WC Appellate Division Decision issued on May 9, 2017 – The Ambiguous Section 312 Opinion

The Appellate Division recently had an opportunity to comment upon the proper treatment of an opinion of a Section 312 examiner when that opinion is ambiguous. The issue arose in a somewhat unusual procedural context. In *Levesque v. Daigle Oil Company*, Me. W.C.B. No. 17-21 (App. Div. 2017), the claimant was concurrently employed by Daigle Oil Company and Louis J. Paradis, Inc. when she sustained a traumatic occupational injury to her right knee in March 2011. She was working for Daigle at the time. Initially there was minimal lost time from work, but eventually the employee underwent an arthroscopy in 2013 and a total knee replacement in 2014. The employee filed Petitions for Award and Payment against Daigle, and Daigle in turn filed the same petitions against Paradis in the name of the employee alleging a gradual injury to the same knee occurring in 2012. The petitions generated the issue of apportionment, and all matters were consolidated for hearing and decision. A Section 312 examiner was appointed and in a written report the physician stated that the post-2011 work for Paradis did not aggravate the pre-existing knee condition in a significant manner. However, in a deposition the physician suggested that post-2011 work at Paradis increased the employee's symptoms in a minor way and expressed the degree of contribution at a 20% level. He also testified that the extent of contribution could be classified as "significant". The ALJ found the overall opinion to be ambiguous and ruled that Daigle had not established the occurrence of a gradual injury for which Paradis was responsible. The Appellate Division agreed that the Section 312 examiner had never explicitly found that the work for Paradis caused a gradual injury to the knee in 2012, and ruled that the ALJ was not compelled to find that there had been a new or separate injury. While recognizing the weight to be given to the conclusions of a Section 312 examiner, the Division held that where inconsistencies exist either within an examiner's report or between an examiner's report and deposition testimony an ALJ must "consider the larger context in which those statements are offered to construe the intent of the examining physician". The Division held that an ALJ is not required to adopt an examiner's opinions when they are unclear or susceptible of different interpretations. For related decisions, see *Thurlow v. Rite Aid*, Me. W.C.B. No. 16-23 (App. Div. 2016) and *Oriol v. Portland Housing Authority*, Me. W.C.B. No. 14-35 (App. Div. 2014).

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