PUBLICATION UPDATE

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Larson's Workers' Compensation Law

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HIGHLIGHTS

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Chapter Revisions

- CHAPTER 7, POSITIONAL AND NEUTRAL RISKS
- CHAPTER 14, JOURNEY ITSELF PART OF SERVICE
- CHAPTER 21, PERSONAL COMFORT DOCTRINE
- CHAPTER 64, NECESSITY FOR "CONTRACT OF HIRE"
- CHAPTER 66, ILLEGAL EMPLOYMENT; FALSE JOB APPLICATIONS
- CHAPTER 81, EARNINGS CREATING PRESUMPTION OF EARNING CAPACITY

Recent Developments in Case Law

- Noteworthy court decisions have been added throughout the set.

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Positional and Neutral Risks. During the past twenty years or so, an increasing number of courts have made awards whenever the injury occurred because the employment required the claimant to occupy what turned out to be a place of danger. A few frankly state that causal connection is sufficiently established when-

ever it brings claimant to the position where he or she is injured. Unexplained falls and deaths occurring in the course of employment are generally held compensable, sometimes on the strength of a presumption, either judicial or statutory, that injury or death occurring in the course of employment also arises out of the employment in the absence of evidence to the contrary. Chapter 7, which discusses this important segment of workers' compensation law, has been revised and updated. Recent decisions include *Soya v. Health First, Inc.*, 2022 Fla. App. LEXIS 1209 (1st DCA, Feb. 21, 2022) [*see* § 7.04[1][b] n. 35], in which the First District Court of Appeal pulled back from the broadest implications of its earlier ruling in *Sedgwick CMS v. Valcourt-Williams*, 271 So. 3d 1133 (Fla. 1st DCA 2019) (en banc), discussed in § 21.02[1][a] Digest n.1, and held that a JCC's analysis of the so-called "increased hazard" rule had been too expansive when the JCC denied compensation to an employee who sustained injuries as she fell while walking across an apparently unobstructed carpeted floor at the end of her workday shift. Observing that the JCC found the fall could have occurred anywhere, the appellate court stressed that even under *Valcourt-Williams*, that was not the rule to be applied. The increased risk analysis under *Valcourt-Williams* applied only where there was some contributing cause outside the employment (in *Valcourt-Williams*, it had been a small dog that caused the home-based employee to fall). The court stressed that where, as here, the cause of the fall was unknown, it was error to deny compensability on grounds that the accident "could have happened elsewhere." In an unusual case, also from Florida, *Silberberg v. Palm Beach Cnty. Sch. Bd.*, 2022 Fla. App. LEXIS 1078 (1st DCA, Feb. 16, 2022) [*see* § 7.04[1][b] n. 35], the First District Court of Appeal, applying Florida's major contributing cause standard and quoting from *Larson's Workers' Compensation Law*, affirmed a JCC's denial of benefits in a claim filed by a teacher who suffered a broken left femur when his leg "went to sleep" while he sat at his desk and then lost his balance as he rose to assist a student. The court noted that the JCC relied upon medical evidence that the teacher's leg could have similarly gone to sleep anywhere; there was nothing about the workplace that increased the risk of injury. While the teacher's injury clearly occurred in the course of the employment, he had failed to show that the injury arose from the work itself. He had shown no more than "routine movements," the type that were also associated with his non-employment life.

Journey Itself Part of Service. Chapter 14, which discusses an important exception to the going and coming rule—that injuries sustained during the journey to and from work are compensable if the making of that journey, or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated, is in itself a substantial part of the service for which the

employee is employed—has been revised and updated as well. Florida provides more narrow coverage here than in most states. In several recent decisions, Florida courts have stressed that the important issue is not so much the employee's status as a traveling employee, but rather his or her "travel status" at the time of the accident. If the employee is merely traveling home (or to work), his or her status as a traveling employee is not enough to allow compensation [*see* Kelly Air Sys., LLC v. Kohlun, 2022 Fla. App. LEXIS 1812 (1st DCA, Mar. 16, 2022), § 14.02 Digest n. 1; *see also* DSK Grp. Inc. v. Hernandez, 2022 Fla. App. LEXIS 2943 (1st DCA, Apr. 27, 2022), § 14.03 n. 6].

