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Recent Cases of Note *by John W. Zatkos, Jr., Esq.*

Case Boils Down to Who Has the More Credible Witness

In *Folmer v. WCAB (Swift Transportation)*, a closely divided panel of judges ruled that the testimony of two doctors was sufficient to prove the injured worker was feigning his symptoms, which are not outwardly visible.

Neil Folmer was injured at work in 1995 when a box of crowbars hit him in the face as he was unloading his truck. He suffered vertigo, cervical disc syndrome or cervical myalgia, and headaches and was granted full disability benefits. In 2001, the Employer filed a petition to terminate benefits, claiming Mr. Folmer was completely healed. The first petition was denied so the Employer filed a second. Two physicians testified that they could not find any evidence of vertigo or cranial nerve damage and one physician testified that the injured worker was faking his current injuries. The judge, claiming to have himself witnessed inconsistencies in Mr. Folmer's behavior, granted the termination.

What does this mean? In the dissenting opinion, Judge Bernard L. McGinley said this ruling would open the door to endless litigation in which "All that will be required is a physician to opine that the client was 'faking.'" Judge Mary Hannah Leavitt, leading the majority countered that the case boiled down to whose witnesses were more credible. There is a good chance that this case will be appealed to the Pennsylvania Supreme Court.

RICO Claim Opens Door to Federal Court in a Michigan Workers' Compensation Case

Brown, et al v. Cassens Transport Co. et al is a landmark case that may have repercussions for Workers' Compensation cases in all states.

In this case, the injured workers (the plaintiffs) alleged that Cassens Transport Company, Crawford & Company and Dr. Saul Margules (the defendants) used mail and wire fraud in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) to deny them Workers' Compensation Benefits under the Michigan Workers' Disability Compensation Act (WDCA).

Normally, Workers' Compensation issues are handled by the State but the RICO claim opens the door to Federal Court. In *Brown*, the Sixth Circuit Court ruled that "the WDCA does not reverse preempt RICO because WDCA was not 'enacted... for the purpose of regulating the business of insurance.'" The ruling allows the plaintiffs to pursue the RICO claim, a process that had been previously denied.

What does this mean? *Brown* opens the possibility of using a RICO complaint in *all* states, not just Michigan. Federal Court can be significantly more time consuming and costly than State Court, so there is the potential to increase the costs of Workers' Compensation litigation. But this does preserve the injured workers' right to pursue justice when an employer acts illegally to deny them benefits.

Social Security Announces Nationwide Launch of Compassionate Allowances

By Shelley W. Elovitz, Esq.

Social Security has created the Compassionate Allowances Initiative as a way to expedite the processing of disability claims for people whose medical conditions are so severe that they obviously meet Social Security's standards. Before this initiative, Social Security held public hearings and relied on the National Institutes of Health to get information on rare diseases and cancers. Social Security anticipates that the Compassionate Allowances Initiative could result in six to nine percent of disability claims being decided in an average of six to eight days.

Michael J. Astrue, Commissioner of Social Security, said, "This is America, and it simply is not acceptable for people to wait years for a final decision on a disability claim. I am committed to a process that is as fair and speedy as possible. The launch of Compassionate Allowances is another step to ensuring Americans with disabilities, especially those with certain cancers and rare diseases, get the benefits they need quickly."

Currently, 50 impairments, 25 rare diseases and 25 cancers, are on the list (see below). Social Security anticipates that this list will expand over time.

If you or someone you know is suffering from one of these afflictions, do not hesitate to contact our office at (412) 338-1153 to see if we can assist you in claiming your benefits.

1. Acute Leukemia
2. Adrenal Cancer - with distant metastases or inoperable, unresectable or recurrent
3. Alexander Disease (ALX) - Neonatal and Infantile
4. Amyotrophic Lateral Sclerosis (ALS)
5. Anaplastic Adrenal Cancer - with distant metastases or inoperable, unresectable or recurrent
6. Astrocytoma - Grade III and IV
7. Bladder Cancer - with distant metastases or inoperable or unresectable
8. Bone Cancer - with distant metastases or inoperable or unresectable
9. Breast Cancer - with distant metastases or inoperable or unresectable
10. Canavan Disease (CD)
11. Cerebro Oculo Facio Skeletal (COFS) Syndrome
12. Chronic Myelogenous Leukemia (CML) - Blast Phase
13. Creutzfeldt-Jakob Disease (CJD) - Adult
14. Ependymoblastoma (Child Brain Tumor)
15. Esophageal Cancer
16. Farber's Disease (FD) - Infantile
17. Friedreichs Ataxia (FRDA)
18. Frontotemporal Dementia (FTD), Picks Disease -Type A - Adult
19. Gallbladder Cancer
20. Gaucher Disease (GD) - Type 2
21. Glioblastoma Multiforme (Brain Tumor)
22. Head and Neck Cancers - with distant metastasis or inoperable or unresectable
23. Infantile Neuroaxonal Dystrophy (INAD)
24. Inflammatory Breast Cancer (IBC)
25. Kidney Cancer - inoperable or unresectable
26. Krabbe Disease (KD) - Infantile
27. Large Intestine Cancer - with distant metastasis or inoperable, unresectable or recurrent
28. Lesch-Nyhan Syndrome (LNS)
29. Liver Cancer
30. Mantle Cell Lymphoma (MCL)
31. Metachromatic Leukodystrophy (MLD) - Late Infantile
32. Niemann-Pick Disease (NPD) - Type A
33. Non-Small Cell Lung Cancer - with metastases to or beyond the hilar nodes or inoperable, unresectable or recurrent
34. Ornithine Transcarbamylase (OTC) Deficiency
35. Osteogenesis Imperfecta (OI) - Type II
36. Ovarian Cancer - with distant metastases or inoperable or unresectable
37. Pancreatic Cancer
38. Peritoneal Mesothelioma
39. Pleural Mesothelioma
40. Pompe Disease - Infantile
41. Rett (RTT) Syndrome
42. Salivary Tumors
43. Sandhoff Disease
44. Small Cell Cancer (of the Large Intestine, Ovary, Prostate, or Uterus)
45. Small Cell Lung Cancer
46. Small Intestine Cancer - with distant metastases or inoperable, unresectable or recurrent
47. Spinal Muscular Atrophy (SMA) - Types 0 And 1
48. Stomach Cancer - with distant metastases or inoperable, unresectable or recurrent
49. Thyroid Cancer
50. Ureter Cancer - with distant metastases or inoperable, unresectable or recurrent