AVERAGE WEEKLY WAGE/ SEASONAL EMPLOYMENT

- Seasonal occupations logically are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. The inquiry centers on the character of the work rather than the period during which the business is open.

- The claimant, an NFL Football Player was not a seasonal employee for the purposes of calculating his pre-injury average weekly wage under Section 309 based upon the terms of claimant’s contract that required he perform tasks during periods outside the football season. This was despite the fact he was only paid during the football season.

The pertinent part of the contract included:

- A lack of seasonal limitations with respect to performance of Claimant’s obligations, which indicated that Claimant’s employment was not seasonal.
- A limitation on Claimant’s ability to play football outside his employment, which was an indication that Claimant’s employment is not seasonal.
- Although the claimant received compensation only after playing in a regular season game and, thereafter, was only compensated during the regular season, the Contract made it clear that Employer would pay Claimant a yearly salary in exchange for performance of all obligations under the Contract, which includes media appearances, performance of which was not limited to the regular football season.

The fact that compensation was received only throughout the regular season did not limit players’ obligations to the regular season; especially where, as here, players were explicitly paid for performance of all obligations under the Contract.

Therefore, the WCJ did not make an error of law by calculating the claimant’s pre-injury average weekly wage pursuant Section 309(c) of the Act. 309(c ) provides:

If at the time of the injury the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two;
OCCUPATIONAL DISEASE/ MEDICAL TESTIMONY

- To be entitled to the presumption of Section 301(f) the claimant must first prove that he suffers from an occupational disease under Section 108(r) of the Act, which provides:

  The term “occupational disease,” as used in this act, shall mean only the following diseases:
  (r) Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

- Sec 109 In addition to the definitions set forth in this article, the following words and phrases when used in order to meet this burden, the claimant must establish a general causative link between the claimant’s type of cancer and a Group 1 carcinogen. In other words, the claimant must produce evidence that it is possible that the carcinogen in question caused the type of cancer with which the claimant is afflicted.

  In order to establish this general causative link, the claimant may submit epidemiological evidence in support of his claims. The employer may submit its own epidemiological evidence to counteract the claimant’s evidence.

  Provided that the claimant demonstrates, among other requirements, the required general causative link, the claimant is entitled to the statutory presumption provided by Section 301(f) of the Act.

- Section 301(f) of the Act establishes the special evidentiary presumption that applies when the employee is a firefighter who suffers from an occupational disease in the form of cancer.

  To establish that a firefighter’s cancer is an occupational disease compensable under the Act, the firefighter must show that his type of cancer is one caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen.

  Once a firefighter establishes that his type of cancer is an occupational disease, he may take advantage of the statutory presumption in Section 301(f) of the Act, provided that the firefighter demonstrates that he

  (1) has served continuously as a firefighter for four years or more,
(2) had direct exposure to a Group 1 carcinogen linked to his type of cancer,
(3) passed a physical examination—either before asserting a claim or engaging in firefighting duties—which revealed no evidence of cancer, and
(4) filed the claim within 300 weeks of his last day of employment.

The burden then shifts to the employer to rebut the presumption. To do so, the employer must identify:

(1) the specific causative agent of claimant’s cancer, and prove that
(2) exposure to that causative agent did not occur as a result of his or her employment as a firefighter.

In other words, the language of Section 301(f) of the Act requires the employer to produce a medical opinion regarding the specific, non-firefighting related cause of claimant’s cancer. The employer may not use generalized epidemiological evidence to rebut the statutory presumption

• In this matter claimant, who had been a firefighter for almost 30 years, fulfilled the requirements of 108(r) resulting in the presumption of Section 301(f) where he proved first that his lung cancer was an occupational disease within the meaning of Section 108(r) of the Act.

The Employer did not submit evidence establishing that the Group 1 carcinogens to which Claimant was exposed as a firefighter did not cause lung cancer. Because Claimant established that he has an occupational disease and met the other requirements of Section 301(f) of the Act Claimant was entitled to the statutory presumption

• Employer’s medical experts’ testimony that the claimant’s diagnosed lung cancer was most likely caused by his significant personal risk factors lacked the level of certainty required by law to establish a causal connection between Claimant’s nonemployment-related risk factors and his cancer.