Personal Comfort Doctrine. The important discussion of the personal comfort doctrine contained in Chapter 21 has been revised and updated as well. Under that doctrine, employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Necessity for "Contract of Hire." Within the workers' compensation system, the concept of "employee" is narrower than the common-law concept of "servant" in one important respect: Most workers' compensation acts require that the service be performed under a contract of hire, express or implied. The discussion of this core element within workers' compensation law, contained in Chapter 64 has been updated. At one time some jurisdictions refused to allow one spouse to be the employee of the other for compensation purposes. Now, however, virtually all jurisdictions have recognized the realities of modern business and marital relations, and award compensation in such circumstances. Persons who perform services and receive some kind of payment, but not under the usual contract between persons equally free to bargain and contract, such as prisoners and relief workers, have in the majority of cases been denied compensation. The trend, however, is in the direction of providing benefits to those sorts of workers.

Illegal Employment: False Job Applications. Persons employed under illegal contracts of hire are usually denied compensation if the illegality results from the obligation to perform illegal acts, but not if it arises merely from a prohibition against making the contract, as in the case of minority or status as an undocumented worker. In virtually all jurisdictions, undocumented workers are now considered employees even if the employment itself was procured by a false application. Generally speaking, a false statement in an employment application does not of itself make the employment contract invalid. Benefits are barred only if (1)

the employee knowingly and wilfully made a false representation as to his or her physical condition; (2) the employer relied on the representation and the reliance was a substantial factor in the hiring; and (3) there was a causal relation between the false representation and the injury. The discussion of these issues, found in Chapter 66, has been updated.

Earning Creating Presumption of Earning Capacity. The degree of disability depends on impairment of earning capacity, which in turn is presumptively determined by comparing preinjury earnings with post-injury earning ability. The discussion of this important issue is found in Chapter 81, which has been updated and revised as well. A record of actual post-injury earnings may be considered in judging earning capacity even if the employment is unrelated to the employment in which the injury occurred. This presumption may, however, be rebutted by showing that post-injury earnings do not accurately reflect claimant's true earning power.

U.S. Supreme Court Declares State of Washington's Special "Hanford Site" Law Unconstitutional. The United States Supreme Court held that Wash. Rev. Code § 51.32.187(1)(b), a special workers' compensation law that applied only to certain workers at a federal facility in the state who were "engaged in the performance of work, either directly or indirectly, for the United States," facially discriminated against the federal government and its contractors and was, therefore, unconstitutional under the Supremacy Clause. Reversing the Ninth Circuit Court of Appeals, which had affirmed a federal district court's decision that found the statute fell within the scope of a federal waiver of immunity contained in 40 U.S.C. § 3172, the Supreme Court disagreed, holding that § 3172 did not clearly and unambiguously waive the federal government's immunity from discriminatory state laws [*see* United States v. Washington, 142 S. Ct. 1976, 213 L. Ed. 2d 336 (2022), § 2.07 n. 12.2].

Truck Driver with Preexisting Condition (Obesity) Recovers for Deep Vein Thrombosis. The Supreme Court of Utah, in a divided decision, reversed a decision by the state's Court of Appeals that found a long-haul truck driver had failed to show that his "required" employment activities were the legal cause of his injuries under the state's *Allen* standard [*see* Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986)]. In *Allen*, to help determine causation when a claimant has a relevant preexisting condition, the high court had adopted the test found in *Larson's Workers' Compensation Law*, § 43.03. Under that test, a claimant must establish that the conditions or activities of his job were both the medical cause and the legal cause of his injury. The ALJ and the Commission awarded benefits, but the Court of Appeals reversed, finding that the claimant had failed to show that his *required* work activities were no greater than those the worker experienced in his everyday life. Specifi-

cally, the Court of Appeals said it could see no meaningful distinction between sitting for a long time in a truck cab and sitting for a long time in a passenger car or sitting for a long time in an airplane seat, or even sitting for a long time on a couch in front of a television screen. The majority of the Supreme Court of Utah disagreed. The question was whether the employment activity was comparable to the usual and ordinary activities that are typical of everyday nonwork life. Driving a commercial diesel truck for approximately nine hours with only one break and a stationary left leg was not like the ordinary activities people do in everyday life, stressed the majority [*see* JBS Carriers v. Utah Labor Comm'n, 2022 UT 31, 2022 Utah LEXIS 63 (June 30, 2022), § 9.02[3] n. 19.1].

