Trends and Issues in Workers' Compensation among the New England States

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Parallel Session B
2:15 – 2:55 pm

Work Related Injuries Workshop
March 25th & 26th, 2019

TKCK

- TKCK is a workers' compensation defense firm defending insurers and employers in all of the six New England states.

The Good, the Bad & the Ugly

- So what's good, what's bad, and what's ugly in the workers' compensation statutes of the New England states?
  - Massachusetts
  - Connecticut
  - Rhode Island
  - New Hampshire
  - Maine
  - Vermont

Massachusetts

- **<u>Good: Opioid Initiative</u>**
  - Opioid voluntary program established by the DIA.
  - The DIA is trying to update rates for payment of medical providers
  - In Camargo's Case, 479 Mass 492 (2018), the SJC held that the very restrictive independent contractor statute M.G.L. c 149 does not determine if a claimant is an employee or an independent contractor for workers' compensation purposes.
    - *Must look to the Act and the case law.

Massachusetts

- **Good: Medical Marijuana**
- In a much anticipated decision the Massachusetts DIA Reviewing Board has denied an employee's claim for reimbursement of Medical Marijuana.
- They affirmed the hearing decision of an Administrative Judge that found although Medical Marijuana would have a positive effect upon a permanently and totally disabled employee, the Federal Law, specifically the Controlled Substances Act (CSA), preempts Massachusetts State Law. The Reviewing Board found that requiring an Insurer to either reimburse an employee or make direct payment would be a direct violation of Federal Statutes and Policy and expose the Insurer to criminal prosecution.
- This decision is entirely consistent with an earlier decision of the Maine Supreme Court and TKCK awaits a decision from New Hampshire on the same issue.
- We anticipate that this decision will proceed to the next level at the Massachusetts Appeals Court. In the meantime Insurers are not required to make any payments for Medical Marijuana.
- Daniel Wright v. Pioneer Valley (Board No. 04387-15)

Massachusetts

- **<u>Good: Medical Marijuana</u>**
- In <u>St. Pierre v. TE Greenwood Construction</u>, (Review Board, April 11, 2018) the Court concluded that the Massachusetts Medical Marijuana Act only covers Massachusetts residents and an employee who was a Vermont resident, with a Vermont marijuana card, using a Vermont dispensary was not covered under the statute and therefore was not entitled to coverage of medical marijuana.

Massachusetts

- **<u>Bad: Surveillance Evidence</u>**
- In <u>Cheryl Marcoux v. Lawrence General Hospital</u>, the Court concluded that video evidence of an employee's activity level is "*adjunct* to medical evidence, and that a judge may not rely on it to counter the opinion of a medical expert when the issue is the extent of disability."

Massachusetts

- **Bad: Wage Issues**
- The Review Board addressed minimum wage-earning capacity in the case of Said Ahmed v. City of Boston, (Review Board, August 29, 2018). The Review Board concluded that when a minimum wage-earning capacity is assessed, it must be at the applicable minimum wage of the Commonwealth at the time(currently $12.00/hr as of January 2019). A factual basis must be given in order to assess a lower earning capacity.

Massachusetts

- **Bad: Wage Issues**
- In Arruda v. A. Vozzella & Sons, Inc., argued by TKCK, the Review Board addressed prevailing wage positions. The Board concluded that the average weekly wage should be calculated based on MGL 152 Section 1(1), which states, "the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two." Where an employee was working prevailing wage jobs as well as non-prevailing wage jobs during his past 52 weeks of employment prior to the injury, the average weekly wage should be calculated using the prevailing wages for the hours worked and non-prevailing wages for the hours where the position was non-prevailing wage job and divide the combined wages by 52.

Massachusetts

- **Ugly: Insurance/Excess Policies**
- Janocha v. Malden Mills. TKCK represented the excess carrier. In this case, the employee was injured and being paid benefits from Malden Mills, a self insurer at the time of his injury. Malden Mills eventually filed bankruptcy and notified Janocha that his benefits would not be paid. Safeco then paid out their bond, however with no adjuster, they paid benefits and medical bills without utilization review or any other reviews of claims. According to the policy, ACE would then owe benefits when $400,000 had been paid out. The Administrative Judge initially the Workers' Compensation Trust Fund to pay, stating that ACE cannot be forced to reach down below their contracted amount to pay benefits to the employee. The Review Board reversed this and ordered ACE American Insurance Company to drop down below the $400,000.00 retention level and to pay the benefits to which the employee is entitled, rather than the WCTF. The 3 Judge panel Appeals Court affirmed the ruling. The SJC denied our request for further appellate review.

