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In This Issue...

JOB OFFER NOT REQUIRED WHERE CLAIMANT'S REFUSAL TO ACCEPT PRIOR JOB DONE IN BAD FAITH

By Matthew B. Esslinger, Esquire

Over the past years the costs of medical bills and medical liability in the workers' compensation setting have steadily increased. Many doctors continue to prescribe ongoing treatment, including narcotics, without any indication of lasting improvement, increase in function, or decrease in pain levels. However, on December 2, 2011, with the Commonwealth Court's issuance of J.D. Landscaping v. WCAB (Heffernan), 31 A.3d 1247 (Cmwlth. 2011), this problem reached new heights and presented new risks for employers and insurers, as the court awarded death benefits based on an employee overdosing on narcotics for his prescribed work injury.

In Heffernan, the employee sustained a work injury in 2002 that was originally accepted as a low back strain but then expanded to include a herniated disc at the L4-5 level. In March of 2006, the employer filed a utilization review request challenging the reasonableness and necessity of all treatment prescribed by Dr. George Rodriguez, on or after March 15, 2007, including medications. On June 4, 2007, the utilization reviewer found that all treatment by Dr. George Rodriguez, including prescriptions for Sonata, Fentanyl, Oxycodone, Fentora, Docusate, and Lyrica were not reasonable and necessary from February 15, 2007, and ongoing into the future. Dr. George Rodriguez initially filed an appeal of that determination but later that was withdrawn.

On June 18, 2007, the employee was found dead with a box of Fentanyl patches. An autopsy revealed that the employee died from drug intoxication due to an overdose of Fentanyl prescribed for his work injury. A fatal claim petition was then filed alleging that his death was due to the work injury. During the hearing, Dr. George Rodriguez testified that his practice included himself along with his

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sister, Dr. Daisy Rodriguez. The testimony demonstrated that both doctors understood the utilization review process and due to the utilization finding that Dr. George Rodriguez's treatment, including his prescriptions, were not reasonable and necessary and that the pharmacy would not fill those prescriptions due to the utilization review finding. Working within that understanding, Dr. George Rodriguez told Dr. Daisy Rodriguez to "handle the situation" and she was free to prescribe whatever treatment she felt appropriate. Dr. Daisy Rodriguez testified that she felt that "this was purely just an issue of replacing prescriptions," and proceeded to write a prescription for the employee on June 16, 2007, giving the employee the same prescriptions written by Dr. George Rodriguez on June 14, 2007, which included the Fentanyl patches. The Workmen's Compensation Judge granted the Fatal Claim Petition and awarded fatal claim benefits. In granting the Fatal Claim Petition, the WCJ noted that while Dr. George Rodriguez was subject to the utilization review determination that his treatment was not reasonable and necessary, his sister, Dr. Daisy Rodriguez, was not subject to that utilization review determination. The WCJ further found that neither Dr. George Rodriguez nor Dr. Daisy Rodriguez scheduled their visits and treatment of patients to get around the utilization determination, citing that Dr. Daisy Rodriguez was free to agree or disagree with Dr. George Rodriguez' plan of care. The employer appealed acknowledging that utilization determinations are provider specific, but arguing that the utilization review determination should nevertheless apply as Dr. Daisy Rodriguez wrote prescriptions identical to those issued by Dr. George Rodriguez two days earlier and with knowledge of the UR determination. The Workers' Compensation Appeal Board affirmed the WCJ. The Commonwealth Court affirmed as well, stating that UR determinations do not address causal relationship. Moreover, based on that principle, the court found that the June 2007, utilization review determination finding that Dr. George Rodriguez' treatment including prescriptions was irrelevant to the fatal claim issue of whether an employee's death is causally related to the work injury.

This case demonstrates the shocking result of both excessive use and abuse of narcotics and the current utilization review process that is not treatment specific but rather provider specific. That element of the utilization review process allows employees who receive unfavorable utilization review results to simply go to a different provider and receive exactly the same treatment. While the above events based on the very short time periods between the utilization review decision and the overdosing would be very difficult to prevent, insurers and employers can reduce the risks associated with ongoing treatment, including narcotics, by continuing to review medical bills and the amount of treatment. That information can then be used to determine whether a prospective utilization review would be warranted and beneficial. In making this determination, in addition to considering the amount and frequency of the ongoing treatment, including use of ongoing narcotics, it is also important to review the corresponding medical reports with an eye towards whether the ongoing treatment demonstrates any improvement in pain levels or functions. In many cases, employees may receive years of ongoing unchanged treatment and medications, despite the fact that the employee has no increase in their function, ability to return to work, or a decrease in their pain levels. This scenario was demonstrated in the recent case of Leca v. WCAB (Philadelphia School District), 39 A.3d 651 (Pa. Cmwlth. 2012).

