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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Fall 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. We wish good health to all our colleagues throughout the workers' compensation community.

The Connecticut Workers' Compensation Commission through the leadership of Chairman Morelli has also remained open for business. Although most hearings are being done telephonically some formal and CRB hearings may be held in person. 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 changes in the Commission.

STRUNK DODGE AIKEN ZOVAS NEWS

Partners Anne Zovas, Richard Aiken, Jason Dodge, and Lucas Strunk of SDAZ have been named to New England Superlawyers for 2020. **Attorneys Philip Markuszka and Christopher D'Angelo of SDAZ** have again been named New England 'Rising Stars' for Superlawyers 2020.

Attorney Katherine Dudack of SDAZ has been named to the Editorial Board for Compensation Quarterly. Compensation Quarterly "is an independent and non-partisan publication which tracks developments in the area of workers' compensation as practiced in the State of Connecticut." Attorney Dudack does an excellent job of editing this newsletter as well!

On September 14, 2020 **Attorney Lucas Strunk of SDAZ** spoke at the Connecticut Legal Conference before fellow members of the Connecticut Bar and the Workers' Compensation Commission; Attorney Strunk provided an update regarding legislative changes in 2020. Most of Attorney Strunk's comments dealt with the impact of Covid-19

and how the Governor's Executive Orders had impacted the Connecticut Workers' Compensation system. See the link in the update portion of our website for Attorney Strunk's full legislative report.

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. For the academic year 2020-2021 Kids' Chance of Connecticut awarded eight scholarships to students going to college. If you have any questions about Kids' Chance of Connecticut or would like to become part of our organization please contact **Jason Dodge or Phil Markuszka 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, 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

When responding to a notice of claim, Form 30C, you should be aware of what injuries are being claimed, the name of the alleged employer and the date of accident. If your notice to contest, Form 43, does not list the same injuries, employer and date of accident then it may be deemed not responsive to the notice of claim and the employer may be potentially precluded from raising defenses. For example, if the notice of claim lists the claimant as working at the "Smith Company" but you list on the disclaimer the "Jones Company" (because perhaps it is the parent company of the Smith Company) it may not be considered a valid disclaimer and may not even get in the right Commission file.

CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

Memorandum 2020-18 has been issued by Chairman Morelli as of October 1, 2020 regarding maximum compensation rates. The Chairman has ordered that the maximum total disability rate for injuries occurring after October 1, 2020 is $1,373 (based on the estimated average weekly wage of all employees in Connecticut). The maximum temporary partial/permanent partial disability rate for accidents after October 1, 2020 is $1,174 (based on the average weekly earnings of production and related workers in manufacturing in Connecticut).

Memorandum 2020-17 was issued by Chairman Morelli on October 1, 2020 which provides instructions on how to calculate compensation rates for those employees that are not subject to FICA or Medicare deductions.

Chairman Morelli on September 14, 2020 spoke at the Connecticut Legal Conference and provided his yearly "State of the Commission" address. Chairman Morelli stated that the Workers' Compensation Commission will likely be getting a new computer system beginning in February 2021; this system will hopefully provide better ability to file forms with the Commission online.

The Chairman confirmed that the new Workers' Compensation Commission office has opened in New Britain; he also advised that a lease has been signed for a new Middletown Workers' Compensation office that will be located near the Department of Labor office in Middletown. New space is desperately needed for the Middletown office as that office does not meet the standards of other Commission offices.

Chairman Morelli has been asked by the Governor to reduce his budget by 10%. He indicated that closure of one office of the commission may reduce the budget by 5%. No decision has been made regarding closure of any office is at this time, however.

The Chairman confirmed that for certain formal hearings they will be held in person; it will largely be left up to the Commissioner as to whether the formal hearing goes forward live or by computer through Microsoft Teams. If a formal hearing does take place that office space will not be used the following day as it will be thoroughly disinfected.

The Chairman advised that to date 1604 Covid-19 claims have been filed and 117 claims had been "litigated" (i.e., hearings have been requested). The Chairman stated that

generally Covid-19 claims are being resolved before any formal hearings are necessary. He stated that the Commission certainly has not been overwhelmed with claims.

