THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-430-6362

SUBROGATION

- The Employer was entitled to subrogation against the claimant's recovery resulting from claimants suit against the third party defendant's carrier for breach of contract and bad faith refusal to defend and indemnify the third party defendant, which was filed after the trial court approved a consent judgment against the third party defendant in favor of Claimant in the amount of $426,723.44 and the claimant agreed not to pursue the third party defendant but rather, with an assignment from the third party defendant of its rights under its liability policy, pursue the third party defendants carrier.

  This is because Claimant's lawsuit against the third party's carrier depended on the malfeasance of the original tortfeasor, i.e., third party defendant's negligence, and placed this liability on the proper party. Claimant ultimately received funds from the third party's carrier to satisfy the judgment against its insured, who was the third party tortfeasor that negligently caused Claimant's injury. The claimant also received workers compensation benefits from the Employer for that same injury.

- Section 319 of the Act gives an employer an absolute right to subrogation. The rationale behind the right to subrogation is threefold: 1) to prevent double recovery for the same injury by the claimant, 2) to ensure that the employer is not compelled to make compensation payments made necessary by the negligence of a third party, and 3) to prevent a third party from escaping liability for his negligence.

  Where an employee's work injury is caused by the negligent conduct of a third party, there is a clear, justifiable right to subrogation under Section 319 of the Act. The employer must prove that it is compelled to make payments by reason of the negligence of a third party and the fund to which it seeks subrogation was for the same compensable injury for which it is liable under the Act.

  An employer's entitlement to subrogation is a question of law based upon the facts as found by the WCJ.

  By allowing reimbursement of Employer's subrogation lien in this matter all purposes of subrogation were met: (1) Claimant, having been made whole for his injury, will not receive a double benefit; (2) Employer will not be compelled to

make compensation payments for the negligence of a third party; and (3) liability is placed on the proper party.

Kennedy v. WCAB (Henry Modell & Co., Inc.) 1649 C.D. 2012 (Decision by Judge Leavitt, August 1, 2013) 8/01

COURSE AND SCOPE

- Claimant did not suffer an injury in the course and scope of employment where the claimant injured his thumb while using his employer's lathe while polishing a bolt for his child's go-cart.

  This is because, although innocent departures from work do not take a claimant outside of the course of his employment, the departure here was strongly marked and not trivial, insignificant or minor in influence. Claimant was not injured attending to his personal comfort, i.e., getting a drink of water or using the restroom, so that he could continue to serve Employer's interests. Rather, the accident occurred after Claimant actively disengaged himself from his work responsibilities and left the machine shop to polish the bolt after he made sure Employer's machines were operating properly. This is also illustrated by the fact that Claimant also felt compelled to inform his co-workers he was leaving, so they could find him if he had to troubleshoot for them.

  Thus, the evidence supported the legal conclusion that Claimant's injury while polishing a bolt for his child's go-cart was a pronounced departure from his work responsibilities and, therefore, it did not occur in the course of his employment.
- An injury may be sustained 'in the course of employment' under Section 301(c)(1) of the Act in two distinct situations:

  (1) where the employee is injured on or off the employer's premises, while actually engaged in furtherance of the employer's business or affairs; or

  (2) where the employee, although not actually engaged in the furtherance of the employer's business or affairs, (a) is on the premises occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on, (b) is required by the nature of his employment to be present on the employer's premises, and (c) sustains injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

  The operative phrase 'actually engaged in the furtherance of the business or affairs of the employer,' which is usually expressed as 'in the course of employment,' must be given a liberal construction. Determining whether an employee is acting in the course of employment at the time of an injury is a question of law, which must be based on the findings of fact made by the WCJ.

An employee is entitled to compensation for every injury received on the premises of his employer during the hours of employment, regardless of whether he is actually required to be at the particular place where the injury occurred, so long as there is nothing to show that he had abandoned the course of his employment or was engaged in something wholly foreign thereto.

- Course of employment' embraces intervals of leisure within regular hours of the working day and momentary departures from the work routine do not remove an employee from the course of his employment. However, the Commonwealth Court has recognized that in answering whether a departure from work is lengthy or temporary, monumental or minor, there is no fixed standard by which to make such a determination.

  Although the Act is remedial in nature and is intended to benefit workers, and thus its provisions must be construed to effectuate their humanitarian objective, there are certain limitations beyond which it was not the intention of the legislature to extend responsibility of an employer for injuries sustained by an employee. The Act was never intended to make the employer an insurer of the safety of all employees.

Trigon Holdings, Inc. v. WCAB(Griffith), No. 207 C.D. 2013 (Decision by Judge Covey, August 7, 2013) 8/13

FATAL CLAIM/MEDICAL TESTIMONY

- An expert's mere offering of alternative analyses with respect to a work-related injury does not render the expert's testimony equivocal. To be unequivocal, the expert need only state that in his or her professional opinion, the result in question came from the assigned cause.

