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ATTORNEYS AT LAW

# *CONNECTICUT WORKERS' COMP UPDATE*

**STRUNK DODGE AIKEN ZOVAS WOULD LIKE TO WISH HAPPY THANKSGIVING TO ALL OUR FRIENDS AND COLLEAGUES. BEST WISHES TO ALL FOR A JOYOUS HOLIDAY SEASON!**

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

The Connecticut Workers' Compensation Commission through the leadership of Chairman Morelli has remained open for business during the Covid-19 pandemic. At this time all hearings are being held in person. Masks are being required to be worn at the Commission offices.

## STRUNK DODGE AIKEN ZOVAS NEWS

**Attorney Richard Aiken of SDAZ** was again in charge of the Verrilli-Belkin Workers' Compensation Charity Golf Event held on September 9, 2021; this event is sponsored by the CBA. The event was well-attended by members of the Bar notwithstanding threatening skies. Proceeds from the tournament go to Food Share.

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.**

**Attorneys Lucas Strunk, Richard Aiken, and Jason Dodge of SDAZ** have been named *Best Lawyers 2021* in New England and Connecticut. Best Lawyers is the oldest and most respected lawyer ranking service in the world. For 40 years, *Best Lawyers* has assisted those in need of legal services to identify the lawyers best qualified to represent them in distant jurisdictions or unfamiliar specialties.

**Attorney Philip Markuszka of SDAZ** was accepted to the Board of Directors of the Hartford County Bar Association on May 18, 2021 for a three year term. Attorney Markuszka has also been appointed to serve on the Glastonbury Zoning Board of Appeals until November 21, 2021. Attorney Markuszka also served as a presenter for

the “Attorneys’ Fees in Workers’ Compensation” CLE seminar on October 29th put on by the Connecticut Bar Association.

**Partners Anne Zovas, Richard Aiken, Jason Dodge, and Lucas Strunk of SDAZ** have been named to Connecticut Super Lawyers for 2021. **Attorneys Philip Markuszka and Christopher D’Angelo of SDAZ** have again been named Connecticut ‘Rising Stars’ for Super Lawyers 2021.

**Attorney Christopher Buccini of SDAZ** has been named to the Connecticut Bar Association’s Workers’ Compensation Section Executive Committee. **Attorneys Aiken, Strunk, and Dodge of SDAZ** are already on the Committee.

**Attorney Buccini** has also been appointed as an Editor to the Compensation Quarterly, a publication of the Workers’ Compensation section of the Connecticut Bar Association which reviews topics and case law regarding workers’ compensation in Connecticut.

On September 27, 2021 **Strunk Dodge Aiken Zovas** participated in the Kids’ Chance of Connecticut Charity Golf Event at Wampanoag Country Club in West Hartford. The event was well-attended with over 100 golfers**. Attorneys Jason Dodge and Phil Markuszka** are Board members of KCOC and helped arrange the event. The mission of Kids’ Chance of Connecticut, Inc. is to provide educational scholarships to the children of Connecticut workers who have been seriously or fatally injured in work-related accidents. If you or your organization wish to become involved in this worthy charity please contact Jason or Phil. 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.

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.

**Our attorneys:**

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## CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

### Memorandum 2021-09

This memorandum advises the public that the title "Commissioner" has now been changed to "Administrative Law Judge." The forms and publications from the commission to the extent that they refer to a Commissioner "shall be interpreted and/or understood to mean "Administrative Law Judge."

### Memorandum 2021-04:

Chairman Morelli has issued Memorandum 2021-04 which orders that the statutory deadlines that previously were waived by Governor Lamont's Executive Order 7K shall begin anew on June 2, 2021.

The 20 day deadline for payment of an award pursuant to Connecticut General Statutes Section 31–303 will begin to run as of June 2, 2021 for any award issued prior to June 2, 2001. Therefore, it is crucial that carriers and self-insurer's make sure that any awards are paid timely in order to avoid a claim for 20% penalty. The Memorandum gives this example: "a 20-day deadline for payment of an award *pursuant to Section 31-303* dated prior to June 2, 2021 must commence on the 20th day following June 2, 2021."

Any Form 36 that is filed after June 2, 2021 will be automatically approved if no objection is filed within 15 days.

As of June 2, 2021 the Judges, at their discretion, can require job searches for temporary partial or Section 31–308a benefits. There is no blanket requirement as of June 2, 2021 for job searches to be performed. We recommend that carriers and self-insurers provide to claimants who are on temporary partial benefits a copy of the Chairman's memorandum and job-search forms.

Beginning June 2, 2021 all Connecticut Workers' Compensation Commission policies, procedures and deadlines will be put back in place as they were prior to March 16, 2020.

