ERACLIDES GAZETTE

What's Inside?

A Primer on Retaliatory Discharge in Tennessee

By: Allen Callison, Associate, Nashville

Following the passage and implementation of the Workers' Compensation Reform Act of 2013, we have seen the number of Tennessee workers' compensation claims fall. In discussing this issue with members of the plaintiff's bar, they are already turning their attention to a new source of revenue that they had previously chosen to mostly ignore: retaliatory discharge cases.

One reason why these claims are rare is that they are difficult to prove on the plaintiff's side. However, a successful plaintiff's case can result in substantial losses for an employer, especially since very few have insurance coverage for this sort of action. Therefore, it is important that everyone is aware of what the elements of retaliatory discharge are, when it can arise, and what we can do to prevent any indicia of impropriety.

Initially, the elements of a workers' compensation retaliatory discharge claim are: (1) the plaintiff was an employee of the defendant at the time of the injury; (2) the plaintiff made a claim against the defendant for workers' compensation benefits; (3) the defendant terminated the plaintiff's employment; and, (4) the claim for workers' compensation benefits was a substantial factor in the employer's motivation to terminate the employee's employment. Yardley v. Hosp. Housekeeping Sys., 2015 Tenn. LEXIS 630 (Tenn. 2015).

In Hayes v. Computer Science Corp., 2003 Tenn. App. LEXIS 23 (Tenn. Ct. App. 2003), the Court of Appeals found that a plaintiff *could* have a right to sue a subsequent employer if s/he was terminated because of filing a workers' compensation claim against a previous employer. Obviously, this decision should have a chilling effect on any employer who learns that they have hired an individual who files serial claims for workers' compensation. However, that case was not published and appears to run contrary to several more recent Supreme Court cases. Therefore, while we would caution against terminating an employee because s/he filed a claim against a previous employer, this case appears to have been overruled.

In the Yardley case issued several weeks ago, the plaintiff sued a potential employer for explicitly not hiring her because she

had previously filed a workers' compensation claim. In that case, the plaintiff was employed by a janitorial company that serviced a hospital. The company was bought out or otherwise lost the contract, and she was forced to reapply with the subsequent contractor. However, the subsequent contractor, Hospital Housekeeping System, refused to hire her because she had recently filed a workers' compensation claim. The Supreme Court refused to extend retaliatory discharge protection under these circumstances, stating that Tennessee's at-will doctrine protected the employer's right to hire whomever they wanted.

Going forward, it is important to be aware that there will likely be an increase in retaliatory discharge cases. Therefore, here are some important tips to keep in mind: (1) proximity in time between the protected action of filing a workers' compensation claim and an employee's termination is not sufficient evidence to establish the necessary causal relationship; (2) do not ever put in writing that you want to terminate an employee because they have filed a workers' compensation claim or because you are concerned they will file another workers' compensation claim; and (3) if you do want to terminate an employee who has previously filed a workers' compensation claim, make sure to document a legitimate reason why you want the employee terminated.

Finally, if you are unsure how to proceed, contact an attorney to ensure that your communications and thoughts on the issue are protected by the attorney-client privilege.

Talking the Talk: Helpful Hints for Recorded Statements & Claimant Depositions

By: Betsy Campo, Partner, Gainesville

I sprung my back.
Woke up this mornin' and I was all stoved up.
Didn't do no shade tree mechanicin' over the weekend.
This pain is wors'n when I tore my rotor cup that one time.
The doctor gimme some inflammatories.
I might could go back there if workmans comp will let me.
I'm fixin' to call my bossman 'bout it now.

No, those aren't the words to a country song--just responses from various depositions of workers' compensation claimants. As those of us engaged in the industry know, workers' compensation has a language all its own. Not only are there terms like TTD, TPD, PTD, etc…but the individual claimants have their own way of describing how they were hurt and what has happened since then. My favorite part of being a workers' compensation defense attorney is to take the claimants' depositions. Not only does it help to put a face to a name when I meet the claimant at the deposition, but it brings the claim to life, and gives it a dynamic that doesn't otherwise exist when I merely look at the paper file. Each claimant's description of the workplace and accident provides a visual, and the tone and presentation they use in responding to deposition questions help me gauge the veracity and reasonableness of their allegations.

All of us involved in workers' compensation can tell a funny story about something a claimant said or did that was memorable. Court reporters also hear more than their fair share of unusual or comical details. Many times I have said to the reporter, or thought to myself "you can't make this stuff up." Not only are the anecdotes from deposition good for a chuckle, they are also a raw, stripped down version of a claimant's reality. They are a splice of life, and the deposition gives us a peek into the claimant's everyday reality, both before and after his or her alleged work accident.