In Leca, the employer filed a prospective utilization review request to determine the reasonableness and necessity of a claimant's chiropractic care beginning on February 14, 2008, and ongoing. The utilization review determination found the treatment reasonable and necessary. The employer appealed via a Petition for Utilization Review. In support of same, it offered an October 2007, IME report from an orthopedic surgeon who, following an examination of the claimant, noted that while the chiropractic treatment claimant was receiving at that time provided temporary relief it offered no overall improvement in his pain complaints. It should be noted that to avoid a possible imposition of unreasonable contest attorneys' fees, whenever an employer is appealing an unfavorable utilization review determination they must have an IME or some medical evidence demonstrating that the treatment at issue is unreasonable and unnecessary. The IME doctor further noted that at the time of his exam, the claimant had constant numbness, could not stand or walk, could only sit for a few minutes and had constant pain ranging from 7-10 on a scale of 1-10. Based on those findings, the IME doctor found that the claimant was a candidate for lumbar surgery and his ongoing chiropractic treatment could not be justified due to the lack of improvement in his condition. The employer also had a records review performed wherein the doctor, also an orthopedic surgeon, found that based on the claimant's records the doctor could find no improvement in the claimant's condition despite treatment for three and a half year period. The doctor referenced that despite medications, adjustments, and therapy, claimant's pain was the same and in some instances worse. The doctor further stated in her report that the primary purpose of the chiropractic treatment, passive modalities, and physical therapy was to restore function, and in the

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absence of objective evidence that said treatment resulted in an increase in function, the continued treatment would not be reasonable.

Conversely, the claimant submitted a contrary records review which found that while the treatment at issue extended well beyond the typical standards of care, the documented subjective complaints and positive objective findings supported the treatment under review. Following a review of the evidence, the WCJ granted the employer's Utilization Review Petition. The WCJ noted that because the IME doctor examined the claimant that doctor was in a better position to render an opinion regarding the effect of the treatment at issue. On appeal, the Commonwealth Court rejected the claimant's attempt to liken the above facts to other case law wherein the court found that the employer had to offer evidence that referenced a specific procedure involving the implantation of a spinal cord stimulator, and found that unlike that scenario the treatment involved here was not directed towards specific procedures, but rather, medical treatment that was repetitive and ongoing in nature. The court found that the doctor's findings that the treatment at issue in Leca was not justified based on the lack of evidence that such care resulted in increased function or decreased pain, supported the finding that the treatment was not reasonable and necessary. The court further noted that contrary to the claimant's argument on appeal the orthopedic doctors relied on by the employer were competent to review a chiropractor's treatment. The court reasoned that the Act only requires that the utilization reviewer reviewing doctor be of the same like practice as the provider under review and did not apply to the challenge of a utilization review determination.

The above case illustrates the benefits of reviewing not only medical bills for the amount and frequency of the treatment but also reviewing the medical records accompanying them. A careful review of medical records, with an eye towards whether the ongoing treatment and medications is improving function and/or pain will allow employers and insurers to determine whether a utilization review is warranted. This approach can help to prevent extreme events, such as those demonstrated in Heffernan, as well as to reduce the ever rising medical costs associated with ongoing treatment that offers no benefit.

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Assignment of Legal Malpractice Actions Disfavored by the Court

By Josh J. T. Byrne, Esq.