The link to the Commissioner's memorandum is

https://wcc.state.ct.us/memos/2021/2021-04.htm

### Memorandum 2021-06:

Memorandum 2021-06 has been issued by Chairman Morelli regarding maximum compensation rates. The Chairman has ordered that the maximum total disability rate for injuries occurring after October 1, 2021 is $1,446 (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, 2021 is $1,140 (based on the average weekly earnings of production and related workers in manufacturing in Connecticut).

https://wcc.state.ct.us/memos/2021/2021-06.htm

**Memorandum 2021-07:**

The Chairman has issued a memorandum providing guidance as to how compensation rates should be calculated without FICA and/or Medicare deductions. The memorandum states:

“In the event that a Commissioner decides that an employee is not subject to FICA and/or Medicare taxes, he or she may exclude the equivalent amount from deduction from gross pay to determine the compensation rate. Currently, such rates are not calculated by the system, nor are the formulae for determining them manually written anywhere - on the VA or elsewhere.

One method for calculating these amounts is by manually following the steps from the exhibits in the front of the rate table book, but omitting the FICA and/or Medicare deductions. Since this is rather involved, the Commission has come up with some "short cut" equations.” The memorandum provides examples how to calculate the compensation rate.

https://wcc.state.ct.us/memos/2021/2021-07.htm

**Memorandum 2021-02**

The Commission has updated the medical guidelines for physician assistants in Memorandum 2021-02. A physician assistant may not see a workers’ compensation patient on more than two consecutive visits and may not assign a permanency rating.

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 Judges Maureen E. Driscoll and Brenda D. Jannotta.

**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

## WORKERS' COMPENSATION PRACTICE TIP

Voluntary agreements must be submitted to the Commission for approval in all lost time claims. The voluntary agreement should list the total wages, average weekly wage and compensation rate for the injury as well as the authorized treating physician. The filing status Form 1A should be submitted with the VA. General Statutes Section 31-296.

## CASE LAW

**MALINOWSKI V. SIKORSKY AIRCRAFT, 207 Conn. App. 266 (SEPTEMBER 7, 2021),**

The Appellate Court affirmed the trial commissioner's finding of compensability in a case of end stage osteoarthritis aggravated by repetitive trauma. The claimant had undergone removal of medial meniscus in the early 1970's and had then worked twenty-seven years for the employer. The respondents' contended that the opinion of the treating physician was inconsistent and was insufficient to support the Trier's conclusion that the arthritis had been permanently aggravated by work activities and therefore necessitated total knee replacement. The respondents' relied on an RME that remarked that the claimant had gone years longer before the replacement than he would have anticipated given the prior surgery. The CRB, on appeal, noted the limited nature of the medical opinion and had affirmed the Trier by noting that the "common knowledge exception" to the need for medical opinion allowed the Trier to find as he did. The Appellate Court chose not to address that issue but rather found the treater's opinion sufficient and that same was expressed with the equivalent of reasonable medical probability. The Court chose to review correspondence from the treater physician and held that same was reasonably based in the evidence before the Trial Judge, notwithstanding contradictory comments in office notes. **Attorney Lucas Strunk of SDAZ defended this claim.**

**BELLERIVE V. THE GROTTO, INC., 206 Conn. App. 700, (August 10, 2021)**

In this case the Appellate Court held that a workers' compensation policy was cancelled under General Statutes Section 31-348, affirming the CRB decision that had reversed the trial commissioner's finding. Liberty Mutual filed electronic cancellation through NCCI in

accordance with Section 31-348. The employer contended that notice should have been sent certified mail to them per General Statutes Section 31-321. The Appellate Court disagreed and found that electronic notification was the protocol of the Commission and satisfied the statute; the Court determined that the legislative history of Section 31-348 showed that the legislature intended to use NCCI for purposes of policy cancellation. The Court concluded that communication between the employer and the carrier post the termination and actual premium paid was not sufficient to void the cancellation. In reaching their decision the Appellate cited the Connecticut Appellate Court case of Yelunin v. Royal Ride Transportation, 121 Conn. App. 144 (2010), which stated that "an employer's understanding as to when coverage terminated is largely irrelevant." Id., 149. The decision determined that the employer's subjective belief of coverage is immaterial and that there is no requirement, per the statute, to advise the employer of the cancellation.

**FRANTZEN V. DAVENPORT ELECTRIC, 206 CONN. APP. 359, (AUGUST 2, 2021)**

The Appellate Court in this legal fee dispute reversed the Compensation Review Board and affirmed the trial Commissioner's decision which split a legal fee on a 50/50 basis. The claimant settled a workers' compensation claim for $850,000; there was a legal fee of $170,000 which was disputed. Law Firm 1 had represented the claimant from 1998 to 2005; Law Firm 2 had represented the claimant from 2007 through the approval of the stipulation on May 8, 2014. The attorney fee was held in escrow by Law Firm 2. When a formal hearing was assigned to address the attorney fee conflict, Law Firm 2 requested a continuance but did not provide the Commissioner of documentation of the reason for the continuance. The continuance was not granted and Law Firm 2 never attended the formal hearing. At the formal hearing Law Firm 1 presented testimony and documentation regarding their representation of the claimant and the number of hours which they had worked on the case. Based on the evidence that was presented before her the Judge issued an order for a 50-50 split of the fee. On appeal at the Compensation Review Board, that decision was reversed because the Board was of the opinion that there should be a more solid evidentiary foundation for the ruling. The CRB had remanded the case for further evidentiary findings (essentially giving Law Firm 2 and opportunity to present its evidence). The Appellate Court reversed the CRB, however, stating that there was sufficient evidence in the record and the Board had not properly reviewed the appeal based on the appropriate legal standard. The Court noted that if there is a factual finding then the Board on appeal must affirm that decision if there is evidence in the record to support it. This case is one which will likely be cited quite a bit by appellants who are successful at the trial level but have a decision reversed on appeal at the CRB.

