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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Winter 2021 **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.

STRUNK DODGE AIKEN ZOVAS NEWS

The 2021 Edition of the *U.S. News – Best Lawyers* "Best Law Firms" rankings were publicly announced. **Strunk Dodge Aiken Zovas has been recognized as a Tier 1 "Best Law Firm" for the 2021 edition.**

The Connecticut Bar Association Workers' Compensation Section raised more than $9,500 for Connecticut Food Bank and Foodshare during their 22nd Annual Verrilli-Belkin Workers' Compensation Charity Golf Event on September 17. **Senior Partner Rick Aiken of SDAZ** has organized and run this event for more than twenty years. Congratulations to Rick on the continued success of this event that provides so much to the community.

Attorneys Lucas Strunk and Jason Dodge of SDAZ will be presenters at the Annual Connecticut Legal Conference for the Connecticut Bar Association in June 2021. Attorney Strunk will provide a legislative report to the Workers' Compensation Section of the CBA; Attorney Dodge will present a review of significant case law in the area of workers' compensation during the period 2020-2021.

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

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. Kids' Chance of Connecticut will hold its annual golf outing at Wampanoag Country Club in West Hartford on September 27, 2021.**

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

The choice of a Respondents Medical Examiner (RME) is an important decision. You should always be aware of the doctor's particular area of expertise and whether she/he is recognized as an expert regarding the claimant's injury. A bad decision regarding the choice of a RME can increase the cost of a file significantly. We recommend that you contact your legal counsel for suggestions regarding RMEs before actually scheduling the RME. Your attorney can provide insight pertaining to how the Commission views a RME doctor and what the RME doctor has said in the past concerning issues such as causation, apportionment, medical treatment, disability and surgery.

CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

The mileage reimbursement rate for travel expenses as of January 1, 2021 has fallen to 56 cents per mile.

For 2021 the panel members on appeals to the Compensation Review Board will be Chairman Stephen M. Morelli and Commissioners Maureen E. Driscoll and Brenda D. Jannotta.

As of November 17, 2020 all "in-person" formal hearings have been suspended by the Workers' Compensation Commission due to increased Covid-19 infection rates in Connecticut.

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).

Dr. Gerald Becker, Dr. Stephan Lange, and Dr. W. Jay Krompinger have retired from Orthopedic Associates of Hartford. Dr. Becker and Dr. Krompinger are orthopedic surgeons and Dr. Lange is a neurosurgeon. Dr. Krompinger and Dr. Lange will continue to perform RMEs. Dr. Becker has retired to Florida. All of these physicians have been a great asset to claimants, employers and the Workers' Compensation Commission. Their treatment of claimants as treating physicians has always been superb. Additionally, they have performed numerous RMEs, and CMEs for the parties in the system. They have also assisted the Connecticut Bar Association many times in the presentation of seminars. Best wishes to these doctors in their retirement.

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

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

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 36s administratively. Objections to Form 36s 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.

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

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 CRB 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 has been considering the claim since argument in Fall 2019. We have recently learned that the parties to the appeal are considering settlement; in view of this a decision in the case has been stayed until March 15, 2021. If the case does settle before the Supreme Court issues a decision then we will be left with the Appellate Court ruling which finds compensable the injuries flowing from this type of non-occupational syncopal episode. We will keep you advised of this case and whether it does settle.

JOANN SMITH V. SEDGWICK CLAIMS MANAGEMENT SYSTEMS, 6351 CRB-1-19-10 (November 5, 2020)

This is a case that every adjuster who works at home should read. The claimant was an insurance adjuster who worked at home. Her office was upstairs in her home. During the day, while she was still logged on to her computer, she got a drink downstairs. She alleged that she fell on the stairs and hurt her shoulder. She did not immediately report this to her supervisor. In fact, she went to the company picnic the next day and did not mention her injury to anyone. She reported the injury on the Monday following the alleged accident. The Commissioner, without commenting on the relative credibility of the witnesses, dismissed the claim. The CRB noted that the Commissioner did not explain why the claim was dismissed; the CRB described the Commissioner's decision as "opaque." The CRB remanded the case back to the Commissioner for a detailed articulation of his decision. Arguably the "personal comfort" doctrine might apply to this

case which allows compensation to claimants while taking short breaks to drink, eat, or go to the bathroom; this doctrine was not mentioned in the CRB decision.

