



2019 Annual Meeting & Educational Conference

DEFENSE ATTORNEY LINE-UP OF ISSUES AROUND THE COUNTRY CA, FL, IL, LA, NY

- JOANNE THOMAS, *SRTK LAW*
- TAYSHA CARMODY, *MCCONNAUGHAY, COONROD, POPE, WEAVER & STERN*
- ADAM COX, *NYHAN BAMBRICK KINZIE & LOWRY*
- WAYNE FONTANA, *ROEDEL PARSONS KOCH BLACHE BALHOFF & MCCOLLISTER*
- MARK HAMBERGER, *HAMBERGER & WEISS LLP*



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Course and Scope of Employment – Redefining the Workplace Under Section 440.09(1), Florida Statutes

Sedgwick CMS and The Hartford vs. Tammitha Valcourt-Williams

Taysha L. Carmody, Esquire





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WHAT'S NEW IN NEW YORK WORKERS' COMP?

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ATTORNEYS AT LAW

PAYOR COMPLIANCE PROJECT

2015: NY WCB ANNOUNCES PROGRAM TO PHASE IN PERFORMANCE GOALS AND PENALTIES FOR TIMELY FILING OF FIRST REPORTS OF INJURY AND TIMELY FIRST PAYMENT.

WCRI STUDY SHOWED FIRST PAYMENT IN NEW YORK LATER THAN MOST STATES. (BELIEVED STUDY DID NOT CONSIDER WAGE CONTINUATION BEFORE FORMAL AWARD DATE OF WC INDEMNITY)

SEE WCB SUBJECT NOS. 046-760 AND 046-808

ONE NEW YORK WCB SOLUTION?

REQUIRE EMPLOYER/CARRIER TO BEGIN INDEMNITY PAYMENTS “WHEN THE EMPLOYER REPORTS A WORK-RELATED INJURY/ILLNESS AND LOST TIME EXCEEDS THE WAITING PERIOD WHETHER THERE IS MEDICAL [EVIDENCE OF DISABILITY] IN THE FILE OR NOT.”

EVEN IF NO MEDICAL EVIDENCE, PAYER TO PAY AT THE TENTATIVE MILD RATE FOR 30 DAYS.

**WCB STATES THE PAYER MAY TRANSFER THE
INJURED WORKER'S CARE TO AN AUTHORIZED
PROVIDER,**

OR

MAY PROCURE AN IME.

**THOUGH NEITHER OPTION IS ALLOWED BY
STATUTE**

COMMENTS

- 1. BY LAW, IT IS CLAIMANT'S BURDEN TO PROVE DISABILITY**
- 2. PAYER WILL HAVE NO RECOURSE TO RECOVER PAYMENTS IF NO MEDICAL EVIDENCE OF DISABILITY IS EVER FILED**
- 3. WCB ISSUES REPORT CARDS ON PAYERS FOR COMPLIANCE WITH TIMELY FIRST PAYMENT AND CAN IMPOSE BULK PENALTIES FOR FAILURE TO MEET STANDARD**
- 4. WCB ISSUES LICENSES TO TPAs, REGULATES SELF-INSURED EMPLOYERS AND CONSIDERS WHETHER PERFORMANCE GOALS ARE MET**

INFORMAL SURVEY OF 23 OTHER STATES

THREE MAY REQUIRE PAYMENT WITHOUT MEDICAL:

- ONE MAY REQUIRE PAYMENT WITHOUT MEDICAL WITHOUT APPARENT PRECONDITIONS.**
- ANOTHER MAY ORDER PAYMENT WITH CLAIMANT TESTIMONY ALONE IN SOME CIRCUMSTANCES.**
- AND A THIRD STATE, GENERALLY NO, BUT BUREAU CAN ORDER PAYMENTS BASED ON A FINDING THAT CLAIMANT WOULD LIKELY PREVAIL.**

20 STATES SAID “NO WAY . . .”

MEDICAL MARIJUANA IN NYS WC: ISSUES WITH FEDERAL LAW

**MARIJUANA, EVEN FOR MEDICINAL USE,
REMAINS ILLEGAL UNDER FEDERAL LAW. 21
USCA § 812.**

**CLASSIFIED AS SCHEDULE ONE DRUG, I.E.,
FEDERAL GOVERNMENT CONSIDERS IT TO
HAVE NO LEGITIMATE USE.**

**POSSESSING ANY AMOUNT OF MARIJUANA
(SIMPLE POSSESSION) IS A FEDERAL CRIME
PUNISHABLE BY UP TO ONE YEAR IN PRISON
AND A \$1,000.00 FINE. 21 USCA § 844.**