**HOLBROOK v. STATE OF CONNECTICUT/ DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT, 6398 CRB-1-20-8 (AUGUST 9, 2021)**

In this case the claimant fell while walking across a floor at work causing a knee injury. The respondent contended that the fall was idiopathic and therefore the injury should not be compensable. At the formal hearing the Judge concluded that the claim was compensable but did not articulate the basis for his opinion. During the pendency of the appeal the Supreme Court issued the decision in *Clements v. Aramark Corporation, ___Conn. ___, S.C. 20167 (June 24, 2021*); the CRB in this case stated that the holding in Clements is "idiopathic falls during the workday unrelated to the conditions of one's employment are not compensable under Chapter 568." In this case the claimant could not recall why she fell but she seemed to recall other people had fallen on the same area of the floor; she also said that her hair had been wet when she fell and that it had been raining earlier in the day. The Board indicated that they are not allowed to speculate why the Judge made his decision, citing *Aylward v. Bristol Board of Education, 5756 CRB-6-12-5 (May 15, 2013), aff'd, 153 Conn. App. 913 (2014) (per curiam).* The CRB held that the "Commissioner still must identify the factual basis wherein this injury arose out of her employment…such evaluation must include a determination as to how the subordinate facts link the injury to a condition of her workplace and support the legal conclusion of compensability." The Board found that this was not done and remanded the case back to the trial Judge to "articulate the basis for his conclusion." We expect respondents to raise numerous defenses to these types of claims following the Clements decision.

**Smith v. Sedgewick Claims Management Systems, 6406 CRB-1-20-12 (August 19, 2021)**

This is a case that every adjuster who works at home should read. It involves two appeals to the CRB regarding the same claim. 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 allegedly went to get a drink downstairs. The claimant alleged that she fell on the stairs and hurt her shoulder. She did not immediately report this to her supervisor. In fact, the claimant 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 trial Judge, without commenting on the relative credibility of the witnesses, initially dismissed the claim. The CRB in the first appeal in the case, **Smith v. Sedgewick Claims Management Systems, 6351 CRB-1-19-10 (Nov. 5, 2020),** noted that the trial Judge did not explain why the claim was dismissed; the CRB described the trial Judge's decision as "opaque." The CRB remanded the case back to the trial Judge for a detailed articulation of his decision. On remand the trial Judge articulated the reasons for the dismissal including: he did not find the claimant credible, the claimant did not report the injury immediately, she did not advise her co-workers of the injury and the fall did not occur during her scheduled work hours. The claimant again appealed that decision but the Board affirmed the dismissal stating that it was a factual decision and within the discretion of the commissioner to deny the claim.

**GEORGE KELLY, M.D. v. STATE OF CONNECTICUT/DEPARTMENT OF MENTAL HEALTH & ADDICTION SERVICES, 6404 CRB-8-20-9 (September 8, 2021)**

The CRB affirmed a Finding of the Judge that the claimant was entitled to workers' compensation benefits due to injuries sustained while he was working as a staff psychiatrist and assaulted by a patient, however, the Board also affirmed the Commissioner's dismissal of a claim for full salary under General Statutes Section 5-142(a). Section 5-142(a) provides full salary to certain Department of Mental Health and Addiction Services employees if they are assaulted in the course of their work. The claimant was hired as a psychiatrist in 2013 to work at Connecticut Valley Hospital, a State-run mental health institution. The claimant was hired as a "per diem" psychiatrist meaning that he would be paid a higher wage but not entitled to "retirement benefits, health insurance, life insurance, paid leave, longevity or other economic benefits." In 2017 the claimant was assaulted by a patient and was totally disabled. The administrator for the State initially began paying the claimant 100% of his average weekly wage which was $7,039.63; the claimant also received voluntary agreements for a claim under Section 5-142(a). Eventually the State changed its position and contended that due to the claimant's "per diem" status he was not entitled to benefits under Section 5-142(a) and was not due any workers' compensation benefits at all. The Judge concluded that the claimant was an employee at the time of the assault and was due workers' compensation benefits; the Judge determined, however, that given the claimant's "per diem" status he was not entitled to Section 5-142(a) benefits. The regular temporary total rate was $1,292 compared to the $7,039.63 he would have been entitled to under Section 5-142(a). In reaching his decision the Judge had to consider the terms of the union contract and had to interpret changes made for the addition of "per diem" clinical staff.

