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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Spring 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 in our role as an "essential" place of business as defined by Governor Lamont has remained open throughout the Covid-19 pandemic providing service and guidance to our clients in this difficult time. Most of our assistants and attorneys are working remotely. We wish good health to all of our colleagues throughout the workers' compensation community.

The Connecticut Workers' Compensation Commission through the leadership of Chairman Morelli has also remained open for business. Hearings are presently being held telephonically and RME's and CME's can be done through telemedicine. The Commission and the Governor have been able to move quickly to make changes in order to accommodate claimants and respondents. See below the Workers' Compensation Commission News section which reviews all of the recent temporary changes in the Commission.

Be safe.

COVID-19 AND WORKERS' COMPENSATION IN CONNECTICUT

In general, diseases such as the flu or common cold are not considered compensable, however, that does not bar a claim for disease to be found compensable. Attorneys who are seeking to have COVID-19 found to be compensable should be aware of the burden of proof in establishing claims; respondents should be aware that certain occupations will certainly have compensable COVID-19 claims. Respondents may have a difficult time determining what claims they should accept and those that they should, reasonably, defend.

There are three types of Connecticut Workers' Compensation claims: (1) traumatic injuries; (2) repetitive trauma claims; and (3) occupational disease claims. As

a practical matter it is doubtful that COVID-19 would be claimed as a repetitive trauma injury. We have been advised that transmission of Covid-19 through needle stick is not expected. Accordingly, if a claim for Covid-19 is going to be pursued it is likely going to be based on occupational disease theory.

In order to understand how such claims are made and the burden of proof associated with occupational disease claims we must first look at the statutory language. **Connecticut General Statues §31-275(15)** defines an occupational disease to be "any disease peculiar to the occupation in which the employee was engaged and due to excess of ordinary hazards of work." While this language seems to require more in terms of proof on the part of the claimant than a traumatic injury claim, the statute also provides a more generous time to file such claims: **General Statutes §31-294c** allows the claim to be filed three years from the first manifestation of symptomatology of an occupational disease (generally when the employee is advised that his condition is due to work by a physician).

Two Connecticut Supreme Court cases that were litigated by **Attorney Jason Dodge of SDAZ** provide guidance as to what is necessary to prove a compensable occupational disease claim. In *Hansen vs. Gordon*, 221 Conn. 29 (1992), a dental hygienist claimed that her hepatitis condition was due to exposure to bodily fluids in the course of her work. In that case the claimant had to establish that in her job as a dental hygienist the claimant was at heightened risk to contract the disease. Expert testimony from the UConn Dental School was presented documenting that dental hygienists were more likely to contract the condition of hepatitis than people in other jobs. The Supreme Court affirmed the finding of compensability and defined "peculiar to the occupation" and "in excess of the ordinary hazards of employment" to refer to those diseases in which there is a causal connection between the duties of the employment and the disease contracted by the employee. The Court stated that it need not be unique to the occupation of the employee or to the work place but it should be "**distinctively associated with the employee's occupation such that there is a direct causal connection between the duties of the employment and the disease."**

In *Malchik vs. Division of Criminal Justice, 266 Conn.728* (2003), a State Trooper claimed that coronary artery disease which developed one year after his retirement was an occupational disease and related to the stress of his job as Trooper. The Court rejected that argument and concluded that the condition claimed was not an occupational disease because it "**was not so distinctively associated with the plaintiff's occupation such that there is a direct causal connection between the duties of the employment and the disease contracted."**

Based on the above, respondents should be aware that in order for a compensable occupational disease claim to be established claimants need to prove causation between the work and the disease but may also need to prove that the employment itself places the claimant at increased risk to contract the disease.

It is our understanding that the Governor has been considering issuing an executive order that may deal with a presumption in favor of compensability for health care workers of first responders who contract Covid-19. As of the date of issuance of this update this executive order has not been issued, however.

STRUNK DODGE AIKEN ZOVAS NEWS

During the Coronavirus pandemic **Strunk Dodge Aiken Zovas** has been a leading law firm providing guidance and insight to their peers regarding how the virus will affect the administration of workers' compensation claims in Connecticut. On April 30, 2020 **Attorney Lucas Strunk of SDAZ** will be a moderator for the Connecticut Bar Association Webinar for lawyers entitled "Use of Telemedicine in Workers' Compensation Claims." Attorney Lawrence Morizio will moderate the webinar as well. Speakers will include Chairman Morelli, Dr. Jerrold Kaplan, Dr. David Cohen, Dr. Andrew Caputo and Brian Hayes of Connecticut Orthopedics.

