THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JUNE 2009 AT A GLANCE
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SUBROGATION/ATTORNEY FEES

- The employer's gross lien includes those monies that were paid in the form of attorney fees chargeable to the claimant's share whether the attorney fee was chargeable against the claimant's ongoing compensation check or chargeable to the proceeds of the Compromise and Release Agreement.

  However, litigation costs, including unreasonable contest attorney fees are not included in the gross lien because they are paid in addition to award of worker's compensation.

- An employer has an absolute right to immediate payment of its past due lien from the recovery fund after payment of attorney's fees and expenses. Its accrued lien, per Section 319 of the Act, is calculated based on its payments of "compensation." The Act does not define the term "compensation but rather, a determination of what constitutes "compensation" must be made on a section-by-section basis, looking to the language of the section and the legislative intent behind it. Attorney fees chargeable to a claimant's compensation would be considered compensation whereas unreasonable contest attorney fees and litigation expenses would not. Therefore, the percentage of claimant's benefits paid to legal counsel are part of the employer's accrued lien subject to subrogation pursuant to the Section 319 of the Act.

- An employer's subrogation rights are statutorily absolute and can be abrogated only by choice. Section 319 of the Act is written in mandatory terms and there are no exceptions, equitable or otherwise. Indeed, "an employer who complies with its responsibilities under the Act should not be deprived of one of the corresponding statutory benefits based upon a court's *ad hoc* evaluations of other perceived 'equities.' Moreover, an employer need not necessarily cooperate with an employee in a third-party action in order to avail itself of its subrogation rights.

  Therefore, an employer's right to subrogation is still absolute irrespective of the fact that the employer had attempted to litigate a petition for modify and/or suspension which, if successful, would have potentially limited the claimant's third-party recovery. The employer was not required to cooperate with the claimant in his attempt to obtain a third-party settlement.

Young v. WCAB (LGB Mechanical) No. 2395, CD 2008 (decision by Judge Flaherty, June 4, 2009). 7/09

NOTICE/APPEAL

- Section 312 of the Act references Section 311 of the Act and specifies that the notice that must be provided pursuant to the latter Section "shall" inform the employer of the nature of the injury. An exact diagnosis, need not be given. A reasonable description of the injury, however, should be given.

  Section 312 of the Act does not require an exact diagnosis but only a reasonably precise description of the injury. Whether the claimant has complied with the notice requirement is a question of fact.

  A claimant's message on the employer's voicemail that she had "work-related problems" was not sufficient notice. This message did not give a reasonably precise description of the claimant's work injury to the employer as required by Section 312.

- Notice is a prerequisite for receiving workers' compensation benefits. The claimant has a burden to show notice was actually given. When the cumulative effect of the work-related diagnosis results in an injury, the injury date is the date of diagnosis. This is known as the discovery rule.

- Raising an issue in a Notice of Appeal filed with the Board is sufficient to be considered raised before a government unit as required by Rule 1551. This is so even if a brief was not filed with the Board. Issues are preserved even if not briefed so long as they are raised in appeal documentation filed with the Board.

Gentex Corporation and Gallagher Bassett Services v. WCAB, (Morack), No. 214 C.D. 2009 (Decision by Jed Flaherty, June 4, 2009). 7/09

COURSE AND SCOPE OF EMPLOYMENT

- The claimant, who was a stationary employee, was not in the course and scope of her employment when she was injured during a paid break while walking on a street in the industrial park where her employer place of business was located but was not on the employer's premises at the time of the injury. This is because the claimant's injury did not occur during a small temporary departure from work to tend to personal comforts or convenience nor did it occur during an inconsequential or innocent departure from work.

- Neither a small temporary departure from work to administer to personal comforts or convenience, nor inconsequential or innocent departures break the course of

employment. The term course of employment also embraces intervals of leisure defined in part as freedom or spare time provided by the cessation of activities. Breaks allowing employees to administer to their personal comfort to better enable them to perform their jobs are considered to be in furtherance of the employer's business. The following breaks have been held not to bring the claimant outside of the course and scope of employment: taking a restroom break; picking up takeout food for lunch; and getting a cup of coffee before meeting with customers.

- Upon determining whether or not a claimant was within the course and scope of employment it is necessary to determine whether the claimant was a traveling employee or a stationary employee. A narrow interpretation of course and scope of employment applies to the stationary employee. Where a claimant is a stationary employee the proper issue is whether the claimant left employer's premises for purely personal reasons or whether he left for reasons related to duties he was required to perform. Merely allowing an employee to perform an act without the employer having directly ordered its performance will not support an award and it is irrelevant that the claimant's injury occurred during a break that the employer required its employees to take. The relevant point would be that the employer did not order or direct the conduct involved.