**HATHAWAY V. CITY OF BRIDGEPORT, 6383 CRB-4-20-3 (SEPTEMBER 17, 2021)**

The Compensation Review Board found that the claimant, a firefighter with the City of Bridgeport since 1988, had filed a timely hypertension claim under General Statutes Section 7-433c and affirmed the finding of compensability issued by the Judge. Upon his employment with the City of Bridgeport the claimant passed a pre-employment physical. Thereafter, the claimant was given yearly physicals through the City of Bridgeport; many of the physical examinations were performed by a nurse practitioner. During the period 2009 through 2014 the claimant had elevated blood pressure readings at the yearly physical examinations. Following some of these examinations the nurse practitioner recommended that the claimant follow up with his internist to address the elevated blood pressure; in 2011 the nurse practitioner sent a letter to the claimant in this regard. The nurse practitioner in 2015 and 2016 diagnosed in her notes that the claimant had uncontrolled hypertension, however, she could not recall whether she specifically told the claimant that he had hypertension. In a 2016 examination the nurse practitioner stated that the claimant had to go to his internist right away and that if he did not make an appointment she would take him off work. The claimant was seen by an internist on December 15, 2016 who diagnosed hypertension and placed the claimant on medication for hypertension. The claimant

filed a notice of claim for compensation for benefits under Section 7-433c in 2017; the respondents contested the case contending that the claimant did not file a timely claim since he was alleged to be well aware of his hypertensive condition long before the filing of the claim in 2017. There was testimony by a cardiologist, Dr. Rocklin, that the claimant may have had "whitecoat hypertension" before December 2016 but not a diagnosis of hypertension. The respondents had an examination with Dr. Krauthammer, a cardiologist, who concluded that the claimant had hypertension more than one year before December 15, 2016. The trial Judge found Dr. Rocklin's testimony more credible than that of Dr. Krauthammer regarding when the claimant was actually diagnosed with hypertension; the commissioner also determined that the nurse practitioner was credible when she testified that she could not recall using the term hypertension when speaking to the claimant and her examinations. Applying the rule found in char Ciarlelli v. Hamden, 299 Conn. 265 (2010), both the trial Judge and the Board determined that the claimant was not advised that he had hypertension until 2016 and therefore the 2017 notice of claim was timely filed.

**GAUDET V. CITY OF BRIDGEPORT POLICE DEPARTMENT, 6337 CRB-4-19-7 (SEPTEMBER 8, 2021)**

In this case the CRB affirmed a dismissal for heart and hypertension benefits under Section 7-433c for the City of Bridgeport Police Chief. Section 7-433c benefits for heart and hypertension were eliminated by statute for new police officers hired after July 1, 1996. The claimant had worked as a police officer for the City since 1983, however, in 2010 he was given the opportunity to be the Police Chief. In order to become Police Chief, he was required to retire and seek his pension rights; he did so and then became the Police Chief from 2010 to 2016. In 2015 the claimant was diagnosed with hypertension and sought benefits under Section 7-433c. The City denied the claim contending that he had been hired as Chief in 2010 and therefore he did not meet the requirements of Section 7-433c, that is, to be hired prior to July 1, 1996. The trial Judge and the Board agreed that the retirement in 2010 as a police officer served to cut off the claimant's entitlement to pursue benefits under the statute.

**SALERNO V. LOWE'S HOME IMPROVEMENT CENTER, 601072205 (AUGUST 25, 2021)**

In this Trial Judge decision the claimant alleged a back injury due to repetitive trauma. He underwent fusion surgery in 2013. He has been out of work and on SSDI since December 2012. He filed a motion to preclude that was granted; the respondents appealed that decision all the way to the Appellate Court but the decision granting the preclusion was affirmed by the Court. Both the treating doctor and RME established causation. A vocational specialist found the claimant unemployable. Notwithstanding this evidence the respondents had not accepted the claim and had not paid the claimant benefits except for a $15,000 advance. At a formal hearing the judge found the

respondents denial of the claim in “bad faith” and ordered indemnity benefits to be paid back to December 2012. Additionally, the Judge ordered attorneys fees to be paid of $35,000 and $500 per week fine pursuant to Section 31-288(b)(1) from December 12, 2012 to August 24, 2021 (452 weeks) for a total fine of $226,000. Respondents should be aware of this decision regarding the payment of benefits. If payments are owed and the medical evidence supports that they are related to a work injury, then benefits should be paid timely; this is the right thing to do and will also avoid exposure for fines and attorneys fees. Also, before focusing in on the defense of a motion to preclude, respondents, in general, should look at the facts of the case to see if the matter is compensable and, if it is, then seek to resolve the outstanding issues.