Significant Post-Surgery Weight Gain Might Be Considered Subsequent Superseding Event Relieving Employer of Continued Liability. It was error for the Idaho Industrial Commission to evaluate a claimant's disability based upon his condition at the point of maximum medical improvement and not at the time of the hearing on the issue, held the Supreme Court of Idaho. Moreover, held the court, the Commission utilized the wrong standard when it held the claimant's post-injury weight gain—from 250 pounds on the date of the injury to 370 pounds months after back surgery—was a "subsequent superseding event" that relieved the employer of liability for the full extent of the claimant's disability. Quoting *Larson's Workers' Compensation Law*, § 10.10, *et seq.*, yet adopting a rule that is a bit different, the court held that the claimant's weight gain could relieve the employer of responsibility only if the employer could show that the claimant's conduct—in gaining so much weight, contrary to his physician's admonitions—amounted to rash or deliberate disregard of a material risk that harm would occur [*see* Sharp v. Thomas Bros. Plumbing, 510 P.3d 1136 (Idaho 2022), § 10.10[1] n. 1.3].

Cannabis Shop Employee's Injuries in Customer Confrontation Might Be Compensable. Finding that the focus of a Nevada Appeals Officer had been too narrow—the officer found that a cannabis dispensary employee had "inserted" himself into a confrontation with a customer and had "escalated the situation from words into a physical altercation with the customer," and in doing so, had removed himself from the course of the employment—a Nevada appellate court held the case must be remanded for a proper determination as to whether the employee's actions in trying to restrain the customer had been undertaken in good faith in an effort to assist a co-employee in the latter's performance of his work. Quoting *Larson's Workers' Compensation Law* extensively, the court stressed that notwithstanding the employer had a policy prohibiting workplace violence, the appeals officer had overlooked critical factors as to whether the employee reasonably thought his actions were necessary at the time of the incident [*see* Durst v.

Silver State Cultivation, 2022 Nev. App. Unpub. LEXIS 67 (Feb. 17, 2022), § 27.01[1] Digest n. 1].

Lack of Disclosure Related to Prior Work Injuries is Violation of § 114-a. Substantial evidence supported a decision by the Board that found that an injured workers' failure to disclose prior work-related injuries, for which he had received schedule loss of use awards, was the sort of misrepresentation prohibited by N.Y. Workers' Comp. Law § 114-a, and that the worker should be prospectively disqualified from indemnity benefits, held a New York appellate court. The court was not persuaded by the worker's argument that the earlier injuries did not need to be disclosed since they were "in the system." The court stressed that he had failed to disclose the injuries that occurred in 1998 and 2002 to treating physicians and the Board had determined the failure to disclose was for the purpose of receiving additional workers' compensation benefits. The Board was within its discretion in disqualifying the worker from additional benefits [*see* Matter of Ali v. New York City Dept. of Corr., 2022 N.Y. App. Div. LEXIS 3224 (3d Dept. May 19, 2022), § 39.03 n. 11].

Three-Week Exposure to "Radar Beams" Was Not "a Definite Occasion" that Would Support Injury by Accident. Construing Va. Code § 65.2-400 and Virginia case law, a state appellate court affirmed the denial of a widow's claim that her husband's death from a heart attack had been caused by a three-week exposure to "radar beams" at the work site. Acknowledging Virginia's strict requirement that a claimant must not only show a period of work activity, but also an injury by accident as a result of "some particular piece of work done or condition encountered on a definite occasion," the court held competent evidence supported the denial of benefits. Evidence suggested that the deceased employee, while not excessively overweight, smoked half a pack of cigarettes daily, drank moderately, and sleepwalked several times each week. This set up the proverbial battle of the medical experts and the Commission was entitled to weigh the evidence and make its findings. As to another issue, the court quoted *Larson's Workers' Compensation Law*, and held the widow could not recover under a negligent first-aid theory because her claim was either a compensable consequence claim that failed when the initial claim was denied or a separate claim that was time-barred [*see* Johnson v. General Dynamics Corp., 2022 Va. App. LEXIS 61 (Mar. 8, 2022), § 50.01 n. 41].

Furnace Worker's COVID-19 Not Compensable. Finding that a furnace worker had failed to establish the necessary third prong in the definition of occupational diseases—that his employment created a risk of contracting the disease (here, COVID-19) in a greater degree and in a different manner than in the public generally, an Ohio appellate court affirmed a trial court's sum-

mary judgment determination in favor of an employer where the worker was unable to present expert medical evidence that he faced a risk of exposure greater than that to which the general public was subjected. This case illustrates the difficulty in establishing a viable COVID-19 claim in the absence of a presumption of compensability [*see* Yeager v. Arconic Inc., 2022-Ohio-1997, 2022 Ohio App. LEXIS 1867 (June 13, 2022), § 51.06[2] n. 29].

