THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
DECEMBER 2016 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-861-6709

SUBROGATION/ EQUITABLE ESTOPPEL

- The Commonwealth Court affirms that the term "installments of compensation" as used in Section 319 of the Act relating to subrogation of employer to rights of the claimant against third persons encompasses medical expenses in addition to indemnity benefits.

  Therefore, the employers lien based upon which is can assert its subrogation right includes indemnity and medical paid and its credit against the balance of recovery includes a credit against future indemnity and ***medical***, during which time the employer is obliged to pay its pro-rata share of attorney fees and cost.

- Although an employer may waive such it right to subrogation or right to a future credit against the balance of recovery, the record must show the waiver was clear and supported by consideration.

  In this matter the alleged waiver was not clear and not supported by consideration. There was also no clear waiver of Employer's rights; rather, there was a request from Claimant's counsel addressed to a person without authority to agree to the request.

- The fact that the employer did not assert its credit against the ongoing medical for 13 years did not equitably estop it from having the right to do so.

  The two essential elements of equitable estoppel are an inducement, and a justifiable reliance on the inducement. The party asserting the estoppel bears the burden of proving it by clear and convincing evidence.

  In this matter the WCJ determined that the parties had never agreed to release Employer' right to future credit. Thus, there was no admission upon which Claimant can rely.

  More importantly, in Thompson v. Workers' Compensation Appeal Board (USF&G Company), 781 A.2d 1146 (Pa. 2001), the Supreme Court analyzed an employer's right to subrogation in light of equitable principles. The court stated that Section 319 is clear and unambiguous. It is written in mandatory terms and, by its terms, admits of no express exceptions, equitable or otherwise.

Furthermore, it does more than confer a 'right' of subrogation upon the employer; rather, subrogation is automatic.

The Supreme Court in Thompson concluded an employer's right to subrogation is generally absolute, unless the employer engages in deliberate, bad faith conduct, which did not occur in this matter.

Whitmoyer v. WCAB (Mountain Country Meats), No. 614 C.D. 2015 (Decision by Judge Simpson, December 1, 2016) 12/16

COURSE AND SCOPE

- The claimant who injured himself unloading his own lockers at work that he voluntarily brought to work unbeknownst to his employer to replace their lockers that were defective suffered an injury in the course of employment because he was ***furthering his employer's business interests*** notwithstanding the fact his employer did not ask him to bring his own lockers and had no awareness that he was bring them to work and unloading them.

  The fact the claimant was not performing his typical job duties and did not receive express permission from Employer to install the locker did not alone take him outside the scope of his employment. To be outside the course and scope of employment the employer needed to prove that the claimant abandoned his employment or was engaged in an activity that was wholly foreign to his employment.

  While the general rule is that all on-premises injuries are in the course of employment, an employer may show abandonment or wholly foreign activity "when the employer can credibly argue that the employee was on the premises but in essentially a non-employee or trespasser status."

  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. Here by replacing a deteriorating locker the Claimant was on Employer's premises and was acting in furtherance of his Employer's interest, and had undertaken an activity solely to benefit Employer.

- The phrase, "actually engaged in the furtherance of the business or affairs of the employer," section 301(c) of the Act as it is used in the Act, applies to every detail necessary for the advancement of the business of the employer and in which the employee was engaged at the time of the accident. It is therefore immaterial whether an employee is acting as a volunteer assisting another employee and/or beyond the scope of his original employment duties when undertaking a task that furthers the employer's interest.

In this matter there was no evidence to demonstrate that Claimant engaged in an activity prohibited by Employer, violated a company policy, or otherwise imposed a detriment upon Employer.

- Section 301(c) (1) of Act provides that an injury must occur in the course and scope of employment and be causally related thereto in order for the injury to be compensable.

  The courts have developed two tests that are used to determine whether an injury was sustained in the course of employment.

  Under the first test, the question is whether the employee was actually engaged in the furtherance of the employer's business or affairs, regardless of whether the employee was upon the employer's premises.

  Under the second test, the employee need not be engaged in the furtherance of the employer's business or affairs, however, the employee: (1) must be on the premises occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on; (2) must be required by the nature of his employment to be present on the premises; and (3) must sustain injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

Grill v. WCAB (U.S. Airways), No. 1490 C.D. 2015 (Decision by Judge McCullough, September 21, 2016) 12/16

UNINSURED EMPLOYERS GUARANTY FUND/ COVERAGE

- The WCJ's finding that the employer was uninsured was not supported by the record because the employer, an Ohio Company, complied with Section 305.2 of the Act by submitting certification form that met the requirements of section 305.2(c) of the Act.

