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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Winter 2019 **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

SDAZ is a sponsor of Kids' Chance of Connecticut, a charitable non-profit organization whose goal is to provide educational scholarships to the children of Connecticut workers who have been seriously or fatally injured in work-related accidents. Kids' Chance will be having a fundraising event at the Thomas Hooker Brewery at 16 Tobey Road, Bloomfield, Connecticut on Friday March 29, 2019 from 5-7 pm. There will be beer tastings, food trucks, tea-cup raffles and more! Come and chill out on Friday evening after a long week of work over a cold brew. Your participation will help fund scholarships for deserving kids. Entrance fee is $30. Tickets can be purchased at the door or online at https://www.kidschanceofct.org/events/

Attorneys from SDAZ attended the annual Hartford County Bar Association Barristers' Ball on February 2d at Wampanoag Country Club. Attorney Anne Zovas in her role as Chair of the Association's Scholarship Program presented scholarships to two UConn Law students on behalf of the Hartford County Bar Association.

Attorney Christopher D'Angelo of SDAZ recently successfully defended a case on a credibility issue notwithstanding RME's that were favorable to the claimant. Please see the **Morton v. Express Employment Services** case below. Congrats to you Chris!

Attorneys Dodge, Zovas, Aiken and Berdon of SDAZ attended CIRMA'S annual meeting at the Sheraton Hartford South Hotel in Rocky Hill on January 25, 2018. David Demchak, President and CEO of CIRMA spoke about CIRMA's present robust financial position and the benefits that have been provided to members over the past year. Looking forward, Mr. Demchak and the keynote speakers noted how CIRMA and Hartford Steam Boiler will be using technology to avoid losses in the future. Seminars were also provided to attendees regarding Cyber Risks and Legal Issues facing Municipalities.

Best wishes to Bill O'Connell, longtime employee of CIRMA, who has retired. Bill has a wealth of knowledge of Connecticut Workers' Compensation Claims with particular expertise regarding Heart and Hypertension cases. A retirement party was held for Bill at the Country Club of Waterbury on February 7 which was attended by members of SDAZ.

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

SDAZ can provide your company with free seminars regarding Connecticut Workers' Compensation issues. Please contact us about tailoring a seminar to address your particular needs.

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**		

LEGISLATIVE NEWS

The workers' compensation section of the Connecticut Bar Association has proposed legislation to "clean up" the current act and remove provisions that no longer have effect.

1. Repeal Section 31-298(a) medical lung panel in the case of occupational disease.
2. Repeal Section 31-304 which pertains to destruction of workers' compensation agreements filed in Superior Court.
3. Repeal Section 31-349(b) through (f) which addressed transfer of cases to the Second Injury Fund.

The Workers' Compensation Commission through the chairman is proposing the following legislation:

1. An act changing the title of workers' compensation commissioner to **workers' compensation administrative law judge** to better reflect the adjudicatory nature of their work.

2. Repeal Section 31-276(a) which had placed the commission within the Department of Labor for administrative purposes only and to better recognize the commission's independent funding.

3. An act removing the statistical director from the workers' compensation statistical division which would codify the current practice in which there is no director.

4. An act reducing the frequency of workers' compensation advisory board meetings from at least twice per quarter to at least once.

Proposed bills at the legislature include:

1. House Bill 5369. "An Act Concerning Workers' Compensation Claims Filed by Members of the National Guard." Seeking to reduce the processing time of workers' compensation claims filed.

2. House Bill 5883. "An Act Requiring Workers' Compensation Insurance Coverage for Detoxification for Certain Injured Employees." Requires coverage for detoxification of injured workers who have consumed opioids for a continuous period of not less than one year.

3. House Bill 6116. "An Act Concerning Workers' Compensation Benefits for First Responder Dive Teams and Canine Search and Rescue Personnel."

4. Proposed Bill 6336. "An Act Authorizing Workers' Compensation Commissioners to Set Deadlines." Authorizing commissioners to set deadlines in hearing claims to facilitate "speedier dispositions of claims."

5. House Bill 6743. “An Act Concerning Municipal Employers' Unemployment Compensation in the Appeals Process." Ensures that employers are reimbursed for any workers' compensation or unemployment benefits paid to an individual if upon appeal it is determined that the individual was not entitled to same.

6. House Bill 6916. “An Act Expanding Remedies for Potential Liability for Unreasonably Contested or Delayed Workers' Compensation Claims." Seeks to protect injured workers:

    1) From losing jobs;

    2) Limiting the number of times doctors and attorneys need to attend hearings;

    3) Prevent workers from going on long-term disability;

    4) Help employers retain well-trained staff; and

    5) To prevent shifting cost of workers' compensation to Medicaid program.