911 Dispatcher's PTSD Claim Found Compensable. A deeply divided Iowa Supreme Court, reversing the denial of workers' compensation benefits related to a claimed mental injury, held that the state's workers' compensation statute does not place a different, higher bar on emergency responders to be eligible for benefits for trauma-induced mental injuries than workers in other roles with identical injuries. Quoting *Larson's Workers' Compensation Law*, the majority of the court observed that the Iowa workers' compensation statute doesn't contain any language stating that injuries must result from an "unexpected cause or unusual strain" [*see* Iowa Code § 85.3(1)]. The majority said that setting different baselines for proving workers' compensation eligibility—one for emergency responders and one for everyone else—further presupposed that emergency responders agreed to assume the risk of suffering psychological injuries simply by accepting the job. The legal basis for this "assumption of risk" notion is unclear; it's certainly found nowhere in this record, stressed the majority. It continued that in any event, Iowa's workers' compensation statute embodied a "no fault" system: employers are not liable for their negligence in causing a workplace injury and workers are not subject to a setoff in benefits for their own conduct that might have contributed to their injury. Iowa's workers' compensation statute did not impose a higher burden on workers with jobs that involve frequent brushes with traumatic events than workers in other occupations. Allowing emergency responders to receive workers' compensation for their proven mental injuries, without imposing some heightened evidentiary hurdle absent in the statute, merely provided them with the compensation to which they're legally entitled [*see* Tripp v. Scott Emergency Commun. Ctr., 2022 Iowa Sup. LEXIS 68 (June 3, 2022), § 56.06[3] Digest n. 32].

California's AB 5 Exception Related to Freelance Writers, Photographers, and Others Does Not Violate First Amendment or Equal Protection Clause of U.S. Constitution. The Ninth Circuit Court of Appeals affirmed a decision by a federal district court dismissing a suit filed by the American Society of Journalists and Authors and National Press Photographers Association challenging Lab. Code § 2778 on the basis that the statute, which exempts specified occupations from application of "ABC" test set forth in *Dynamex Operations West, Inc. v. Superior Court*, and codified in California's AB5, violates the First Amendment and the Equal Protection Clause of

the U.S. Constitution by offering more narrow exemption to freelance writers, photographers and others than offered to certain other professionals. The Ninth Circuit concluded that Lab Code § 2778's use of different worker classification tests for different occupations under different circumstances to determine the worker's status as employee or independent contractor did not implicate the First Amendment or violate the Equal Protection Clause because the law regulated economic activity, not speech, and a rational basis supported the distinctions it drew [*see* American Society of Journalists and Authors, Inc. v. Bonta, 15 F.4th 954, 86 Cal. Comp. Cases 1024 (2021), § 61.03[1] n. 1.1].

Florida's 401-Week Limitation on TTD Benefits is Constitutional. In a post-*Westphal* decision, a Florida appellate court held the state's 401-week limit on temporary total disability benefits was constitutional. The appellate court stressed that Claimant's substantive rights were established by the version of the law in effect on the date of accident. Under § 440.15(3)(c), Fla. Stat. (1997), Claimant's eligibility for temporary benefits "terminates on the expiration of 401 weeks after the date of injury." The court noted that it had previously held that this 401-week (7.7 years) expiration date acted as a cap on the employee's "bank" of weekly temporary compensation benefits established by the maximum number of weeks otherwise payable under § 440.15. The court also noted that under the 1997 version of § 440.15, Claimant would have been entitled to a maximum of 104 weeks in TTD benefits, but that in *Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla 2016), the Florida Supreme Court held that the 104-week maximum, which represented a significant reduction from the prior law, as applied to Mr. Westphal and others similarly situated, unconstitutionally violated the right to access to the courts. As a remedy, the *Westphal* court revived the prior statute, which provided for a 260-week limitation. The appellate court said the JCC below had correctly assumed the 260-week maximum in accordance with *Westphal*, but ultimately concluded that Claimant's eligibility for TTD benefits had expired under § 440.15(3)(c), Fla. Stat. many years before his 2016 surgery. Relying on *Westphal*, Claimant argued on appeal that the 401-week limitation in § 440.15(3)(c), Fla. Stat., as applied to him, was similarly unconstitutional as a violation of right of access to courts. The appellate court disagreed. It stressed that the legislative reduction of benefits alone was not enough to show a denial of access to courts. The court acknowledged that like the injured worker in *Westphal*, Claimant's eligibility for TTD benefits terminated under the statute without regard to his actual disability from the compensable injuries. But the ultimate question here was whether the statute, with this 401-week limitation, passed constitutional muster because it remained a reasonable alternative to tort litigation, where a worker was not without