One lesson that I learned while pursuing my Communications degree was the art of verbal mirroring. Verbal mirroring is a way to establish rapport with someone by adopting that person's inflections, tone, mannerisms or speaking style. In claimant's depositions in North Central Florida, that oftentimes involves what I refer to as "southern-speak." In my early years of practice in this area, I often had a difficult time understanding some of what the claimants said at deposition. Some phrases were foreign to my Iowa-born and raised ears. Over the past 20+ years, though, I have learned to speak and understand "southern," so taking claimants' depositions is much, much easier. I don't think I will ever personally refer to the grocery store shopping cart as a "buggy," but I will call it that when taking a deposition, if that is what the claimant calls it.

No matter the status of the claimant's workers' compensation case – whether it be denied completely for misrepresentation, or whether I am defending against a PTD claim – I approach all claimants the same at deposition: with courtesy and respect. The deposition is my one, and possibly only, opportunity to hear the claimant's description of what allegedly happened at work that brought us to the point of the deposition. It may also be the claimant's only opportunity to be given the spotlight to speak about the incident and its sequelae. The words the claimant uses to describe the incident, and his or her tone, inflection and mannerisms all give depth to my understanding of the case.

In an effective deposition, employing verbal mirroring may help the claimant to respond freely to open-ended questions. Information will often be offered by the claimant that I did not anticipate. I listen and follow up with additional open-ended questions in an effort to secure more potentially helpful details. I have always loved treasure hunts, and each deposition is just like one; except, instead of hidden treasure, I am trying to find out information that could be key to the defense in the case.

If you are an adjuster and you get an opportunity to take a recorded statement, I strongly recommend that verbal mirroring be practiced and employed. Do not rely solely on your standard form questionnaire when getting the information. Keep it handy, for reference, but listen closely to the responses and, mirroring words used by the claimant in the answers, ask follow-up questions. Let the conversation flow somewhat freely and let the claimant open up. Use your form to steer the conversation back on topic if you stray too far. The information you gather will be useful and meaningful, and it will help provide you with a clearer understanding of the case. If you listen closely, it very well may help you measure the quality or veracity of the claimant's version of events so you can decide how to respond to the claim.

If you are taking a statement in some parts of Florida, be mindful that you may hear some words or phrases that are new to you. When that happens, the best thing to do is not to say "pardon." or "excuse me," but you need to say "do what now?" and the claimant will repeat the answer. If you mirror the language of the claimant, you will get more and better information than if you just ask pre-drafted questions. So, the next time you find yourself taking a claimant's deposition or taking a recorded statement, keep these guidelines in mind and get out there and "talk the talk."

Effective Usage of the Pay & Investigate Rule

By: Sean O'Neil, Associate, Jacksonville

When used effectively, Fla. Stat. 440.20(4), better known as the 120 day "pay and investigate rule," is a fantastic tool adjusters can employ when confronted with adverse, complex or unknown facts. This article will serve as a guidepost to help the informed adjuster navigate 440.20(4) to arrive at an educated decision on whether to invoke the 120 day rule.

When must the 120 day rule be invoked?

Within 14 days after the initial provision of benefits or the receipt of a petition for benefits, the carrier must either pay the requested benefits or file a response to claimant's petition. When coupled with the fact that knowledge of a disability by a worker's supervisor, foreman or company HR department is imputed on the carrier, adjusters are placed under immense pressure to make quick and often uninformed decisions on compensability due to fears of penalties, interest and attorney's fees.

Fla. Stat. 440.20(4) provides "if a workers' compensation carrier is uncertain of compensability, it can admit or deny compensability within 120 days after the initial provision of compensation or benefits." The use of the word "or" makes it clear that the words "compensation" and "benefits" refer to two distinct entities. Osceola Cnty. Sch. Bd. v. Arace, 884 So.2d 1003 (Fla. 1st DCA 2004). Compensation simply refers to payment of indemnity benefits. What then, constitutes "benefits?" The initial provision of benefits occurs on the date a claimant visits an authorized physician. Id. Remember, mere authorization of benefits is not enough. The claimant must *actually attend* his initial authorized visit before a benefit is provided, thereby enabling the 120 day rule to be invoked.
With this in mind, the carrier must invoke the 120 day rule in writing or lose their ability to assert it at the following times: 1) within 14 days of receipt of claimant's petition; 2) within 14 days of the initial payment of indemnity benefits; 3) within 14 days of claimant's first *attended* authorized treatment.

How to Apply the Rule

Once you decide to invoke the 120 day rule, the process is relatively straight forward. First, you must invoke the option in *writing.* A simple, plain statement advising that the carrier has elected this option will suffice. However, the carrier should make sure to delineate whether it is being invoked on overall compensability of the claim or in reference to a particular benefit. Second, the carrier must actually pay the benefits. As stated above, mere authorization is not enough. Finally, the carrier must act within the 120 day window. If the carrier intends to deny the claim, notice of denial *must* be sent *in writing* within 120 days. Should the carrier wish to deem the claim compensable, no action is required. However, it is good policy to accept compensability in writing, as failure to make an unambiguous acceptance could breed unnecessary litigation, thus exposing the carrier to unnecessary exposure.