Connecticut

- **<u>Good: Medical Marijuana</u>**
- In <u>Petrini v. Marcus Dairy</u> (2016), the CRB found medical marijuana to be reasonable and necessary for an employee who had failed back surgery. The case was appealed but settled before it reached the Appeals Court. As a result, this area is still unsettled and currently TKCK attorneys note that requests for reimbursement of medical marijuana is often denied at the lower levels.

Connecticut

- **Bad: "Arising out of"**
- In Magistri v. NE Fitness Distributors, 6089 CRB 2-16-4 (5/10/17), an Employee was involved in motor vehicle accident as a result of a sleep apnea, which was a preexisting and non-work-related condition. The Board concluded that sleep apnea would not have led to a motor vehicle accident ***if*** the employee were not driving for his employment.

Connecticut

- **Ugly: "Arising out of"**
- In Clements v. Aramark, 182 Comm App 224 (2018), an Employee was walking to her work station for a shift when she suffered lightheadedness and passed out. She hit the floor and suffered a head injury. Lower courts opined that her injury did not arise out of causation because the lightheadedness was caused by a cardiac issue. However, the Appeals Court reversed this decision, saying the injury was caused by the floor because without having hit her head on the floor, she would not have been injured. This case has been appealed to the Connecticut Supreme Court.

Connecticut

- **<u>Ugly: Pre-Existing Conditions</u>**
- In Connecticut, courts have held to establish an injury arising out of employment, the conditions of employment must be the "proximate cause" of the injury. These cases are very pro-claimant and suggest that virtually any pre-existing condition (personal or occupational) that leads to an injury at work is compensable.

Connecticut

- **<u>Ugly: Commissioner's Opinion</u>**
- If the commissioner evaluates a claim for settlement (puts a number on it), it is nearly impossible to settle the claim for anything less.
- If a commissioner evaluates the claim for settlement, you cannot ask another commissioner to evaluate it if you do not like the number.
- If the commissioner does not think the settlement is fair, even if both attorneys agree to the number, they may not approve the stipulation.

Connecticut

- Also **Ugly** was Williams v. City of New Haven, 329 Conn. 366 (2018)The Superior Court of Connecticut held that an employee could still file a claim against the employer for retaliatory discharge under Connecticut General Statute S31-290a, even though an arbitration board ruled against him and determined no retaliation occurred. The mediator found that the employee was fired for "just cause."

Rhode Island

- **Good, Bad & Ugly! Average Weekly Wage Issue**
- In Darocha v. Centrex Distributors, Inc., the Court interprets RIGL 28-33-20 and the calculation of the AWW and overtime over "up to the 52-week period" prior to the date of injury. The Appellate Division reversed the trial judge's decision finding that "length of service" does NOT equate to length of employment as found in RIGL 28-33-20 (a)(1) and that in order to use a week in dividing overtime, the employee MUST be actively engaged in work, not simply in service of the employer while out on a non-work related disability and therefore, only the weeks the employee actually worked could be used to calculate his overtime pay.

New Hampshire

- **Good: Medical Marijuana**
- Panaggio v. WR Grace & Company, 2017-L-0248, 6/6/17
- The most notable case in New Hampshire in 2018 was argued by TKCK and involved reimbursement for medical marijuana. The Board denied the employee's claim for the reimbursement of the cost of medical marijuana. The Board opined that ordering the insurer to reimburse the employee for the cost of medical marijuana would force the insurer to violate Federal Law.
- Further, under the NH medical marijuana act, health insurance providers are exempt from liability for reimbursement of the cost of marijuana and the Board found that the workers' compensation carriers are included within the statutory provision exempting "health insurance provider."
- The employee appealed to the NH Supreme Court and TKCK presented oral argument. We are awaiting the decision.