  Under section 305.2(c) of the Act an out of state employer who had insurance out of state may file a certification form that states the out of state employer had workers' compensation insurance at the time of the accident and that Claimant was entitled to benefits under that state law.

  The purpose of section 305.2(c) is to insure that the responsible employer, and not the UEGF, is liable for the payment of compensation benefits

  In this matter the Ohio employer complied with Section 305.2(c) because it filed a certification form with the Pennsylvania Bureau of Workers' Compensation in order to access its Ohio coverage for payments.

The employer's certification form stated that: 1) Employer had workers' compensation insurance coverage in Ohio on the date of Claimant's work injury; 2) that Claimant was covered under this policy; and 3) that Claimant was entitled to benefits under Ohio's workers' compensation law.

The certification form identified the Ohio Bureau of Workers' Compensation as the insurer responsible for the claim and proceeds to set forth an insurance policy number, effective December 19, 2008, which policy remained active as of January 6, 2014, the date the form was signed.

This means that Section 305.2 (C) permits an out of state employer to file a certification with the Pa. Bureau of Workers' Compensation in order to access its Ohio coverage for payments.

Salvadori v. WCAB (Uninsured Employers Guaranty Fund and Farmers Propane, Inc.) No. 2166 C.D. 2015 (Decision by Judge McCullough, December 5, 2016) 12/16

ATTORNEY FEES/SUPERSEDEAS FUND/ LITIGATION COSTS

- An employer is entitled to recover from claimant's Counsel the invalid unreasonable contest attorney fees award that it was required to pay to counsel. This is because the employer would not be entitled to reimbursement for such costs from the Supersedeas Fund.

  An order to refund unreasonable contest attorney fees involves no repayment of compensation benefits and denying a refund order would result in unjust enrichment by allowing an unsuccessful claimant's counsel to keep funds that may only be awarded where the claimant is the prevailing party.

  The Commonwealth Court therefore ordered Counsel to refund to Employer the $14,750 in unreasonable contest attorney fees that Employer paid to Counsel following reversal of the WCJ's decision that has assessed unreasonable contest attorney fees against the employer.

- Supersedeas Fund reimbursement is limited to "payments of compensation," and only disability and medical payments can be recovered. By contrast, unreasonable contest attorney fees and other litigation costs are payment "in addition to the award for compensation," not payment of compensation benefits.

  Therefore, an employer following a successful appeal of the award of unreasonable contest attorney fees has no recourse from the Supersedeas Fund for either unreasonable contest attorney fees or other litigation costs.

- This holding follows the reasoning of the court decision of Barrett v. Workers' Compensation Appeal Board (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010) that held that where litigation costs are awarded and are paid by the employer as a

result of denial of a stay and the award of costs is later reversed on appeal, the employer is entitled to an order requiring the claimant's counsel to repay the erroneously awarded costs because to do otherwise would result in an unjust enrichment and would deprive the employer of any meaningful appeal from an erroneous costs award because litigation costs cannot be recovered from the Supersedeas Fund.

County of Allegheny v. WCAB (Parker) No. 82 C.D. 2016 (Decision by Judge Colins, December 20, 2016) 12/16

IRE/ APPEAL

- The claimant did not waive the issue of challenging the validity of the IRE statute due to his failure to challenge its validity before the WCJ and the WCAB pursuant to Section 703 of the Administrative Agency Law and under Pa. R.A.P. 1551(a), which allows a party to challenge the validity of a statute for the first time on appeal.

  (Section Pa. R.A.P. 1551(a) provides, in pertinent part:

  > *. . . No question shall be heard or considered by the court which was not raised before the government unit except:*
  >
  > *(1) Questions involving the validity of a statute*

  Section 703(a) of the Administrative Agency Law, 2 Pa.C.S. § 703(a), provides in pertinent part that:

  > *A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal…)*

  Therefore, because the Commonwealth Court Decision of Protz v. Workers' Compensation Appeal Board (Derry Area School District), 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (en banc), which held that Section 306(a.2) of the Act was an unconstitutional delegation of legislative authority because the General Assembly "proactively approved versions of the AMA Guides beyond the Fourth Edition without review", challenged the validity of the statute and was decided after the WCJ decision but before the WCAB issued their decision the claimant was permitted to challenge the validity of the IRE provision for the first time on appeal before the Commonwealth Court.

.

Beasley v. WCAB (Peco Energy Company) No. 634 C.D. 2016 (Decision by Judge Pellegrini, December 22, 2016) 12/16