  Therefore, claimant medical expert's testimony on causation of decedent's death was unequivocal although he offered four possible explanations regarding causation but all four resulted from the claimant's fall in the course and scope of his employment.

- To succeed on a Fatal Claim Petition, the claimant has the burden of proving that the employee sustained a work-related injury and that the injury was a substantial, contributing cause of the employee's death.

  Where the causal connection between the work injury and the death is not obvious, the claimant must present unequivocal medical evidence establishing the connection.

  Expert testimony is competent even if the witness admits to uncertainty, doubt, reservation, or a lack of information with regard to certain medical details, as long as the witness does not recant the opinion first expressed.

The Manitowoc Co., Inc, v. WCAB (Cowan) No. 472 C.D. 2013 (Decision by Judge Friedman, August 20, 2013) 8/13

REINSTATEMENT/STATUTE OF LIMITATIONS/STATUTE OF REPOSE /PENALTY

- The Pennsylvania Supreme holds that the Commonwealth Court's interpretation of Section 413(a) as automatically barring all post-500-week / post-suspension claims for total disability is mistaken, as the three year statute of limitation period and 500 week statue of repose periods set forth in section 413(a) are to be construed and considered concurrently. The provisions of Section 413(a) stand together, not in opposition to one another, and effect must be given to both as far as possible.

  Therefore, for purposes of determining the effect of the expiration of the limitations periods set forth in Section 413(a), there is no basis in law or logic to distinguish between the three-year limitations period and the 500-week period.

- Under Section 413(a), claimants retain the right to file a Petition for any Modification that they hold at the time of any workers' compensation payment, for a minimum of three years from the date of that payment.

  Where such payments have been suspended due to a return to work, or an attempted return, without a loss in earnings, Section 413(a) extends that right to petition to the entire 500-week period during which compensation for partial disability is properly payable.

  In the event that payments are resumed after suspension, workers' compensation claimants continue to retain the right to petition for any modification that they hold at the time of any workers' compensation payment received subsequent to suspension, for a minimum of three years from the date of that payment.

  In the event that a period of suspension comes to an end upon the resumption (or commencement as the case may be) of workers' compensation payments, claimants retain the right to petition for modification as set forth in Section 413(a).

  What this means, by way of example, is that if a post-suspension claimant receives a workers' compensation payment pursuant to a brief recurrence of total disability 448 weeks after his return to work, while that claimant retains only 52 weeks of eligibility for partial disability benefits, the claimant nonetheless remains entitled to petition for reinstatement of total disability benefits for three years from the date of this most recent payment, even though the claimant's compensation has been cumulatively been suspended for 500 weeks.

The key issue is whether the petition was filed within three years of the most recent payment of compensation.

- Under the plain language of Section 413, a claimant has, at minimum, three years after the date of his most recent payment within which to file a petition for modification premised upon a change in disability.

  Where those payments are suspended due to the claimant's return to work without loss in earnings, the claimant's right to file for a modification is extended beyond those three years. A claimant who is no longer receiving workers' compensation payments is allotted some nine and a half years of potential entitlement to partial disability payments and during that 500-week time period, payments may be resumed at any time.

  Effect may be given to both parts of Section 413(a) concurrently, and that the parts need not be read as being mutually exclusive of one another

- Notwithstanding the fact the employer reinstated the claimant's compensation for periods following the expiration of 500 weeks of suspension by Supplemental Agreement the claimant was not entitled to a reinstatement of benefits because Claimant's benefits were suspended on September 20, 1989, when Claimant returned to his pre-injury position without a loss of earnings. Nothing in the Act constrains an employer from voluntarily compensating a claimant beyond the obligation imposed by the Act; however, the Act does not enable an employer, or the parties, to create a statutory right to relief which does not exist, nor to resurrect any statutory right which has expired according to the terms of the statute.

- Under Section 413(a) a petition may be filed at any time "within three years after the date of the most recent payment"). Thus, any such payment made at any time prior to the expiration of a claimant's right to workers' compensation will extend the right to petition for reinstatement of total disability benefits.

  Once the claimant's rights have expired, however, as here, no payment, whether by agreement or misconstruction of the Act, or commendable compassion, can operate to resurrect an expired claim premised upon the Workers' Compensation Act.

  Therefore, payments to the claimant's did not resurrect his expired claims where the claimant received payments pursuant to Supplemental Agreements executed subsequent to the expiration of his statutory right to compensation.

- The Employer did not violate the Act by refusing to continue payments under the final Supplemental Agreement, which was not enforceable under the Act since claimant's right to compensation expired prior the execution of that agreement.

Because no payments were then properly payable to claimant, the employer was not "an employer who is obligated to pay" at that time, and its refusal to pay appellant could not constitute a violation of the Act.

Cozzone v. WCAB (PA Municipal/East Goshen Township), No. 51 MAP 2012 (Decision by Justice Castille, August 19, 2013) 8/13