Department of Labor and Industry v. WCAB (Savani). No. 1263 C.D. 2008 (Decision by Judge Smith-Ribner, March 10, 2009) 7/09

CREDIT (PENSION OFFSET)

- The employer was not required to produce actuarial evidence in support of its entitlement to a pension benefit offset pursuant Section 204(a) where the claimant was receiving a pension pursuant to a defined contribution plan because a defined contribution plan is an individualized retirement account that is individualized, meaning employer contributions to the employee's pension are easily ascertained.

- The employer, Allegheny Ludlum Corporation, was entitled to the pension benefit offset, not withstanding the fact that they had purchased the plant where the claimant worked from Bethlehem Steel in November 20, 1998 where the Judge found credible the employer's fact witnesses testimony that Allegheny Ludlum Corporation was presently paying his pension benefits despite the fact that the claimant might in the future be entitled to retirement benefits from Bethlehem Steel.

- Regulation 34 Pa. Code Section 123.8 provides that workers' compensation benefits shall be offset by the net amount an employee receives in pension benefits to the extent funded by the employer directly liable for the payment of workers' compensation benefits.

- Section 204(a) implicitly recognizes that public policy bars an employer from utilizing an employee's own retirement funds to satisfy its workers' compensation obligations.

Allegheny Ludlum Corporation v. WCAB (Bascovsky), No. 1960 C.D. 2008 (decision by Judge McGinley, June 17, 2009). 7/09

SUPERSEDEAS FUND REIMBURSEMENT

- An employer was entitled to reimbursement from the Supersedeas Fund for overpayments it had made to the claimant due to a WCJ's failure to grant it a credit for Unemployment Compensation and Severance Payments following the WCJ's granting of the claimant's Claim Petition where the employer's request for supersedeas was denied by the WCAB but it was then subsequently determined the employer should have been granted the credit for the payment of Unemployment and Severance Benefits.

- Reimbursement from the Supersedeas Fund will be granted where the following requirements were satisfied:

  1. A supersedeas was requested;
  2. The request for supersedeas was denied;
  3. The request was made in a proceeding under Section 413 or Section 430 of the Act;
  4. Payments were continued because of the Order denying supersedeas; and
  5. In the final outcome of the proceedings, it was determined such compensation was not, in fact, payable.

  In this matter, the issue before the Court was whether the employer fulfilled elements three and five.

  The employer fulfilled element three because its request for supersedeas was made pursuant to the provisions of Section 430 and therefore it was the irrelevant that the offset/credit sought by employer are derived from Section 204(a) and not Section 413.

  Section 430 of the Act allows an employer or insurer to request a supersedeas to suspend its obligation to pay workers' compensation benefits to a claimant pursuant to an Order of a WCJ or the Board while that Order is being appealed to the Board or the Court. This is precisely what the employer did in this case. Employer requested a supersedeas in connection with its appeal of WCJ's initial decision and Order granting claimant's Claim Petition.

The employer also fulfilled element five because there was a determination made that employer made overpayments of workers' compensation to the claimant, which means that it was determined that the claimant was not entitled to all of the workers' compensation benefit payments he received pursuant to the WCJ's original award because of employer's entitlement to the offset/credits for the unemployment compensation and severance benefits paid to the claimant.

It was also relevant that the claimant returned to work before employer could obtain its offset/credit meaning that the employer's only remedy was to recover the overpayments that it made to the claimant through the Supersedeas Fund.

- The Court distinguished this decision claimant holding in City of Wilkes-Barre v. WCAB (Spaide), 868 A.2d. 620 (Pa. Cmwlth. 2004) because in Spaide the employer had already acknowledged liability for the claimant's injury and was paying workers' compensation benefits at the time it filed a Petition To Review Compensation Benefit Offset. In Spaide it was determined that the claimant's request for Supersedeas Fund Reimbursement was made pursuant to Section 204(a) and not Section 413 or Section 430.

  The instant case was distinguishable because the employer made the overpayment in the context of the WCJ's failure to provide a credit upon granting its Claim Petition and therefore its request for supersedeas was made pursuant to Section 430 of the Act.

Boeing Company v. WCAB (Horan), No. 1466 C.D. 2008 (Decision by Judge Cohn Jubelirer, June 24, 2009). 7/08