JAMES ARRICO V. CITY OF STAMFORD, 6345 CRB-7-19-9 (November 17, 2020), ***appeal pending*, AC 44409/44488**

The claimant had two compensable back injuries; the claimant also had pre-existing conditions including colitis, acid reflux and a seizure disorder. The claimant was awarded 16 percent of the back for the first injury. After the second injury the Trial Commissioner found that the claimant had achieved maximum medical improvement and granted a Form 36 awarding an additional 5 percent rating (total of 21 percent). She also determined that the claimant's present condition was not due to the compensable injuries and that additional medical treatment was not the responsibility of the respondent. On appeal the CRB determined that the issue of medical treatment was not an issue for the formal hearing and remanded the case to address ongoing medical treatment. The CRB affirmed the Finding regarding maximum medical improvement and the rating but remanded the case to the Commissioner to address causation issues and whether the claimant was totally disabled or not. The CRB found that the Commissioner's handling of the evidence in the case was "unorthodox" and stated that the substantial factor test should be applied on the issue of causation. This case is on appeal to the Appellate Court, AC 44409/44488.

JOSHUA GALINSKI V. BEAVER TREE SERVICE, L.L.C., 6361 CRB-1-19-12 (December 9, 2020), *appeal pending*, AC 44442

The claimant worked for a tree service which was owned by his father. The company was cutting down a large tree. While doing so they established a "drop zone"; employees were not to enter the "drop zone" while limbs were being cut up above. Notwithstanding the fact that this was communicated to the claimant he entered the "drop zone" and was hit by a limb that had been cut. The claimant sustained serious injuries and was rendered a quadriplegic. The respondents denied the claim contending that the claimant entered the "drop zone" because he was intoxicated in violation of Connecticut General Statutes Section 31–284(a). The respondents presented testimony of a toxicologist who indicated that the metabolite score of 695 revealed that the claimant was a heavy marijuana user and that his long-term use of marijuana had impaired his ability and likely caused him to enter the drop zone when he should not have. The claimant presented testimony that there was no evidence that he had used marijuana on the date of the injury and that there was no evidence of acute influence of marijuana. The Trial Commissioner dismissed the claim citing section 31–284(a). On appeal, the CRB reversed stating that the defense of intoxication must be proven by the respondents and they must show that the claimant was actively under the influence at the time of the accident. The CRB concluded that there was no evidence to support that conclusion and therefore reversed the dismissal. It is likely the respondents will take an appeal in this case arguing that the CRB usurped the Trial Commissioner's discretion; the claimant will continue to contend that there was

no evidence to show acute intoxication as of the date of the injury. It is interesting that the respondents apparently did not raise the issue as to whether the claimant's actions constituted willful and serious misconduct by entering the drop zone notwithstanding the fact that he was aware that he was not supposed to enter the zone. On appeal the respondents may also argue that Section 31-275(1)(C) bars a compensable claim if the injury is due to the use of narcotic drugs. The case is on appeal at the Appellate Court, AC 44442.

KELLY BEEL V. ERNST & YOUNG, 6352 CRB-7-19-10 (December 16, 2020)

In this case a Motion to Preclude was granted by the Trial Commissioner and that ruling was affirmed on appeal. The respondents' appeal of preclusion was based on two defenses: that the Notice of Claim Form 30C was defective since it did not properly list the place of the accident and that respondents' payments before the issuance of the Form 30C should allow them the so-called "safe-harbor" protection that had been found in Dubrosky v. Boehringer Ingelheim, 145 Conn. App. 261, *cert denied*, 310 Conn. 935 (2013). The CRB agreed with the Trial Commissioner that the Form 30C was valid and the issue of the location of the injury was a "minor defect." The CRB found that short term disability payments made to the claimant did not bar preclusion as well and that the respondents did not meet the qualifications for the "safe harbor" defense. The appeal of this case to the Appellate Court has been withdrawn, AC 44482.

