THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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INDEPENDENT CONTRACTOR/ CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT

- Since the Construction Workplace Misclassification Act (CWMA) affects substantive rights it cannot be applied retroactively in workers' compensation matters to determine whether an individual is an employee or an independent contractor.
  Therefore the CWMA could not be applied to an analysis of whether the claimant was an independent contractor where the Claimant's injury occurred on August 28, 2010, which was prior to the enactment of the CWMA on October 13, 2010. Additionally, the CWMA stated it was effective in 120 days, or February 10, 2011.

- The CWMA sets forth criteria which must be established in order for an individual in the construction industry to be deemed an independent contractor and not an employee for purposes of workers' compensation. The absence of a single criterion will negate the independent contractor status, and the individual will be deemed an employee.

- CWMA can only be applied to the construction industry. An application to any other industry would be well beyond the Legislature's intention that the CWMA apply only to the construction industry.

- The CWMA may not be used as guidance for the common law analysis of whether a claimant is an independent contractor or an employee.

  This is because the distinctions between the CWMA and the traditional factors are significant and reflect legislative activity beyond mere clarification of pre-existing common law. Additionally, using the WWMA as guidance to applying traditional common law would have the effect of the CWMA replacing the common law traditional factors, which would result in the CWMA being applied to industries and professions other than the construction industry. Such application would be well beyond the Legislature's intention that the CWMA apply only to the construction industry.

- Under traditional common law the Pa. Supreme Court has held that the main factors to be analysis upon determining whether a claimant was an independent contractor is a review of the Control of manner work is to be done; responsibility for result only; terms of

agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.

Whether some or all of these factors exist in any given situation is not controlling. Although each factor is relevant, control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status.

Thus, in sum, under the common law, there are no mandatory factors, but rather, there is a weighing of factors, with control being a primary factor.

D & R Construction v. WCAB (Suarez, Travelers Insurance Company, Uninsured Employers Guaranty Fund, and T & L Development), Nos. 1558 C.D. 2016 and1578 C.D. 2016 (Decision by Judge Hearthway, August 1, 2017) 8/17

LOSS OF USE/ REMAND/EVIDENCE

- In this matter that was litigated by report, the doctor's reports that the Claimant has lost the use of his finger for all intents and purposes was a legal conclusion that had no evidentiary value and did not constitute substantial competent evidence on which to base a factual finding of permanency. An alleged loss of use must be permanent to be compensable.

  The distinction must be made between factual medical evidence which can constitute substantial evidence to support the WCJ's findings and legal conclusions which do not constitute such evidence

  In this matter claimant's medical evidence did not fulfill his burden in support of his petition seeking loss of use benefits for the loss of the right index finger where claimant's medical experts records and reports described Claimant's diagnoses, but did not detail whether these are expected to be permanent.

  Claimant was asking WCJ to infer the worst from the diagnoses and then conclude that this supports a finding of permanency. Inferences must be made from the evidence and not from an assumption or speculation; sufficiency of evidence cannot be based on assumptions. Without evidence in the record concerning permanency, one can only speculate on this question, which neither the WCJ nor the Court may do.

It is Claimant's responsibility as part of his burden of proof to elicit information about future functionality of his finger so that there is a factual underpinning from which one could conclude that his condition is permanent.

- When a claimant seeks specific loss benefits for an injury he has the burden of proving that he has permanently lost the use of his injured body part for all practical intents and purposes.

Whether a claimant has lost the use of a body part, and the extent of that loss of use, is a question of fact for the WCJ. Whether an injury has resulted in the permanent loss of the use of a member, such as a hand, is a question of fact.

Whether the loss is for all practical intents and purposes is a question of law.

While case law does not specify what evidence is required in order to prove a permanent loss of use for all practical intents and purposes it is clear that a claimant must present medical evidence in order to prove that his loss of use is permanent and for all practical intents and purposes. Further, competent medical evidence of permanent loss of use for all practical intents and purposes must be presented before further support in the form of a claimant's testimony can be considered.

- Pennsylvania Rule of Appellate Procedure 1551 provides, the court may in any case remand the record to the government unit for further proceedings if the court deems them necessary.

Part of the inquiry made upon determining whether remand is appropriate is whether the petitioner could not by the exercise of due diligence have raised the issue before the WCJ.

In this matter remand was denied where the court was not satisfied that Claimant could not have, by the exercise of due diligence, raised this question of permanency of the alleged loss of use of the right index finger before the government unit. Claimant was precluded from questioning his medical expert about the issue of permanency.