**BASSETT V. TOWN OF EAST HAVEN, 6410 CRB-3-21-1 (OCTOBER 22, 2021)**

The Compensation Review Board affirmed a dismissal in a claim where the employee sustained a traumatic amputation of his hand after igniting an explosive device which he found in the course of his work. The claimant was a 29-year-old supervisor of a summer youth program for a municipality. In the course of this job the claimant would supervise and assist teenage workers in cleaning up areas of East Haven. During the course of picking up an area outside a school the claimant found a “small brown sphere with paper wrapped around it, foil stuck on it, and the wick attached thereto.” The claimant had a lighter which he used to light the wick; the sphere exploded causing serious injuries and an amputation of the hand. The respondent Town acknowledged that the claimant’s injuries occurred during the course of his work but did not arise out of his work. The trial Judge concluded that “his intentional lighting of the wick broke the chain of causation with respect to the scope of his employment and that the claimant’s resulting injuries did not “arise out of” his employment.” There was no finding of serious and willful misconduct. In affirming the dismissal, the Board cited the case of *Sapko v State, 305 Conn. 360 (2012)*, regarding proximate causation. The CRB noted that the requirement that an injury “arise out of” employment relates to the origin and cause of the accident.

**DIAZ V. CITY OF BRIDGEPORT, ____Conn. App.____ ,AC 44104 (November 9, 2021)**

The claimant was awarded a permanent partial disability award under General Statutes Section 7-433c for his heart condition; the award called for a payment of 245 weeks at a rate of $551.13 per week beginning in February 2020. The claimant sought a “commutation” or lump sum payment of the last 123 weeks of the award to pay his property taxes and credit card debt. The trial Judge approved the award commutation at a discount of 3%. The municipality objected claiming the claimant received a double recovery, was being paid at higher than the maximum rate allowed in view of the commutation, and that it violated the cap provisions of the hypertension statute. The CRB

affirmed the commutation as did the Appellate Court in this decision. The Court held that there was no double recovery and that the commutation order should not be considered when applying the cap pursuant to General Statutes Section 7-433b(b) or the maximum rate statute, General Statutes Section 31-309(a).

**TESTA V. REGAL CARE OF WEST HAVEN LLC, 300125852 Third District (OCTOBER 14, 2021)**

**Attorney Christopher Buccini of SDAZ** successfully defended a claim for attorney fees and penalties in the 3rd District in New Haven. The claimant suffered compensable injuries to her shoulder in the Fall of 2019 which did require medical treatment but no lost time. The claimant alleged that she re-injured her shoulder in the spring of 2020 while working for the same employer who had switched insurers. Attorney Buccini represented the subsequent insurer and maintained that the claimant's need for treatment and benefits were the result the responsibility of the 2019 claim while the carrier for the 2019 injury raised a Hatt defense and refused any advances of benefits despite the treating physician implicating their date of loss as the main contributing factor to the claimant's ongoing shoulder issues and disability. The claimant's attorney requested attorney's fees and penalties against both carriers, alleging that both carriers unduly delayed benefits owed to the claimant. The presiding Administrative Law Judge dismissed all claims for penalties and fees against Attorney Buccini's client while awarding a significant penalty and attorney's fees against the prior carrier.

**SMITH V. TOWN OF OLD LYME, 800189947 8th District (September 30, 2021)**

**Attorney Christopher Buccini of SDAZ** secured a complete dismissal in connection with an occupational disease claim in the 8th District. The claimant's widow alleged that the claimant, who died as a result of mesothelioma, developed this disease as result of occupational exposure to asbestos while working for two employers. In a dueling-expert case, the presiding Judge found that there was insufficient factual and medical evidence to support the claimant widow's position that his employment with Attorney Buccini's client was a substantial contributing factor to his development of mesothelioma and resulting death. The presiding Judge did find that the claimant's widow had sustained her burden of proof with respect to the co-respondent employer and issued a significant award of retroactive and ongoing benefits.

**O'DONNELL V. GLOBAL MEDICAL RESPONSE INC., 6415 CRB-7-21-2 (November 4, 2021)**

The Compensation Review Board affirmed a formal hearing decision which relied heavily on the testimony of the respondent's psychiatric examiner, Dr. Kenneth Selig. The claimant sustained a compensable psychiatric, head and neck injury as a result of an assault by a patient during the course of his work as an emergency medical technician. A voluntary agreement was issued. The claimant did return to work on a part-time basis for two years, however, he was then laid off and made a claim for total disability benefits. The claimant was placed on total disability benefits. Dr. Selig examined the claimant and determined that the claimant did not have PTSD but rather had an anxiety disorder which was not substantially related to the work accident. Dr. Selig opined that the claimant had a 5% impairment of the brain and that the claimant was capable of work. Dr. Selig noted that diagnostic testing such as CT scan of the head, MRI of the brain, and EEG's were normal. He disagreed with the opinion of Dr. Williams, a treating psychiatrist, that the claimant had an impairment rating of 60 to 70% of the brain. The Board affirmed the Judge's finding that Form 36 should be approved and permanency paid based on the 5% rating of Dr. Selig. The CRB also affirmed the Judge's conclusion that a seizure disorder was unrelated to the work assault based on the testimony of a treating neurologist. The Board agreed with the Judge's ruling that the respondents were not liable for any additional medical treatment.