Chairman Morelli and Commissioners Driscoll and Jannotta will sit at the Compensation Review Board (CRB) this coming year.

Chairman Morelli acknowledged the assistance of retired Commissioners Delaney and Mastropietro who have been hearing cases during the pandemic. The Chairman noted that these former Commissioners did not have to assist at the hearings but were willing to come in to help the Commission when there were not enough Commissioners to preside at all the hearings.

The Chairman did confirm that Dr. Ahmed Khan of New Britain, a neurosurgeon, is no longer authorized to treat patients with Connecticut Workers' Compensation claims.

There is a new stipulation questionnaire form that can be found at www.wcc.state.ct.us/download/acrobat/sq.pdf Respondents have to file these in cases where there is a pro se claimant for a settlement; generally claimant's attorneys complete these forms if counsel is involved.

The Commission mediation guidelines have been updated and can be found at www.wcc.state.ct.us/memos/2020/2020-15.htm

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

All time requirements are hereby waived per Order of Governor Lamont's Executive Order 7K.

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

The commission has informally stated this regarding Covid-19 testing and compensable surgeries:

"It has come to our attention that many doctors are requiring covid-19 testing as a part of routine pre-operative physicals. Please be advised that if the testing is required for a doctor to perform an authorized surgery for a workers' compensation claimant, the testing should be covered and reimbursed."

Job searches are waived for temporary partial benefits as of Monday, March 16, 2020.

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.”

Remote notarization is authorized.

Most 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.

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 their direct line where they can be reached at the time of the hearing.

Commissioner Memorandum 2020-09

The Chairman on April 1, 2020 issued the following memorandum regarding 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 State of Connecticut New Britain (6th District) workers' compensation office has moved. Their new address is:

Workers' Compensation Commission
24 Washington Street
New Britain, CT 06051
Phone: (860) 827-7180
Fax: (860) 827-7913

Exam Charges: Commissioner Medical Exam (CME) fee has increased to $900; Respondent Medical Exam (RME) fee is still $750.

Dr. Andrew Nelson, a board certified hand surgeon, has joined Starling Physicians at 1 Lake Street in New Britain. Dr. Nelson used to practice in the Waterbury area.

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

COVID-19 AND WORKERS' COMPENSATION IN CONNECTICUT

On July 24, 2020 Governor Lamont issued Executive Order 7JJJ which establishes a **rebuttable** presumption of compensability for certain limited Covid-19 claims. This was a semi-victory for respondents since there was concern that the Order would establish an **irrebuttable** presumption of compensability of Covid-19 claims for essential workers. Now, in all cases, employers will be able to raise a defense to a claim of Covid-19, if there is one, and can prevail if the Commissioner determines that the employment, by a preponderance of the evidence, was not the cause of the claimant contracting Covid-19.

For a claimant to have a rebuttable presumption in favor of compensability of an occupational disease claim certain factors must be present pursuant to Executive Order 7JJJ. First, the claimant must have missed work due to a diagnosis of Covid-19 or symptoms that were diagnosed due to Covid-19 during the period March 10, 2020 through May 20, 2020. Additionally, the claimant had to have a diagnosis of Covid-19 within three weeks of the "date of injury" (defined to be date of disability or death) either 1) by positive laboratory test or 2) based on symptoms by a licensed physician, P.A. or R. N. Also, the claimant must have worked outside of their home at least one of fourteen days prior to the date of injury and had not received an offer or directive from the employer to work from home instead of at work. If the date of injury was more than fourteen days after March 23, 2020 the claimant had to be employed by an employer deemed essential by the Connecticut Department of Economic Development pursuant to Executive Order 7H. Assuming all those factors are answered in the affirmative then the claimant's Covid-19 claim would be found compensable as an occupational disease unless the employer or insurer can prove by a preponderance of the evidence (more likely than not) that the condition is not due to work.

For those claims for Covid-19 that do not meet the requirements outlined above, a claimant could still pursue a claim, but it would be their burden of proof to establish a compensable occupational disease. The Governor's Order confirms that "occupational diseases must ordinarily be peculiar to and distinctively associated with the occupation in which the employee was engaged." This evidentiary burden is higher for the claimant than in a normal workers' compensation claim involving a traumatic injury.

