THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
DECEMBER 2013 AT A GLANCE
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EXCLUSIVITY-IMMUNITY/ OCCUPATIONAL DISEASE/ STATUTE OF REPOSE

- The Pennsylvania Supreme Court holds that the exclusivity provision of Section 303(a) does not preclude the employer from a liability lawsuit filed by its employee/employees estate, where the claimant's Mesothelioma did not manifest itself within 300 weeks of the claimant's after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease

- Put another way, claims for occupational disease which manifests outside of the 300-week period prescribed by the Act do not fall within the purview of the Act, and, therefore, that the exclusivity provision of Section 303(a) does not apply to preclude an employee from filing a common law claim against an employer.

  This is because the legislature did not intend the Act to apply to claims for disability or death resulting from occupational disease which manifests more than 300 weeks after the last occupational exposure.

  To rule otherwise would be to find that Section 301(c) (2)'s 300-week time window operates as a de facto exclusion of coverage under the Act for essentially all mesothelioma claims.

  In reaching this holding the Court construes Section 301(c)(2) as follows: "whenever occupational disease is the basis for compensation, for disability or death under this Act, the Act shall apply only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment.

Tooey, Executrix of The Estate Of John F. Tooey, Deceased, And Kathleen Tooey In Her Own Right, et. Al. v. WCAB (A.W. Chesterton Company, et. al.) No. 21 WAP 2011(Decision by Madame Justice Todd, November 22, 2013) 12/13

RETIREMENT

- Pennsylvania Supreme Court grants claimant's Petition for Allowance of Appeal Limited to the issue concerning the appropriate evidentiary standard to apply to her receipt of retirement benefits in determining voluntary retirement from the workforce.

The order of the Commonwealth Court is VACATED as to this issue, and the case is REMANDED to the Commonwealth Court for reconsideration in light of our decision in City of Pittsburgh v. WCAB (Robinson), 67 A.3d 1194, 1209 (Pa. 2013), which held there is no presumption of retirement arising from the fact that a claimant seeks or accepts a pension …; rather, the worker's acceptance of a pension entitles the employer only to a permissive inference that the claimant has retired.

It will be recalled Claimant testified on cross-examination that she began receiving Pension Benefits of $699 per month in April 2002, and Social Security Retirement Benefits of $1,101 per month as of October 2004, but explained that she only accepted these benefits because "I was being impoverished by lack of funds coming in from employment." Claimant further stated she did not look for work following her 2001 work injury. When asked whether she considered herself retired, Claimant responded "Well, I'm collecting retirement," and subsequently clarified that if not for her work injuries, she had planned to continue working."

Fitchett v. WCAB (School District of Philadelphia) No. 350 EAL 2013
(Per Curiam, December 4, 2013) 12/13

MEDICAL BILLS/UTILIZATION REVIEW

- A treatment summary, entitled "Medical Expert Opinion" and or a verbal description of the treatment provided to a claimant by a Healthcare Provider subject to an Utilization Review does not satisfy the requirement that the Provider subject to an Utilization Review supply the URO with records, within the meaning of 34 Pa. Code §127.464.

  Therefore the WCJ properly dismissed Provider's Petition Seeking Review of a Utilization Review Determination because, consistent with County of Allegheny (John J. Kane Center-Ross) v. Workers' Compensation Appeal Board (Geisler), 875 A.2d 1222 (Pa. Cmwlth. 2005), and Stafford v. Workers' Compensation Appeal Board (Advanced Placement Services), 933 A.2d 139 (Pa. Cmwlth. 2007) she lacked jurisdiction because the Provider failed to submit any medical records to the URO.
- The written treatment summary does not constitute a "record" per the Bureau's instructions to UROs and reviewers that specifically provides that summaries prepared by a provider for purposes of utilization review "are not to be considered or mentioned by the Reviewer as part of the review or determination report."

  An Oral Account of the treatment does not constitute a "record" consistent with the definitions of "medical record" provided in Title 28 of the Pennsylvania Code (Health and Safety). 28 Pa. Code §1001.2 defines "medical record" as "documentation of the course of a patient's condition and treatment, maintained to provide communication among health care providers for current and future patient care."

