THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JUNE 2011 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
CAMPBELL, LIPSKI & DOCHNEY
(W) 215-430-6362

INSURANCE POLICY/ WCJ/ COVERAGE

- The Act governs proceedings before a WCJ. Section 104 of the Act authorizes an executive officer of a corporation to elect to be excluded from workers' compensation insurance coverage. To implement Section 104, the Pennsylvania Department of Labor and Industry has promulgated Forms LIBC-509 and 513.

  The claimant was excluded from coverage under the Act where, consistent with Section 104, Claimant executed Forms LIBC-509 and 513, and they were filed with the Department of Labor and Industry. Accordingly, Claimant effected his election to be excluded from all benefits and rights under the Pennsylvania Workers' Compensation Act.

- The WCJ did not have jurisdiction to entertain claimant's contract claims made pursuant to his insurance contract. Therefore the WCJ could not entertain claimant's argument that the insurer's failure to issue the executive officer exclusionary endorsement was fatal to its position that it does not owe him coverage under the policy. The WCJ also did not have jurisdiction to rule upon claimant's argument that his insurance policy has an "entire contract" clause, which provided that the terms of the policy may be changed only by endorsement and therefore the WCJ erred in relying upon Forms LIBC-509 and 513 because they are not part of the contract.

  This is because a Claimant's contract claims do not belong in a claim petition proceeding before a WCJ, who does not have jurisdiction to issue declaratory judgments on the meaning of a contract, even a contract in the form of a workers' compensation policy. Courts decide breach of contract issues. The WCJ adjudicates disputes arising from the Act. The WCJ does have authority to adjudicate the significance of the LIBC forms executed by claimant and properly did so here.

  Likewise, it was not the responsibility of the WCJ to enforce the provisions of The Insurance Company Law of 1921 or the terms of the Rating Manual. If Claimant believed Insurer has failed to follow the terms of the Rating Manual in violation of state insurance regulatory law, he should have made a complaint to the Rating Bureau or to the Pennsylvania Insurance Department or both.

Wagner v. WCAB (Anthony Wagner Auto Repairs & Sales, Inc.), No. 1527 C.D. 2011 (Decision by Judge Leavitt, June 4, 2012) 6/12

CREDIT

- The WCJ did not commit an error of law by attributing the retained investment returns of the fund of the defined-benefit plan to the Employer as if there were an actual contribution by the employer pursuant to Section 204(a) of the Act.

- In the context of a defined-benefit plan, where an employer cannot provide evidence of actual contributions for the use of an individual member Section 204(a) of the Act does not explicitly require an employer to prove the amount of its actual contributions. Nothing in the statute precludes the sound use of actuarial principles in evaluating employer funding in defined-benefit pension plans

  Therefore, the WCJ did not commit an error by denying claimant's Offset Petition where the testimony found credible provided an explanation for why the retained investment returns of the defined-benefit plan were not an actual fund that could be isolated in the context of a defined-benefit plan.

  Claimant's argument, premised upon attributing the retained investment returns to Employer as if there were an actual, existing fund, failed to appreciate the essence of a defined-benefit pension plan that impedes direct tracing and quantification of employer funding for which actuarial science offers a rational alternative and failed to acknowledge that the retained investment returns merely reflect an actuarial assumption.

- Section 204(a) of the Act provides that benefits afforded under the Act are subject to being offset by retirement benefits "to the extent funded by the employer directly liable for the payment of compensation" and that the pension plan benefits which are received by an employee "shall . . . be credited against the amount of the workers' compensation award. The Board's regulations provide that "in calculating the offset amount for pension benefits, investment income attributable to the employer's contribution to the pension plan shall be included on a pro rata basis."

  An employer may use actuarial evidence to establish the offset without the necessity of proving actual contributions and, if the actuarial testimony is accepted as credible, it is legally sufficient to establish the extent of an employer's funding for offset/credit purposes. The extent to which an employer funded a particular employee's defined benefit pension can only be determined by an actuarial formula.

