THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MARCH 2019 AT A GLANCE
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OCCUPATIONAL DISEASE/MEDICAL TESTIMONY/SUBROGATION/EVIDENCE

- Section 301(f) then provides an evidentiary presumption of entitlement to compensation for a claimant who can show he: (1) served four or more years in continuous firefighting duties; (2) had direct exposure to a Group 1 carcinogen; and (3) passed a physical examination prior to asserting a claim or prior to engaging in firefighter duties after undergoing a physical examination that revealed no evidence of cancer.

  Section 301(f) further imposes an additional requirement on volunteer firefighters by providing that any claim made by a member of a volunteer firefighting company "shall be based on evidence of direct exposure to a carcinogen referred to in Section 108(r) as documented by reports filed pursuant to PennFIRS and provided that the member's claim is based on direct exposure to a carcinogen referred to in Section 108(r).

  Nothing in the language of Section 301(f) explicitly requires volunteer fire companies to identify and document the specific Group 1 carcinogens encountered at a fire incident in PennFIRS reports in order for the evidentiary presumption of compensability to apply to their volunteer firefighters.

  Notwithstanding the requirement of the PennFIRS report the court recognized the impracticability of requiring volunteer fire companies to document each firefighter's exposure to the specific Group 1 carcinogens encountered at each fire event.

  Accordingly, the only reasonable and practicable interpretation of the PennFIRS reporting requirement in Section 301(f) is to document a volunteer firefighter's presence at a type of fire where firefighters are routinely exposed to Group 1 carcinogens known to cause various types of cancers.

  In this matter the PennFIRS reports provided by the claimant were sufficient where they detailed the types of fires the claimant responded to, such as cooking fire, electrical, building fire, false alarm, etc. These reports denoted claimant's participation in incidents involving exposure to fire smoke likely to contain TCE and other Group 1 carcinogens causally related to the development of large B-cell NH-lymphoma. This was sufficient to satisfy the PennFIRS reporting requirements in Section 301(f).

- The Pa. Supreme Court has permitted individuals, not qualified as experts, but possessing experience or specialized knowledge, to testify regarding technical matters

that may have been thought to be within the exclusive province of experts. However, a witness may not testify concerning a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

In this matter the Fire Commissioner's lay testimony was competent evidence of the legislative intent for including the PennFIRS reporting requirements in Section 301(f) where the WCJ cited the Fire Commissioner's considerable experience with the PennFIRS reporting requirements as both a member of a volunteer fire company, his service as Pennsylvania's Fire Commissioner and his extensive knowledge of the operation of volunteer fire companies.

- The language in Section 301(f) requires that an employer's rebuttal evidence show that the firefighter's cancer was not caused by firefighting exposures.

  An employer's rebuttal evidence must establish: (1) the specific causative agent of the claimant's cancer; and (2) that exposure to that causative agent did not occur as a result of his work as a firefighter.

  Where a claimant meets the general causation burden in Section 108(r), the employer may not rebut the evidentiary presumption in Section 301(f) merely by revisiting the general causation requirement and challenging its accuracy. At the rebuttal stage, the issue relates not to the types of cancer relative to potential carcinogens, but rather requires proof that the claimant's cancer was not caused by his occupation as a firefighter.

- An expert's testimony is unequivocal if, after providing a foundation, he states that he believes or thinks the facts exist. In short, the expert must state not that the injury or condition may have possibly come from the assigned cause, but rather that in his professional opinion, the injury or condition did come from the assigned cause.

  Further, competency when applied to medical evidence, involves a determination that the expert's opinion is sufficiently definite and unequivocal to render it admissible. Even if the witness admits to uncertainty, reservation, doubt or lack of information with respect to scientific or medical details, as long as the witness does not recant the opinion first expressed, the evidence is unequivocal.

  Claimant's medical expert's testimony was unequivocal where he upon relying on medical and scientific evidence, concluded, within a reasonable degree of medical certainty, that Claimant's cancer arose out of his work as a firefighter and the exposures associated with it.

- Trover, the agent for Highmark, had standing to assert subrogation for medical bills that Highmark paid prior to the determination that the claimant's cancer was compensable.

  To establish an agency relationship, direct proof of specific authority is not needed where it can be inferred from the facts that the parties intended to create an agency relationship.

Therefore, where the non-occupational carried Highmark paid the claimant's bills, Highmark, through its agent Trover, was the proper party to assert subrogation.

- The WCJ did not commit an evidentiary error by accepting as competent testimony of the WC Supervisor regarding the process of determining the lien amounts in HRI/Trover's Consolidated Statements Of Benefits (CSBs) pursuant to the Business Record Exception where testified she testified that the CSBs and the cumulative lists related to them are records kept in the ordinary course of business.

  For a hearsay document to be admissible into evidence under the business records exception in Pa.R.E. 803(6), it must be supported by evidence sufficient to support a finding that the item is what the proponent claims it is. Thus, the authentication requirement is satisfied by evidence sufficient to support a finding that the document in question is what its proponent claims.

