is a Section 501(c)(3) public charity established for the purpose of providing educational opportunities and scholarships for the children of workers seriously injured or killed on the job. Kids' Chance of Connecticut is part of Kids' Chance of America which assists and supports Kids' Chance organizations in more than 40 states in the U. S. Partners of this group on a national level include NCCI, One Call, Paradigm, Sedgwick, ExamWorks, MES Solutions, Safety National, Berkley, Broadspire, Genex, and OPTUM. Vincent Armentano, Senior Vice President of Business Insurance Claims at Travelers, is the President of Kids' Chance of Connecticut, Barbara Ruel, Associate Vice President of Paradigm, is Vice President, Brenda Calia Vice President , Managed Care of CareWorks MCS, is Secretary, **Jason Dodge, senior partner at SDAZ**, is Treasurer and Scholarship Chair. Board members also include Liz Sinatro of Coventry, Pam Ferrandino, Vice President, Business Development at Gallagher Bassett, and **Philip Markuszka of SDAZ**. A kickoff event for the organization will take place on October 4, 2018 5:00 p.m. to 7:00 p.m. at the Rockledge Grille in West Hartford. (See SDAZ website under updates for more information). If you or your company are interested in assisting this worthy charity as a Board member or Partner please contact Jason Dodge.

Attorneys Lucas Strunk, Anne Zovas, Rick Aiken and Jason Dodge have been named to Connecticut Super Lawyers for 2018. Attorney Philip Markuszka has been named to the 2018 Connecticut Rising Stars list.

Attorneys Strunk, Aiken and Dodge have again been appointed to the Executive Committee of the Connecticut Bar Association Workers' Compensation Section for 2018-2019.

At the Connecticut Legal Conference on June 11 Attorneys Lucas Strunk, Rick Aiken and Jason Dodge were recognized as being recertified as workers' compensation specialists by the Connecticut Bar Association. Also, Lucas Strunk in his role as the legislative liaison for the Workers' Compensation Section of the CBA gave a speech to the Section about legislative changes (or the lack of them) to the Connecticut Workers' Compensation Act (see Attorney Strunk's 2018 legislative report at our website).

SDAZ is pleased to announce the hiring of Attorney Christopher Buccini as a Senior Associate. He received his Juris Doctorate from the Quinnipiac University School of Law in 2005 and Bachelor of Arts from the University of Connecticut in 2001 . Attorney Buccini has been practicing workers' compensation since he began his law career in 2005. Prior to joining Strunk Dodge Aiken Zovas, Attorney Buccini worked as Senior In-house Counsel for a multinational insurance company where his practice was solely devoted to representing and defending insurers and employers in all facets of workers' compensation claims. Attorney Buccini is admitted to practice before all Connecticut State Courts and the United States District Court, District of Connecticut. Attorney Buccini is a member of the Connecticut Bar Association.

You can now follow us on Facebook at https://www.facebook.com/Strunk-Dodge-Aiken-Zovas-709895565750751/

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

Please contact us if you would like a copy of our laminated "Connecticut Workers' Compensation at a glance" that gives a good summary of Connecticut Workers' Compensation law to keep at your desk.

Our attorneys:

Lucas D. Strunk, Esq.	**860-785-4502**	**Nancy E. Berdon, Esq.**	**860-785-4507**
Jason M. Dodge, Esq.	**860-785-4503**	**Katherine E. Dudack, Esq.**	**860-785-4501**
Richard L. Aiken, Jr., Esq.	**860-785-4506**	**Philip T. Markuszka, Esq.**	**860-785-4510**
Anne Kelly Zovas, Esq.	**860-785-4505**	**Christopher J. D'Angelo, Esq.**	**860-785-4504**
Christopher Buccini	**860-785-4520**		

CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

At the Connecticut Legal Conference on June 11 Chairman Morelli spoke about changes that are being made to the commission website and provided information

about the commission. He advised that Commissioner Colangelo will be presiding in the Fifth District in Waterbury, Commissioner Driscoll in the Third District in New Haven and Commissioner Watson will be in both the First District in Hartford and the Sixth District in New Britain. He stated that as of October 15, 2018 it is hoped that the new "Public Portal" for the commission website will be up and running; eventually this new site will allow efiling of documents but it is likely this will be a gradual rollout (as in 4-5 years to get the site ready for efiling). Chairman Morelli states that it is the goal of the commission to go "paperless" at some point. The Chairman indicated that the new rate tables that will come out in October will likely be less complicated because of the changes in the Federal Tax Law. Regarding Form 36's, he stated that the Commission is now accepting Form 36's based on a Physician Assistant opinion (a change from the past; see Commission Memorandum 2018-04). There will be a new medical protocol as of July 1, 2018 for the foot and ankle. Chairman Morelli indicated that given the retirement of some commissioners there are fewer commissioner available for mediation purposes.