FURTHER, THROUGH THE COMMERCE CLAUSE, CONGRESS HAS PREEMPTED ANY STATE LAW PERMITTING THE USE OF MEDICAL MARIJUANA VIA THE PASSAGE OF THE CONTROLLED SUBSTANCES ACT. GONZALES V RAICH, 545 US 1 [2005].

CONTROLLED SUBSTANCES ACT MAKES IT A CRIME FOR ANY PERSON TO “ATTEMPT OR CONSPIRE” TO COMMIT ANY OFFENSE PROHIBITED BY THE CSA. 21 USCA § 846.

FURTHER, 18 USCA § 2 STATES, “WHOEVER COMMITS AN OFFENSE AGAINST THE UNITED STATES OR AIDS, ABETS, COUNSELS, COMMANDS, INDUCES OR PROCURES ITS COMMISSION, IS PUNISHABLE AS A PRINCIPAL.” AS SUCH, THERE IS THE POTENTIAL FOR POSSIBLE CRIMINAL EXPOSURE FOR FACILITATING THE PROCUREMENT OF A CONTROLLED SUBSTANCE.

ON 1/4/2018 ATTORNEY GENERAL JEFF SESSIONS EFFECTIVELY PERMITTED THE PROSECUTION OF ANY ACTIVITY IN CONFLICT WITH THE CONTROLLED SUBSTANCES ACT. *SEE,*

[HTTPS://WWW.JUSTICE.GOV/OPA/PR/JUSTICE-DEPARTMENT-ISSUES-MEMO-MARIJUANA-ENFORCEMENT](https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement)

HOWEVER, ROHRABACHER-FARR AMENDMENT, NOW KNOWN AS ROHRABACHER-BLUMENAUER AMENDMENT, STATES JUSTICE DEPARTMENT CANNOT USE APPROPRIATIONS, OR FEDERAL FUNDS, TO PREVENT STATES WHO HAVE LEGALIZED USE OF MEDICAL MARIJUANA FROM IMPLEMENTING SUCH LEGAL USE. NOT REASSURING SINCE:

- **ONLY SHORT TERM RENEWALS MOST RECENTLY THROUGH 9/30/19;**
- **“*STATEMENT BY THE PRESIDENT*” SUGGESTS HE COULD IGNORE THIS PROVISION AS HE WOULD TREAT IT CONSISTENTLY WITH HIS “CONSTITUTIONAL RESPONSIBILITY TO FAITHFULLY EXECUTE THE LAWS OF THE UNITED STATES.” *SEE, [HTTPS://WWW.WHITEHOUSE.GOV/BRIEFINGS-STATEMENTS/STATEMENT-BY-THE-PRESIDENT-28/?UTM_SOURCE=LINK](https://www.whitehouse.gov/briefings-statements/statement-by-the-president-28/?utm_source=link);***
- **DOES NOT MAKE THE USE OF, OR PAYMENT FOR, MEDICAL MARIJUANA LEGAL IN ANY STATE.**

ISSUES WITH STATE LAW

PUBLIC HEALTH LAW § 3368: “NOTHING IN THIS TITLE SHALL BE CONSTRUED TO REQUIRE AN INSURER OR HEALTH PLAN UNDER THIS CHAPTER OR THE INSURANCE LAW TO PROVIDE COVERAGE FOR MEDICAL MARIJUANA.”