Assignment of legal malpractice actions is an interesting topic. As a general concept, assignment of legal malpractice claims is disfavored. Gurski v. Rosenblum and Filan, LLC, 276 Conn. 257, 271, 885 A.2d 163, 170 (Conn. 2005) (listing fifteen different jurisdictions which do not allow the assignment of legal malpractice claims). Pennsylvania has allowed the assignment of legal malpractice actions. Hedlund Mfg. v. Weiser, Stapler & Spivak, 517 Pa. 522, 539 A.2d 357 (1988); Ammon v. McCloskey, 440 Pa.Super. 251, 655 A.2d 549 (1995). However, our Superior Court has recently ruled in the case of Frank v. Tewinkle 212 Pa. Super 2012, that champerty is a viable defense in assignment of contract cases against lawyers (the effect should be the same for legal malpractice cases). The first question for most people (attorneys included) will be, what is champerty?

The court helpfully gives a definition in its opinion: Long considered repugnant to public policy against profiteering and speculating in litigation, champerty is defined by Black's Law Dictionary (8th ed.) as: [a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds;...an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.

The court held:
Under Pennsylvania law, if an assignment is champertous, it is invalid. An assignment is champertous when the party involved: (1) has no legitimate interest in the suit, but for the agreement; (2) expends his own money in prosecuting the suit; and (3) is entitled by the bargain to share in the proceeds of the suit. Internal cites deleted.

This is an interesting decision, which should continue to restrict the ability of actions against lawyers to be assigned, and help keep Pennsylvania from straying too far from the national consensus on the issue of assignment of legal malpractice cases.

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CHANGE IS IN THE AIR

by Shae Chasanov, Esq.

The Delaware Supreme Court has issued a recent ruling that changes "the Delaware way." This decision is Christian v. Counseling Resource Associates, Inc. It was decided on January 2, 2013 and it impacts the way missed deadlines imposed in the court's scheduling order must be handled. Ignoring this decision will place your client in a precarious position, as opposing counsel may be permitted to introduce never before seen evidence on the eve trial.

Drejka and the History Behind Christian

Delaware Superior Court and Supreme Court have addressed litigants' failure to comply with the trial court's scheduling order in numerous decisions. The case law commonly relied upon is Drejka v. Hitchens Tire Serv. Inc., 15 A.3d 1221 (Del. 2010).

The Drejka decision involved a personal injury lawsuit in which the plaintiff was injured while traveling on Route 1 near Smyrna, Delaware. A wheel fell off a nearby concrete truck and struck plaintiff's car, thereby causing injuries.

The Court established deadlines pursuant to its scheduling order. Plaintiff had until January 16, 2009 to submit any expert reports. It failed to do so until 4 months later, on May 5, 2009, at which time the plaintiff produced a report from her treating physician. Defendant Hitchens Tire Service filed a Motion in Limine seeking to preclude the plaintiff's reliance on the late produced expert report. The Superior Court agreed that the conduct was sanctionable, as plaintiff failed to comply with the scheduling order. As such, the trial court precluded plaintiff's reliance on the late produced expert report. Defendant then sought summary judgment, as the plaintiff could not make a prima facie claim of negligence without an expert. Summary judgment was granted.

The Supreme Court overruled the Superior Court's decision, as the preclusion of plaintiff's expert report was found to be an abuse of discretion. While the report's late production was sanctionable, a dismissal of plaintiff's claims was not appropriate.

The Supreme Court held that the trial court should balance the following 6 factors when late discovery issues arise:

(1) The extent of the party's personal responsibility;

(2) The prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;

(3) A history of dilatoriness;

(4) Whether the conduct of the part or the attorney was willful or in bad faith;

(5) The effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and

(6) The meritoriousness of the claim or defense

In short, the Supreme Court held that the preclusion of a plaintiff's expert due to non-compliance of a scheduling order is severe and should only be used as a last resort, when other sanctions have proven ineffective.

Facts & Background of Christian

The Delaware Supreme Court issued a new ruling on January 2, 2013, in Christian v. Counseling Res. Assoc. A strikingly similar issue was present in Christian, as the trial court precluded plaintiffs' experts from testifying at trial, as plaintiffs failed to produce their expert reports in accordance with the court's scheduling order. This again led to a dismissal of the lawsuit. As these issues are continuously presented to the Supreme Court, the Court used Christian to refine Drejka.

Christian involved a medical negligence claim. The trial court implemented a scheduling order, establishing various deadlines including expert deadlines and a trial date. The plaintiffs had to retain new counsel during the litigation, and therefore, the parties filed a stipulation to amend the deadlines for filing expert reports and the discovery cut-off date. No other dates were affected, and the trial court approved these extensions.

