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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Winter 2020 **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

There is a new surgical procedure on the forefront of how to deal with chronic pain that doctors in CT may be utilizing soon.

The Intracept procedure is for patients who have noted Modic Changes as seen on an MRI in their lumbar spine. The procedure is FDA approved and has been used by doctors around the country since 2016. The procedure is a minimally invasive procedure that targets the basiverterbral nerve for relief of chronic vertobrogenic low back pain.

Unlike typical radiofrequency ablation procedures this is a surgery under anesthesia where once this nerve is targeted and burned it cannot regenerate. Thus, this is a one time surgery and will not be repeated in the future.

Compared to a fusion surgery this procedure is estimated to cost in the range of $20,000. In addition, patients who have this procedure are expected to return back to light duty work within two weeks and full duty within a 3-6 months.

In addition, patients who have had this procedure performed have been removed from all of their opioid medication.

The company that markets this procedure is in the process of training doctors in CT to perform this surgery. Thus we may see this procedure being requested for chronic low back pain sometime soon. If you need any further information about this please contact **Attorney Heather Porto at SDAZ.**

Attorney Anne Zovas of SDAZ has been appointed to the State of CT **Task Force to Study Remedies and Potential Liability for Unreasonably Contested or Delayed Workers' Compensation Claims**. The Task Force was created under a Special Act of the general assembly to first identify the extent of unreasonably contested or delayed workers' compensation claims, and then study methods to expand remedies. The Task Force is headed by Rep. Susan Johnson who had sponsored a bill last year which sought to make interest and attorney's fees mandatory in the case of undue delay or unreasonable contest. In addition, the bill sought to reestablish civil claims against insurers and third party administrators. The bill was ultimately reworked such to establish the Task Force to study the issue of contested claims, undue delay, and the law regarding bad faith handling of workers' compensation claims. The task force includes representatives of the various stakeholders and legislators including two physicians who practice in the field of workers' compensation. The original bill was the subject of a fiscal note which documented costs associated with additional formal hearings at $650,000.00 in fiscal year 20, as well as $683,000.00 in salaries and fringe benefits associated with staffing for those formal hearings. The fiscal note also referenced the costs to defend suits and the state's liability for claims against its TPA. The task force was to report back to the legislature by January 1, 2020 but only held its first meeting on January 7th. Hearings are being held on a biweekly basis. **Attorneys Strunk and Dodge of SDAZ** have testified before the Task Force requesting that the present system for penalties for undue delay not be modified. **If you or a representative of your business would like to be heard please contact Anne Zovas for more information**. There is a strong push by some on the Force, including Rep. Johnson, to quickly draft forceful legislation that may have a significant impact on employers and insurers.

Attorney Strunk and Dodge of SDAZ will attend the College of Worker's Compensation Lawyers annual seminar and dinner in New Orleans on March 27 and March 28, 2020. Attorneys Strunk and Dodge are members of the College of Workers' Compensation Lawyers which has been established to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation.

Attorney Chris Buccini of SDAZ will be speaking at the Connecticut Bar Association Workers' Compensation Retreat in Orlando, Florida on May 3, 2020. Chris will be giving a point-counter-point presentation with Attorney Meghan Woods on the issue of undocumented workers and what their entitlement is to workers' compensation benefits in Connecticut. (See the *SAQUIPAY v. ALL SEASONS LANDSCAPING OF RIDGEFIELD, LLC.,* CRB decision below that addresses this issue).

SDAZ is a sponsor of **Kids' Chance of Connecticut.** Kids' Chance of Connecticut provides educational scholarships to the children of Connecticut workers who have been seriously or fatally injured in a work-related accident. If you are aware of a child who may qualify for a scholarship to a college or technical school please go to the

following website for an application www.kidschanceofct.org. Also, Kids' Chance of Connecticut will have their annual charity golf outing at Wampanoag Country Club in West Hartford, Connecticut on September 28, 2020. Hope to see you there!

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, 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.