New Hampshire

- **<u>Good: Holiday</u>**
  - Full holiday in third-party subrogation cases

- **<u>Good: Hearing Officers</u>**
  - Hearing Officers are fair

New Hampshire

- **Bad: Temporary Total Disability**
- TTD continues as long as the injured worker remains totally disabled, possibly for life
- TTD does not require abject helplessness (i.e. totally physical incapacity)
- Extended TTD has eliminated litigation of permanent total disability, since TTD is continuous and no time constraint
- If employee on TTD, insurer must show "change of conditions" and that the "employee has an earning capacity in suitable work under normal employment conditions."
- Application of DEC (Diminished Earning Capacity) rate is important because once a DEC rate is established, a cap of 262 weeks combining all weekly benefits is in effect, thereby limiting the exposure.
- Legislature is trying to change to unlimited weeks for partial disability

New Hampshire

- **<u>Ugly: Medical costs</u>**
- Medical costs are much higher in New Hampshire
- If the costs are not reasonable, then the burden shifts to the employee to prove reasonableness.

Vermont

- **<u>Good: Medical Marijuana</u>**
- In Vermont, the Court concluded that it cannot compel a workers' compensation insurer to pay for medical marijuana. In <u>Hall v. Safelite</u> Group 6-18WC, which was litigated by TKCK, the Court found that medical marijuana reasonable and related but due to federal statute cannot compel insurance to pay

Vermont

- **Good: Volunteer v. Employee**
- In contrast, in Perrault v. Chittenden County Transportation Authority, 2018 VT 58, the claimant was a driver of a local shuttle bus. The Board found that he was considered a volunteer because the payments received by the driver were simply to make the driver whole (i.e. gas, wear and tear on vehicle) and therefore not wages. Without wages, the claimant could not be an employee and was therefore not entitled to benefits under the Act.

Vermont

- **Bad: Volunteer v. Employee**
- Lyons v. Chittenden Cent. Supervisory Union, 2018 VT 26. The employee was injured while student teaching. Court found that she received wages and thus was an employee because she received an advantage in that position was meeting the requirement for a teacher's license and because the value of that advantage could be "estimated in money."

Vermont

- **<u>Ugly: Liability for Medical Treatment</u>**
- In <u>Crowe v. Fonda</u> Group 04-18wc, the current employer was liable for wages due an employee for medical treatment for a work injury despite the fact that the injury occurred with a prior employer. See 640 (c) and Rule 4.1400

Maine

- **Good: Medical Marijuana**
- In Bourgoin v. Twin Rivers Paper, the Maine Supreme Court stated that where the Court uses MMUMA, the state marijuana act, to order an insurer to pay for medical marijuana, this puts the insurer in conflict with federal law because marijuana is a schedule 1 drug under the CSA. The MMUMA must yield to the CSA and therefore, the insurer cannot be ordered to violate federal law.

Maine

- **<u>Bad: Unemployment</u>**
- In <u>Lenfest v. Hallett,</u> WCB App. Div. No. 18-25 (9/25/18), the Board concluded that an award of unemployment does not preclude total disability workers compensation award.

Maine

- **<u>Some Good, Some Bad, Some Ugly: Statutory changes</u>**
- Ch. 1 § 5 (1)(A)(3): 401K, 403b and equivalent plan making funds that cease, must be included as fringe benefits in the AWW. Ends when employee returns to work. Must be determined at date of injury.
- Ch. 1 - AWW may be adjusted once in 90 days by WCB-4 and if decreased, employee can invoke dispute resolution.
- Ch. 2 § 3: no longer need to include impairment evaluation for lump sum.
- Ch. 2 § 5: process of terminating benefits has changed. If there is an order of payment, a petition to terminate benefits must be filed and a notice indicating that the employee has a right to request extended benefits due to extreme financial hardship pursuant to § 213 (1). The 260-week benefit limitation in § 213 was extended to: 1. 312 weeks on January 1, 1999; 2. 364 weeks on January 1, 2000; 3. 416 weeks on January 1, 2007; 4. 468 weeks on January 1, 2008; and 5. 520 weeks on January 1, 2009.