7. House Bill 6929. “An Act Allowing Certain State and Municipal Workers and First Responders to File Workers' Compensation Claims for Injuries Sustained While Traveling to and from Work.”

8. Senate Bill 164. “An Act Including Certain Mental or Emotional Impairments within the Definition of Personal Injury under the Workers' Compensation Statutes."

9. Senate Bill 171. "An Act Expanding the Definition of Injury in the Workers' Compensation Act." Seeks to expand the definition of injury to include certain mental or emotional impairments.

10. Senate Bill-660. “An Act Concerning Permanent and Partial Disability and Pension Offsets." To prevent classification of permanent partial disability settlements as wages for purposes of workers' compensation benefits.

11. Senate Bill 699. "An Act Concerning Workers' Compensation Coverage for Treatment of Post-Traumatic Stress Disorder for Police Officers and Firefighters."

CONNECTICUT WORKERS’ COMPENSATION COMMISSION NEWS

Commissioner Pedro Segarra has begun presiding over cases in the 6th district in New Britain. We extend to Commissioner Segarra best wishes in his new position. Formerly Commissioner Segarra was the Mayor of Hartford from 2010-2016. He has been a lawyer for over 30 years and graduated from UConn Law School.

Commissioner Toni Fatone of West Hartford is the newest member of the Connecticut Workers’ Compensation Commission. Previously she was the Deputy Commissioner of the Department of Administrative Services. Congratulations to Commissioner Fatone in her new role.

The mileage rate as of January 1, 2019 is 58 cents per mile; this is an increase from last year.

As of November 1, 2018 the Commission has published new protocols for the foot and ankle; they can be found at https://wcc.state.ct.us/download/acrobat/protocols.pdf

Commissioner Salerno’s retirement party took place on December 6, 2018 at La Bella Vista in Waterbury; over 300 people attended. Chairman Morelli and former Chairman Mastropietro both spoke to the attendees and complimented Commissioner Salerno on her service and dedication to the commission. Irish folk dancers provided entertainment for the evening.

Former Chairman Mastropietro and former Commissioner Delaney have formed a partnership, Mediation & Arbitration Services, LLC. The former commissioners will assist in mediating workers’ compensation claims in Connecticut. They can be reached at P.O. Box 370494, West Hartford, Ct. 06137 or 855-466-4047 or medarbllc@gmail.com

We now have a number of former Commissioners who are working privately as mediators. In addition to Commissioners Mastropietro and Delaney, former Commissioners Walker and Doyle have mediated claims successfully (Attorney Walker mediates out of his law firm, Walker, Feigenbaum and Cantarella; Commissioner Doyle works with Litigation Alternatives).

To a large extent the practice of workers' compensation has changed in the last few years given the use mediation in the Commission and private mediation. Many cases have been resolved (and formal hearings avoided) through the mediation process. Given the complexity of some of the cases that we deal with today, mediation is helpful to resolve claims and stop endless litigation. On the other hand, not all cases can be mediated and experienced counsel is needed to litigate those cases that cannot be settled or mediated.

New mediation guidelines in the Commission have been issued as of November 1, 2018. The commissioners who are available for mediation are The Honorable Scott A. Barton, Randy L. Cohen, Carolyn M. Colangelo, Daniel E. Dilzer, Brenda D. Jannotta, Peter C. Mlynarczyk, Charles F. Senich, and Michelle D. Truglia. The guidelines can be found at https://wcc.state.ct.us/memos/2018/2018-09.htm

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/Default.aspx

PRACTICE TIPS

We have noticed in the last 5-10 years that Medicare issues involving MSA's and conditional payments have delayed settlement of some cases for years or sometimes stopped settlements altogether. We all have seen cases where the proposed MSA seems to be exorbitant when compared with the claimant's age and realistic medical exposure. Rather than pay inflated MSA's the respondents are faced with a waiting game to see if a proposed surgery or ongoing narcotic prescription can be eliminated in order to reduce the MSA to a reasonable level to allow the case to settle. While the medical aspect of the case is being worked on the indemnity remains open and employers and carriers are faced with ongoing exposure for weekly payments. While we realize that generally our goal is to achieve a global settlement of all claims, we think that, in certain cases, it may be more efficient and economical to consider an indemnity only stipulation rather than waiting to resolve the medical issues and delays caused by Medicare. By settling the indemnity respondents can potentially avoid ongoing litigation over what is owed. Moreover, the claimant's interest in treating may decrease once the indemnity has been settled thereby allowing for a reduced MSA to be approved at a later date.