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WORKERS' COMPENSATION PRACTICE TIP

Many times medical providers in Connecticut will not provide medical treatment unless written authorization is given. Delay in medical treatment sometimes occurs when the insurance carrier sends written authorization to the medical provider but somehow it is misplaced or ignored by the provider. If the claimant or their representative is not carbon copied on the written authorization they are not aware that the authorization has been provided and they cannot follow up with the medical provider to obtain the treatment. SDAZ strongly recommends that when issuing written authorization to medical providers that the claimant or their attorney be sent a copy of the authorization. This will alert the claimant that the treatment has been authorized and they can follow up accordingly. Hopefully this will avoid delay in treatment and unnecessary hearings. It has been our

experience that sometimes hearings are assigned specifically to address authorization for medical treatment that has already been authorized unbeknownst to the claimant.

CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

Chairman Morelli has appointed Commissioners Cohen and Watson on appeals before the Compensation Review Board for the calendar year beginning January 1, 2020.

The Chairman has issued memorandum 2020 – 01 regarding mediation before the commission. There memorandum states that if the matter is assigned for mediation and a request for continuance is made less than 14 days prior to the mediation date than the matter will not be the subject of additional mediation sessions before the Commission.

We received information that as of July 1, 2020 the Commissioners will be changing districts. As we receive additional information as to what Commissioners will be in each particular district we will of course inform you.

Former Commissioner Nancy Salerno reports that she is available for mediation services. She can be reached directly at nesjd1@gmail.com or https://litalt.com/salerno/. or you can call Litigation Alternatives at 860-521-8500.

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

SAQUIPAY V. ALL SEASONS LANDSCAPING OF RIDGEFIELD, LLC., 6332 CRB-7-19-5 (JANUARY 31, 2020)

In this much anticipated decision, the compensation review board reversed a finding by the trial Commissioner which had dismissed the claim for total disability benefits for an undocumented worker with limited ability to speak English. The claimant had a compensable back injury; the claimant had a burst fracture at L1 and had undergone a lumbar decompression of fracture and fusion at T 12 to L2. The employer did not have workers compensation coverage and therefore the second injury fund had made payments pursuant to section 31–355. The claimant had come under the care of Dr. Karnasiewicz, a respected neurosurgeon, who determined that the claimant had a permanent impairment of 25% of the back and a light to sedentary work capacity. Vocational assessments were performed by two experts who both concluded that the

claimant was unemployable. At the time of the formal hearing the issue was entitlement to total disability benefits and the parties stipulated that the claimant was unemployable pursuant to the case of *Osterlund v State*, 135 Conn. 498 (1949). Presumably, the second injury fund could not voluntarily place the claimant on total disability benefits without a finding given that it was a no insurance situation. The trial Commissioner was unwilling to accept the parties' stipulation of facts that the claimant was unemployable. The trial Commissioner determined that pursuant to the federal Immigration Reform and Control Act a claimant was legally precluded from pursuing a claim for total disability benefits which required him to perform a work search. She noted that the statute stated "any award of benefits under the act that requires an undocumented claimant to seek out work as a prerequisite to receipt of benefits involves a violation of federal law must be denied." The compensation review board in a lengthy decision rejected the trial Commissioner's analysis and ordered total disability benefits to be paid. The board acknowledged that a trial Commissioner always has the right to reject a stipulation of facts but that a blanket rejection without any basis is improper. The board also stated that the trial Commissioner's decision to disregard expert testimony cannot be arbitrary. The compensation review board noted that the trial Commissioner on her own raised the issue of the claimant's immigration status. In an analysis of the Osterlund decision the board determined that a claimant does not have to prove eligibility for total disability benefits solely through proving that they are actively seeking employment. The board noted that determination as to whether the claimant is entitled to total disability benefits under Osterlund involves analysis of how the injury has affected the claimant, education and intelligence levels, vocational background, age and other factors. The board clearly rejected the trial Commissioner's determination that the status as an undocumented worker who cannot seek work in the State is a bar to a claim for total disability benefits under the Osterlund doctrine. Since both the claimant and the second injury fund sought an order of total disability benefits in this case it is unlikely that a further appeal will be pursued. In reaching their decision the board quoted the Worker's Compensation treatise "19 Connecticut Practice Series: Worker's Compensation law" which is co-authored by **Attorneys Strunk and Dodge of SDAZ**.