In Memorandum 2018-03 the Commission alerts that "a former New York based orthopedic surgeon, Spyros Panos, whose license to practice medicine was previously suspended, is accused of misappropriating another physician's identity and fraudulently performing peer/utilization review services….We have reason to believe that a company identified as Excel O LLC may have acted as a peer/utilization review organization and utilized Panos' assumed medical alter ego to perform peer/utilization reviews….We expect, and encourage, other insurance carriers and entities to self report to this Commission any dealings they may have had with Panos, his associated organization and their fraudulent peer/utilization activities." We suggest that if your company has utilized this group and/or Panos that you contact the Chairman at 860-493-1500.

Governor Malloy has nominated former City of Hartford Mayor, Pedro E. Segarra, to be a workers compensation commissioner. This will be an interim appointment; Attorney Segarra will have to be appointed by the new Governor in 2019 as well**.** Attorney Segarra has recently practiced at the law firm of Shimkus, Murphy and Rosenberger in Hartford. Attorney Segarra was also formerly Corporation Counsel for the City of Hartford and Deputy Assistant State's Attorney for the State of Connecticut's Division of Criminal Justice.

A retirement party was held for former Workers' Compensation Commissioner Ernie Walker on July 19 at the Farmington Club. The event was a sellout. **Attorney Luke Strunk of SDAZ** gave a speech in honor of Commissioner Walker. Attorney Strunk presented Commissioner Walker with a signed photograph of Yankee great Mariano Rivera throwing his last pitch; this was given to the commissioner for his ability to "close" settlements.

A retirement party has been scheduled for former Chairman John Mastropietro on September 20 at La Bella Vista in Waterbury. Notwithstanding his retirement, Commissioner Mastropietro will be handling hearings in the Summer and Fall of 2018 as

a temporary commissioner. Commissioner Nancy Salerno will also likely be retiring as of November 1, 2018.

The **2018 *Official Connecticut Practitioner Fee Schedule*** effective July 15, 2018 has been issued by the Workers' Compensation Commission. Go to the following site to order: https://www.optum360coding.com

The commission does have a website where you can look up such information as to whether a hearing is assigned, list of all claims for an employee, status of a form 36, and interested parties. This is quite a useful site and is a different website than the commission's main site. It can be found at:

http://stg-pars.wcc.ct.gov/ClaimLookup.aspx

CASE LAW

***Callaghan v. Car Parts International, LLC,* 329 Conn. 564 (2018**)

In this important subrogation case the Connecticut Supreme Court held that an employer does not have a credit or moratorium against future workers' compensation claims for that amount received by the employee out of the third party proceeds which is due to the one-third reduction in the employers' workers' compensation lien pursuant to P.A. 11-205. Public Act 11-205 provides that the employer's lien is reduced by one-third and that reduction ''shall inure solely to the benefit of the employee.'' In this case the employer acknowledged that their lien was reduced by one-third but contended that the amount the claimant netted from that reduced lien still established a moratorium against future claims. The Supreme Court acknowledged that the case of *Enquist v. General Datacom*, 218 Conn. 19, 20–21, 587 A.2d 1029 (1991) (a case won at the Supreme Court by **Attorney Jason Dodge of SDAZ**) established that "double-recoveries" should be avoided and that, in general, the net amount a claimant receives out of a third party recovery will create a credit against future workers' compensation claims; however, the Court determined that the intent of P.A. 11-205 was to benefit the employee and allowing a credit for those funds the worker receives by the employer's lien reduction would thwart that purpose. The Court held that "In the present case, and unlike in *Enquist*, however, the statutory amendment before us does contemplate the possibility of providing the employee with duplicative sources of recovery." The Court went on to say that "P.A. 11-205 thus creates a clear benefit in favor of the employee, to the detriment of the employer, by taking funds the employer otherwise would be entitled to receive and, instead, allowing them to pass to the injured employee, even if the net proceeds from the third-party action were not enough to reimburse the employer's claim."