**CHOLAKIAN V. CITY OF BRIDGEPORT POLICE DEPARTMENT, 6295 CRB-4-18-10 (November 4, 2021)**

The claimant was a police officer for the City of Bridgeport. The claimant alleged that he sustained a left knee injury when he was at a firing range and had to get down on his right knee to shoot. The claimant contended that following the episode he was limping around the firing range. A video of the event, however, demonstrated that the claimant was moving freely. Two witnesses were presented in support of the claim, however, the Administrative Law Judge found them unreliable. The Judge dismissed the claim concluding that "the claimant was not credible and persuasive with respect to his mechanism of injury." The Compensation Review Board on appeal affirmed the dismissal of the claim. The CRB noted that the Administrative Law Judge is given "great latitude" to determine whether claimant's testimony as to the mechanism of injury is consistent with the video evidence of the event.

**GUSTAFSON v. A. DUIE PYLE, INC., 6408 CRB-3-20-12 (NOVEMBER 18, 2021)**

The Compensation Review Board affirmed the decision of the Administrative Law Judge which found that a cervical spine surgery was compensable and the treatment was a reasonable; in doing so, the Board and the Judge both rejected the opinion of the CME physician. The claimant first had a work injury involving his neck in 2017; that injury apparently resolved. The RME doctor for that injury suggested that the claimant had a right-sided cervical strain. Thereafter, on May 21, 2018 the claimant sustained a new cervical injury at work while lifting with a different employer. The claimant's symptomatology was predominantly on the left side. The claimant underwent neck surgery involving a fusion at C5-6 in November 2018. Following the surgery the left-sided symptoms were relieved but the claimant began to have right-sided symptoms post-surgery. The treating orthopedic suggested that the claimant needed further surgery and related it to the 2018 accident. A RME with Dr. Jambor was performed and he concluded that the condition was due to the 2018 accident; after being informed about the 2017 injury Dr. Jambor determined in an addendum that the condition was due to a combination of the 2017 and 2018 accidents. A CME was performed by the neurosurgeon, Dr. Alan Waitze. He concluded that the proposed surgery should not be performed and that the neck condition was not due to the 2018 accident. The claimant processed the disputed surgery through his personal health coverage and had a good recovery; he was able to return to work. The trial Judge accepted the opinion of the treating doctor and rejected the opinion of the CME, concluding that the surgery was reasonable and related to the 2018 accident. The CRB affirmed stating that "there is no legal presumption of credibility for any expert in a workers' compensation case." This case again demonstrates trial Judges do not have to abide by the opinion of the CME and can choose to accept another expert opinion if they deem it more credible. The CRB rejected the respondent's argument that the Judge improperly relied on the treating doctor's opinion since the treating doctor was not aware of the prior workers' compensation claim. The fact that the claimant had a good result and returned to work after the second surgery seemed to influence the trial Judges decision that the surgery was reasonable.

## LEGISLATIVE UPDATE

# 2021 LEGISLATIVE REPORT

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The 2021 legislative session came to a close July 9, 2021 with a flurry of activity related to the Workers' Compensation Act in the closing days and then again during the special session that addressed the implementer bill. As a result, there are a number of new public acts which the practitioner will certainly want to review whether representing the claimant or a respondent.

**PUBLIC ACT 21-107 (SENATE BILL 660) "An Act Expanding Workers' Compensation Benefits for Certain Mental or Emotional Impairments Suffered by Health Care Providers in Connecticut with COVID-19"** was effective upon passage June 30, 2021. The new law redefines post-traumatic stress disorder as post-traumatic stress injury, notwithstanding that the diagnosis must still meet the criteria for PTSD as specified in the most recent addition of the "Diagnostic and Statistical Manual for Mental Disorders."

Despite the title of the new law, the now "eligible individuals" qualifying for coverage for an event on or after July 1, 2019 has been expanded beyond police officer, parole officer or firefighter to include emergency medical services personnel, Department of Correction employees and telecommunicators. Health care providers join the eligible group when encountering a qualifying event on or after March 10, 2020.

The new law primarily addresses Subsection 16 of Section 31-275 and rewrites Section 31-294k. The workings of and the benefits available pursuant to Section 31-294k remain the same. In the case of a telecommunicator, however, the term "witnesses" will mean that the dispatcher hears by telephone or radio while directly responding to an emergency

call that which constitutes a qualifying event under the established law and while providing a dispatch assignment.

Health care providers as defined means:

> (A) a person employed at a doctor's office, hospital, health care center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, group home, home health care provider, any facility that performs laboratory or medical testing, pharmacy or any similar institution, or (B) a person employed to provide personal care assistance as defined in Section 17b-706 in or about a private dwelling provided such person is regularly employed by the owner or occupier of the dwelling for more than twenty-six hours per week.

The Act also references that a health care provider must be engaged in activity substantially dedicated to mitigating or responding to the public health and civil preparedness emergencies declared by the Governor on March 10, 2020 or any extension thereof.