On March 26, 2020 **Attorney Jason Dodge SDAZ** along with Attorney Jonathan Dodd of The Dodd Law Firm presented a webinar to the Connecticut Bar Association entitled "Covid 19 and Worker's Compensation practice-questions and answers." In this seminar Attorney Dodge presented an overview of occupational disease claims and what is required in order to prove a compensable Covid-19 claim. The seminar reviewed the significant changes which had been made to Connecticut Worker's Compensation practice and process since the coronavirus pandemic started. Hypothetical fact patterns were presented for discussion to the more than 250 attorneys who attended the webinar.

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

If a claimant has two jobs at the time of their injury they may be entitled to concurrent income benefits under Connecticut General Statutes Section 31-310. Benefits for the concurrent income are paid by the responsible insurer/self-insurer first and then reimbursement can be sought from the Second Injury Fund within two years of the payments through submission of a Form 44. It is recommended that no concurrent income benefits be paid, however, until the Second Injury Fund reviews the proposed Voluntary Agreement with the concurrent income and agrees that the case qualifies for benefits under Section 31-310 and what the correct compensation rate should be. Carriers do not want to be placed in a situation where they pay concurrent benefits only to find out later that the Fund does not agree that the case qualifies or that the rate is wrong.

CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

CHANGES IN THE ADMINISTRATION OF WORKERS' COMPENSATION CLAIMS DUE TO COVID-19

Job searches are waived as of Monday, March 16, 2020

All time requirements are hereby waived per Order of the Governor. **Executive Order 7K:**

The Commission no longer approves Form 36's administratively. Objections to Form 36's that are received after 15 days will be considered by the Commission.

The requirement to send forms by certified mail is suspended. They can be sent by regular mail or fax. The Commission recommends the parties "take any measures which would support proof of delivery and receipt of any forms should subsequent substantiation be required."

The 20 day requirement for payment is suspended under General Statutes Section 31-303.

The Governor now allows remote notarization.

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All workers' compensation hearings must be done telephonically.

The three-day rule for cancellation of informal hearings is suspended.

Continuances of hearings are liberally granted.

Out-of-state stipulations may be used for in-state claimants. Canvassing of the pro se claimants by phone is strongly suggested.

The Commissioner, in his or her discretion, will decide which hearings go forward. Hearings that are deemed important include, but are not limited to: benefits not being paid, medical treatment which is denied and deemed urgent, Form 36's and hearings regarding Commissioner's examinations.

The Commission now will strictly require the parties to speak to each other before requesting a hearing.

Regarding the call-in procedure for hearings it can proceed in one of two fashions: (1) The parties contact each other by phone prior to the hearing and then while they are both on the line call the commissioner's office for the hearing, or (2) advise the commissioner the day before the hearing of your direct line where you can be reached at the time of the hearing.

There are no apportionment hearings at the present.

Only formal hearings of high priority will be going forward; those that do go forward will proceed telephonically.

Memorandum 2020-03 states that if you have flu-like symptoms before you go to a medical doctor appointment you should call the medical provider in advance.

Respondent's Medical Examinations and Commissioner Medical Examinations:

Due to the Covid-19 pandemic many RMEs and CME's have been canceled by the examining physicians. Additionally, claimants have sought to have RME's and CME's canceled due to concerns with Covid-19. During the pandemic the parties should be flexible regarding rescheduling examinations and allowing claimants to cancel examinations. It is doubtful that a Commissioner would require a claimant to attend an examination or order benefits to be suspended if he/she failed to attend an examination during the period that the State of Connecticut is trying to discourage social interaction.

Commissioner Memorandum 2020-09

The Chairman on April 1, 2020 issued the following memorandum re telemedicine:

WCC RME AND CME POLICY REGARDING THE USE OF TELEMEDICINE

In response to the ongoing COVID-19 health crisis WCC has decided that RMEs and CMEs can be conducted using telemedicine at the discretion of the doctor. The following procedure will apply:

1. The decision to conduct an RME or CME by telemedicine will be made by the doctor; claimants who refuse to participate, will be subject to the same consequences as if they had failed to attend an in-person appointment.