When to Invoke

Understandably, the 120 day rule is most commonly invoked in high exposure cases such as chemical exposure, catastrophic injuries, and first responder presumption cases. However, carriers should also invoke the rule in cases with lower exposure. For instance, take a scenario where the claimant's initial treatment is somewhat inexpensive, but his condition could deteriorate should treatment be denied. If you accept initially, absent fraud, you are bound by this decision. Instead, the carrier should invoke the 120 day rule so as to monitor and investigate the claim.

Unless settlement appears imminent, the savvy adjuster should also consider implementing a cost benefit analysis as to whether invoking the 120 day rule, rather than initial acceptance, is more beneficial. There is no obligation for the carrier to actually investigate. Additionally, if payment of benefits was already to occur, why not utilize the extra 120 days available? In situations involving more than nuisance value exposure, it would be unwise to limit your decision making to 14 days when 120 days is available.

Conclusion

440.20(4) is a handy tool designed to enable prolonged investigation into complex or spurious claims. Like most tools, it is not without flaws. The statute requires strict adherence to the procedural

guidelines listed above and often exposes claims adjusters to depositions to ensure compliance. Therefore, when invoking the rule, carriers should calendar the date to ensure they act within the 120 day window. However, carriers should not hesitate to employ this rule, especially in cases where they are inclined to accept compensability. In these cases, the carrier gains a risk free 106 additional days, at a minimum, to evaluate the claim should they have the resources to comply with the procedural guidelines.

Washed Out—Pro Se Settlement Considerations

By: Marcus Rodriguez, Associate, Orlando

Knowing how to effectively finalize a settlement with a pro se claimant is an essential skill that decreases workers' compensation litigation costs. Under Fla. Stat. 440.20(11), when a settlement agreement is reached with an unrepresented claimant, the claimant may appear before the JCC for a washout hearing. This is where the judge reviews the settlement in order to assure that its terms are fair, and that the claimant understands the rights he is waiving.

Scenario: You have put in the time and the effort, and finally succeed in convincing a pro se claimant to agree to a reasonable settlement offer. Now comes the washout hearing. On its face it seems rather straightforward: the judge simply wants to make sure that the settlement is in the best interests of the claimant. What could go wrong? But then we find ourselves in a situation where the judge is giving the claimant every possible opportunity to develop some sort of last minute "buyer's remorse." Sound familiar? Now the claimant is beginning to wonder whether or not he fully comprehends what settling his case actually means, and either he backs out or the judge does not approve. That feeling of accomplishment has now departed. The fundamental key to avoiding this scenario in its simplest terms is thorough communication.

In essence, a settlement is an agreement between the parties that is construed as consistent with the rules applicable to interpretation of contracts. Robbie v. City of Miami, 469 So.2d 1384, 1385 (Fla. 1985) The party seeking enforcement of the settlement bears the burden of proving that there was indeed an underlying "meeting of the minds" or mutual reciprocal assent sufficient to bind the parties. Long-Term Management, Inc. v. University Nursing Care Center, Inc., 704 So.2d 669 (Fla. 1st DCA 1997). Therefore, to have a true "meeting of the minds," both parties to an agreement must mutually agree upon the terms of that agreement. This is why it behooves us (both counsel AND the adjuster) to clearly explain every detail of the settlement agreement to the claimant so that there are no misinterpretations as to what the terms convey. If a claimant displays any confusion to the judge, the judge could disapprove the agreement. This would prolong the settlement process, thus exposing the employer/carrier to further litigation costs, and potentially ongoing medical treatment costs.

Additionally, it helps for the adjuster to echo what each stage of the case signifies to the claimant. It is also advantageous for defense counsel to meet with the claimant beforehand to explain the settlement papers and the hearing procedure. This provides an opportunity to answer any questions or concerns of the claimant, before they arise in the hearing and detonate the settlement. This also gives defense an opportunity to let the claimant know about some of the questions and procedures of the judge. Often by telling the claimant in advance that the judge's questions may seem to suggest backing out of the settlement, this is simply a tactic to ensure the settlement is desired. By treating the agreement as a binding contract, we can assure ourselves that we have done our due diligence in establishing a mutual understanding of the terms of the settlement.

It is also important to note there are additional requirements for the pro se settlement documents themselves. For compensable claims under Fla Stat. 440.20(11)(b), Rule 60Q-6.123 requires that the following be provided: (1) notice to the employer, (2) a maximum medical improvement (MMI) report establishing the date of MMI, (3) a permanent impairment rating, (4) information concerning the need for future medical care, and (5) an estimate of the cost of future medical care or an explanation as to why an estimate cannot be reasonably obtained. For claims settled on a denied basis under Fla Stat. 440.20(11)(a), instead of the foregoing items, a notice of denial (DWC-12) is required. Remember that these are not mere suggestions, but precise rubrics intended to be followed. Failure to provide the requisite items may also lead to delay in attaining settlement approval, thus leading to an increase in costs to the carrier.

In a nutshell, let's not get ahead of ourselves. See your way through the pro se settlement to the very end. The simple task of communicating and following up can end up being the difference between a job well done and a complete blunder at the finish line.