For those cases that do settle with a MSA we suggest that respondents consider paying the small fee that will allow the MSA to be professionally administered rather than having the case self-administered by a claimant. It has been our experience that claimants have difficulty documenting for Medicare the payments that they make out of their MSA's and generally do not have the payments reduced by the Connecticut

Workers' Compensation fee schedule. Professional administration provides to a claimant the benefit of knowing that their MSA payments are being made appropriately and at the right rate. The cost of the professional administration is surprisingly low. This may provide further incentive to the claimant to settle a case.

CASE LAW

Wright v. Pioneer Valley, Massachusetts Department of Industrial Accidents, Board #04387-15 (February 14, 2019)

In this Massachusetts decision the Reviewing Board denied a claim for reimbursement of medical marijuana costs based on federal preemption grounds. The Board cited a similar decision in the Maine case of **Bourgoin v. Twin Rivers Paper Co., LLC, 187 A. 3d 10 (2017)**. The Massachusetts Board held that "To be clear, we do not suggest that the Massachusetts Act is preempted in its entirety by the CSA as such a determination is outside the parameters of this dispute. However, until marijuana is removed from Schedule I of the CSA or is otherwise "legalized" by federal authorities, a workers' compensation insurer that is ordered to pay for an employee's medical marijuana pursuant to M.G.L. c. 152 and the Massachusetts Act would risk prosecution for violating the CSA and the cited federal aiding and abetting law, 18 U.S.C. § 2(a). Where such action would be akin to state law requiring what federal law forbids, there is a positive conflict between the two laws, and, we hold that, as applied to the facts of this case, the Massachusetts Act is preempted by the CSA." Connecticut does not have to follow rulings in Massachusetts or Maine but certainly our Appellate or Supreme Courts would consider these rulings if they ever have the opportunity to address this issue. Presently there have been rulings at the Commission and CRB levels, see **Petrini v Marcus Dairy, 6021 CRB-7-15-7 (2016**), in Connecticut allowing medical marijuana in Connecticut Workers' Compensation cases but those cases have not directly addressed the issue of federal preemption which appears to be a very viable defense to such claims.

DICKERSON v. CITY OF STAMFORD, SC 20244

This case is an appeal from a CRB ruling allowing a claim for cardiac benefits under General Statutes Section 7-433c notwithstanding that the heart attack became manifest after the police officer's retirement. The Supreme Court agreed on January 30, 2019 to hear the appeal. This case will be the first opportunity that the Supreme Court has had to determine the implications of their decision in **Holston v. New Haven, 323 Conn. 607 (2016),** a case litigated by Attorney Dodge of SDAZ.

COUGHLIN V CITY OF STAMFORD FIRE DEPARTMENT, CASE NO. 6218 CRB-5-17-9 (February 15, 2019)

The firefighter in this case had a compensable hypertension claim under Section 7-433c. He retired and later developed coronary artery disease (CAD) that was substantially related to the hypertension. The commissioner dismissed the case due to the fact that the CAD was not manifest until after retirement. The Board reversed stating that since there was a causal relationship between the accepted hypertension condition and CAD the claimant was entitled to coverage for CAD; this decision is arguably inconsistent with the Supreme Court's ruling in **Holston v. New Haven, 323 Conn. 607 (2016)**, which found that causation issues do not apply in 7-433c cases. It is likely this case will be appealed to the Supreme Court and be heard with the **Dickerson** case discussed above.

DeJESUS v. R.P.M. ENTERPRISES, INC. and/or ROBERT M. MARION, SR., 6201 CRB-1-17-7 (NOVEMBER 8, 2018)

The claimant, a mechanic, sustained an injury at work when an automobile fell on him. He was brought to the emergency room after the incident in a car driven by the manager of the employer; the manager did not go into the ER. After the incident the employer paid for a wheelchair ramp for the claimant and helped pay for a wheelchair. No written claim was filed by the claimant within one year of the accident. The trial commissioner and the CRB determined that the employer had provided medical treatment to the claimant under General Statutes Section 31-294c by his agent driving him to the hospital and therefore the requirement to submit written notice within one year of the accident was tolled. The Board also determined it was appropriate to "pierce the corporate veil" and allow a claim against the employer personally as well as the corporation that he established since the owner was the alter ego of the corporation.