2. For RMEs and CMEs conducted by telemedicine:
   a. Claimants shall advise the doctor at the time of the telemedicine examination if anyone else is present and must identify such person;
   b. Attorneys, paralegals and/or hearing representatives are prohibited from being present with a claimant at the time of a telemedicine examination;
   c. If claimant or anyone present with claimant intends to record the examination, or any portion of the examination, the doctor must be advised in advance and must expressly consent.

3. In addition, for a CME conducted by telemedicine, the party submitting the medical packet to WCC shall ensure that all diagnostic studies, including images (e.g. CD of MRI, CT-scan) are included in the packet.

THE COMMISSION HAS PROVIDED THE FOLLOWING UPDATE REGARDING THE USE OF TELEMEDICINE AND BILLING:

"The Workers' Compensation Commission is encouraging the use of telemedicine in response to the COVID-19 pandemic. Providers have been instructed to bill telemedicine visits with the appropriate CMS or CPT identified telemedicine code, utilizing modifier 95 together with place of service 02. Carriers have been advised to reimburse these visits at the fee schedule rate with no reduction (excluding contractual discounts).

Until further notice, the Workers' Compensation Commission is instructing that workers' compensation claims billed with place of service 02 shall be reimbursed at the **non-facility rate**."

The Families First Coronavirus Response Act (FFCRA) provides to certain employees paid sick leave and expanded family and medical leave for specific reasons related to coronavirus. For more information regarding this go to the following link:

https://wcc.state.ct.us/download/acrobat/DOL%20FFCRA%20Poster%203-25-2020.pdf

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

PETRONE, ADMINISTRATRIX, V. TOWN OF RIDGEFIELD, 6313 CRB-4-19-3 (FEBRUARY 27, 2020)

The Compensation Review Board reversed a trial Commissioner opinion regarding application of section 31–284b in a dispute regarding life cover insurance coverage. The claimant sustained a compensable injury while working for a municipality. Since the claimant was working for a Town, the employer had continued liability for equivalent life

insurance coverage which she had at the time of the injury while she was receiving indemnity payments. Eventually, while the claimant was on indemnity benefits, she died and a request was made for payment of life insurance proceeds. Notwithstanding that the Town had continued to pay life insurance premiums, the life insurance carrier denied liability for the lump sum life insurance payment since by the terms of the life insurance contract the claimant had to be an “active employee” at the time of death in order for the benefit to be due. Since the claimant was on Worker’s Compensation benefits and deemed by the life insurance carrier not to be an “active employee” the life insurer denied liability for the life insurance payout. The Trial Commissioner had determined that by paying the premiums while the claimant was living the Town had fulfilled its obligation under section 31–284b and that she did not have any jurisdiction to address the coverage dispute raised by the life insurance carrier. The CRB reversed the case contending that the Commissioner incorrectly interpreted the law; the CRB determined that the purpose of the statute was to put the claimant in the same financial position she was in at the time of the injury as she was while receiving Worker’s Compensation benefits. Since prior to the time of the injury the claimant’s beneficiaries would have been entitled to the life insurance payout had she died, the Board determined that continuing the life insurance that would not pay her any benefit if she died while she was on Worker’s Compensation benefits did not place her in the same financial position. The CRB concluded that essentially the Town had to act as a self-insurer and pay whatever the life insurance lump sum payout that would have been owed if the claimant was an active employee. Therefore, assuming that the life insurance was $50,000 the Town will have to pay that in a lump sum to the beneficiaries notwithstanding the fact that the Town also had in good faith been paying the premium for the coverage right up until the death of the claimant. We suspect that the municipality will appeal this decision to the Appellate Court. In the interim, all municipalities should check their employees’ life insurance coverage to make sure that it applies and will payout in the same manner if the claimant dies while on Worker’s Compensation; doing so will avoid potential liability of the Town to act as self-insurer for the life insurance proceeds.

