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ATTORNEYS AT LAW

## CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Fall 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](mailto:jdodge@ctworkcomp.com) or 860-785-4503.

**CASE LAW ALERT: See Caye CRB case below for update on recent litigation regarding medical marijuana.**

### STRUNK DODGE AIKEN ZOVAS NEWS

Strunk Dodge Aiken Zovas is pleased to announce that **Attorney Heather Porto** has joined the firm as a partner. Attorney Porto has been practicing in the area of workers' compensation defense since she graduated with Honors from Quinnipiac Law School in 2000. Attorney Porto on a daily basis has defended municipalities and private employers in all aspects of workers' compensation including death claims, permanent total claims, Section 31-290a discrimination cases and occupational disease claims. Attorney Porto has argued before the Appellate Court and Compensation Review Board and is admitted to practice in U.S. District and State of Connecticut Courts. We welcome Heather to our firm and look forward to her continuing her workers' compensation defense practice with SDAZ. Heather's email is [HPorto@ctworkcomp.com](mailto:HPorto@ctworkcomp.com) and her phone is 860-785-4500 x4514. Please feel free to reach out to Heather and congratulate her on her new position.

All of the senior partners at SDAZ, **Attorneys Richard Aiken, Jason Dodge, Lucas Strunk, and Anne Zovas**, have been named to New England Superlawyers for 2019. SDAZ is the only respondent's firm in Connecticut where all of the senior partners have been so named. Attorneys **Philip Markuszka** and **Christopher D'Angelo** of SDAZ have been named New England 'rising stars' for Superlawyers 2019.

On October 1, 2019 Kids' Chance of Connecticut held its inaugural Golf Event at the Wampanoag Country Club in West Hartford. Kids' Chance of Connecticut awards

scholarships to the children of workers with serious work-related injuries. The event was a success with over 84 golfers participating. The highlight of the night was Cecilia Hawkins thanking KCOC for awarding her a scholarship after the passing of her dad; she was given a standing ovation after her remarks. In 2019 KCOC awarded five college scholarships. **Attorneys Jason Dodge and Phil Markuszka of SDAZ** assisted running the event; both Jason and Phil are on the KCOC board. **Attorneys Katie Dudack and Chris Buccini** of SDAZ golfed at the outing; Katie won the long drive and closest to the pin contest for women! Go to <https://www.kidschanceofct.org/> to learn more about Kids' Chance of Connecticut.

On November 1, 2019 Attorney Anne Zovas of SDAZ was part of the panel discussion at the Connecticut Bar Association seminar entitled "Game of Bones." This seminar was sponsored by Orthopedic Associates of Hartford and the CBA; numerous doctors from that medical group spoke regarding the wrist/hand/elbow, spine, shoulder and knee. **Attorneys Dodge, Dudack, Buccini, D'Angelo, Markuszka, Porto, Aiken and Berdon** from SDAZ attended as well.

**Attorneys Lucas Strunk and Jason Dodge** of SDAZ were recently named in the College of Workers' Compensation Lawyers newsletter for their inclusion in Best Lawyers for 2019.

One of our clients, The American Equity Underwriters, Inc. (AEU), the leading provider of workers' compensation insurance for waterfront employers, has announced that claims supervisor **Earl Burak** has been elected Vice President of the Longshore Claims Association (LCA), a non-profit organization of claims professionals serving the shipping industry and longshore and stevedoring communities. In this role, Earl will assist the LCA president in performing duties related to the day-to-day management of the LCA over a two-year term. To learn more about the LCA or perhaps join the organization, visit [longshoreclaimsassociation.org](http://longshoreclaimsassociation.org).

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](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), [HPorto@ctworkcomp.com](mailto:HPorto@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:

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## CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

Soline Oslena has recently been appointed a Workers' Compensation Commissioner by Governor Lamont. She formerly was with the claimant's law firm of Sayet & Seder in Norwich. Best wishes to Commissioner Oslena in her new position!

At the recent "Game of Bones" seminar held on November 1, Chairman Morelli gave a brief outline of the status of the Commission. The Chairman indicated that all of the districts will be closed one day in January on a staggered basis while they are getting new computer hardware. The Chairman stated that it is hoped that a new computer system will be installed sometime in the third quarter of 2020. Chairman Morelli advised that the Commission website is being updated to be more consistent with other State of Connecticut websites. Finally, the Chairman indicated that in approximate 3 to 4 months the Sixth District offices in New Britain office will be relocated.

In Memorandum 2019-09 the Chairman Morelli provided information regarding the procedure for scheduling Commissioner exams (CME). The memorandum provides for possible sanctions if the medical package is not sent to the Commission by the time ordered by the Commissioner. Claimants are responsible for providing diagnostic studies to the CME as well as an interpreter if needed. Also in Memorandum 2019-08 the Chairman indicated that the fee for a CME is increased to \$900 (was previously \$750).