This is because medical testimony is necessary to establish a causal connection, the medical witness must testify, not that the injury or condition might have or possibly came from the assigned cause, but that in his professional opinion the result in question did come from the assigned cause.

Wayne Deloatch v. WCAB (City of Philadelphia), No. 1684 C.D. 2018 (Decision by Judge Brobson, January 3, 2020) 1/20

COURSE AND SCOPE
• The Pennsylvania Supreme Court grants claimant’s Petition for Allowance of Appeal and sets forth the following two issues to be reviewed:

(1) A traveling employee is entitled to a presumption that he is in the course and scope of employment when traveling to or from work unless his actions at the time of accident are so foreign and removed from his usual employment to constitute abandonment of employment. What constitutes an abandonment of employment such that a traveling employee is not entitled to benefits under the Pennsylvania Workers’ Compensation Act?

(2) A traveling employee is entitled to a presumption that he is in the course and scope of employment when traveling to or from work unless his actions at the time of the accident are so foreign and removed from his usual employment to constitute abandonment of employment. Consequently, is an injury compensable under the Pennsylvania Workers’ Compensation Act when an employee is injured while returning home after attending a work sponsored social event?

• It will be recalled that the Commonwealth Court held that employer rebutted that the claimant, who was a traveling employee, was in the course and scope of employment where, upon leaving his last appointment of the day, passed the exit to his home to attend a happy hour at a bar with co-workers and was then involved in a motor vehicle accident on his way home from the happy hour.

The court reasoned that by passing his home exit to attend the happy hour claimant’s “homeward trip” had ended before Claimant traveled to attend the happy hour at a bar.

The Commonwealth Court distinguished this case from cases where a traveling employee was found to be in the course and scope of employment where they were injured on their way home. In those cases, benefits were granted benefits because the homeward trip was a necessary part of the business excursion. The court further reasoned that the rule recognizes that a traveling employee is subjected to hazards the employee would otherwise have the option of avoiding, and as a result, the hazards of travel become the hazards of the employment.

In this matter, the Commonwealth Court felt that the Claimant clearly had the option of avoiding any hazards simply by choosing to take the exit home as opposed to bypassing his exit to attend happy hour. Under the circumstances, the court felt that Claimant’s travel from the bar to his home could not be considered in the course and scope of his employment.

Peters v. WCAB (Cintas Corporation), No. 467 MAL 2019 (PER CURIAM, January 8, 2020)

UTILIZATION REVIEW
• The Hearing Office erred when it concluded that Pharmacy’s fee review was premature because Employer denied that the compound cream was related to Claimant’s accepted work-related shoulder strain. This is because Employer’s non-payment did not fit any of the following three exceptions to the rule that an employer must pay an invoice within 30 days.

(1) Where the insurer denies liability for the alleged work injury;

(2) Where the insurer has filed a request for utilization review; or

(3) Where the 30-day period insurer is allowed for payment of a provider’s invoice has not yet elapsed.

Employer had the option but did not file a Petition for Modification to revise Claimant’s accepted work injury and did not seek Utilization Review. Employer expressly accepted liability for Claimant’s work injury in the nature of a right shoulder strain both in the NTCP and in the C & R Agreement and the compound cream was prescribed for that injury.

Had Employer sought Utilization Review, the filing of Pharmacy’s Fee Review petition would have been premature. Further, Employer’s liability to Pharmacy would have been suspended pursuant to Section 301(f.1)(5) of the Act.


INCARCERATION

• The Pennsylvania Supreme Court grants the employer’s Petition for Allowance of Appeal is Limited To the issues set forth below:

(1) Whether the Commonwealth Court erred in reversing the appeal board’s affirmance of the WCJ’s grant of Petitioner’s suspension petition for a 75-week period which allowed Petitioner to assert a credit against Respondent’s future compensation for money paid to Respondent during his incarceration as the grant of a suspension was consistent with the Act and the applicable case law?