TEDESCO V. CITY OF BRIDGEPORT, 6312 CRB–4–19–3 (MARCH 3, 2020)

The Compensation Review Board reversed a decision by the trial Commissioner finding that the claimant was permanently disabled. In a prior 2015 decision before Commissioner Senich the issue was what permanent impairment the claimant was entitled to receive and not whether the claimant was totally disabled. In the 2015 decision the Commissioner had awarded a permanent impairment award of 60% of the back; at that time the Commissioner also referenced an opinion by one of the doctors that the claimant was permanently and totally disabled. The Commissioner did not find in 2015 that in fact the claimant was permanently and totally disabled, however. In a

subsequent 2018 decision a new trial Commissioner had to address a claim for total disability benefits; no new evidence was presented that was different in 2018 from the evidence presented in 2015. The trial Commissioner in 2018 determined that the claimant in fact was totally disabled and that benefits were due under General Statutes Section 31–307. The CRB noted that the earlier decision dealt solely with permanency and not total disability issues and therefore it was wrong for the Commissioner to rely on the earlier decision to establish entitlement to total disability benefits. Additionally, the CRB correctly pointed out that in order to be entitled to benefits for total disability post payment of permanent impairment the claimant must prove that the present disability "is distinct from and due to a condition that is not a normal and immediate incident of the loss for which the claimant received disability benefits for loss of use." *Marandino v. Prometheus Pharmacy, 294 Conn. 564, 582 (2010)*. The Board, citing the *Marandino* decision as well as *Gustafson v. SNET/Southern New England Telecommunications, 6191 CRB–2–17– 4 (April 13, 2018)*, reversed the Commissioner's finding and ordered a new trial pointing out that the new trial Commissioner should address the *Marandino* test. In view of this, respondents should not just voluntarily place a claimant on total disability payments once permanent partial disability has been paid; the *Marandino* test should be applied before any total disability benefits post permanency are paid. **Attorney Dodge of SDAZ** litigated both the *Marandino* and *Gustafson* claims.

COUGHLIN v. CITY OF STAMFORD FIRE DEPARTMENT, 334 Conn. 857 (March 10, 2020)

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 diagnosed until after retirement. The CRB reversed stating that since there was a causal relationship between the accepted hypertension condition and CAD the claimant was entitled to coverage for CAD. The Supreme Court agreed with the Board and determined that the heart disease claim was substantially related to the accepted hypertensive condition and therefore the CAD was also a compensable injury notwithstanding that it became manifest after retirement. This decision distinguished 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. In that case a claimant had failed to file a timely hypertension claim and thereafter sustained a heart attack before retirement. The Supreme Court found that the heart attack claim was a new and separate injury in that case and the heart claim could be pursued even though the heart claim was substantially caused by the untimely filed hypertensive condition. This decision will impact municipalities significantly since new conditions that may occur to claimant's post retirement will be considered compensable so long as they are substantially related to previously accepted injuries under Section 7-433c. This exposes municipalities to large costs for medical treatment and disability as the population of individuals with accepted 7-433c claims ages and their conditions deteriorate.

DICKERSON v. CITY OF STAMFORD, 334 Conn. 870 (March 10, 2020)

In this case the CRB reversed a finding of the trial commissioner which had dismissed a claim for a heart attack since no claim for benefits was filed within one year of the heart attack. The CRB determined that the myocardial infarction (MI) was due to an underlying accepted hypertension (HTN) injury that had been accepted under Section 7-433c while the claimant was employed as a police officer. Notwithstanding that the MI occurred after the claimant's retirement the Board held that he could pursue the claim. The CRB refused to agree with the respondent's contention that the case of *Holston v. New Haven Police Dept., 323 Conn. 607 (2016),* should apply to the claim (in *Holston* the Supreme Court had allowed a heart attack claim to be pursued under Section 7-433c despite the fact it was substantially related to an underlying, untimely filed hypertension claim). The Supreme Court in this case determined that if in fact the hypertension was a substantial factor in the MI then the claim for the MI would be compensable under Section 7-433c. The case was remanded by the Supreme Court for to the CRB and then to the Commissioner for a determination of whether the HTN was a substantial factor in the MI. It is likely such a finding will be made now in favor of the claimant by the Commissioner below. This case, like the *Coughlin* case above, will undoubtedly increase the exposure for municipalities in Section 7-433c claims.

