

In Holowchuk v. O'Sullivan Menu Publishing, the Appellate Court Once Again Upholds Workers' Compensation Judge's Decision

The recent decision of the Appellate Court in the matter of *Holowchuk v. O'Sullivan Menu Publishing* is another example of how the Appellate Court will uphold the lower court's decision after determining that decision is based on credible evidence.

This matter involves an appeal of the trial court's decision following a determination of an increase of permanency after the filing of an application for review and modification. The employee suffered an admitted work injury in 2007 and received an award of disability of 35% of permanent partial disability for the back. In 2013, he filed an application with the court to re-open and modify the award. The case was tried on three different dates in 2014 and 2015. There was testimony from the employee and the expert physician witnesses for both parties. Following the testimony, the Workers' Compensation Judge (WCJ) determined that the employee met his burden of proof and found an increase of 10% in his permanent partial disability. This appeal was taken regarding the finding of increased permanency.

The Appellate Division affirmed the lower court's decision holding that it must look to see "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility" and if so, the Court would not upset the decision of the WCJ. In this matter, the Appellate Court found sufficient evidence in the record to support the conclusion. The Appellate Division noted that the employee, whom the WCJ found credible, testified that his pain was no longer stable, but had sharpened and become more frequent. He now had increased complaints of pain, both in frequency and severity, broader numbness and a dropped left foot. This was confirmed by employee's expert. There was discussion in the decision that the judge of compensation rejected a settlement under N.J.S.A. 34:15-20. The WCJ apparently was unwilling to approve a settlement that required the employee to relinquish his statutory right to seek medical benefits for an additional two years. The Judge, in rejecting the settlement, indicated that there is no requirement for "demonstrable objective medical evidence in cases such as this where there is already evidence of a severe disability which is corroborated by a doctor's opinion." The Appellate court decided that since the record contained demonstrable, objective medical evidence sufficient to support the judge of compensation finding, it would not upset the decision.

Comment: It has long been known that the Appellate Court will not overturn a WCJ decision when the decision is based on credible evidence found in the record of the lower court proceedings. The WCJ is in the best position to evaluate the evidence and credibility of the witnesses. The Court continues to follow this rule. What is most interesting in this decision is that the parties wanted to resolve for a S. 20 settlement initially and the Judge refused to approve. As such, a trial became necessary since the respondent was unwilling to keep open the employee's right to seek medical benefits for an additional two years and/or re-open his claim again. It is important for employers to understand that the court will not prejudge a case, but that the Judge made clear his intentions when he refused to approve the S. 20 resolutions. Here, even with little change in the medical evidence the appellate division upheld a decision based on no new demonstrable objective medical evidence when a severe disability had already been found, but only subjective complaints.

For more information, please contact Jennifer G. Laver at jlaver@wglaw.com or 856.382.1008.