THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
DECEMBER 2015 AT A GLANCE
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APPEAL/CONSTITUTIONALITY/IRE

- A December 2, 2014 amendment to Rule 1513(d) modified the language of subpart (5) of the Pennsylvania Rules of Appellate Procedure and now provides that questions involving the validity of a statute may be raised for the first time before the Commonwealth Court in the parties brief.

  However, Rule 1513(d) of the Pennsylvania Rules of Appellate Procedure in effect when Claimant filed his Petition For Review on February 18, 2014 required a challenge to the validity of a statute be asserted in the Petition For Review or be deemed waived.

  The fact that he claimant raised the argument challenging the constitutionality of the IRE provision was not relevant. Any effort to address an issue in a brief that has not been properly raised in the appeal documents is unavailing.

  Accordingly, the claimant waived his argument that the IRE provisions of the Act unconstitutionally delegated legislative authority to the AMA. The claimant had only asserted an unspecified constitutional claim, alleging that Section 306(a.2) of the Act was arbitrary and capricious.

Winchilla v. WCAB (Nexstar Broadcasting), No. 213 C.D. 2014 (Decision by Judge Pellegrini, September 18, 2015) 12/15

HEART ATTACK/ MEDICAL TESTIMONY

- Upon offering a medical expert opinion relating a heart attack to work it is not necessary that the expert pinpoint the exact work duty which caused the exertion. In other words, it is not necessary to prove and identify the precise work details which caused a heart death that resulted from decedent's work activity.

  An expert witness is permitted to base an opinion upon facts of which he has no personal knowledge, so long as those facts are supported by evidence in the record.

  Therefore, claimant's medical expert's testimony that exertion performed by decedent on the date of his death caused his fatal heart was supported by substantial evidence where the overwhelming circumstantial evidence in this case

showed that on the date of the heart attack Decedent performed his regular work activities, which involved heavy labor and use of a jackhammer, over the course of a 14-hour workday.

- Where exertion leads to a fatal heart attack, there is no need to pinpoint the exact work duty which caused the exertion.

- In order for a decedent's fatal heart attack to be compensable, the claimant must establish that the heart attack was causally related to the decedent's employment.

  Claimant need only prove a connection between the decedent's employment and his death; showing a greater than normal exertion is unnecessary.

  If the causal connection is not obvious, the connection must be established by unequivocal medical testimony

Robert Dietz (deceased) by Judith Dietz v. WCAB (Lower Bucks County Joint Municipal Authority), No. 2051 C.D. 2014 (Decision by Judge Leavitt, August 14, 2015 Petitioner) 12/15

MEDICAL TESTIMONY/ OCCUPATIONAL DISEASE/WCJ

- It is true that the Commonwealth Court has held that expert testimony which adamantly rejects any causal relationship between exposure to the hazards of firefighting and lung disease is incompetent because of the presumption in Section 301(e) of the Act, which provides :

  > *If it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard*, ***it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.***

  However, a medical expert's opinion is not rendered incompetent if the doctor indicates his acknowledgment that the presumption exists; but he believes its use as a risk factor for lung disease is not as medically compelling.

  Therefore, the WCJ did not commit an error by adopting employer's medical experts testimony as credible whether the expert indicated his acknowledgment that the presumption existed; but he believe its use as a risk factor for lung disease was not as medically compelling as the claimant's history of smoking cigarettes from age 18 at the rate of one-half to one pack per day; Claimant averaged one to two alcoholic drinks per day; Claimant's grandparents suffered chronic obstructive lung disease and lung cancer; Claimant had been diagnosed as suffering obstructive sleep apnea, gastroesophageal reflux, depression, hypertension, and a cardiac condition, Wolff- Parkinson-White syndrome.

- The WCJ did abused his discretion by not permitting the rebuttal testimony of Claimant's additional expert where employer's medical expert deposition was taken on May 3, 2012 and Claimant did not schedule deposition of his rebuttal expert until March 27, 2013.

This is because the admission of evidence is a matter within the sound discretion of the WCJ who, upon denying claimant's request relied upon the regulations that provide the following:

Regulation § 131.63(d) provides:

A party wishing to present depositions for rebuttal or surrebuttal shall notify the judge in writing within 21 days after the conduct of the hearing or deposition at which the testimony to be rebutted or surrebutted has been given.

Regulation § 131.53(e) provides:

Following a request to present rebuttal or surrebuttal testimony, the testimony shall be presented at a hearing or deposition provided the testimony shall be taken no later than 45 days after the conclusion of the case of the party presenting the testimony or evidence to be rebutted or surrebutted.

Although , the WCJ may, for good cause shown, waive or modify any provision of the Special Rules of Administrative Practice and Procedure Before Workers' the WCJ choose not to do so in this matter and that was not a violation of his discretion.

Swigart v. WCAB (City of Williamsport), No. 493 C.D. 2015 (Decision by Judge Covey, December 23, 2015) 12/15

APPEAL/ BECHTEL POWER/ REINSTATEMENT

- The principles of Bechtel Power Corp. v. Workmen's Compensation Appeal Board (Miller), 452 A.2d 286 (Pa. Cmwlth. 1982) precluded the claimant's right to litigate a Petition for Reinstatement alleging wage loss per her 2007 while she was still appealing the denial of wage per her Claim Petition that alleged wage loss resulting from that same 2007 injury was pending.

This is because Bechtel Power Corp stands for the proposition that matters pending on appeal cannot be revisited by the filing of new, similar petitions.

- Bechtel Power also applies to prevent premature petitions, re-litigation of identical issues, and to preclude a party from advocating inconsistent positions when the issues in the litigation s are identical.

  Bechtel Power applied to this matter because the claimant was attempting to re-litigate identical issues. The initial WCJ did not award indemnity benefits relating back to claimant's 2007 injury and claimant's Petition for Reinstatement also involved a claim for ongoing disability related to a reduction in hours since the 2007 Injury.

  Bechtel Power also applied because the claimant maintained two mutually exclusive positions.

  This is because in the reinstatement petition, ostensibly claimant sought to reinstate the benefits as set forth in the WCJ's decision. Simultaneously, in the appeal of her Initial Claim, she challenged the adequacy of the award because it did not include any ongoing disability benefits or wage loss.

  Further complicating the matter, in her reinstatement petition, Claimant presumed an award of indemnity benefits that she did not receive.

Gieniec v. WCAB (Palmerton Hospital) No. 195 C.D. 2015 (Decision by Judge Simpson, November 3, 2015) 12/15

SUBROGATION

- The employer/carrier is entitled to subrogation against Claimant's recovery of uninsured motorist benefits from a non-negligent co-employee's personal automobile policy for which Employer did not pay.

  This is because an employer has the right to subrogation not only where the employer paid for the policy, but also where a third party, such as a customer or a co-worker, paid for the policy.

  Therefore, where Claimant's co-employee paid for the uninsured motorist insurance policy, Employer was entitled to subrogate against Claimant's settlement proceeds.

Davis v. WCAB (PA Social Services Union) No. 216 C.D. 2015 (Decision by Judge Friedman, December 30, 2015) 12/15