

THE GREY & GREY REPORT

Published by:

GREY & GREY, L.L.P.

NASSAU: (516) 249-1342
360 Main Street
Farmingdale, NY 11735

MANHATTAN: (212) 964-1342
277 Broadway, Ste 400
New York, NY 10007

QUEENS: (718) 268-5300
118-21 Queens Blvd, Ste 618
Forest Hills, NY 11375

www.greyandgrey.com

WHAT'S NEW AT GREY & GREY ...

“When you are through changing, you are through,” wrote Bruce Barton, an advertising executive and self-help author in the early 1900s. While things have certainly changed since then, the need for change itself has not. In that spirit, we continue to adapt to the times so that we can better serve the needs of our clients.



We have been able to secure additional space in our Manhattan office, which is being renovated as this edition of The Grey & Grey Report goes to press. The expansion allows us to transfer more staff to that office, and we look forward to meeting with clients in our new conference room.

We also welcome attorney Sasha Shafeek to our personal injury department. She and Sherman Kerner are now responsible for cases in Manhattan, Brooklyn, the Bronx and Staten Island, while Steve Rhoads and Pierre Bazile are responsible for cases in Queens, Nassau and Suffolk.



In this issue (Winter, 2008):

	Page
What's New at Grey & Grey.....	1
What's New in Workers' Compensation.....	1
Recent Workers' Compensation Decisions	2
What's New in Social Security.....	3
What's New in Long Term Disability	4

Robert Grey is now the Treasurer-Elect of New York Committee for Occupational Safety and Health (NYCOSH), and has been invited to speak about workers' compensation at a state-wide union convention. He continues to lecture for a number of local unions and has been asked to serve as a state-wide lecturer for the New York State Bar Association on workers' compensation practice.

WHAT'S NEW IN WORKERS' COMPENSATION ...

The new administration of the Workers' Compensation Board continues to make dramatic changes to the system. In October, 2008 the Board released a batch of new forms, including a new employer accident report (form C-2), a new employee claim form (C-3), and four new medical report forms (C-4s). The Board indicated that it would continue to accept the old forms until the end of 2008, but that use of the new forms would be required as of January 1, 2009.



Within 48 hours after the Board released

the new forms we had revised our procedures and begun mailing the new C-3 and C-4 forms to our clients. So far, the results have been encouraging.

The Board has also changed what it does once it receives the new forms. If the Board receives a C-2 form from the employer or a C-3 form from the injured worker, but not a C-4 form from the treating doctor, it will “assemble,” but not “index” the case. The Board will only “index” a case when it receives a C-4 medical report to go along with the C-2 or C-3 form.

It is important to have a case indexed (not just “assembled”) because (1) the insurance company’s time to accept or contest the claim starts running from the date of indexing and (2) if a problem arises in the claim you cannot get a hearing if the claim has not been indexed. The key is to see a doctor soon after the accident and to be sure that the doctor fills out and files a C-4 form.



The new forms are available on the Workers’ Compensation Board website at www.wcb.state.ny.us/content/main/forms.jsp

All of these new forms and procedures are tied to the Board’s plan to decide contested cases more quickly, known as “the Rocket Docket.” That plan has not yet been put into place, however, so we will defer comment to the next edition of The Grey & Grey Report.



RECENT WORKERS’ COMPENSATION DECISIONS ...

We use this space to report on changes in the law and recent decisions of interest.

In the summer of 2008 the Court of Appeals (the highest court in New York) decided the Ramroop case, upholding a decision that denied a certain type of workers’ compensation benefit to undocumented immigrants. Before this decision, the law was clear that immigration status is not important in a claim for workers’ compensation benefits; what is important is that the person was an employee and was injured on the job. The Court of Appeals’ decision called that principle into question, causing great concern among workers’ rights groups.

In October, however, an appellate court ruled that except for the limited category of benefits involved in the Ramroop case, immigration status is still irrelevant in workers’ compensation cases. We will continue to watch this issue and report any further cases of interest.