As such, the health care provider will qualify for benefits in the event he or she:

(i) Witnesses the death of a person due to COVID-19 or due to symptoms that were later diagnosed as COVID-19;

(ii) Witnesses an injury to a person who subsequently dies as a result of COVID-19 or due to symptoms that were later diagnosed as COVID-19;

(iii) Has physical contact with and treats or provides care for a person who subsequently dies as a result of COVID-19 or due to symptoms that were later diagnosed as COVID-19; or

(iv) Witnesses a traumatic physical injury that results in the loss of a vital body function of a person due to COVID-19 or due to symptoms that were later diagnosed as COVID-19.

As noted above, the indemnity provisions of Section 31-294k remain the same to the extent that there is a 52 week cap on benefits and a bar to awarding benefits beyond four years after the qualifying event. The practitioner will also recollect that this section prohibits payment of benefits pursuant to Section 31-308(b) and Section 31-308(a).

**PUBLIC ACT 21-18 "An Act Concerning Minor and Technical Changes to the Workers' Compensation Act." (SENATE BILL 907)** was the joint bill submitted by the Chairman and the Executive Committee's Legislative Subcommittee as guided by Attorney Bud Drapeau. The Public Act has been signed by the Governor and is effective

October 1, 2021.

Section 1 substitutes the term “administrative law judge” for any reference to the commissioners not only in the current statute but with respect to all pending legislation.

Section 2 amends Section 31-280a(c) by reducing the number of meetings of the Advisory Board to once each calendar quarter (rather than twice).

Section 3 repeals Section 31-283f regarding the Statistical Division and substitutes language which eliminates the full-time salaried director appointed by the Chairman to administer the division.

Section 4, the final request of the Chairman’s office, substitutes new language to Section 31-298 eliminating the term “cassettes” relative to the release of audio recordings.

Section 5 begins those changes suggested by the Legislative Sub-Committee of the Executive Committee (except as noted below). Section 31-349 is subject of substantive language which eliminates references to transfer of liability and the notice provisions, making for a much shorter statute. The law continues to reference that the amount of disability paid is less any compensation payable or paid with respect to the previous disability. The existing language defining that which is payable or paid remains.

Section 6 and Section 7 make technical changes to conform Sections 31-354 and 31-355 by eliminating references to 31-349(f) and Section 31-349(c) transfer references.

Section 8 of the new law repeals three obsolete provisions eliminating (at the Chairman’s request) Section 31-276a which transferred the Workers’ Compensation Commission to the Labor Department for administrative purposes only. Section 31-298, the medical panel provision which per the historians in our section, has not been used since the 1980s is eliminated. The anachronistic 31-304 allowing Superior Court judges to destroy VAs filed with the Clerk of Superior Court greater than ten years in age is also eliminated. That particular procedure was associated with appeals prior to the establishment of the Compensation Review Division.

**SPECIAL ACT 21-35 "An Act Establishing a Task Force to Study Cancer Relief Benefits for Firefighters"** was effective on passage July 12, 2021. The new law results from a modification of an earlier pending bill at the legislature that sought to establish presumptions for cancers contracted by firefighters. The new law will establish a task force to study cancer relief benefits for firefighters. This study is to include, but is not limited to, an examination of the adequacy of the cancer relief program established pursuant to Section 7-313j and the feasibility and implications of providing workers' compensation and other benefits including death benefits to firefighters who are diagnosed with cancer acquired as a result of occupational exposure to noxious fumes and poisonous gases. Among the members of the task force will be an individual with expertise in the state's workers' compensation program, one with expertise in cancer research, as well as a representative of the Firefighters Labor Organization. Both

municipal paid and volunteer fire departments will be represented by a member as well. The twelve member task force is to report its findings and recommendations to the Labor Committee not later than January 1, 2022, at which time the task force will terminate.

As has been noted at the time of prior reports and presentations, the legislative session is truly not over until the budget implementer is reviewed and passed in both chambers. This year's implementer, **SSPA21-2 (Senate Bill 1202)** added a number of changes to the Act by way of a simple exercise of power by the Democratic majority which sought to preserve proposed changes that it may have viewed as lost by Republican efforts to delay or filibuster. As a result, vestiges of House Bill 6478 appeared in the special session's implementer. At Section 290, effective upon passage June 15, 2021, Section 31-290a is expanded to prohibit employers from discharging or disciplining an employee for exercising his or her rights under the Act. The amendment to 31-290a will also provide relief in the event an employer deliberately misinforms or deliberately dissuades an employee from filing a workers' compensation claim for benefits or, on or after October 1, 2021, a claim for payment of benefits from the Connecticut Essential Workers' COVID-19 Assistance Fund. (See herein.)