Maine

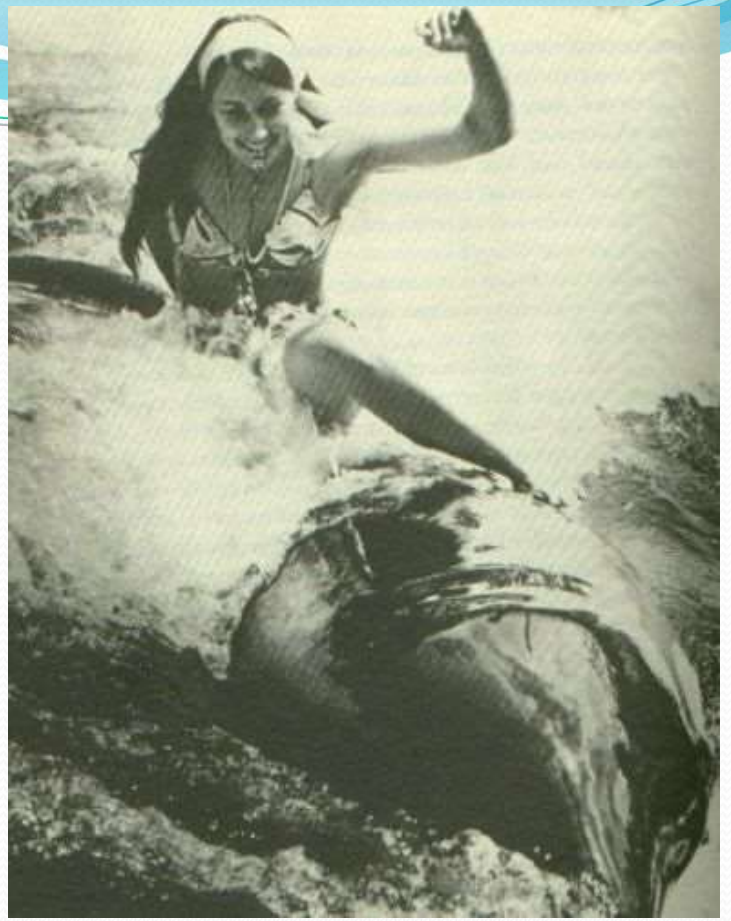
- **<u>Some Good, Some Bad, Some Ugly: Statutory changes (continued)</u>**
- Ch. 3, § 1-A: Employers must file a first report of report of injury for ALL claims, including medical only claim. Copy must go to the employee and the insurer within 24 hours of completion.
- Ch. 4, § 1(B): Independent Medical Examiners must have had active treating within 24 months.
- Ch. 4 § 2(6): Independent Medical Examiner not precluded from treating employee
- Ch. 5: New releases created
- Ch. 6: New rehabilitations process, streamlining the process
- Ch. 8: Permits an employer/insurer to terminate benefits when the employee has been released to work with no restrictions by the treating physician, there are no conflicting medical reports and the employee, instead of returning to work, receives vacation, paid time off or holiday pay instead of regular wages.

Maine

- **<u>Some Good, Some Bad, Some Ugly: Statutory changes (continued)</u>**
- Ch. 9 § 2(2): Procedure for coordinating benefits, including PTO
- Ch. 12: Changes to formal hearing procedures
- Ch. 12 § 2: Petitions for medical and related services must include itemized bills, liens, co-pays, and out of pocket expenses. Payment of medical bills must be made within 10 days after decree is issued or the date of information required under Chapter 5 is received, whichever is later.
- Ch. 13: Rules of Appellate Division changes
- Ch. 15, § 6(1): The $5,000 guideline limit to forfeitures was removed.