- There is no exception to the rule that records be provided to the URO where the physician in the foreign county now resides, in this matter Greece, does not maintain medical

records. If a provider or claimant wants to be paid for medical services, the provider must comply with medical conventions in Pennsylvania and keep medical records.

Leventakos v. WCAB (Spyros Painting), No. 2156 C.D. 2012 (Decision by Judge Pellegrini, December 5, 2013) 12/13

FEE REVIEW

- Section 306(f.1) (5) only permits providers, and not billing entities, to file Applications for Fee Review. Therefore, the Bureau cannot rule upon a Fee Review Application if it is not determined whether the entity who filed the Fee Review is a provider.

- The Bureau lacked jurisdiction to determine whether an entity known as the "Physical Therapy Institute" was a medical provider.

  This is because the Fee Review process is designed to be a simple process limited to disputes over the amount of payment due for medical fee where it is alleged that the payment had not been calculated in accordance with the compensation fee schedule or medical billing protocols. The Fee Review proceeding is not undertaken to determine liability for a particular treatment. The Fee Review process presupposes that liability has been established.

  In this matter, the issue of whether the Physical Therapy Institute was a provider of physical therapy to Claimant or simply a billing agency was beyond the scope of a Fee Review. Liability must be established before a Fee Review proceeding can take place. Further, the Fee Review process assumes that the person seeking a Fee Review has been established as a valid medical provider. The question of whether the Physical Therapy Institute is a "provider" is a complex issue for a Workers' Compensation Judge to decide.

- Since the Bureau lacked jurisdiction to consider the carriers challenge to its Medical Fee Review Section's fee determination, because it was not determined whether the Physical Therapy Institute was a Provider under Section 306(f.1)(5) of the Act, the Medical Fee Review Section lacked jurisdiction to act upon the Physical Therapy Institute's Fee Review applications.

- In cases in which liability for a particular treatment is at issue, the claimant, not the medical provider, must pursue compensation before a workers' compensation judge in the regular course.

Selective Insurance Company of America v. Bureau of Workers' Compensation: Fee Review Hearing Office (The Physical Therapy Institute), No. 613 C.D. 2013(Decision by JUDGE LEAVITT, December 6, 2013) 12/13

ATTORNEY FEES/ATTORNEY CLIENT PRIVILEGE/ PHYSICIAN-PATIENT PRIVILEGE

- If an employer fails to issue a Notice of Compensation Payable or Denial upon receipt of notice of a work injury, thus forcing the claimant to litigate the compensability of the injury, the employer will be liable for the payment of the claimant's attorney's fees unless it can prove that its contest was reasonable.

  Where an employer failed to file a Bureau document acknowledging or denying the claimant's alleged injury an Employer is liable for Claimant's attorney's fees unless Employer can prove that its contest was reasonable.

  The employer presented an unreasonable contest where it did not issue a Bureau document and the WCJ found claimant credible that he gave employer notice of the injury, notwithstanding the fact claimant did not seek medical treatment, and that Claimant continued to work while remaining cautious with lifting and getting help when needed.

- In an instance where an employer presented an unreasonable contest on one of multiple issues that were litigated, attorney's fees are assessed in an amount attributable to the litigation of that issue that was unreasonably contested, and not the entire claim. Therefore, where the WCJ's assessment of unreasonable contest attorney fees was premised upon the attorneys incurred in litigating the entire case, notwithstanding the fact the employer only presented an unreasonable contest on the notice issue, the WCJ's order assessing the attorney fee was remanded for a recalculation of the attorney's fees award based only on the services Claimant's counsel provided in litigating the issue of notice with regard to his Claim Petition

- The WCJ did not err upon issuing an interim order, in response to employer's attempt to depose claimant's treating physicians notwithstanding the fact the treating physicians were employed by the employer, where WCJ' s interim order: 1) allowed Employer to schedule the deposition of any treating physician, but prohibited counsel for Employer from having any ex parte contact with any physician to be deposed, and 2) Permitted Claimant's counsel to cross-examine the particular physician as to any such ex parte contacts during any deposition.

