THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JULY 2015 AT A GLANCE
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COURSE AND SCOPE

- Section 601(a)(10)(i)-(ii) of the Act, added by Act of December 23, 2003, applies to all employees and not just to and not just to the a limited class of volunteer emergency personnel discussed in Subsections (1) to (9) of Section 601(a).

  Section 601(a)(10)(i)-(ii) provides:

  (10) An employe who, while in the course and scope of his employment, goes to the aid of a person and suffers injury or death as a direct result of any of the following:

  (i) Preventing the commission of a crime, lawfully apprehending a person reasonably suspected of having committed a crime or aiding the victim of a crime. For purposes of this clause, the terms "crime" and "victim" shall have the same meanings as given to them in section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the "Crime Victims Act."

  ii) Rendering emergency care, first aid or rescue at the scene of an emergency.

  Under subsection 601(a)(10), an employee who "goes to" the aid of another by performing these specifically identified acts cannot be said to have abandoned the course of employment or to have engaged in something wholly foreign thereto.

  Therefore, the claimant who was hired by the employer to install pipeline and was on duty suffered a compensable injury in the course and scope of employment where he injured himself trying to rescue a worker who have a different employer from a concrete hole that was 30 feet from where he worked.

- Subsection 601(a)(10) is focused on specific acts performed by an employee at a specific time. Subsection 601(a)(10) does not bring injuries incurred by an individual who aids another within the ambit of the Act simply because

the individual is an employee. Rather, subsection 601(a)(10), by its plain language, requires that the individual is functioning as an employee at the time the emergency arises and the employee goes to the aid of another.

Employees are not covered under subsection 601(a)(10)because they went to the aid of another person, but because they did so while otherwise within the course and scope of their employment.

- Under subsection 601(a)(10), the key questions necessary to determine if a claimant's injuries are covered by the Act are (i) whether the individual is an employee within the meaning of the Act, (ii) whether the action taken by the employee falls within one of two specific categories of aid to another, and (iii) whether the employee acted as described in subsection 601(a)(10)(i)-(ii) while otherwise within the course and scope of employment.

- In order to determine whether the claimant was within the course and scope of employment at the point in time when the emergency arose and the employee went to the aid of another person, the court must examine whether the claimant satisfied either of the two tests developed under Section 301(c) of the Act.

  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.

  The addition of subsection 601(a)(10) brings the acts of aiding another specifically identified by subparts (i) and (ii) into the category of actions that, like a temporary departure to administer to human comforts, do not constitute an abandonment of employment by an employee or constitute acts that are inherently high risk so as to be wholly foreign to employment.

- Following the Supreme Court's decision in Kmart Corporation v. Workers' Compensation Appeal Board (Fitzsimmons), 748 A.2d 660, 664 (Pa. 2000) the General Assembly amended Section 601(a) and added subsection 601(a)(10). Therefore, it is the language of subsection 601(a)(10) and not the Supreme Court's analysis in Kmart that is controlling in the instant matter.

Pipeline Systems, Inc. V. WCAB (Pounds), No. 1577 C.D. 2014 (Decision by Judge Colins, July 7, 2015) 7/15

INTEREST/WCAB DECISION

- Simple interest and not compound interest is payable at "ten percentum per annum" on all due and unpaid compensation pursuant to Section 406.1 of the Act.

  This is because compound interest will be awarded only where it is explicitly provided for by contract or by statute. Section 406.1 of the Act does not expressly provide for compound interest. Thus, the awarding of compound interest is contrary to the existing status of the law.

- The decisions of the WCAB, an administrative agency, are not binding on the Commonwealth Court. Moreover, administrative agencies themselves are not bound by their previous decisions.

Tobler v. WCAB (Verizon Pennsylvania, Inc.), No. 2211 C.D. 2014 (Decision by Judge Simpson, July 9, 2015) 7/15

CREDIT/PENALTY

- The employer was entitled to an offset against Disability Pension benefits that the claimant began receiving February 29, 2012 retroactive to February 2011, which was the date on which she applied, and not as of the date the clamant returned the Employee Report of Benefits Form (LIBC-756 form), because the employer provided the claimant with an Employee Report of Benefits Form (LIBC-756 form) in a timely manner in March 2012 and upon receipt of Claimant's LIBC-756 form on March 26, 2012, employer sent Claimant a Notice Of Offset Form on March 27, 2012.