Executive Order 7JJJ makes clear that the employer is entitled to a credit against any total or partial disability claims for any payments made to the claimant under the Families First Coronavirus Response Act or other sick leave that is paid through a program designed to respond to Covid-19 claims.

The employer is also entitled to receive a copy of all positive Covid-19 results.

The order also amends General Statutes Section 31-290a; that statute is the wrongful termination/discrimination law and prohibits discrimination or termination in response to filing a workers' compensation claim. The amendment to the statute prohibits any

discipline of employees for filing a claim and actions that "deliberately misinform or otherwise deliberately dissuade an employee from filing a claim for workers' compensation benefits." These changes will affect not only Covid-19 claims but all other claims. In order to issue an Executive Order, the Governor pursuant to Connecticut General Statutes Section 28-9(b) must do so in order to protect the "public health." It is unclear why amendment of Section 31-290a was required by public health concerns due to the pandemic.

The Executive Order is interesting in that it seems to bar certain Covid-19 claims from being given the presumption of compensability based on the actions of the employee. If the claimant "chose" to come to work as opposed to working from home as offered by the employer those claims due to exposure to Covid-19 at the job site will not be given the presumption of compensability.

The Governor's initial order was effective immediately. On September 8, 2020 through **Executive Order No. 9A** the Governor extended the orders to November 9, 2020.

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 Statutes Section 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 Section 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, if a claimant does not qualify for the rebuttable presumption for Covid-19 claims established by Executive Order 7JJJ then a claimant needs 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.

CASE LAW

LINDA FIELDHOUSE v. REGENCY COACHWORKS, INC., 6344 CRB-2-19-8 (August 12, 2020)

The CRB reversed a dismissal and found that the claimant based on the “totality of circumstances” had filed a timely claim for workers’ compensation benefits. The claimant fell at work on November 27, 2015 and was assisted up by her supervisor from the floor. She was given permission by the supervisor to leave work early and get medical treatment but she was not directed to go to any particular medical facility. No bills were paid by the employer within one year of the accident. No hearings were requested within one year of the incident and no written notice of claim was filed until 2017. The claimant did reach out to the insurance agent for the employer and asked to file the claim; the agent completed a first report of injury for the claimant before the one year anniversary of the accident and told the claimant she had two years to file a claim. The carrier for the employer on November 22, 2016 took a statement from the claimant and issued a prescription card to her; the carrier assigned a file number within one year of the accident. Also, the carrier in March 2017 advised the claimant they were

arranging a RME for her. The trial Commissioner dismissed the claim but on appeal to the CRB the decision was reversed; the Board held the under the "totality of the circumstances" the claimant substantially complied with the notice of claim requirements of Section 31-294c. In reaching their decision the Board cited the case of *Hayden-Leblanc v. New London Broadcasting*, 12 Conn. Workers' Comp Rev. Op. 3, 1373 CRD-2-92-1 (January 5, 1994), a case litigated by Jason Dodge of SDAZ.

VITTI v. CITY OF MILFORD, ____CONN. ____ (August 24, 2020)

In this Section 7-433c accepted heart claim the police officer had to undergo a heart transplant. After the surgery he recovered and did 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 CRB 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. The case was appealed to the Connecticut Supreme Court which determined that the claimant was not entitled to 100% rating and that the 23% rating was appropriate. In reaching their decision the Court determined that the transplanted heart was more akin to an actual human organ than a prosthetic device.

BARKER v. ALL ROOFS BY DOMINIC, ___ Conn.___ (August 13, 2020)

The Supreme Court, in a 4-3 decision where Chief Justice Robinson wrote the dissent, affirmed a finding that the City of Bridgeport had liability for a workers' compensation claim under General Statutes Section 31-291 as principal employer. The claimant was injured from a fall off a roof of one of the City's buildings; the actual employer was uninsured, and the City had control of the property. The City's argument that repair of one of its roofs was not part of trade or business of the City was not accepted by the Court; in reaching its decision the Court held that the City had responsibility under General Statutes Section 7-148(c)(6)(A)(i) to manage, maintain and repair its public buildings. Accordingly, the Court held that the City met the requirement of Section 31-291 that the employer be in the "trade or business" of the work being performed by the injured employee. The dissent concluded that the City should not have been liable since it was not in the business of roofing, did not have a roofer on its payroll, and no employee of the City was on the project. This case started off with five Justices on the panel, but the panel was expanded to seven Justices after oral argument, presumably because there was no consensus on the Court.