The Commission has issued Memorandum 2019-11 which outlines the method for calculating the compensation rate for those individual that do not have FICA or Medicare deductions taken out of their pay. The memo states "In the event that a Commissioner decides that an employee is not subject to the Federal Insurance Contributions Act (FICA) and/or Medicare taxes, he or she may exclude the equivalent amount from deduction from gross pay to determine the compensation rate. Currently, such rates are not calculated by the system, nor are the formulae for determining them manually published anywhere. One method for calculating these amounts is by manually following the steps from the exhibits in the front of the rate table book, while omitting the FICA and/or Medicare deductions. Since this is rather involved, the

Commission has developed the "short cut" ..." Please go to the Commission Memorandum at the Commission website to get the formula.

The Chairman has issued **Memorandum 2019-13** which will significantly affect the manner in which stipulations are drafted that have MSA's in them. We predict that there will be many stipulations initially rejected by the Commission for failure to follow this Memorandum. For a stipulation that has a MSA the Memo orders that the stipulation: state whether or not the claimant is (a) receiving or applied for or is appealing a denial of Social Security Disability Insurance Benefits or (b) receiving Medicare or (c) that there is a reasonable expectation of the claimant's becoming eligible for Medicare within thirty months of the settlement; confirm that Medicare's interests are being taken into account; indicate which party is liable for any conditional payments; should not have hold harmless language in it regarding conditional payments but if it does it should be in **bold print**; require the workers' compensation carrier make payment for any structured payments if the life company paying the structure goes into default; is required to have "allocation" language if the claimant is on SSDI. The memo states that "where a stipulation does not establish a Medicare Set-Aside, but where there is a reasonable basis to suspect that the claimant will become Medicare-eligible in the foreseeable future, the stipulation should specify the dollar amount of the proceeds of the stipulation which is paid in settlement of claims for future medical treatment." See the link on our updates page for more information about this memo.

The Commission has issued Memorandum 2019-10 which provides information regarding COLA's and the new maximum rates for total disability and permanency. As of October 1, 2019 the new maximum rate for total disability is \$1,328 and the permanency maximum is \$1,158 (this applies to all injuries occurring after July 1, 1993).

The new benefit table book can be found online at <https://wcc.state.ct.us/download/acrobat/Benefit-Rate-Table-2019-2020.pdf>

On October 9, 2019 the Commission issued the following memo regarding a new return-to-work program: "In October, the RETAIN-CT project was launched as a pilot in the Greater Hartford region. RETAIN is an early return-to-work initiative funded by the U.S. Department of Labor to prevent long-term disability. In Connecticut, the RETAIN-CT study is being piloted with Workers' Compensation claimants of The Hartford Insurance Group with musculoskeletal conditions, and the work involves elements of provider training with special billing codes to reimburse for proactive return-to-work communication, early return-to-work coordination, and use of employment specialists

from local workforce development boards. Major partners on the pilot project include the CT Department of Labor, UConn Health, The Hartford Insurance Group, and Capital Workforce Partners. To learn more about the RETAIN-CT study, or if you would like to register as a RETAIN-CT provider, visit [www.retainct.com](http://www.retainct.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/Default.aspx>

## CASE LAW

### **CLEMENTS V. ARAMARK CORPORATION, 182 Conn. App. 224, cert granted, 330 CONN. 904 (September 25, 2018)**

The Connecticut Supreme Court heard oral argument on this important appeal on **October 25, 2019**. **Attorney Richard Aiken** of SDAZ attended to listen to the argument. As we reported in our Spring 2018 update, the Appellate Court found this claim compensable, overruling the CRB and Trial Commissioner. The claimant was injured while on the campus of the employer walking to her job as a mess attendant for a vendor at the Coast Guard Academy. While going between one building to another early in the morning the claimant fainted due to "cardiogenic syncope"; she hit her head on the ground and sustained a concussion. The Commissioner and Board had dismissed the claim because the fall was due to an underlying, non-occupational cause. The Appellate Court reversed concluding that this was an issue of law that must be construed in accordance with the "remedial purpose of the Act." The Supreme Court will consider this limited issue on appeal: "Did the Appellate Court properly determine that the condition causing the plaintiff's injury did not need to be "peculiar" to her employment." Based on the questions posed by the court at oral argument it is clear that the Justices were struggling with establishing compensability in a case such as this. We will report to you immediately once the decision is issued (probably within the next six months).