- **HOWEVER, THE WORKERS’ COMPENSATION BOARD SAYS THAT PUBLIC HEALTH LAW § 3368(B)(2) DOES NOT EXTEND TO WORKERS’ COMPENSATION CARRIERS, ONLY TO HEALTH INSURERS, CITING INSURANCE LAW § 1113(A)(3) AND INSURANCE LAW §4101(A). *SEE, OUR LADY OF VICTORY HOMES, 2018 WL 2752819, (WCB NO. G0856772, DECIDED 6/4/18). TO THE CONTRARY, INSURANCE LAW § 1113(A)(15) DOES, IN FACT, INCLUDE WORKERS’ COMPENSATION AND EMPLOYER’S LIABILITY INSURANCE.***

ISSUES WITH NYS WCB MTG

ALTHOUGH TREATMENT THAT IS NOT FDA APPROVED IS NOT PERMITTED PER MEDICAL TREATMENT GUIDELINES GENERAL GUIDELINE PRINCIPLES, § A.20., THE BOARD HAS FOUND:

- **WITHOUT A SPECIFIC RULING BY A FEDERAL COURT, PREEMPTION DOES NOT APPLY,**
- **THE BOARD HAS THE AUTHORITY TO DIRECT PAYMENT UNDER WCL § 13,**
- **PUBLIC HEALTH LAW § 3368(2) DOES NOT APPLY TO WC CARRIERS**
 - **SEE, MATTER OF WDF INC., 2018 WL 1723750, (WCB NO. G1403803, DECIDED 2/16/18) AND OUR LADY OF VICTORY HOMES, SUPRA.**

BUT...

TREATING PROVIDER MUST STILL REQUEST A VARIANCE AS BURDEN OF PROOF IS STILL ON TP TO SHOW:

- **MEDICAL NECESSITY AND APPROPRIATENESS,**
- **CLAIMANT AGREES,**
- **OTHER TREATMENT CONSISTENT WITH THE MTG HAS BEEN TRIED AND FAILED, OR WHY NOT APPROPRIATE.**

**OUR LADY OF VICTORY HOMES, SUPRA,
APPEALED TO APPELLATE DIVISION, 3D DEPT.;
RECENTLY PERFECTED AND AWAITING
ARGUMENT AND DECISION. *SEE, MESSECAR*
V. OUR LADY OF VICTORY, INDEX NO. 528165.**

NYS WCB HANDLING OF MEDICAL MARIJUANA

MEDICAL MARIJUANA IS A CASH BUSINESS. CLAIMANTS MAKE PAYMENT IN CASH AND SEEK REIMBURSEMENT FROM THE CARRIER/SELF INSURED EMPLOYER. THERE IS LIMITED MEDICAL CONTROL OVER WHAT A CLAIMANT MAY PURCHASE IN A DISPENSARY: TREATING PROVIDER MUST INDICATE BRAND AND FORM, BUT NOT DOSAGE.

CARRIERS/SELF INSURED EMPLOYERS IN NEW YORK ARE NOT DIRECTED TO MAKE PAYMENTS TO DISPENSARIES. INSTEAD, THE WCB HAS HELD THAT IT HAS THE AUTHORITY TO DIRECT CARRIERS/SELF INSURED EMPLOYERS TO REIMBURSE CLAIMANTS FOR OUT OF POCKET EXPENSES FOR MEDICAL MARIJUANA AS A “MEDICAL AND TRAVEL EXPENSE” IN CASES WHERE THE TREATING PROVIDER FILED THE APPROPRIATE REQUEST FOR A VARIANCE AND MET THE BURDEN OF PROOF.

GIVEN THE NUMEROUS LEGAL ISSUES CITED ABOVE, WE ARE RECOMMENDING OUR CLIENTS DENY REQUESTS FOR MEDICAL MARIJUANA AND APPEAL IF NECESSARY ON THE LEGAL AND MTG ISSUES.

VIRTUAL HEARINGS (AND DIGITAL AUDIO RECORDINGS)

OCTOBER 2017:

- **BOARD IMPLEMENTED VIRTUAL HEARING TECHNOLOGY**
- **PERMITS CLAIMANTS, ATTORNEYS, WITNESSES AND ALL PARTIES TO PARTICIPATE REMOTELY BY COMPUTER OR MOBILE DEVICE**

BOARD NOTES “FIRST HIGH DEFINITION ALL ACCESS SYSTEM IN THE NATION.”