It should be recalled that P. A. 11-205 only reduces the employers' lien in those cases where the employer does not pursue the case directly itself in Superior Court. The *Callaghan* decision noted that "As mentioned previously, the one-third reduction mandated by P.A. 11- 205 applies only when the employee brings the third-party action;

the employer can avoid the reduction in its claim by instead bringing the action itself." Given the ruling above, subrogation interests of the employer may be better served if the employer files the lawsuit itself rather than waiting for the claimant to pursue the third-party case. Employers' rights may be more protected (and higher liens recovered) if the employers become more proactive in pursuing the subrogation action themselves.

***Kuehl v. Koskoff*, 182 Conn. App. 505 (2018)**

In a case reminiscent of Tolkien's Trilogy, the Appellate Court in this legal malpractice claim reversed a verdict for the plaintiff/widow since the Court ruled the plaintiff failed to prove by expert testimony that the plaintiff would have prevailed in the workers' compensation claim that formed the basis for the malpractice case against her lawyer. Sylvia Kuehl claimed that her husband died due to a work injury but that her lawyer failed to file a notice of claim in her behalf; a notice of claim had been filed in behalf of Ms. Kuehl's injured husband but no timely claim for the widow was filed after the employee's death. Ms. Kuehl eventually requested a hearing to address her case but the respondent insurer denied the widow's case alleging that it was untimely; the Connecticut Supreme Court dismissed that case**, *Kuehl v. Z-Loda Systems Engineering, Inc*., 265 Conn. 525 (2003)**, a case successfully defended by **Attorney Nancy Berdon now of SDAZ**. Thereafter, Ms. Kuehl was able to have the legislature enact a change in the statute that would have allowed her to pursue her workers' compensation claim; the insurer again defended that case contending that the new statute was unconstitutional as a public emolument (a law designed only to benefit one person). Again the Supreme Court dismissed Ms. Kuehl's case and agreed that the new statute was unconstitutional under the Connecticut State Constitution, ***St. Paul Travelers Cos. v. Kuehl*, 299 Conn. 800 (2011)**. **Attorney Jason Dodge now of SDAZ** defended that case. The Appellate Court decision in the legal malpractice case may now effectively end this legal odyssey. Footnote: Although the widow received nothing in the workers' compensation case or legal malpractice case there was a substantial settlement in a third party negligence action from the accident that was the source of the compensation claim.

***Simon Williams v City of New Haven*, 329 Conn. 366 (2018)**

In this case involving a claim pursuant to §31-290a, the Supreme Court affirmed the decision of the Compensation Review Board permitting the claimant to pursue his claim of wrongful termination in the compensation forum despite the fact that the State Board of Mediation and Arbitration had upheld the claimant's termination in an arbitration proceeding brought pursuant to the claimant's collective bargaining agreement. At issue was the application of General Statute §31-51bb which states that an employee will not be denied the right to pursue a statutory cause of action even though the claim had previously been decided pursuant to a collective bargaining agreement. The City had argued that collateral estoppel did apply because the claimant did not pursue the §31-

290a claim in "court" pursuant to the statute; that the claimant had presented to the Superior Court by way of application to vacate the arbitration award; and, that the issues to be presented under the claimant's §31-290a claim were the same as those raised in the arbitration proceeding before the state board, a forum similar to the workers' compensation system because rules of evidence and judicial fact-finding do not occur in either forum.

The court relied heavily on their conclusion that the "primary purpose" of §31-51bb was to provide the same "right" to an employee subject to a collective bargaining agreement as is provided to other employees. This decision allows the claimant to now proceed with the claim under §31-290a in the compensation forum. **Attorney Anne Zovas of SDAZ defended the claim.**

***Mickucka v. St. Lucian's Residence, Inc.,* 183 Conn. 147 (2018)**

The Appellate Court determined that the claimant's rights to present a vocational total disability claim were not violated by the commissioner when he approved a form 36 for maximum medical improvement at a formal hearing. The claimant's treating orthopedic had placed the claimant at maximum improvement and the respondents file a form 36. The formal hearing notice was issued solely to address a form 36 issue and not a claim under Osterlund v. State, 135 Conn. 498 (1949), that the claimant was vocationally totally disabled. At the formal hearing the commissioner stated that he could not address the vocational disability claim because it was not noticed for the formal hearing but that he would address the issue at a hearing that he would assign in three weeks. The claimant's attorney declined the offer to have the case reassigned and the commissioner approved the form 36. On appeal the Appellate Court determined that there was no due process violation due to the fact that the commissioner offered that the vocational disability claim could be heard at a further hearing.