JANET FELICIANO v. STATE OF CONNECTICUT, et al., ___Conn. ___ (August 24, 2020)

At issue in this case was whether the State of Connecticut's Motion to Dismiss was properly granted by the trial court. The plaintiff, a state employee, was a passenger in a motor vehicle owned and insured by the state; said vehicle was being operated by another state employee, William Texidor ("Texidor"). Both the plaintiff and Texidor were acting in the course of their employment when they were struck by another vehicle that

was uninsured. The plaintiff suffered various injuries that required medical treatment and she also lost wages. The plaintiff conceded in her responses to the state's request for admissions that she applied for and received workers' compensation benefits. The plaintiff also brought a civil action against the state of Connecticut and Metropolitan Casualty Company, alleging that Texidor's operation of the vehicle was negligent and caused the collision. The state filed a Motion to Dismiss for lack of subject matter jurisdiction on the grounds of sovereign immunity which the trial court granted.

On appeal, the Supreme Court held that the waiver of sovereign immunity from suit in General Statutes Section 52-556 for claims arising from a state employee's negligent operation of a state owned and insured motor vehicle extends to persons who are state employees and, therefore, the court had jurisdiction over the action. However, the Supreme Court found that the waiver of sovereign immunity pursuant to Section 52-556 does not preclude the state from asserting a defense to liability under the workers' compensation exclusivity provision set forth in Section 31-284(a).

The Supreme Court concluded that Section 31-284(a) precluded the plaintiff's claim and the state was entitled to judgment as a matter of law. The Court noted that while the trial court correctly concluded that the plaintiff's action against the state was barred by Section 31-284(a), the form of the judgment was improper because the trial court had jurisdiction over the plaintiff's complaint. As such, the trial court's judgment of dismissal was reversed and the case was remanded with direction to render judgment in favor of the state.

REVERON V. COMPAS GROUP, 6358 CRB-5-19-11 (September 16, 2020)

The CRB upheld a dismissal of a claim for back injury. The Board found that the Commissioner's dismissal was appropriate in that she found the claimant not credible and determined that the RME doctor was credible and persuasive. The Commissioner did not rely on the CME opinion that she concluded vacillated.

DIPISA V. BETHEL HEALTH & REHABILITATION, 6334 CRB-7-19-6 (September 23, 2020)

The claimant sustained a compensable injury to her back on April 4, 2010 and was placed at maximum medical improvement June 8, 2017 by the treating orthopedist. On that same date, the pain management specialist diagnosed the claimant with bilateral trochanteric bursitis. The RME opined that the claimant's trochanteric bursitis was not related to the April 4, 2010 injury and that the claimant did not require any additional treatment for the lumbar spine. A CME concurred that the trochanteric bursitis was not

related to the compensable injury and opined that the claimant did not require additional surgery or injections for her back.

The trial Commissioner dismissed the claim for trochanteric bursitis. In affirming the commissioner's decision, the CRB noted that the commissioner had incorrectly stated that the RME had opined that the claimant's trochanteric bursitis is not related to the claimant's work injury. The RME never mentions trochanteric bursitis in his report, nor did he have an opinion relative to causation for same at the time of his deposition. The CRB held that the Commissioner's inaccurate finding was harmless error as the Commissioner also relied on the opinions of the CME in dismissing the trochanteric bursitis claim.

The Commissioner also denied any additional medical treatment for the claimant's back injury based on the opinion of the CME. The CRB, however, held that the Commissioner improperly denied all future treatment since the CME's opinion was limited to the need for additional surgery and injections only. As such, the CRB limited the scope of the Commissioner's finding to only include those treatment modalities specifically referenced in the CME report and left the claimant to her proof in the future for other medical treatment.