In our cases, we continue to battle the insurance companies on the issue of “apportionment.” This issue usually comes up where the worker has a previous injury or medical condition, causing the insurance company to argue that it should not have to pay full benefits. Obviously we disagree, and fortunately for our clients we usually win the argument.

In one recent case, our client had a minor injury when she was a teenager. Thirty years later, after an injury on the job, she needed to

have a total knee replacement. Based on its doctor's report, the insurance company took the position that only half of her permanent injury was work-related and that the other half was due to the childhood injury. Although a Workers' Compensation Law Judge agreed with the insurance company, on appeal the decision was reversed and over \$30,000 in additional benefits was awarded to our client. In another case, our client had considered having knee replacement surgery before her work-related accident, but had decided to put it off for as long as possible. After she was injured at work, her symptoms increased to the point where she could no longer avoid having the surgery. Because surgery had been considered before the work-related accident, the workers' compensation insurance company took the position that it should not be responsible to pay for the procedure. The judge found in favor of our client, and his decision was upheld by the Board when the insurance company appealed.



In another recent decision, our client was the widow of a victim of asbestosis. Like many asbestos victims and their families, she was entitled to file for workers' compensation and bring a lawsuit against the asbestos manufacturers, which she did.

When an injured worker files a lawsuit, however, the workers' compensation insurance company usually has a right to recover some of the money it has paid out of the lawsuit (called a "lien") and may also be entitled to stop paying the injured worker (called a "credit"). In this

case, the workers' compensation carrier had been paid its lien and was arguing for a credit that would end any future compensation payments to the widow.

After a number of hearings that required us to track down documents that were over 15 years old, we proved that the insurance company's credit was far less than it had claimed. As a result, our client's benefits were reinstated, with \$46,000 in retroactive payments.



WHAT'S NEW IN SOCIAL SECURITY ...

We previously reported that the Social Security Administration continues to face a massive backlog of cases at the hearing level, with most claimants waiting well over a year to have their case heard by an administrative law judge. The agency has taken a number of steps to address this problem. SSA's first proposal was opposed by social security lawyers because it included regulations that would have made it more difficult to get all the medical evidence before the Judge and also would have limited review of unfavorable decisions.

Instead, SSA is trying to use technology to speed the processing of claims, including the use of online hearing requests. We think that this will benefit our clients because it should eliminate the problem of hearing requests being lost by SSA and because hearing request will be forwarded more quickly from the local offices to the hearing office.

SSA is also using paperless electronic files in new cases, requiring us to submit records electronically using a special bar code. Again, this process helps reduce the number of documents that are "lost" by the SSA mailroom.

WHAT'S NEW IN LONG TERM DISABILITY ...

The United States Supreme Court shined a light on employer-provided Long Term Disability benefits in the case of Metropolitan Life Insurance Company v. Glenn. When an employee has Long Term Disability coverage through an Employee plan, those benefits are subject to federal law (ERISA). ERISA says that an employee who is denied benefits must first appeal to the employer or plan administrator and then, if the denial is upheld, may sue in federal court for relief. However, depending on the terms of the policy, the court will uphold the employer or administrator's decision unless it is "arbitrary and capricious," which is difficult to prove.

The Supreme Court has now ruled that in a lawsuit about LTD benefits, the court must look at the conflict of interest that exists when the insurance company that has to pay the benefits also gets to decide the claim. In the Glenn case, the court reversed the denial of benefits where the insurance company could not explain its rejection of strong medical evidence and where it ignored fact that the claimant was granted Social Security Disability benefits after it required him to apply. This ruling may significantly weaken the arbitrary and capricious standard.

We are already using the Glenn decision to challenge insurance company denials of benefits in our own cases, and we are asking the courts to allow us to question insurance carriers about their policies and practices in making these decisions. We will keep you posted in future editions of The Grey & Grey Report.

Grey & Grey, LLP
360 Main Street
Farmingdale, New York 11735