### **WOODMANSEE V ELECTRIC BOAT CORPORATION, 6252 CRB-8-18-3 (September 11, 2019)**

The respondents appealed from the Commissioner's Finding establishing a death due to colon cancer compensable due to exposure to asbestos at work. The respondents

contended that the death could not be considered compensable since the claimant's demise was due to personal alcohol abuse; the commissioner found that both the alcohol abuse and asbestos exposure were significant factors in causing the colon cancer and the claimant's death. Since the exposure to asbestos was a significant factor the Commissioner found the claim compensable. The Commissioner rejected the respondents argument that the claim was barred per Section 31-275(1)(C) which states "In the case of an accidental injury, a disability or a death due to the use of alcohol or narcotic drugs shall not be construed to be a compensable injury." Since this claim was an occupational injury and not an accidental injury the Commissioner and CRB concluded that the statute did not apply and that death benefits were owed notwithstanding the fact that the death was significantly due to the claimant's alcohol abuse. **Attorney Lucas Strunk of SDAZ** defended this claim.

**JAMES S. ROCK (DECEASED), ISABEL ROCK RUSSACK, SUCCESSOR ADMINISTRATOR V. UNIVERSITY OF CONNECTICUT, 6237 CRB-8-18-1 (OCTOBER 17, 2019)**

This case involves a complicated appellate history regarding a death claim of an employee who was not married and who did not have any dependent children. The Supreme Court in a prior decision, *Estate of Rock v. University of Connecticut*, **323 Conn. 26 (2016)**, had concluded that an estate of an employee does not have standing to pursue a Worker's Compensation claim. The case was remanded for additional proceedings. At a new formal hearing the trial Commissioner concluded that the claim had always been pursued in the name of the decedent and not based on the estate; he determined that "captioning the case in the name of the legal representative would serve no purpose and would only create confusion." The Commissioner considered whether there was sufficient evidence in the record to establish that the claimant during his period of employment was exposed to asbestos on the job in Connecticut; notwithstanding an expert opinion that there was causal relationship between the work in Connecticut and the claimant's development of mesothelioma and death, the Commissioner concluded that there was no direct evidence of exposure to asbestos on the job and therefore dismissed the claim. On appeal, the CRB affirmed the Commissioner's finding that the claimant had standing to proceed with the claim, but the CRB also affirmed the Commissioner's conclusion that there was not sufficient evidence to document exposure to asbestos at work to cause the claimant's death, thereby dismissing the case. It appears that both parties likely will not be satisfied with the Commissioner's conclusions and a further appeal to the Appellate Court is likely.

**CAYE v. THYSSENKRUPP ELEVATOR, 6296 CRB-1-18-11 (10/2919)**

The CRB affirmed the trial Commissioner's finding that the respondents were required to pay for medical marijuana for a claimant with serious back and leg injuries. Both the treating doctor and the RME agreed that medical marijuana was appropriate. The sole issue in the case was whether the Commissioner or Board could order the respondents to pay for the marijuana. The respondents contended that federal law under the Controlled Substances Act, 21 U.S.C., Section 801 et. seq., barred the sale or distribution of medical marijuana as a Schedule I drug. The respondents asserted that the U. S. Constitution Supremacy Clause, art. VI, Section 2, cl. 2, preempted state statutes where there was a conflict. The respondents claimed they might be subject to criminal prosecution including Racketeering charges under the RICO statute if they were to aid the purchase of marijuana. The CRB, in a split 2-1 decision, ordered the respondents to reimburse the claimant for the marijuana (but not pay the pharmacy for it). The majority felt the respondents did not face "material" risk of federal prosecution and that the chances of criminal charges were speculative. In reaching their conclusion the CRB cited the venerable case of **Marbury v. Madison, 5 U. S. 137 (1803)**, (a case which is usually the first decision law students read in law school) for the proposition that if a person has a right they must be provided a remedy to obtain that right. Commissioner Schoolcraft in a well-written dissent disagrees that prosecution is speculative against the respondents and concludes that the Commissioner and Board did not have the power to order what they did since it is in direct conflict with federal legislation. We expect an appeal to the Connecticut Supreme Court regarding this decision. You will recall that there was a prior medical marijuana case that had made its way to the Supreme Court but it was settled before a decision was issued. **Petrini v. Marcus Dairy , 6021 CRB-7-15-7 (5/12/16), appeal withdrawn, S. C. 19973 (3/29/18)**. An interesting fact in the **Caye** case is that the workers' compensation carrier was willingly reimbursing the claimant for the medical marijuana and it only became an issue when the excess carrier coverage was reached and the excess carrier balked at payment for the marijuana. Also, the Board's order that the respondents reimburse the claimant but not pay the pharmacy is completely inconsistent with the manner that normal worker's compensation claims are handled and bars the respondents from negotiating with the provider, thereby inflating costs.

**RONALD MORTON V. EXPRESS EMPLOYMENT SERVICES INC., 6300  
CRB-8-18-12 (OCTOBER 31, 2019)**

The Compensation Review Board affirmed a dismissal for alleged work injuries to the hand and shoulder. The trial Commissioner had found that the claimant's testimony regarding how the injury occurred was inconsistent with the medical records and that the claimant was not credible. **Attorney Christopher D'Angelo of SDAZ** successfully defended the claim.