- Where an employer established a prima facie case, and if Claimant desires to challenge the prima case, Claimant is required to offer her own evidence demonstrating the materiality and relevance of her assertion that retention in the

fund of investment returns of non-vesting employees impacted the extent to which Employer contributed to Claimant's pension.

Marnie v. WCAB (Commonwealth of PA/ : Dept. of Attorney General), No. 1583 C.D. 2011 (Decision by Judge Cohn Jubelirer, June 7, 2012) 6/12

VIOLATION OF POSITIVE WORK ORDER/ WCJ

- Employer has the burden of proving the violation of the positive work rule or order and that the violation removed Claimant from the course and scope of his employment.

  When an employer raises the affirmative defense of a violation by an employee of a positive order or rule, the employer must prove that (1) the injury was, in fact, caused by the violation of the order or rule; (2) the employee actually knew of the order or rule; and (3) the order or rule implicated an activity not connected with the employee's work duties.

  Therefore, the employer fulfilled its burden of proof of proving claimant's injury occurred as the result of his violation of a positive work order or rule where Employer demonstrated that Claimant was injured because he drove a forklift in violation of a work rule, that Claimant actually knew of the work rule prohibiting unauthorized personnel from driving the forklift, and that driving the forklift was not an activity connected with Claimant's work duties.

- When reviewing witnesses' testimony, determinations as to weight and credibility are solely for the WCJ as fact-finder. If supported by substantial evidence, a WCJ's findings are conclusive on appeal, despite the existence of contrary evidence.

Miller v. WCAB (Millard Refrigerated Services and Sentry Claims Service), No. 2306 C.D. 2011 (Decision by Judge Friedman, June 22, 2012) 6/12

REINSTATEMENT

- The Pennsyvannia Supreme Court grants Claimant's Petition for Allowance of Appeal from the Order of the Commonwealth Court that held that under Section 413(a) of the Act, where a claimant's benefits are suspended because of no current loss of earnings, said benefits may be resumed only if the claimant files a reinstatement petition within 500 weeks from the effective date of the suspension. Absent circumstances justifying application of the doctrine of equitable estoppel, a reinstatement petition filed outside of the 500-week period will be considered time-barred by the statute of repose.

Therefore**,** notwithstanding the fact the employer reinstated the claimant's compensation for periods following the expiration of 500 weeks of suspension by Supplemental Agreement, the Commonwealth Court held that the claimant was not entitled to a reinstatement of benefits because Claimant's benefits were suspended on September 20, 1989, when Claimant returned to his pre-injury position without a loss of earnings. Pursuant to Section 413(a) of the Act, therefore, Claimant had until approximately April 1999 to file a Reinstatement Petition before his right to benefits was completely extinguished but the claimant did not file a reinstatement petition until September 26, 2008; over nine years after the 500-week period had expired.

- The Supreme Court states the questions under appeal are as follows:

  (1) Whether the Commonwealth Court erred as a matter of law when it held that petitioner's petition to reinstate was barred by § 413 of the Workers' Compensation Act, when he filed the petition within three (3) years from the last date of payment of compensation paid pursuant to a supplemental agreement, payments were ongoing when the petitioner filed the petition to reinstate, and East Goshen Township unilaterally ceased payments while the petition was pending?

  (2) Whether the Commonwealth Court committed an error of law when it held that East Goshen Township did not violate the Act and thereby denied petitioner's penalty petition when the Township unilaterally ceased payment of compensation on January 25, 2009 after it had entered into a supplemental agreement providing for payment of partial disability at the rate of $318.52 effective November 28, 2007 and there was no order of the WCJ or agreement of petitioner suspending payment?

Andrew Cozzone v. WCAB (PA MUNICIPAL/EAST GOSHEN TOWNSHIP), No. 91 MAL 2012 (Per Curiam June 26, 2012)