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Pennsylvania Supreme Court Clarifies Causation Standard in Asbestos Litigation

By Mohamed N. Bakry, Esq.

In the case of Betz v. PneumoAbex LLC, the Pennsylvania Supreme Court ruled that plaintiffs cannot rely on the theory that every fiber of inhaled asbestos was a substantial factor in causing the plaintiff's asbestos-related disease. This decision overturns previous Superior Court decisions (Tragarz v. Keene Corp., Howard v. A.W. Chesterton Co. and Estate of Hicks), thus forcing plaintiffs to prove that each product, on its own, was a substantial factor in bringing about the disease. Pennsylvania law requires that in order to provide a sufficient basis for liability, an exposure to a defendant's product must be a substantial contributing factor in causing the disease.

At trial, the plaintiffs relied on expert opinions asserting the "every fiber" theory: that every exposure to asbestos, regardless of time and level, substantially contributed to the development of the asbestos-related disease, as the basis for their case. This expert testimony was challenged by the defendants, who claimed that the "every fiber" theory was the result of a new scientific technique and was not generally accepted in the scientific community. Subsequently, a Frye hearing was held to evaluate the credibility of the expert testimony. In sustaining the challenge, the judge determined that the expert's methodology failed to support that the disease was a result of workplace exposure to asbestos and not to another source.

The Pennsylvania Supreme Court agreed with the use of a Frye hearing along with the judge's determination. The Court found further error in the expert's testimony by concluding that when an expert does not clearly articulate his methodology or when he draws conclusions outside of the scope of his scientific field, it is appropriate to scrutinize his findings under a Frye hearing. In this instance, the expert was a pathologist who would typically focus on diagnosing through empirical review, not on attributing specific causation. The Supreme Court additionally found that the expert's "every fiber" opinion was inconsistent with substantial cause principles of Pennsylvania law, which requires that exposure to a defendant's product be a substantial contributing factor in causing the disease and not one minor factor amongst many others.

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Recent Legal Malpractice Appellate Opinion Regarding Statute of Limitations

By Josh J. T. Byrne, Esq.

On February 19, 2013, the Superior Court issued an opinion in O'Kelly v. Dawson, 421 WDA 2012. The Superior Court's opinion by Judge Wecht upheld a legal malpractice verdict in favor of plaintiff, James O'Kelly who was represented by defendant/appellant, Michele S. Dawson, Esquire, in an underlying divorce. The primary allegation was the attorney had not finalized an alimony agreement between the spouses, and as a result, a less favorable alimony award was entered by the master in the divorce action. The appeal argued the spouses never agreed on all of the essential terms of the alimony agreement, and the statute of limitations barred legal malpractice action.

The Superior Court determined that the jury was presented with conflicting evidence with respect to whether the essential terms of alimony had been agreed upon, and found their decision that an agreement had been reached did not "shock the conscience." The Superior Court noted it could not put itself "into the jury's place."

The statute of limitations argument was not before the jury, but argued in a motion for summary judgment, as well as a post-trial motion. The appellant had requested the issue of statute of limitations not be sent to the jury, but be decided by the judge. The trial court found the statute of limitations was tolled by the equitable discovery doctrine until the date of the trial court order adopting the master's recommendation. On appeal, it was argued that no two reasonable minds could disagree the statue limitations barred the claim, and in the alternative, that the trial judge erred in not sending the issue to the jury with respect to the exercise of reasonable diligence by the husband in discovering the alleged error. The court noted appellant argued before the trial court that no two reasonable minds could differ in finding that the plaintiff knew, or should have known, of the potential malpractice as of the date of the master's recommendation, and therefore the issue should not go before the jury. The appellant succeeded as to process, "but failed as to substance." While recognizing this would usually be an issue for the jury, the Superior Court found appellant could not "now be heard to assert that the trial court erred in granting Appellant's request that the limitations issue be reserved for the court." The Superior Court found the argument that the issue should have been sent to the jury had been waived. The Superior Court found the trial court "necessarily made a factual finding as to Husband's reasonable diligence." The Superior Court noted that following the master's recommendation, appellant had advised the husband the trial court would reject the master's recommendation and order alimony to reflect the parties' proposed alimony agreement.