***Thomas v City of Bridgeport,* 6206 CRB-3-17-7 (July 30, 2018)**

The claimant was a laborer for the employer who was injured in a softball game between the parks department and the roadway department. The commissioner and the CRB found the claim compensable since the claimant was asked to play in the game by his supervisor and it occurred during work hours. The respondents contention that this was a "recreational" injury that was not covered pursuant to General Statutes Secton 31-275(16)(B)(i) was not accepted by the Board. The CRB decision was based on the conclusion that the employee felt that the game was important to the employer and that he would be "looked upon unfavorably" if he did not participate. Moral to the story: if the employer has an athletic event or picnic and the employer does not want injuries sustained during that activity to be considered compensable then the participation by employees must be strictly voluntary with no coercion by supervisors requiring employees to play.

***Barker v. All Roofs by Dominic*, 183. Conn. App. 612 (2018)**

The Appellate Court affirmed a finding that the City of Bridgeport had liability for a workers' compensation claim under General Statutes Section 31-291 as principal employer. The claimant was injured from a fall off a roof of one of the City's buildings; the actual employer was uninsured and the City had control of the property. The City's argument that repair of one of its roofs was not part of trade or business of the City was not accepted by the Court.

***Cortes v. State of Connecticut/Judicial Branch*, 6195 CRB-2-17-5 (2018)**

In this case the CRB had the opportunity to discuss a poorly written Finding. The Board concluded that it was error for the commissioner to deny a motion to correct and motion to articulate and ordered a trial de novo in a case where the trial commissioner had, in large part, copied verbatim the claimant's proposed finding. The commissioner also had found witnesses to have a range of credibility from marginally, partially, and fully credible without explanation being given for the conclusions. The CRB held that the decision was "vague and indecipherable" and they could not understand the substantive meaning of the ranges in credibility found by the commissioner. The CRB found that they will not "assess the merit of a decision which is "ambiguous, unclear or *incomplete*." The Board indicated that it was inappropriate "cutting and pasting" by a Commissioner a proposed finding of a party into the commissioner's actual finding, citing Sinclair v Stop & Shop Companies, Inc. 5036 CRB-3-05-12 (2007), dismissed for lack of final judgment, A.C. 28651 (2007); Bernardo v. Capri Bakery, 4570 CRB-3-02-9 (2004). In the case the commissioner had copied the claimant's proposed finding without editing the portion that referred to statements the attorney had made about actions taken by "our office." All parties to workers' compensation claims deserve a more complete Finding that, importantly, is actually written by the Commissioner.

***Appeal of Estate of Roy J. Smith*, Department of Health and Human Services Office of Medicare Hearings and Appeals, ALJ Appeal No. 1-5726172041 (Sept. 28, 2017).**

In this Longshore and Harbor Workers Compensation case it was found that the right of Medicare to recover conditional payments for medical bills paid by Medicare due to a work-related injury is limited to a claim against the employer and not the estate of the deceased injured worker. The case was litigated in favor of the employee on the compensability issue. Thereafter, the employer reimbursed the Medicare Secondary Payer Recovery Contractor ("MSPRC") for the conditional payments but the MSPRC also sought reimbursement from the estate of the claimant for the conditional payments. The administrative law judge in the Longshore case determined that the MSPRC could only seek reimbursement from the employer and not the claimant. The judge held that the determination of the amount of compensable medical expenses by the Department of Labor in the Longshore case is binding on CMS with respect to what services can be the subject of a claim by CMS for reimbursement of conditional payments, since the Department of Labor has exclusive jurisdiction to make the factual and legal determinations in Longshore cases; the ALJ held that CMS and its contractors have no authority to second-guess the determinations by the Labor Department. We would

assume that a similar ruling would be found under our State Workers' Compensation Act and that CMS would have to abide by the factual findings by the Workers' Compensation Commissioners regarding medical issues.