  Under the business records exception, it is not necessary to produce either the individual who made the entries or the custodian of the record at the time the entries were made or to establish that the witness qualifying the business record had personal knowledge of the facts reported in the business record. To that end, the person who received the document can also authenticate what he or she received and acted upon.

  The object of authentication under the business records exception is to establish a presumption of trustworthiness to offset the hearsay character of the evidence. In this matter the Employer did not offer any evidence to challenge authentication or trustworthiness of the CSB.

Bristol Borough v. WCAB (Burnett), No. 464 C.D. 2018 (Decision by Judge Simpson, March 22, 2019) 3/19

JURISDICTION/ EMPLOYMENT RELATIONSHIP

- Jurisdiction only lies in Pennsylvania under Section 305.2(a) (1) if at the time of injury a claimant's employment is principally localized in Pennsylvania.

  Pennsylvania did not confer jurisdiction upon claimant's injury where the claimant, who was injured in Delaware, worked several distinct jobs for Employer and each of those jobs was separated by periods of time during which Claimant was laid off and he was working solely in Delaware, at a different rate than he had worked in PA, at the time of his injury, which reflects his employment was principally localized in PA.

  The fact claimant was solely employed in Delaware was further illustrated by the fact that he was not a permanent employee of employer and was given no assurances or guarantees of future work, and upon working for employer in Delaware after being laid

off from a job in PA he had to complete new hire forms, which were indicative of his status as a new employee.

- A claimant has the burden of proof to establish jurisdiction in Pennsylvania for his workers' compensation claim. In order to meet this burden, Claimant must show by a preponderance of the evidence that (1) Employer has a place of business in Pennsylvania and that Claimant regularly works at or from such place of business, or (2) having worked at or from such place of business, Claimant's duties have required him to go outside of Pennsylvania for a period of not more than one year, or (3) if clauses one and two do not apply, Claimant is domiciled in Pennsylvania and spends a substantial part of his working time in the service of his employer in Pennsylvania.
  Put another way, Employment is "principally localized" in Pennsylvania where an employer has a place of business in Pennsylvania and the claimant regularly works at or from that place of business, or where the claimant is domiciled in Pennsylvania and spends a substantial part of his working time in the service of his employer in Pennsylvania.

- To consider several distinct jobs as a single period of employment, there must be evidence of an ongoing employment relationship. An ongoing employment relationship does not exist where a claimant works for an employer on a per-job basis followed by a break in employment during which he works for a different employer before being re-hired by the original employer.

  In this matter the claimant's time of injury job in Delaware was distinct from his earlier employment period in Pennsylvania where following his layoff upon working for employer in Delaware after being laid off from a job in PA he was given no assurances or guarantees of future work, and upon working for employer in Delaware after being laid off from a job in PA he had to complete new hire forms, which were indicative of his status as a new employee.

McDermott v. WCAB (Brand Industrial Services, Inc.) No. 518 C.D. 2018 (Decision by Judge Ceisler, January 18, 2019)3/19

FEE REVIEW

- A Fee Review Hearing Officer has jurisdiction to determine whether a medical service was provided by a "provider" where the employer challenges a fee determination of the Medical Fee Review Section for the stated reason that the medical service was not rendered by a "provider" within the meaning of the Act.

To hold otherwise would offend due process, Article V, Section 9 of the Pennsylvania Constitution as well as the Act's careful scheme for resolving fee disputes to place the question of whether a putative provider is actually a "provider" beyond the reach of judicial review.

In so holding the Commonwealth Court states that it does not expand the scope of the fee review proceeding beyond timeliness and amount owed to a provider that has treated a claimant for his work injury. For instance, this holding does not allow the Hearing Office to determine the reasonableness of the medical care or service; the claimant's injury as work-related; or the employer's liability for a work injury. Where utilization review is sought, a fee determination is premature.

Furthermore, this holding does not limit the determination of the status of a "provider" to a fee review proceeding. In appropriate cases, this question may also be determined by a WCJ in the course of a claim or penalty petition proceeding

- Where an employer challenges a provider's treatment as neither reasonable nor necessary, it must seek Utilization Review pursuant to Section 306(f.1) (6) of the Act. Where a provider does not receive payment within 30 days, and payment has not been stayed by an employer's Utilization Review Request, the provider may file a Fee Review petition under Section 306(f.1)(5) of the Act.

  An employer's liability for a claimant's work injury must be established before the fee review provisions can come into play. This is because a Fee Review is designed to be a simple process with a very narrow scope limited to determining the relatively simple matters of amount or timeliness of payment for medical treatment.

  Whether an entity is a "provider" is a question of employer liability and, thus, beyond the scope of a fee review proceeding.

- An employer may challenge a claimant's medical treatment as not medically necessary. Once it loses that challenge, however, it cannot use a C&R Agreement to deprive the provider of its right under the Act to prompt payment for services rendered to treat a claimant's work injury. This is because the Pharmacy is not a party to the C&R.

Armour Pharmacy v. WCAB Fee Review Hearing Office (Wegman's Food Markets, Inc.) No. 1725 C.D. 2017 (Decision by Judge Leavitt, March 29, 2019) 3/19