2018: 276,320 HEARINGS STATEWIDE

- **AT 53,827 AT LEAST ONE ATTENDEE
ACCESSED REMOTELY**
- **NO LIVE STENOGRAPHIC COURT REPORTERS
AT HEARINGS**
- **REPLACED BY DIGITAL AUDIO RECORDING (DAR)
SYSTEMS**

1/13/19:

BOARD LAUNCHED A NEW APP FOR STATE OF THE ART VIRTUAL HEARINGS

OUR EXPECTATION:

- **PERCENTAGE OF HEARINGS WITH ONE OR MORE PARTIES APPEARING VIRTUALLY WILL CONTINUE TO INCREASE**
- **VIRTUAL APPEARANCE GAINING FAVOR WITH CLAIMANTS' ATTORNEYS**

COMMENTS:

- 1. TECHNOLOGY GLITCHES WITH MISSED APPEARANCES**
- 2. DIGITAL RECORDING LESS RELIABLE THAN LIVE REPORTER MINUTES. PARTIES CANNOT OBTAIN OFFICIAL HEARING TRANSCRIPT.**
- 3. JUDGE UNABLE TO ASSESS CLAIMANT'S PHYSICAL APPEARANCE OR DEMEANOR REMOTELY.**
- 4. COUNSEL FOR BOTH SIDES LOSE OPPORTUNITY FOR "COURTHOUSE STEPS" NEGOTIATION OF ISSUES UNLESS ALL PARTIES ARE PRESENT.**

INFORMAL STUDY OF 29 STATES:

- **10 STATES ALLOW SOME LIMITED REMOTE ACCESS TO HEARINGS/CONFERENCES, WITH VARIOUS LIMITATIONS WHICH MAY INCLUDE:**

CONSENT OF THE JUDGE AND/OR OPPOSING COUNSEL

A SHOWING OF GOOD CAUSE OR UNUSUAL CIRCUMSTANCE

CREDIBILITY OF CLAIMANT NOT AN ISSUE

**19 STATES:
NO VIRTUAL APPEARANCE ALLOWED**

COMMENT:

**NEW YORK MAY STAND ALONE IN PERMITTING
ALL PARTIES, COUNSEL AND WITNESSES TO
MAKE UNFETTERED UNILATERAL DECISION
TO APPEAR VIRTUALLY.**

EXTREME HARDSHIP REDETERMINATION PROCEDURE

BACKGROUND:

2007 OMNIBUS WC REFORM INCLUDED MAXIMUM BENEFIT WEEKS (“CAPS”) BETWEEN 4.3 AND 10 YEARS IN PPD CASES.

(PRIOR TO 2007, PPD BENEFITS COULD BE FOR LIFE)

SAFETY NET/EXTREME HARDSHIP:

IF LOSS OF WAGE EARNING CAPACITY (LWEC) OVER 75%, CLAIMANT MAY REQUEST A RECLASSIFICATION, DURING FINAL YEAR OF BENEFITS, TO PERMANENT TOTAL OR TOTAL INDUSTRIAL DISABILITY, ELIMINATING DURATIONAL CAP.

BOARD PUBLISHED QUALIFICATIONS FOR EXTREME HARDSHIP ON 4/26/17 IN SUBJECT NO. 046-938:

- CLAIMANT MUST SUBMIT FORM C-35 WITH
DETAILED FINANCIAL INFORMATION ON
MONTHLY EXPENSES, HOUSEHOLD INCOME
FROM ALL MEMBERS.**
- OFFER OTHER FACTORS THAT CONTRIBUTE
TO EXTREME HARDSHIP.**

COMMENTS:

“EXTREME HARDSHIP” WAS AN UNDEFINED TERM IN 2007 LEGISLATION, THOUGH GOVERNOR’S MEMORANDUM USED TERM “EXTREME FINANCIAL HARDSHIP.”

CLAIMANTS WITH GREATER THAN 75% LWEC (425 WEEK CAP) ONLY ENTERED FINAL YEAR, THEN ELIGIBLE TO APPLY, BEGINNING IN 2017.

CONCERN IN EMPLOYER/CARRIER COMMUNITY THAT BOARD WOULD LIBERALLY INTERPRET EXTREME HARDSHIP IN FAVOR OF CLAIMANTS, AND LIFT THE DURATIONAL BENEFIT CAP.

RECENT BOARD DECISIONS: “SO FAR, SO GOOD”

BOARD IS REQUIRING CLAIMANT PRODUCTION OF DOCUMENTARY PROOF OF INCOME AND EXPENSES AS EVIDENCE OF FINANCIAL SITUATION.

BOARD HAS FOUND THAT CLAIMANT’S EXPENSES EXCEEDING HIS/HER INCOME DOES NOT NECESSARILY QUALIFY AS EXTREME HARDSHIP.