a remedy. Applying this standard to these facts, the court concluded that the statute was constitutional as applied to Claimant [*see* Doss v. United Parcel Services, 331 So. 3d 216 (Fla. 1st DCA 2021), *rev. denied*, 2022 Fla. LEXIS 335 (Feb. 25, 2022). § 80.03[7] n. 38].

Out-of-State Expert's AMA Guides Report Inadmissible. The Supreme Court of Kentucky held that under the clear wording of KRS 342.0011, which generally defines "physician" as a person "licensed in the Commonwealth of Kentucky," an ALJ could not consider a medical report prepared by Dr. Christopher Brigham, a well-known authority on the AMA Impairment Guides, since he was not licensed in Kentucky. Dr. Brigham, who did not examine the injured worker, but rather reviewed the medical file, had opined that under the AMA Guides (5th Edition), applicable in Kentucky, it was not appropriate—under the medical facts in the case—for the examining physician to assess an additional 2 percent permanent impairment rating for pain. Relying on Dr. Brigham's opinion, the ALJ had declined to award that additional 2 percent. The Supreme Court of Kentucky reversed and remanded, saying that consideration of Dr. Brigham's report was not allowed under the Kentucky statute. The court added, as a final point of clarification, that its holding does not apply to treating physicians [*see* Toler v. Oldham County Fiscal Court, 2022 Ky. LEXIS 143 (June 16, 2022), § 80.07[2] Digest n. 8 and § 128.05[8] n. 52.3].

To Rebut Claimant's Odd-Lot Status, Employer Need Not Contact Prospective Employers and Specifically Advise Them of Claimant's Condition. Agreeing that the claimant had made a prima facie showing of obvious unemployability under the odd-lot doctrine—claimant had been rated with a 22 percent PPD, claimant's vocational rehabilitation expert opined that claimant was unable to work and a job search would be futile, and claimant had been determined by the Social Security Administration to be disabled—the Supreme Court of South Dakota said the burden shifted to the employer to establish suitable employment within claimant's community existed "by showing that a position is available which is not sporadic employment resulting in an insubstantial income . . . ." [SDCL 62-4-53]. The court observed that the employer had shown the availability of at least three such positions. Claimant disputed the suitability of the positions, arguing that the employer or carrier was required to speak to each employer and inform that employer of claimant's limitations before suggesting that the positions were suitable. The court disagreed. The employer did need to consider all of a claimant's limitations in relationship to the requirements of the position but did not need to contact the prospective employer. The court stressed that the record was devoid of any evidence indicating claimant had attempted to find employment since 2015. It agreed with the Department's and the circuit court's determination that

claimant had failed to sustain his claim for permanent total disability [*see* Baker v. Rapid City Regional Hosp., 2022 SD 40, 2022 S.D. LEXIS 83 (July 20, 2022), § 83.01 Digest n. 6].

Injured Worker Laid Off Due To COVID-19 Cutbacks Not Entitled to Reduced Earnings Award. Where an injured employee returned to light work following a work-related injury, but with a different employer—not the firm that employed him at the time of his injury—and he was subsequently laid off, along with a number of other employees, due to the COVID-19 slowdown, he was not entitled to a reduced earnings award; the loss of his job was not related to his disability, held a New York appellate court. The court added that the former employee might qualify for unemployment benefits, but that was not a matter before the Board [*see* Matter of Coll v. Cross Country Constr., 202 A.D.3d 1236, 163 N.Y.S.3d 642 (3d Dept. 2022), § 84.03 n. 6.1].

