

# 11.08.19

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## Appellate Court Cautions Against Loosely Handling Motions

In the matter of Riley v. Thomas Company, Inc., decided by the Appellate Court on November 1, 2019, the Respondent took an appeal from an Order denying its motion to dismiss and requiring the Respondent to provide surgery and temporary disability benefits. The Appellate Court vacated the Order and remanded for further proceedings.

The Petitioner alleged injury to his foot and ankle in 2015. The claim was denied as the medical records indicated he needed surgery resulting from a prior motor vehicle accident. However, the Respondent provided benefits without prejudice pending a need for treatment evaluation.

The Respondent thereafter filed a motion to dismiss the claim petition and terminate the Petitioner's temporary disability benefits based upon reports from Dr. Lamprakos that the Petitioner's injuries were pre-existing and he merely suffered a sprain and strain of the foot related to the work injury. The Petitioner countered with a report that treatment was related to the work injury. A consent Order was entered, without any proceedings on the record, dismissing the Respondent's motion and requiring medical treatment.

The Petitioner filed a motion for temporary disability benefits eleven months later which the Respondent opposed and reasserted its position the injury was pre-existing. The motion was closed without proceedings on the record as the Respondent paid the temporary disability benefits.

In 2018, the Petitioner had his fourth surgery, a total ankle replacement. The surgery was initially authorized by the Respondent then deauthorized and the procedure was not paid for. The Petitioner filed a motion seeking continued treatment with his physician, temporary disability benefits and payment for the surgery. The Respondent argued all of the surgeries were not causally related to the work injury, despite the Respondent paying for the three prior surgeries. A consent Order was entered, without any proceedings on the record, directing the Respondent to provide physical therapy without prejudice and select a treating physician. The Order did not address the Petitioner's request for temporary disability benefits or the Respondent's renewed request to dismiss the claim petition.

Six months later, the Petitioner sought an Order for a fifth surgery. The Respondent opposed based upon a report from Dr. Raikin that the Petitioner's injuries were not causally related to the work injury. The Workers' Compensation Judge, the third on the case, noted there were no transcripts of the proceedings on any of the prior Orders yet indicated it would be a reasonable assumption that the first Order was still in effect. The determination was made without any rationale by the Judge despite the conflicting Orders.

As the Respondent continued to challenge payment of the fourth surgery (which was still outstanding), the Judge ordered production of the adjuster and supervisors to address why the surgery was authorized then deauthorized. The Respondent was also to obtain a report from Dr. Raikin limited to the medical necessity of the fifth recommended surgery and have the doctor available to testify.

At a hearing two weeks later, the only issue was the medical necessity of the fifth surgery as the Respondent authorized payment for the fourth surgery. With regards to medical necessity, Dr. Raikin refused to testify under reasonable conditions. The Judge believed the fifth surgery was "more than reasonable" as the Respondent paid for the four prior surgeries and Ordered Dr. Malay (the Petitioner's doctor) remain the authorized treating physician.

The Appellate Court noted there was no record that the issue of causation was decided in either prior Order. In a footnote, the Appellate Court essentially cautioned against entering into consent Orders without any proceedings on the record.

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The Appellate Court also noted the Workers' Compensation Judge erred by shifting the burden to the Respondent to produce Dr. Raikin's testimony in support of their defense the injuries were not causally related to the work injury. The Judge relieved the Petitioner of his burden to establish medical and legal causation by shifting the burden to the Respondent, which is inappropriate.

**Comment:** The multiple motions filed in this matter were handled far too loosely by the parties. There were no clear conclusions on the record on the key issue of causation or other issues raised nor clarification of how those issues were resolved.

For more information, please contact Vanessa Mendelewski at [vmendelewski@wglaw.com](mailto:vmendelewski@wglaw.com) or 973.854.1061, or Jeffrey D. Newby at [jnewby@wglaw.com](mailto:jnewby@wglaw.com) or 856.667.5804.