DENNIS LOPEZ v. FIRST GROUP OF AMERICA, INC., 6305 CRB-3-19-1 (DECEMBER 11, 2019)

The claimant sustained a compensable left shoulder injury on August 7, 2016. The treating physician was Dr. Redler, an orthopedic surgeon. The claimant worked as a diesel technician performing oil changes and maintenance for the employer, a bus company. The claimant underwent surgery in March 2017. In June 2017, while on Worker's Compensation, the claimant was terminated by the employer. The claimant contended that he was under the impression that if he was given a full duty release to

work the employer might hire them back. At a July 7, 2017 medical examination with Dr. Redler the claimant, at his request, was given a release to full duty by Dr. Redler. The respondents filed a Form 36 based on the full duty release and it was approved since it was uncontested. Following the full duty release, however, the claimant was not rehired by the employer. At a subsequent examination on September 29, 2017. Dr. Redler acknowledged that he released the claimant to full duty work on July 7, but that this was done “with the understanding that he would go back but have any kind of help he needed for overhead heavy lifting greater than 20 pounds." The claimant was placed at maximum medical improvement on September 29, 2017. The claimant sought temporary partial benefits from July through September 2017. The trial Commissioner and CRB awarded temporary partial benefits, notwithstanding the full duty release to work in July and the approved and initially uncontested Form 36. . The Commissioner found Dr. Redler credible and noted that he "provided a detailed explanation of his understanding and experience with employers who were willing to accommodate employee restrictions in exchange for full duty releases due to insurance requirements." Moral of the story: a full duty release may not necessarily relieve the obligation to pay temporary partial benefits if the release was given by the treating doctor in effort to get the claimant back into his job. Note: the CRB made clear that the informal ruling regarding a Form 36 has no bearing on the Form 36 approval at a formal hearing and that it is a Trial de Novo on the issue at formal hearing (new trial).

DOMBROWSKI V. CITY OF NEW HAVEN, 194 CONN. APP. 739 (DECEMBER 10, 2019).

In this case, a pro se claimant sought to open a stipulation which was approved by the workers compensation Commissioner. On the date of the settlement approval, the claimant was requested by defense counsel to sign the full and final stipulation, another agreement entitled "settlement agreement, general release and covenant not to sue", a stipulation and what it means form, and a stipulation questionnaire form. The general release signed by the claimant on the date of the stipulation approval had language in it that stated the claimant had 21 days to consider the settlement agreement and had a revocation period of seven days following the stipulation approval. The insurance carrier promptly issued a settlement check, however, the claimant returned the check to the carrier and sought to open the stipulation approval, citing the numerous potential claims that were closed out by the general release. The trial Commissioner, CRB, and the Appellate Court all denied claimant's motion to open the stipulation. The Appellate Court noted that the claimant's main argument as to why the settlement agreement should be opened was based on the general release which had been signed; since the general release dealt with issues unrelated to the Worker's Compensation claim, the Court found that the trial Commissioner did not have jurisdiction to consider claimant's arguments in that regard. Notwithstanding the Court's refusal to open the settlement agreement, the Court in Footnote 9 expressed concern that the claimant had received the settlement documents on the same morning as the stipulation approval and did not have opportunity to fully review them. If a general release is part of a Workers’ Compensation settlement then the parties should make sure that the claimant has ample time to review the document before the accompanying stipulation is approved by

the workers compensation Commissioner.

ROLAND PRAIRIE V. UTC/UTAS/HAMILTON SUNDSTRAND, CASE NO. 6303 CRB –1–19–1 (NOVEMBER 21, 2019)

The claimant sustained compensable left shoulder and left elbow injuries as a result of a 2015 accident at work. In the course of treatment the claimant was referred by the treating doctor for a cervical MRI scan, EMG study and x-rays of the neck to determine whether his left upper extremity symptomatology was due to the accepted shoulder condition or unrelated neck condition. The claimant was also referred for cervical physical therapy and underwent that treatment. At the formal hearing the issue was whether the diagnostic studies and the cervical physical therapy should be paid for by the respondents. The trial Commissioner concluded and the Board affirmed that the respondents were responsible for the MRI, EMG and x-rays of the cervical spine since they "were reasonable and necessary diagnostic tests undertaken to rule out a recurrent rotator cuff tear." On the other hand, the Commissioner and Board found that the respondents were not liable for the cervical physical therapy as there was no medical report establishing the neck condition as related to the compensable accident. The Board disagreed with the claimant's contention that the cervical physical therapy was diagnostic in nature as well.