  This is because attorney client privilege did not apply where the claimant's treating physicians were acting in their capacity as treating physicians of Claimant, and not as employees of Employer. To allow application of the attorney-client privilege in this manner would be improper, as it would confer upon Employer an unfair strategic advantage.

- Upon applying the Physician-Patient privilege in the workers' compensation context, a claimant seeking compensation benefits fits into the exception to the physician-patient privilege, which means that where a party places his or her physical or mental condition in issue, the privacy right against disclosing private medical information is waived. Nevertheless, such waiver does not permit unfettered disclosure, and it does not permit an employer's counsel to obtain information in any way he sees fit.

  A number of policy were sited by the court, including: 1) the recognized privacy interest underlying the physician-patient relationship; 2) the physician's duty of loyalty to the patient; 3) the risk of disclosing medical information that is irrelevant to the action; 4) the potential tort liability physicians may face for breach of privacy; and 5) the potential that defense counsel may seek to improperly influence the physician or to dissuade the doctor from testifying.

The Pennsylvania State University v. WCAB (Sox), No. 455 C.D. 2013 (Decision by Judge Brobson, December 19, 2013) 12/13

FINAL RECEIPT/NOTICE OF SUSPENSION/PENALTY

- A Final Receipt, signed by an employee is prima facie evidence of the termination of the employer's liability to pay compensation, premised upon recovery of the employee. However, Section 434 and 34 Pa. Code § 121.17(a) creates an affirmative duty on the insurance company to know that the requirements for a Final Receipt have been met before the Final Receipt may be lawfully prepared and presented to a claimant.
  The WCJ may, at any time within three years from the date to which payments have been made, set aside a Final Receipt if it be shown that all disability due to the injury had not terminated. To set aside a Final Receipt, the claimant must establish that he or she had not fully recovered from the work injury when the Final Receipt was signed.

  However, the three-year statute of limitations in Section 434 of the Act, is not a bar to obtaining benefits if the claimant proves that the Final Receipt was obtained by fraud, intentional or unintentional deception or other improper action of the employer.

  The insurer's presentation of a Final Receipt to a claimant known to be receiving ongoing medical treatment is the equivalent of fraud sufficient to set aside a Final Receipt beyond the three year period of Section 434.

  In addition, the insurer engages in fraudulent conduct where an insurer prepares a Final Receipt, knowing that the claimant is still disabled, and the claimant signs it without knowing the significance of the Final Receipt.

  In this matter, the Claims Handlers conduct of preparing the Final Receipt, sending it to Claimant and filing it with the Bureau without any information regarding Claimant's full

recovery from his work injury constituted fraud, as well as an intentional or unintentional deception and improper action, supporting the WCJ's decision to set aside the Final Receipt after the three-year statute of limitations period.

- Unequivocal medical evidence is only required to set aside a Final Receipt only when it is not obvious that the claimant has not fully recovered and the claimant has returned to work with no loss of earning power

- If the employee does not challenge the Notice of Suspension within the twenty-day period, the employee shall be deemed to have admitted to the return to work and receipt of wages at prior or increased earnings, and the Notice of Suspension shall be deemed to have the same binding effect as a fully executed Supplemental Agreement for the suspension of benefits.

  Notwithstanding the fact the Notice of Suspension was not challenged within the twenty-day period, the fact it now had the same effect as a Supplemental Agreement entitled the claimant to challenge it on the basis that it was materially respect incorrect pursuant to the first paragraph of Section 413(a) of the Act. The WCJ may set aside a supplemental agreement for relevant and significant inaccuracy, even absent a finding of mistake of law or fact, fraud, or overreaching.

  The WCJ properly set aside a Notice of Suspension and reinstated Claimant's benefits, notwithstanding the fact a Challenge was not filed within 20 days, where the record established the claimant never returned to work, which meant the Notice of Suspension issued by carrier was totally incorrect, and carrier had no basis to suspend Claimant's benefits.

- The issuance of the Final Receipt and Notice of Suspension, which were knowingly materially incorrect, provided the predicate for the Judge, using her discretion, to assess a 50% Penalty.

Kraeuter v. WCAB (Ajax Enterprises, Inc.), No. 457 C.D. 2013 (Decision by Judge Leadbetter, December 19, 2013) 12/13