- Employers must remind employees of their duty to report benefits every six months in order to avoid circumstances where an employer's lack of diligence results in the employee being subjected to a large retrospective offset.

In this case, Employer was entitled to the retroactive offset because it notified Claimant of her duty to report her pension disability benefits by sending an LIBC-756 form approximately sixty days before and again less than thirty days after she began receiving her disability pension. Accordingly, although Claimant was subjected to a large retrospective offset, the amount Employer recouped was not related to any lack of diligence on Employer's part.

The employer must notify the claimant of his reporting requirement by sending him a Form LIBC-756 every six months. By doing so it will be a rare case where an employer will need to recoup an overpayment longer in duration than six months. The recoupment of an overpayment that occurs over six months or less eliminates the need of the WCJ to inquire into hardship. Though, a WCJ can structure a recoupment in a way that minimizes its impact on the claimant.

- The employer was not subject to penalties because it suspended claimant's benefits by taking the offset without first obtaining an executed agreement or order.

  This is because the regulation at 34 Pa. Code §123.4 allows an employer to take an offset unilaterally.

  However, at least 20 days prior to taking the offset, the employer must notify the employee, on Form LIBC-761, "Notice of Workers' Compensation Benefit Offset," that the workers' compensation benefits will be offset.

Gelvin v. WCAB (Pennsylvania State Police), 1503 C.D. 2014 (Decision by Judge McCullough, July 13, 2015) 7/15

IMPAIRMENT RATING EVALUATION

- The language of Section 306(a.2) provides that the IRE physician shall be "chosen by agreement of the parties, or as designated by the department," Section 306(a.2) (1) does not require that the employer first seek agreement from the claimant on an IRE physician before requesting that the Bureau designate the physician.

  Section 306(a.2) (1) merely lists two alternative methods for selecting the IRE physician: 1) Bureau designation; or 2) Agreement of the parties.

  This section does not state that the designation by the Bureau is limited to the situation where the parties have been unable to agree.

An employer, if it wishes to select the IRE physician rather than go the Bureau designation route, must obtain the claimant's agreement. If the employer chooses not to obtain the claimant's agreement, the Bureau selects the IRE physician, and the employer loses the ability to determine or influence the identity of the IRE physician.

- Although an IRE must be requested within the time limits set forth in Section 306(a.2)(1) to automatically reduce the claimant's status to partial disability, an IRE may be requested outside those time limits under Section 306(a.2)(6), , in which case reduction of the claimant's status to partial disability must be sought through a modification petition.

Section 306(a.2) (1)'s requirements for IREs, however, also apply to IREs requested and performed under Section 306(a.2) (6). This means the employer may first have the Bureau designate the IRE physician whether the IRE is requested with 60 days of the receipt of 104 weeks of total disability or beyond the 60 days.

Logue v. WCAB (Commonwealth of Pennsylvania), No. 1882 C.D. 2014 (Decision by Senior Judge Colins, July 14, 2015) 7/15

INDEPENDENT CONTRACTOR/ CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT

- Section 3(a)(1) of the Construction Workplace Misclassification Act provides that an individual who performs services in the construction industry for remuneration is an independent contractor only if he has a written contract to perform such services.

  Therefore, the claimant was not an independent contractor at the time of his injury where he had not yet signed a "written contract to perform such services" at the time of his injury but, rather, signed an Independent/Sub-Contractor Agreement after Claimant's injury and his release from the hospital.

- Employment status is a critical threshold determination for liability. A claimant must prove an employer/employee relationship in order to receive benefits.

  Section 2 of the Construction Workplace Misclassification Act provides that for purposes of workers' compensation, the term "employee" shall have the same meaning as in section 104 of the Workers' Compensation Act, which states that

the term “employe” includes all natural persons who perform services for another for a valuable consideration.”

Section 3(a) of the CWMA provides:

For purposes of workers’ compensation . . . an individual who performs services in the construction industry for remuneration is an independent contractor only if:

(1) The individual has a written contract to perform such services.

(2) The individual is free from control or direction over performance of such services both under the contract of service and in fact.

(3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

Staron v. WCAB (Farrier), No. 2140 C.D. 2014 (Decision by Senior Judge Friedman, July 17, 2015) 7/15