Agency Case Law Update

IWCAC – October 15, 2020

JORDAN TALSMA

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Post-July 1, 2017 Shoulder Cases

- ***Chavez v. MS Technology, LLC*, File No. 5066270 (Arb. Dec. Feb. 5, 2020)(Deputy McGovern)**
  - Facts: Claimant alleged injuries to her right shoulder, neck, and right upper extremity
    - Medical: arthroscopic repair of the rotator cuff tendon of the supraspinatus, infraspinatus, and subscapularis tendons; extension debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy; subacromial decompression
  - Issue: Whether Claimant sustained an injury to her shoulder only (85.34(2)(n)) or injuries which extended beyond the shoulder (85.34(2)(v))

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Post-July 1, 2017 Shoulder Cases

- ***Chavez,* cont.**
  - Shoulder or Whole Body:
    - Glenohumeral joint: "Ball and socket" joint
      - Distal to the glenohumeral joint = arm
      - Proximal to the glenohumeral joint = body as a whole
    - Must be expert evidence as to whether the injury is confined to the shoulder or extends to the body as a whole
  - ❑ Arbitration Decision: Proximal to the glenohumeral joint/Body as a Whole

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Post-July 1, 2017 Shoulder Cases

❑ ***Deng v. Farmland Foods, Inc.*, File No. 5061883 (Arb. Dec. Feb. 25, 2020)(Deputy McGovern)**

- ❑ Very similar to *Chavez* but non-surgical case
- ❑ Claimant injured left shoulder (infraspinatus and labrum)
  - ❑ Deputy McGovern found "claimant experiences pain and symptoms due to injury to part of her anatomy that are proximal to the glenohumeral joint. For instance, she sustained injury to the infraspinatus muscle belly and has residual symptoms in the trapezius, both of which are proximal to the glenohumeral joint"
- ❑ Arbitration Decision: Proximal to the glenohumeral joint/body as a whole

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Post-July 1, 2017 Shoulder Cases

- ***Deng* Appeal Decision:**
  - Issue: whether the labrum and the infraspinatus should be compensated under 85.34(2)(n) or as an unscheduled whole body injury under 85.34(2)(u)
  - Labrum = Claimant concedes it is part of the "shoulder" because it is located entirely within the glenohumeral joint
  - Infraspinatus: Commissioner finds it is part of the "shoulder"
    - Claimant: "Shoulder" includes only the glenohumeral joint
    - Defendants: "Shoulder" extends beyond the joint and includes the infraspinatus

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Post-July 1, 2017 Shoulder Cases

- ***Chavez* Appeal Decision:**
  - Rotator cuff = shoulder (relied on *Deng*)
  - Labral tear = shoulder ("closely interconnected both in location and function to the glenohumeral joint")
  - Subacromial decompression = shoulder ("closely entwined with the glenohumeral joint both in location and function")
- **Takeaways:**
  - Holdings are confined to structures immediately attached to the glenohumeral joint
    - Still unclear about the structures beyond the glenohumeral joint (i.e., clavicle)

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Industrial vs. Functional Disability

- ***Draper v. Menard, Inc.*, File No. 5061657 (Arb. Dec. Aug. 6, 2019)(Deputy McGovern)**
  - Parties stipulated that Claimant sustained an industrial disability
  - **Issue - 85.34(2)(v):** "If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings, than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity."
    - Claimant accepted offer to return to work with same employer, accepted wage increase, and was later terminated but termination was in no way related to Claimant's work injury
      - Therefore, injury was calculated by the functional method instead of industrial method

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Industrial vs. Functional Disability

- ***Martinez v. Pavlich, Inc.*, File No. 5063900 (Appeal Dec. July 30, 2020)**
  - Issue: Claimant had returned to work for the same or greater earnings, but the work he was performing was for a different employer
    - Claimant had voluntarily resigned from previous employment
  - **85.34(2)(v)**: "… if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability."

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Industrial vs. Functional Disability

- ***Martinez*, cont.**
  - Defendants argue that because Claimant voluntarily resigned and began working for a different employer, his PPD benefits should be calculated by considering his reduction in earning capacity under the industrial disability method
    - Claimant and Defendants made opposite arguments than they typically would
  - Decision: "When the two new provisions cited by each party are read together . . . It appears the legislature intended to address only the scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant employer at the same or greater earnings but is later terminated by the defendant-employer."

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Industrial vs. Functional Disability

- **Takeaways:**
  - The injured worker must return to work with the same employer at an earnings level that was the same or greater than at the time of the injury in order for the functional loss limitation to be applicable.
  - Reaffirms that a work incident that produces permanent injuries to three separate scheduled members entitles the injured worker to industrial disability compensation under the catch-all provision of 85.34(2)(v)

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Notice

- ***Kudic v. IOC Black Hawk County, Inc.*, File Nos. 5066504, 5066505 (Arb. Dec. Mar. 13, 2020)**
  - **Issue:** "The fighting issue is when the claimant knew or should have known or her injury"
  - **85.23:** an injury is not compensable unless, within 90 days of the date of the occurrence of the injury either (1) the employer had actual knowledge of the occurrence of an injury or (2) notice of the occurrence of an injury was provided to the employer
    - **Purpose:** give the employer an opportunity to timely investigate the facts surrounding the injury
  - **Finding:** A reasonably conscientious manager would have investigated whether Claimant's request for an accommodation was due to a work-related reason
    - Burden is on Defendant to prove by a preponderance of the evidence that a reasonably conscientious manager would not have viewed a request for accommodation as an alert that there was a possibility of a potential compensable claim

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Penalty

- ***Becirevic v. Trinity Health Corporation*, File No. 5063498 (App. Dec. Mar. 24, 2020)**
  - Employer's authorized treating physician opined Claimant reached MMI for "failure to progress" on February 10, 2017 and provided a five percent impairment rating on February 14, 2017 with restrictions which did not comport with requirements of Claimant's job
    - Despite the fact the Employer's authorized treating physician imposed permanent restrictions that precluded Claimant from returning to her job, Employer only paid 5% rating.
  - **Finding:** Defendant knew from the moment it received authorized physician's permanent restrictions that Claimant would be unable to continue in her position.
    - Defendant based its payment of permanent partial disability benefits on one factor of industrial disability alone, the impairment rating.
    - Defendant had the burden to establish a reasonable basis, or excuse, and to prove contemporaneous conveyance of those bases to Claimant.

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Lay Testimony and Functional Impairment

- ***Streif v. John Deere Dubuque Works of Deere & Company*, File No. 5068621 (Arb. Dec. Dec. 3, 2019)**
  - Injury to Claimant's left thumb, which had to be partially amputated after it was crushed by a falling cylinder
    - Claimant: Loss of use of hand
    - Defendant: Loss of use of thumb
  - **85.34(2)(x):** "Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment."
    - Deputy: "However, the new statute does not appear to prohibit using lay testimony in aiding to ascertain which of the two ratings in this case is more convincing or credible."

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