New York Court Clarifies Treatment of Schedule Loss of Use for Multiple Injuries of Same "Member." The Court of Appeals, in a split decision, held that separate SLU awards for different injuries to the same statutory member are contemplated by section 15 and, when a claimant proves that the second injury, "considered by itself and not in conjunction with the previous disability" [*see* N.Y. Workers' Comp. Law § 15[7]), has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use. The court stressed that here, each claimant had the opportunity to present evidence regarding the degree of loss of use attributable solely to the accident in question. Because claimant Liuni submitted evidence regarding the loss of use of his left arm that was attributable solely to the injury to his shoulder and demonstrating that the second injury resulted in a greater degree of loss of use of the body member in question, reversal and remittal to the Board to make an SLU award in light of that evidence is warranted. Because claimant Johnson did not submit any such evidence, the Appellate Division order in his case must be affirmed. While not specifically overruling *Genduso v. New York City Dep't of Education*, 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3d Dept. 2018), this decision certainly calls it into question [*see* Johnson v. City of New York, 2022 N.Y. LEXIS 591 (Apr. 21, 2022), § 86.03 n. 16].

Signed Mediation Agreement Binds Employer/Carrier to $1 Million Payment in Spite of Worker's Death Seven Days After Mediation. Observing that after the 2007 amendment to S.C. Code § 42-9-390, an agreement settling a workers' compensation dispute no longer had to be approved by the Commission if both parties were represented by counsel, a South Carolina appellate court held that an employer and carrier were required to file a mediated settlement agreement with the Commission and follow through on the payment of the $1 million called for in the agreement

in spite of the fact that the injured worker was killed in an unrelated auto accident seven days after the parties had signed the mediated agreement. The deceased, his attorney, the employer, the carrier, and the mediator had all signed the mediator's agreement and were awaiting final paperwork from the carrier. With its decision, the appellate court reversed a determination by the state's Industrial Commission that had ruled the deceased worker's claim abated with his death because it had not been approved by the Commission [*see Ex parte* Horne, 2022 S.C. App. LEXIS 82 (Aug. 3, 2022), § 89.02 n. 4].

Deposit of Funds into Attorney's Trust Account Amounted to Express Trust Favoring Medical Care Providers. The federal district court for the Eastern District of Wisconsin affirmed a decision by a U.S. Bankruptcy Judge that the deposit of $400,000 into the trust account of an injured employee's attorney "for disbursement to medical providers and lienholders," following settlement of the employee's workers' compensation claim, amounted to an express trust and, therefore, could not be claimed as exempt property by the injured employee in his Chapter 7 bankruptcy case. At the time of the settlement, it had been acknowledged that the employee's medical bills related to his injury exceeded $870,000. In the Bankruptcy Court's order, the judge had commented that the arrangement might have been a "wink-wink" arrangement between the employee and the employer's carrier to avoid payment of the medical expenses. The arrangement amounted to an express trust favoring the creditors. Alternatively, the court said the circumstances were sufficient to create a constructive trust [*see* Ryan v. Branko PRPA MD LLC, 2022 U.S. Dist. LEXIS 36406 (E.D. Wis., Mar. 2, 2022), § 89.09 n. 5.1].

Employer's Contributions to Healthcare Plan and Pension Fund are Not Used in Computing Average Weekly Wage. The Ohio appellate court held that various fringe benefits in the form of health and welfare benefits, together with the employer's contributions to various pension funds were not to be used in computing the injured worker's average weekly wage under Ohio Rev. Code 4123.61. Citing *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Comp. Program*, 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983), the court said such fringe benefits could not be readily converted to a cash equivalent in the same way that regular wages and were not the sort of payment that the state's workers' compensation law intended to be included within the AWW. **Treatise** quoted [*see* State *ex rel.* Matheny v. Industrial Comm'n of Ohio, 2022-Ohio-1824, 2022 Ohio App. LEXIS 1697 (May 31, 2022), § 93.01[2][b] n. 59.13].

Commission Erred in Considering Claimant's Concurrent Employment Where There was no Evidence Primary Employer Knew About Concurrent Work. Claimant, a captain in the Springfield Fire De-