Morocho v. WCAB (Home Equity Renovations, Inc.) No. 1393 C.D. 2016 (Decision by Judge Hearthway, August 3, 2017) 8/17

IRE

- The WCAB's affirmance of the WCJ's decision that granted employer's Petition for Modification finding Employer was entitled to modify Claimant's benefits from total disability to partial disability as of January 4, 2006 based upon an IRE performed on October 13, 2005 was reversed due to the Supreme court decision of Protz v. Workers' Compensation Appeal Board (Derry Area School District), 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (Protz I), aff'd, in part, rev'd, in part, 161 A.3d 827 (Pa. 2017) (Protz II) This is because the Pa. Supreme Court in Protz held that the IRE provision of Section 306(a.2) constituted an unconstitutional delegation of legislative authority and concluded that as a result of the unconstitutional delegation, the entirety of Section 306(a.2) of the Act must be stricken as unconstitutional.

  By doing so, the Supreme Court struck the entire IRE process from the Act.

  Accordingly, the WCAB's affirmance of the WCJ's Modification of Claimant's benefits based upon the IRE was stricken because under the Supreme Court's Protz decision Section 306(a.2) was stricken and no other provision of the Act allows for modification of benefits based on an IRE.

- In an instructive footnote its decision Commonwealth Court rejects employer's argument that Claimant failed to timely raise the issue of the constitutionality of Section 306(a.2) (1) of the Act due to the IRE examiners use of the 5th Edition of the AMA Guides, which was prescribed by Protz I because Claimant failed to notify the Attorney General of a constitutional challenge.
  Court reasons that because this matter began before Protz I and Protz II were decided and this appeal implicated the validity of Section 306(a.2)(1) of the Act, Claimant raised this issue at the first opportunity to do so. Thus, Claimant was not precluded from raising the issue of the improper use of the Fifth Edition of the AMA Guides on appeal.

  Furthermore, the court reasoned that the Claimant was not required to notify the Attorney General of a constitutional challenge, because she was arguing that the Court should remand for the WCJ to apply their precedent in Protz I, which concluded that Section 306(a.2)(1) of the Act was unconstitutional as to the Fifth Edition of the AMA Guides. Claimant, herself, was not litigating the constitutionality of Section 306(a.2) (1) of the Act, which has just recently been decided by the Supreme Court.

Thompson v. WCAB (Exelon Corporation), No. 1227 C.D. 2016 (Decision by Judge Brobson, August 16, 2017) 8/17

CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT (CWMA)

- Pennsylvania Supreme Court grants claimant's Petition for Allowance of Appeal and will address the following issue:

Whether the Commonwealth Court's decision interpreting the language of the Construction Workplace Misclassification Act (CWMA) to mean that the CWMA only applies to circumstances where the putative employer's industry or business is construction was in error?

- It will be recalled that the Commonwealth Court in its decision circulated on February 17, 2017 had held that the dispositive question to determining if one falls within the purview of the CWMA is whether the individual is performing services for remuneration "in the construction industry."

  The Commonwealth Court did not apply the CWMA in this matter because the employer was not engaged in the construction industry but was rather a restaurant that hired the clamant to engage in remodeling.

Department of Labor and Industry, Uninsured Employers Guaranty v. WCAB(Lin and Eastern Taste No. 124 EAL 2017 (PER CURIAM, August 23, 2017) 8/17

SUSPENSION/ VOLUNTARY QUIT

- Where it is established that the claimant's loss of earnings is no longer the result of the work-related disability, the employer is not required to establish the availability of an alternative job within the claimant's medical restrictions.

  The courts have further held that an employer does not need to demonstrate that a claimant is physically able to work or that available work has been referred to a claimant where the claimant has voluntarily retired or withdrawn from the workforce.

  Therefore the WCJ did not err in granting the employer's Petition for Suspension where she found that the Claimant was actually working within his physical restrictions at the time he stopped reporting to work and that the claimant quit the job that was within his restrictions because her refused to sign a letter regarding the reprimand.

  In the context of the facts of the case where Employer established that Claimant's loss of earnings was related to a factor other than his work injury, i.e., his voluntary quit, Employer was not required to establish the availability of an alternative job within Claimant's medical restrictions. Further, where, as here, Claimant's loss of earnings is related to a factor other than his work injury, Claimant's benefits must be suspended.

  Under the facts of this case, additional medical evidence potentially clarifying Claimant's physical limitations is not required.

Torijano v. WCAB(In A Flash Plumbing), No. 1686 C.D. 2016 (Decision by Judge Hearthway, August 30, 2017) 8/17