REED V. ASBESTOS MANAGEMENT COMPANY LLC, 6370 CRB-6-20-1 (January 27, 2021)

The CRB again in this case reversed a dismissal that was based on a defense of intoxication under Section 31-284(a). The claimant fell at work and lost consciousness. At the hospital following the accident the claimant was found to be positive for amphetamines and cocaine. A history was taken of using cocaine two days before and drinking alcohol 5-6 days per week. The hospital record had a statement that the diagnosis of syncope and loss of consciousness "likely" was secondary to alcohol and substance abuse. The Trial Commissioner dismissed the claim concluding that the claimant had an idiopathic event unrelated to work. On appeal the CRB performed a thorough review of the respondent's burden to prove that intoxication had caused the injury under Section 31-284(a). The CRB stated that this burden was a two-pronged inquiry: the respondent needed to show the claimant was intoxicated at the time of the injury and that the intoxication was a substantial factor in the injury. The CRB concluded that there was no expert testimony presented by the respondents in this regard and therefore reversed the Trial Commissioner on the intoxication issue. The CRB determined that the statement in the medical records that the injuries were "likely" due to substance abuse was not the same as the required burden to show that the injury was "more likely than not" due to the abuse (a reader of this decision may question if there is a significant distinction between the two). Going forward it is clear that respondents need to provide strong expert testimony to present a successful intoxication defense.

The CRB also determined that this case was analogous to Clements v. Aramark, 182 Conn. App. 225 (2018), *cert. granted*, 330 Conn. 904 (2018), where the Appellate Court determined that injuries were compensable notwithstanding that the claimant's fall at work may have been due to underlying cardiac issues. Therefore, the CRB here determined based on Clements that the case was compensable. It should be noted that the Clements case has been argued before the Connecticut Supreme Court quite some time ago but no decision has been released; the Clements case may settle. A reversal of Clements at the Supreme Court likely would affect the CRB's decision in this case, but that result probably will not occur as Clements appears to be in process of settling.

ROUSSEAU V. ACRANOM MASONRY INC., 6366 CRB-5-19-12 (February 3, 2021)

The CRB affirmed a Trial Commissioner's finding that the respondents were liable for a right hip replacement procedure. On October 26, 2015 the claimant lifted a large beam at work and felt pain in his right side. He came under the care of Dr. Duffy. Dr. Duffy was of the opinion that the work episode had aggravated an underlying condition and hastened the need for hip surgery. A RME was held with Dr. Brittis who opined that the right hip condition was not substantially related to the 2015 incident. A CME was performed by Dr. Christopher Lena who determined that there may have been a small aggravation as a result of the work incident but he did not think it was "a significant material contributor to the progression of his arthritic changes." Notwithstanding the Commissioner's examiner's opinion, the Trial Commissioner found the claim compensable. She did not find the opinion of Dr. Lena persuasive; she did conclude that Dr. Duffy's opinion was credible and persuasive. The Trial Commissioner found the claimant credible regarding his claim that he had not suffered from hip pain prior to the work accident. The respondents contended that the Trial Commissioner did not apply the proper causation standard and that the Commissioner did not have to address the claimant's credibility in a case of medical causation. The CRB affirmed the Trial Commissioner's opinion. The CRB stated "we believe that sufficient medical evidence was presented to establish that a workplace injury exacerbated the claimant's pre-existing hip ailments and accelerated his need for hip replacement surgery." This is another case where the Trial Commissioner and CRB rejected the opinion of a CME which was favorable to the respondents.