(2) Whether the Commonwealth Court’s interpretation that Petitioner is precluded from suspending benefits under the circumstances of this case, creates an unequal application of the law for similarly situated claimants, and similarly-situated employers in violation of the Equal Protection guarantees of the Constitutions of the Commonwealth of Pennsylvania and the United States of America
It will be recalled that the Commonwealth Court held that the WCJ committed an error upon suspending claimant’s compensation premised upon the incarceration provision of Section 306(a.1) by suspending the claimant for the 525 days he spent in *pretrial incarceration*, although, upon his conviction, was credited as time served.

The Commonwealth Court explained that under the plain language of Section 306(a.1), incarceration that occurs before a conviction, due to the inability to meet bail, is not a “period during which the employe is incarcerated *after a conviction,***” and such an interpretation would be inconsistent with the fundamental principles underlying the WC Act and its purpose.

The Commonwealth Court reasoned that the intent of the General Assembly upon enacting Section 306(a.1), which was to preclude the payment of workers’ compensation benefits to persons who are convicted of violations of the Pennsylvania Crimes Code and who, as a result of those convictions, are thereafter removed from the work force. Because a claimant has only been accused of a crime prior to the conviction, the Act does not consider that period of incarceration as the claimant’s fault or a voluntary withdrawal from the workforce.

*Sadler v. WCAB (Philadelphia Coca-Cola), No. 413 EAL 2019 (PER CURIAM, December 28, 2020)*

**LITIGATION COSTS/ATTORNEY FEES**

- The WCJ does not have the power to order reimbursement of litigation costs where the employer was ordered, following the unsuccessful defense against a Claim Petition, to pay those litigation costs and, upon being denied supersedeas by the WCAB, paid those costs but the WCAB subsequently reversed the WCJ’s granting of the underlying Claim Petition.

The court upon reaching this holding concluded that the Supreme Court in *County of Allegheny v. WCAB (Parker), 177 A.3d 864 (Pa. 2018)* implicitly overruled the rational of the Commonwealth Court’s prior decision of *Barrett v. WCAB Board (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010).*

It will be recalled that in *Barrett* the Commonwealth Court had held that where an employer has been ordered to pay litigation costs under section 440, the employer is denied supersedeas and pays those costs, and the legal basis for the award of the costs is later reversed on appeal, the WCJ can order the claimant’s counsel to refund the overpayment.

Eight years later in *Parker* the Supreme Court held that Section 440 of the Act does not permit an employer, after requesting and being denied supersedeas, to disgorge attorney’s fees that it paid to a claimant’s counsel for an unreasonable contest when an appellate tribunal subsequently determines that the award of attorney’s fees was made in error.
Although this case involved litigation costs and not attorney fees, the rationale of Parker applied because attorney fees and litigation costs are both payable under Section 440 of the Act and the court reasoned that just as there is no statutory mechanism to provide reimbursement to an employer for erroneously awarded attorney’s fees in section 440 of the Act, there is no statutory mechanism to provide reimbursement to an employer for erroneously awarded litigation costs in section 440 of the Act.

- The Supreme Court in Parker stated that an inference can be drawn from the General Assembly’s decision to create a specific fund for reimbursement of compensation benefits, but not for attorney’s fees and costs, that it intended the latter to be ultimately borne by the employer once paid.

The Supreme Court in Parker further posited it appeared that the General Assembly may have contemplated that the ability to request supersedeas of an attorney’s fee award on appeal would suffice to protect employers from having to pay out erroneous awards under Section 440, and that where, as here, an inappropriate award is paid, employers are the better party to absorb the loss.

Upon reaching this conclusion the Supreme Court in Parker expressly rejected the idea that equitable principles should be read into the Act to prevent unjust enrichment, determining that the intricate statutory scheme enacted by the General Assembly precludes such a reading of the Act.

*David A. Crocker V. WCAB (Georgia Pacific LLC), No. 401 C.D. 2019 (Decision by Judge McCullough, January 30, 2020)*