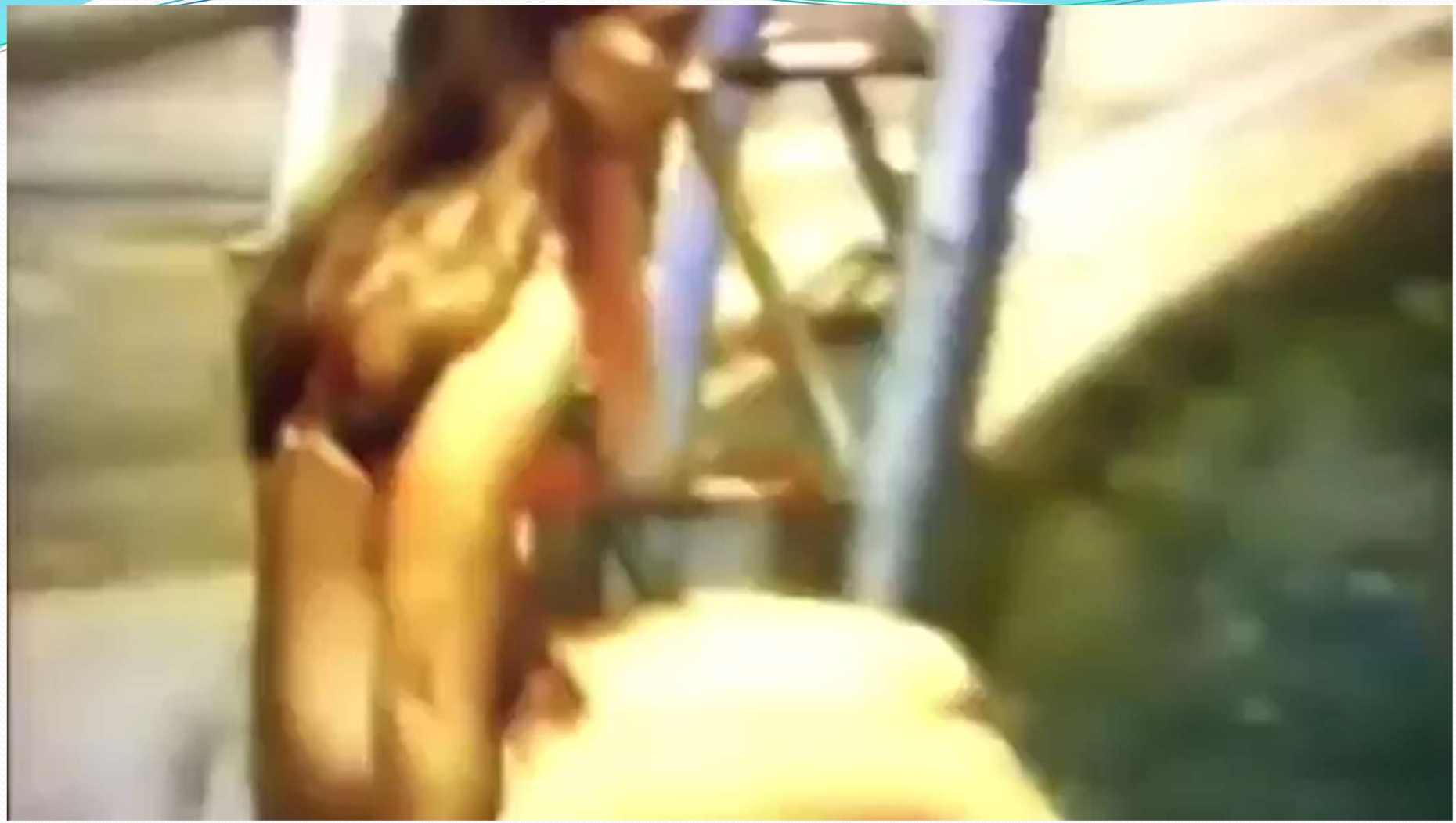
Eckis

- Eckis hired by Sea World to be a secretary. Injured after being asked to "ride" Shamu (wearing a bikini) for a promotional brochure.



http://www.orcahome.de/shamu.htm

- Eckis v Sea World, 134 Cal. Rptr. 183 (Cal App. 1976)



How would each state respond?

- **Tort action v Workers' Compensation?**

- 1st Element: Employment Status

- 2nd Element: Performing Duties at the Employer's Request, and furthered business of the Employer
  - Note: Employer negligence v Employee Assumption of Risk
- 3rd Element: Personal Injury (Physical and Emotional)

- 4th Element: Damages: Tort v WC

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Thank you.