WILSON V. CITY OF STAMFORD, 6309 CRB –7–19–2 (DECEMBER 13, 2019)

The decedent police officer had sustained a compensable heart condition for which he had been paid permanent impairment under General Statutes Section 7-433c. After his retirement the claimant died; the cause of death on the death certificate included fatal cardiac dysrhythmia, acute coronary syndrome, and Artherosclerotic heart disease. The respondents questioned whether they had liability for widow's benefits under General Statute Section 7 – 433c based on their contention that no death benefits could be paid since the claimant was not a police officer at the time of death and death was not causally related to the underlying accepted heart condition. The CRB concluded that the death was causally related to the heart condition; the Board also determined that the decedent did not have to be an employee at the time of death so long as there was a causal relationship to the underlying accepted heart claim. The respondents likely will appeal this case as they have similar cases up on appeal.

DUNKLING V BRUNOLI, INC., 195 CONN. APP. 513 (FEBRUARY 4, 2020)

The Appellate Court affirmed a finding that a principle employer had liability under Connecticut General Statutes Section 31-291. At issue in this case was whether Lawrence Brunoli, Inc. ("Brunoli") had served as "principal employer" pursuant to Section 31-291 at the worksite where the claimant's injury occurred. Brunoli contended that it did not have control over the job site as required under Section 31-291 for a principle employer relationship to exist. The State of Connecticut DOT had entered into

a contract with Brunoli to act as general contractor for work on a project and permitted Brunoli to subcontract with Mid-State Metal Building Company, LLC and the claimant's employer, Connecticut Metal Structures, LLC. The injury to the claimant occurred while he was fixing gutters that had not been installed correctly; by the time the work had been performed Brunoli had left the construction site but the work was performed at the request of Brunoli. The Appellate Court held that Brunoli was the "principal employer" of the claimant pursuant to Section 31-291 notwithstanding that the injury occurred when Brunoli no longer had a presence at the job site; the Court noted that Brunoli had the ability to make the repairs itself or supervise the repairs. The Appellate Court's ruling is an expansive interpretation of Section 31-291 since it does not require the principle employer to actually be at the job site in order to be in "control" of it.

LEFEVRE V. TPC ASSOCIATES, INC., 6297 CRB-4-18-11 (January 17, 2020)

The respondents were precluded from contesting liability in a death claim caused by cardiac arrest. The widow asserted that the claimant's brief period lifting boxes at work (which was shown on video) had caused the cardiac arrest and death. The treating cardiologist confirmed causation and the commissioner issued a finding in behalf of the widow. The respondents appealed questioning if the medical opinion was persuasive and credible; the respondents also objected to the commissioner's findings which completely adopted the claimant's proposed findings. The Board affirmed the finding determining that there was sufficient medical evidence to support the finding.

ORZECH V. GIACCO OIL COMPANY, 6307 CRB-8-19-2 (January 30, 2020)

In this interesting and sad case the claimant's death by suicide was found to be compensable and widow's benefits were ordered to be paid. The claimant alleged injuries to his back, shoulder and knee due to an accident at work on November 1, 2016. While he had a serious pre-existing knee condition he claimed it became much worse after the accident and that he needed a knee replacement. That claim was denied; the claimant did not have health coverage to pay for the knee replacement while he waited for the workers' compensation claim to be resolved. The claimant died on July 23, 2017; he was found to have alcohol in his system as well as many other drugs. A pathologist from the Chief Medical Examiner's office determined that the death was a suicide. The claimant's attorney presented psychiatric expert testimony that the claimant's suicide was substantially related to depression due to the work injuries. The respondents' examiner questioned if there was sufficient evidence to determine that the claimant did commit suicide as opposed to accidentally overdosing on medication. The Board affirmed the trial commissioner's finding of compensable death and cited *Wilder V. Russell Library Company, 1907 Conn 56 (1927)*, in support of their ruling. The CRB rejected the respondent's contention that the death was due to intervening and superseding events unrelated to the work accident. The Board disagreed with the respondent's argument that *Sapko v. State, 305 Conn. 360 (2012*), applied; in *Sapko* a

death due to drug overdose was found to be not compensable since it was in part due to ingestion of medication unrelated to the work accident. Also, in *Sapko* there was no determination that the claimant had committed suicide, unlike in this case.