Section 291 of the special session law substitutes new language in Section 31-306 as of June 15, 2021 increasing the amount to be paid for burial expenses to $12,000.00 for an employee that dies on or after the effective date of the law. Thereafter, on January 1, 2022 and each January thereafter the compensation for burial benefits will be adjusted by the percentage increase in the consumer price index for urban wage earners and clerical workers in the northeast as defined in the United States Department of Labor's Bureau of Labor Statistics.

Practitioners will remember that House Bill 6478 had proposed an increase to $20,000.00 in addition to the adjustment under the consumer price index. The Workers' Compensation Executive Committee had expressed support for the sum of $7,500.00. Whether the $12,000.00 figure was ever the subject of public hearing discussion will need to be reviewed.

**SECTION 289** of **SSPA21-2** establishes the **"Essential Workers COVID-19 Assistance Program."** The program becomes effective October 1, 2021. The program, which this writer believes is funded by federal monies from the American Recovery Act, will provide benefits on a first-come, first-served basis through June 30, 2024. The program will provide benefits to essential workers for lost wages, out-of-pocket medical expenses and/or burial expenses. Compensation is provided without the need to prove that the illness arose from employment.

Under the new law, an "affected person" who is an "essential employee" will qualify for relief if he or she died or could not work due to contracting COVID-19 or symptoms later diagnosed as COVID-19 between March 10, 2020 and July 20, 2021.

Applying for benefits requires proof by way of a positive laboratory test or a diagnosis documented by a licensed physician, physician's assistant or APRN. During the 14

consecutive days immediately before death or inability to work, the applicant must not have worked solely from home with no physical interaction with other employees or have received an individualized written offer or directive to work solely from home. "Affected person" does not include federal employees who qualify for benefits under the COVID-19 presumptions included in the American Rescue Plan of 2021. Essential employees able to apply for relief from the program are those employed in a category that the Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices as of February 20, 2021 recommended to receive a COVID-19 vaccination in phase 1a or 1b of the program. The legislative commissioner's office noted that these individuals would include health care personnel, firefighters, police officers, corrections officer, food and agricultural workers, manufacturing workers, grocery store workers, public transit workers, education sector workers and child care workers.

The program's administrator is to be the Office of the Comptroller or a third party administrator yet to be appointed. The bill authorizes the administrator to establish the program and provides a manner in which to consider evidence that does not require strict rules but rather representations under oath. The administrator has a number of obligations that include controlling administrative costs not to exceed 5% and as of January 1, 2022, to submit monthly reports. The practitioner who seeks to assist an applicant to this program should review procedures outlined within the new special act.

The program will provide weekly benefits for all uncompensated leave calculated at 75% of the claimant's net average weekly earnings but not to exceed the average weekly earnings of all workers in the state. The earnings relevant for purposes of calculating the average weekly wage are those earned in the 8 weeks immediately preceding the date unable to work. The program will provide a $3,000.00 burial expense.

Of note is that a pending workers' compensation claim will not prevent the administrator from approving the person's claim for benefits. Any subsequent workers' compensation benefits, however, will be offset by the assistance received from the program. The administrator is to notify the Workers' Compensation Commission of any available offsets.

An affected person who seeks to have his or her application reconsidered can file an appeal with said review being conducted by the administrator's designee who will conduct a de novo review and from which there is no further appeal. On balance, this program provides an alternative to workers who contracted COVID-19 who may have difficulty proving their case by more traditional methods under the Workers' Compensation Act.

Practitioners who are reviewing the legislative website should also be aware that **PUBLIC ACT 21-110 is entitled "An Act Concerning the Office of the Correction Ombuds, the Use of Isolated Confinement, Seclusion and Restraints, Social Contacts for Incarcerated Persons and Training and Workers' Compensation Benefits for Correction."** This public act is the former Senate Bill 1059 which contained a provision to include Department of Corrections employees as protected workers for purposes of post-traumatic stress injury. With the passing of Senate Bill 660, however,

that language was stricken. The assumption is that the title of the Act may be corrected before the final legislative record is created.

**PUBLIC ACT 21-157 "An Act Concerning the Insurance Department's Recommendations Regarding the General Statutes"** contains a provision that eliminates the Insurance Commissioner's requirement to submit reports to the Joint Standing Committee of the General Assembly relative to Section 31-290d. In addition to workers' compensation fraud claims, the commissioner need no longer provide reports relative to health insurance fraud or fires by arson.

Please note that Commissioner Barton's reappointment was confirmed and congratulations to him are in order. As all are aware, Chairman Morelli reinstated all timelines and filing requirements as of June 2, 2021. In person hearings recommenced effective July 1, 2021.

On a final note, please be aware that the implementer also contains a provision that instructs the Governor to establish the second week of February each year as "Kindness Week" so as to promote special acts of kindness. The Governor will be required to formulate suitable exercises to be held in the state capitol or elsewhere in recognition and observance of the week so as to promote it with residents of the state. Given some of the acrimony caused during this year's special session over the implementer bill, I remain hopeful that the legislators will recognize the second week of February as well.

As always, the status and the full text of proposed legislation and the new public acts can be viewed on the General Assembly website, cga.ct.gov.

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