EXPANDED LIST OF PROVIDERS AUTHORIZED TO TREAT

**LEGISLATION SIGNED ON 4/12/19 PERMITS THE
FOLLOWING TO TREAT:**

NURSE PRACTITIONERS (NP)

PHYSICIAN ASSISTANTS (PA)

OCCUPATIONAL THERAPISTS (OT)

ACUPUNCTURISTS

PHYSICAL THERAPISTS (PT)

LICENSED CLINICAL SOCIAL WORKERS (LCSW)

LAW TAKES EFFECT ON 1/1/2020

NEW LAW GIVES NPs NEARLY THE SAME RIGHTS AS PHYSICIANS

- **ALLOWS NPs TO OPINE ON CAUSAL RELATIONSHIP, DISABILITY AND DEGREE THEREOF**

APPEARS REPORTS OF PTs, OTs, PAs AND ACUPUNCURISTS CANNOT BE USED AS EVIDENCE OF CAUSAL RELATIONSHIP OR DISABILITY

UNDER PRIOR LAW, REFERRALS TO PTs AND OTs HAD TO COME FROM AN AUTHORIZED PHYSICIAN.

UNDER NEW LAW, PHYSICIANS, PAs, PODIATRISTS AND NPs MAY REFER PATIENTS TO PTs OR OTs

COMMENTS:

TIME WILL TELL WHETHER THIS EXPANDED LIST OF AUTHORIZED TREATERS WILL HAVE A SIGNIFICANT COST IMPACT ON EMPLOYERS.

NPs WILL BILL AT 75% OF PHYSICIAN CHARGE, BUT FREQUENCY WILL BE A FACTOR.

PAID FAMILY LEAVE

➤ **FOUR STATES CURRENTLY HAVE PAID FAMILY LEAVE PROGRAMS**

CALIFORNIA

RHODE ISLAND

NEW JERSEY

NEW YORK

BY 2020 WASHINGTON DC & WASHINGTON STATE WILL JOIN THE GROUP, WITH MASSACHUSETTS IN 2021

NY PAID FAMILY LEAVE

NYS AMENDED ITS **DISABILITY BENEFITS LAW TO INCLUDE PAID FAMILY LEAVE. FIRST LEAVES BEGAN IN 2018**

ALL **PRIVATE EMPLOYERS IN NYS, REGARDLESS OF NUMBER OF EMPLOYEES, MUST OFFER PAID FAMILY LEAVE. **PUBLIC EMPLOYERS** MAY OPT OUT, BUT MUST OFFER PFL AS A SUBJECT OF COLLECTIVE BARGAINING.**

NYS PAID FAMILY LEAVE IS FUNDED BY A DEDUCTION FROM EMPLOYEE PAYROLL, WITH **NO COST TO THE EMPLOYER**

NYS' PAID FAMILY LEAVE PROGRAM IS ADMINISTERED BY THE **NYS WORKERS' COMPENSATION BOARD**

NYS PAID FAMILY LEAVE CIRCUMSTANCES

➤ PAID FAMILY LEAVE CAN BE TAKEN FOR :

BONDING WITH A NEW **CHILD IN THE FIRST 12 MONTHS OF THE CHILD'S LIFE OR PERIOD OF ADOPTION, OR FOSTER CARE**

CARE OF A **FAMILY MEMBER WITH A SERIOUS HEALTH CONDITION**

RELIEF OF FAMILY PRESSURE DURING **ACTIVE MILITARY SERVICE**

PAID FAMILY LEAVE **CANNOT BE TAKEN FOR ONE'S OWN ILLNESS !**

PAID FAMILY LEAVE WEEKLY AND MONETARY BENEFITS

**IN NYS PAID FAMILY LEAVE BENEFITS ARE PHASED IN
OVER FOUR YEARS, EFFECTIVE JAN. 1 OF EACH YEAR**

**2018 – MAXIMUM 8 WEEKS / 50% OF THE STATE
AVERAGE WEEKLY WAGE (AWW)**

2019 – MAXIMUM 10 WEEKS / 55% OF \$1357.11 (\$ 746.41)

2020 – MAXIMUM 10 WEEKS/ 60% AWW

2021 – MAXIMUM 12 WEEKS / 67% AWW

FOR FURTHER INFORMATION, CONTACT

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