Judge Colville filed a dissenting opinion. The dissenting opinion was not published with the majority opinion.

Professional liability avoidance requires attorneys to be aware of the possibility of equitable tolling of the statute limitations. While Pennsylvania operates under a strict "occurrence rule" with respect to the statute of limitations, the statute may be tolled if an attorney offers reassurances of a positive result after an alleged act of negligence.

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CHANGE IS IN THE AIR

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The parties informally granted the plaintiff a second extension of time to produce expert reports by the end of January 2011. Plaintiffs requested a teleconference with the court in February 2011 to discuss the discovery schedule and conflicts by both parties with the trial date. The trial court denied this request and no conference was held.

Plaintiffs identified 3 experts in May 2011, offering two preliminary disclosures of their opinions. The 3rd disclosure was given in mid June 2011. On June 22, 1011, defendants filed a motion to preclude plaintiffs' expert testimony, which was granted. The Supreme Court found this to be an abuse of discretion, particularly because the court refused to address the plaintiffs' scheduling concerns raised at the time the teleconference was sought.

The Christian court recognized that the 6 Drejka factors are difficult to apply consistently, and therefore, the court added some "refinements" to afford greater predictability to litigants and trial courts. These refinements are addressed below.

The Significance of Christian

Pursuant to Christian, when a party grants an informal extension to opposing counsel, that party will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order. Also, if the trial court is asked to extend deadlines contained in the scheduling order, the trial date should not be altered by such extensions. If it is necessary to postpone the trial date, the trial will be rescheduled after all other trials already on the court's docket.

If litigants act without court approval, they do so at their own risk. If a party misses a discovery deadline, opposing counsel may act in 1 of 2 manners. It may (1) resolve the matter informally or (2) promptly notify the court. Such notification can be done through a motion to compel, through a proposal to amend the scheduling order or through a request for a court conference.

If the party chooses the first avenue and decides not to involve the court, he will waive his right to contest any late filings by opposing counsel from that time period forward. The court will not consider any motions to compel, motions for sanctions, motions to preclude evidence or motions to continue the trial once this occurs. If a party misses a deadline and opposing counsel fails to notify the court, the offending party will be permitted to introduce vital discovery on the eve of trial. The party prejudiced by this delay accepts this risk by failing to promptly alert the trial court when the first offense occurred.

If the party chooses the second avenue and promptly notifies the court, he will not waive his right to objection and preserves his right to future objections.

The Christian court acknowledges that parties can still avoid motion practice and agree to reasonable extensions, as has been done in the past. The difference now is that the parties must promptly file a proposed amended scheduling order for the trial court's signature. This agreement shows the trial court that the parties are able to meet the new deadlines and still be ready for trial. If the court finds that the new deadlines are too ambitious, a conference should be held to address those concerns.

Recommendations Considering Christian

When opposing counsel misses a deadline included in the scheduling order, a party should promptly notify the court, in essence to request court involvement. This allows a party to preserve its objections, including future objections that have yet to present themselves. To do otherwise, and fail to notify the court, serves to waive any objections on timeliness and permits the opposing counsel to introduce vital evidence the day before trial.

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NEWS & FIRM NOTES

Michael A. Cognetti, Esq., a partner in the Philadelphia Office, successfully argued before the Pennsylvania Superior Court regarding the regular use non owned exception under a policy of insurance issued by Erie Insurance. In Rother vs. Erie, the Superior Court agreed with defendant that the claimant's use of his father's vehicle on seven occasions over a two week period for the purpose of getting back and forth to work and for emergency purposes only was a regular use and habitual. Therefore, the claimant was precluded from recovering underinsured motorist coverage after being in a collision with an intoxicated driver.

Jeffrey B. McCarron, a partner in the firm's Philadelphia office and the Chair of the Professional Liability Group has been named Lawyer of the Year 2013 for Legal Malpractice Defense in Philadelphia by Best Lawyers.

Bradley K. Shafer, Esq., a partner in the firm's Wheeling WV office recently presented a CLE course on the implementation of the Affordable Health Care Act in St. Clairsville OH. The presentation was titled "What Every Employer Needs to Know About Health Care Reform."

Swartz Campbell LLC was recently named a Tier 1 Best Law Firm for Legal Malpractice Defense in Philadelphia by Best Lawyers.

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