SECULA v. SBC/SNET, 6314 CRB-5-19-3 (March 10, 2020)

At issue in this case was the trial commissioner's finding that the Commissioner's examiner's opinion with regard to causation was unpersuasive. The claimant sustained a compensable work injury in 2011 and sought authorization for a right total knee replacement. The claimant sustained at least two injuries prior to 2011 as well as a re-injury to the right knee following the work injury in 2011 that prompted him to return to the treater after a three year gap in treatment. The respondents contended that the work injury was not a substantial factor in causing the claimant's right knee condition and need for surgery based upon opinions of their examiners as well as the Commissioner's examiner that the claimant had pre-existing degenerative changes to the knee. The claimant contended that the need for right knee replacement was causally related to the 2011 work injury based upon opinion of the treater. The trial commissioner found credible the treater's opinion that the claimant's need for right knee replacement was causally related to the work injury and found the Commissioner's examiner's opinion unpersuasive because his "opinion that the claimant's condition was a 'self-limited issue' is inconsistent with both the claimant's testimony and the claimant's medical records". The CRB in affirming the trial commissioner's decision that the claimant's right knee condition and need for surgery were the result of the compensable injury in 2011 specifically noted that although the respondents' examiners as well as the Commissioner's examiner proffered medical opinions which sought to limit the scope of

the injury which occurred in 2011, the trial commissioner retained the discretion to determine, based on her review of the totality of the evidence presented, whether that injury constituted a substantial contributing factor to the claimant's knee condition and need for a right knee arthroplasty. The CRB additionally noted that the trial commissioner was under no compunction to offer additional elaboration regarding her reasons for disregarding the Commissioner's examiner's opinion.

SMITH V. REGALCARE AT WATERBURY, LLC, 6316, 6316 CRB 5-19-3 (March 10, 2020)

This case also involved the trial commissioner's decision not to rely on the opinion of the Commissioner's examiner. The claimant testified that she was taking a seat on a couch at her place of employment when she felt and heard a pop. The respondents contended that the claimant did not sustain a compensable injury at work based upon opinion of the Commissioner's examiner, who did not believe the mechanism of injury described by the claimant would cause a torn meniscus. In finding that the claimant suffered a compensable injury at work which directly led to or accelerated her need for right knee surgery, the trial commissioner found the claimant's testimony credible at the Formal Hearing. The trial commissioner further found the opinions of the claimant's treaters credible and persuasive. The trial commissioner did not find the respondents' examiner persuasive and she did not find the Commissioner's examiner's opinion as to causation persuasive, as it relied in part on finding the claimant had not sustained a torsional injury to her knee and the trial commissioner found that the claimant had offered credible testimony as to how she injured her knee. The CRB in affirming the trial commissioner's decision determined that the trial commissioner had a proper basis supporting her conclusion and the trial commissioner was not obligated to give the Commissioner's examiner's opinion greater weight. Additionally, the CRB found that the trial commissioner clearly provided her rationale for finding the treating physicians' opinions as to causation more persuasive than the Commissioner's examiner's opinion. The CRB found that having observed the claimant's testimony, the trial commissioner was in the best position to determine whether the mechanism of injury described and/or demonstrated by the claimant was "torsional."

CONNORS V. AMERICAN FROZEN FOODS 6326 CRB-4-19-5 (April 3, 2020)

In this case the CRB affirmed the Commissioner's dismissal of a temporary total claim. The claimant had a compensable injury. His doctor had him on light duty, however, the

physician then placed him on temporary total after an examination. The respondents denied the TT claim noting that there was no change in objective findings and questioned why there was a change in work status. The treating doctor was deposed and acknowledged the absence of objective findings and stated that where there are subjective complaints there can be secondary gain issues. He also stated that he could not comment on how the claimant's family illnesses may have affected him. Despite no contrary medical evidence to say the claimant had a work capacity the Commissioner dismissed the TT claim holding that the report changing the claimant to TT status was not credible or persuasive.

GFELLER V, BIG Y FOODS, 6322 CRB-2-19-5 (April 8, 2020)

In this case the claimant sustained a compensable shoulder injury and was placed on light duty. The employer offered her a position within her work capacity and she went back to work. Thereafter the claimant was terminated for cause by the employer unrelated to the work injury. The claimant did not claim temporary partial benefits after her termination. Subsequently the claimant had surgery and was paid temporary total benefits while out of work. When she was released to work the employer denied a temporary partial claim contending that the claimant would have been accommodated in a light duty postion but for the fact that she had been previously terminated for cause. The CRB affirmed the Commissioner's finding that TP was owed; the Board held that it was within the Commissioner's discretion to award the TP notwithstanding the termination.