partment, sought workers' compensation benefits following his response to a call involving a young girl who had been viscously attacked by a dog. One issue before the arbitrator related to the claimant's average weekly wage. The arbitrator determined that his annual salary was $97,418.47. This was based on $90,537.97 working for the city and $6,880.50 working for a funeral home. The arbitrator awarded benefits based on the computed average weekly wage that included both employments and the city appealed. In relevant part, it objected to the AWW computation. The appellate court reversed. It noted that Section 10 of the Act mandated that an employer have knowledge of concurrent employment for it to be considered in calculating claimant's average weekly wage [*see* 820 ILCS 305/10 (2014); Jacobs v. Industrial Comm'n, 269 Ill. App. 3d 444, 448, 206 Ill. Dec. 945, 646 N.E.2d 312 (1995)]. Claimant pointed to two facts—that he had worked for the funeral home concurrent with his employment with the city for 14 years and that personnel records from the funeral home indicated "its ability to communicate with the city." The appellate court said that neither of these facts was sufficient to show awareness of claimant's concurrent employment. To assume that the city had knowledge of claimant's work at the funeral home because he had been there a long time would require one to speculate that the subject must have been discussed at some point during that time. Similarly, it would be speculation to conclude that the funeral home had contacted the city simply because it was able to do so. An award under the Act could not be based on mere speculation. Therefore, the Commission erred in considering claimant's concurrent employment in determining his average weekly wage. The case was remanded to allow the Commission to recalculate claimant's average weekly wage without considering concurrent employment [*see* City of Springfield v. Illinois Workers' Comp. Comm'n, 2022 IL App (4th) 210338WC-U, 2022 Ill. App. Unpub. LEXIS 1090, § 93.03[1][a] n. 4.4].

Employer Need Not Pay for Claimant's Opioids More than 9 Years After Accident. The Delaware Supreme Court affirmed a decision of the Superior Court that in turn had affirmed a decision by the state's Industrial Accident Board ("IAB") granting an employer's petition for review as well as the IAB's findings that the claimant's ongoing narcotic pain medications were no longer compensable. The Delaware Supreme Court observed that the IAB's June 2020 decision, based upon the medical opinion of a board-certified physical medicine, rehabilitation, and pain management physician, was that claimant's need for opioids was no longer casually connected to an industrial accident that had occurred more than nine years earlier. The supreme court said the employer's evidence—which included the fact that the claimant had failed to advise physicians of her illegal marijuana use—was sufficient to withstand the claimant's motion to dismiss before

the Superior Court [*see* Sheppard v. Allen Family Foods, 2022 Del. LEXIS 187 (June 23, 2022), § 94.03[1] n. 2.2].

Court Clarifies Employer's Duty to Provide Special Housing. Where a Pennsylvania construction worker, who had been rendered a paraplegic in a compensable workplace injury, obtained a bona fide estimate indicating it would cost more than $119,000 to make necessary accommodations to the home where he lived, that amount did not become the claimant's baseline entitlement, such that when he purchased a one-level house for $230,000, he could require the employer to pay $119,000 toward the purchase price. The Commonwealth Court stressed that, in these sorts of cases, the Board was required to weigh the remedial purposes of the Act against the need to avoid windfalls to the claimant. Here, that analysis was never undertaken. The court observed that claimant had apparently settled a third-party civil action for $6 million. The employer had paid more than $5,000 to make necessary modifications to a bathroom. There was no requirement here that it do more [*see* Ralph Martin Constr. v. Castaneda-Escobar (Workers' Comp. Appeal Bd.), 2022 Pa. Comm. LEXIS 98 (Aug. 1, 2022), § 94.03[1] n. 26].

Death Benefits Denied Where 16-Year-Old Dies on First Day of Work. That a mother received a Social Security Disability check on behalf of her 16-year-old son each month, due to his learning disability, did not mean she was "dependent" upon him within the meaning of § 440.16(1)(b), Fla. Stat., held a Florida appellate court. Accordingly, she could not recover workers' compensation death benefits when he died in a tragic drowning accident on his first day at work. He had no prior wages. Construing § 440.16(1)(b), Fla. Stat., the court said payment of a specific type of compensation was allowed upon the death of an employee resulting from a compensable accident. But only several specified relatives can get it, a parent and sibling being two examples. The statute-based entitlement "on account of dependency upon the deceased," and the amount of compensation was calculated as a "percentage . . . of the average weekly wages." The court stressed that that a relative must have a particular type of dependency to be entitled to the benefit: dependency on the decedent's wage-earning capacity. The mother could show no such dependency under the statute and could not, therefore, recover death benefits [*see* Sandifort v. Akers Custom Homes, 2022 Fla. App. LEXIS 4697 (1st DCA July 13, 2022), § 97.01[2] n. 6.1].