SALERNO v. LOWE'S HOME IMPROVEMENT CENTER, 6101 CRB-6-16-5 (NOVEMBER 14, 2018)

In this case the carrier failed to file a form 43 until more than one year after form 30c was filed in a repetitive trauma claim. The carrier objected to a motion to preclude that was filed contending it was "impossible" to pay the claim because the claimant had put his bills and lost time through personal insurance. The Board held that they "are not willing to extend the "safe harbor" provision, as contemplated by General Statutes § 31-294c (b), to cases in which there is no evidence that the respondents ever accepted the compensability of the claim, either through their course of conduct or through written documentation." The carrier never issued a voluntary agreement or through their conduct agreed that the matter was compensable and therefore the CRB found that they were precluded. The so-called "safe harbor" provision of the statute allows a

contest to be filed up to a year after the notice if the employer pays all benefits owed within 28 days of the notice.

LENT v. CITY OF STAMFORD, 6222 CRB-5-17-9 (December 7, 2018)

The CRB reversed a trial commissioner's decision granting of a motion to dismiss and ordered a trial on the merits in this case. The claimant alleged that he had hurt his hand at work; the respondents contended that he hurt his hand when he was angry and purposely struck an object with his hand. Before the formal hearing on compensability was fully litigated the Connecticut State Board of Mediation and Arbitration and the State of Connecticut Employment Security Division found that the claimant had been injured as the respondents alleged. The employer in the workers' compensation claim thereafter filed a motion to dismiss citing the decisions from the other cases that dealt with the same set of facts. The Board held that for due process purposes the claimant should be allowed to proceed on the merits and that the claim should not have been dismissed. The respondents can argue at the formal hearing that collateral estoppel (issue preclusion) applies but the claimant should be allowed to show other standards may have been used in the other venues as compared to the workers' compensation system.

LETAJ v. ATMI, INC., 6186 CRB-5-17-4 (January 11, 2019)

In this case the claimant alleged that the workers' compensation lien rights of the insurance carrier were not protected by a lien filed pursuant to General Statutes Section 31-293 with the defendant's attorney and not the defendant himself in the third party action. Claimant alleged that the statute required that the lien notice be sent to the "party" (the defendant) and not his attorney. The trial commission found in favor of the claimant but the Board reversed noting that in general we attempt to avoid double recoveries and that notice to the attorney was sufficient. We recommend that notice be sent to BOTH the alleged tortfeasor and counsel if he is represented.

Vitti v. City Of Milford, 6246 CRB-4-18-2 (January 17, 2019)

In this Section 7-433c heart claim the police officer had to undergo a heart transplant. After the surgery he recovered and did fairly well and was given 23% rating for the heart. The claimant sought a 100% rating on the theory that his entire heart had to be replaced. Both the commissioner and the Board concluded that the claimant was entitled to the amount of impairment that existed at the time of maximum improvement (23%) and not a 100% rating.

Ronald Morton v. Express Employment Services, 800194899 (November 15, 2018)

The claimant was working on assignment with Habasit America when he allegedly injured his left thumb on 6/23/16. The claimant testified that he reported the injury to his supervisor at Habasit America and called Express Employment on 6/26/16 to notify them that he would be unable to work due to an "old thumb injury". The claimant failed to file a first report of injury until three weeks later at which time he also reported a 6/30/16 right shoulder injury. The claimant had not mentioned the right shoulder injury at any time prior. The claimant's supervisor testified that neither injury was ever reported to him. The claimant was terminated from his assignment at Habasit America on July 19, 2016. Medical records obtained from the claimant's initial treatment for the left thumb referenced an onset of pain following a "pop" in the left thumb. The claimant also reported months of ongoing right shoulder pain. Subsequent medical reports, however, conflicted with this history. At the Formal hearing, the claimant testified that the pain in his left thumb intensified over time and denied ever experiencing right shoulder pain prior to the alleged 6/30/16 incident. RME's were performed by Dr. Ashmead and Dr. Barnett which supported compensability of the injuries based on the claimant's subjective history. Ultimately, however, the Commissioner **dismissed** the claim in its entirety based on the claimant's lack of credibility. The Commissioner specifically found that the claimant's testimony was inconsistent with the medical records and the testimony of other witnesses. The Commissioner did not credit the opinions of either RME as same were based solely on the claimant's subjective history**. Attorney Christopher D'Angelo of SDAZ successfully defended the case.**

JAMES PONT v. ELECTRIC BOAT CORPORATION (December 2018)

In this trial level decision the claimant sought benefits for a 60% impairment of the lungs due to asbestosis or related disease. The respondents contested the impairment on the grounds that diagnostic films and pulmonary function studies did not support the claim. In reviewing multiple medical opinions, the trial commissioner ultimately accepted the testimony of Dr. Michael Conway and awarded a 28% impairment which was consistent with the testing and the medical history. The commissioner held that the claimant had failed to establish the cause of his additional and progressive impairment. **Attorney Lucas Strunk of SDAZ successfully defended the case for the respondents**.