Wrongful Death Action Related to Employee's COVID-19 Exposure Barred by Exclusive Remedy Rule. Where the family of a deceased worker sued the worker's employer alleging it had improperly housed dozens of employees who had contracted COVID-19 and had failed to provide quarantined employees with adequate food and medical care, the civil action was barred by the exclu-

sive remedy provisions of the Texas Workers' Compensation Act ("the Texas Act"), held a federal district court, following removal of the original action filed in Texas state court. Reviewing the pleadings, the court said the plaintiffs had judicially admitted that their claims were based upon a workplace incident. Their exclusive remedy was pursuant to the Texas Act [*see* Sil v. Larsen Farms, 2022 U.S. Dist. LEXIS 27705 (N.D. Tex. Feb. 15, 2022), § 100.03[5] n. 24.2].

To Recover Under Retaliatory Discharge Statute, Employee Must Either Have Filed Claim or Initiated Proceedings for Benefits Before Termination. In a case filed raising claims of workers' compensation discrimination in violation of R.C. 4123.90 and violation of the Ohio Civil Rights Act under R.C. 4112.01 *et seq.*, the trial court did not err in granting summary judgment to defendants as to the claim for worker's compensation retaliation. The court stressed that an employee presents a prima facie case for retaliatory discharge under R.C. 4123.90 when he or she demonstrates the following: (1) he or she was injured on the job; (2) a worker's compensation claim had been filed; and (3) he or she was discharged in contravention of R.C. 4123.90. The court agreed with the former employer that here, the statutory retaliation claim pursuant to R.C. 4123.90 was barred by the fact that she was terminated before she filed her worker's compensation claim. The language of R.C. 4123.90 is clear and unambiguous that an employee must have either filed a claim or initiated or pursued proceedings for worker's compensation benefits prior to being discharged for his employer to be liable under statute [*see* Bryant v. Dayton Casket Co., 69 Ohio St. 2d 367, 433 N.E.2d 142 (1982)]. Of course, as noted by the plaintiffs, Ohio recognizes a common-law tort claim for wrongful discharge in violation of public policy when an injured employee suffers retaliatory employment action after injury on the job but before the employee files a worker's compensation claim or institutes or pursues a worker's compensation proceeding [*see* Sutton v. Tomco Machining, Inc., 129 Ohio St. 3d 153, 2011-Ohio-2723, 950 N.E.2d 938 (2011), § 104.07[1] n. 29.2].

Trial Court Erred in Finding Petitioners Had Waived Attorney-Client Privilege Due to Lack of Privilege Log. While not a workers' compensation case, the holding of the appellate court is nevertheless instructive regarding discovery disputes. Here, the appellate court quashed the portion of the trial court's order finding that the petitioners had waived attorney-client privilege for failing to file a privilege log. The appellate court held petitioners' counsel's e-mail explanations were sufficient to expressly claim attorney-client privilege and describe the nature of the redacted communications. Petitioners' counsel provided information pursuant to Fla. R. Civ. P. 1.280(b)(6) that was sufficient to permit respondents' counsel and the trial court to assess the claim of attorney-

client privilege, or at least allow for in-camera review [*see* Andreatta v. Brown, 330 So. 3d 589 (Fla. 1st DCA 2021), § 127.11[3][c] n. 15.1].

Withdrawal of Lien Claim Does Not Rid WCAB of Jurisdiction to Review Sanctions Petition Filed Against Lien Claimant. Where a police officers trust fund paid money pursuant to its disability policy to one of its members, a correctional officer, and then filed a lien claim against the prospective officer's workers' compensation award for the sum it had paid, but withdrew the lien after the officer's attorney petitioned for costs and sanctions against the fund and its non-attorney appearing pursuant to the Labor Code § 5700 for alleged misbehavior, the withdrawal did not deprive the WCAB of jurisdiction on the issue and the Board was within its power to affirm an award of attorney's fees against the fund and its non-attorney representative, for failure to appear at four hearings on the petition for costs and sanctions. The court of appeal also held that notice of the hearing on the petition for costs and sanctions was adequate to satisfy due process because the hearing date was clearly stated, and a simple inquiry could have cleared up any confusion about how the hearing was to be held telephonically [*see* California Correctional Peace Officers Assn. etc. v. Workers' Comp. Appeals Bd., 74 Cal. App. 5th 525, 289 Cal. Rptr. 3d 259 (2022), § 135.02[1] n. 8.4].

Table of Cases. A revised Table of Cases has been included in this release.

Index. A revised Index has been included in this release.

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Publication 340 Release 129 December 2022

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