THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JUNE 2018 AT A GLANCE

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DISFIGUREMENT/ LOSS OF USE

- Section 306(c)(22) of the Act, by necessity, allows wide latitude in assessing awards for disfigurement, as these types of determinations are extraordinarily fact oriented and must be made on a case by case basis, taking into account, among other factors, the nature and severity of the disfigurement.

- While the Act itself provides limited guidance on how to calculate disfigurement awards, the prior case law offers some guidelines.

  First and foremost, courts have held that the most meaningful evidence involves the fact-finder's in-person observation of the disfigurement itself. It is the physical appearance of the claimant himself and the unsightliness of the disfigurement which constitutes the evidence considered by the WCJ.

  After the fact-finder observes the claimant, in order to qualify for a disfigurement award, the fact-finder must determine that the disfigurement created an "unsightly appearance.

  If there is an appeal, the WCAB is then obligated to personally view the Claimant because that is the only meaningful way for the WCAB to determine whether the WCJ's opinion is supported by substantial competent evidence.

  If the WCAB, upon viewing claimant's disfigurement, concludes that the WCJ entered an award significantly outside the range most WCJs would select, the Board may modify the award as it deems appropriate. This is because the public policy goal is to establish uniform awards for similar types of disfigurements.

- WCJs arguably exhibit a capricious disregard of competent evidence by failing to consider other awards for similar disfigurements issued by WCJs around the state. This mandates an affirmative obligation on the part of all Pennsylvania WCJs to do an analysis of awards for similar disfigurements from throughout Pennsylvania to assess an award that fits within those standards.
  The WCJs are required to consider comparable awards for similar disfigurements, then by reason, the WCJs should be provided with the necessary resources to easily access this

information. The paradox is that if a WCJ does not have readily available access to this information, the court deems it improper to characterize a WCJ's decision making standards as a "capricious disregard of competent evidence".

- Upon an appeal to the WCAB in furtherance of the goal of promoting statewide uniformity, the WCAB must explain how it determined that WCJs would select the weeks awarded for the disfigurement. The WCAB should provide an explanation for its decision to increase a disfigurement award to allow the Court to determine whether the Board's decision is compatible with the goal of uniformity.
An adequate explanation requires the WCAB to indicate what range is acceptable under the circumstances, what most WCJs would award within that range or how the WCAB reached its conclusion that most WCJs would award greater compensation.

  In this matter the case was remanded because the WCAB failed to establish that objective, rational, and demonstrable standards to assess disfigurement awards are being utilized by the WCAB, what data/information the Board is relying upon, or how and where is this information maintained. The WCAB offered no guidance on precisely how many "similar" disfigurement awards the WCAB reviewed, or the precise descriptions of the other facial scars that the WCAB took into account. This lack of explanation and information raised the concern that the WCAB was simply substituting its judgment for that of the WCJ.

Keister Miller Investments LLC, v. WCAB (Hoch), No. 1303 C.D. 2017 (Decision by Judge Ceisler, March 23, 2018) 6/18

NOTICE/OCCUPATIONAL DISEASE

- The claimant gave timely 21 day notice where after developing cancer while working as a firefighter where she stopped working on September 9, 2004 but filed her Claim Petition on September 23, 2011, which was a few months after she received a Union Letter informing her of the Act 46 firefighter cancer presumption law. This is because the Claim Petition was filed prior to receipt of a medical report dated February 24, 2012 that confirmed the link between her cancer and her work as a firefighter.

- Section 311 provides in part:
  > *...in cases of injury resulting from ionizing radiation or* ***any other cause in which the nature of the injury or its relationship to the employment is not known to the employe****, the time for giving notice shall not begin to run until the employe knows or by the exercise of reasonable diligence should know of the existence of the injury and its possible relationship to his employment.*

  Consistent with Section 311, in an occupational disease case, the notice period begins to run against a claimant when she has (1) knowledge or constructive knowledge (2) of a

disability (3) which exists, (4) which results from an occupational disease, and (5) which has a possible relationship to her employment.

This the discovery rule calls for more than an employee's suspicion, intuition or belief; by its terms, the statute's notice period is triggered only by an employee's knowledge that she is injured and that her injury is possibly related to her job.

A claimant does not know of the possible relationship between a disease and work until she is so informed by a medical expert. To hold otherwise would require a claimant to sort through her many symptoms unassisted and essentially diagnose herself.

- The presumption provided by Act 46 of the Act was clearly intended to give claimants in specific occupations an evidentiary advantage in establishing one of the elements necessary to support an award (i.e., the causal link between her injury and her employment), not to circumvent or replace the notice provisions of Section 311. This is because Section 311 requires actual knowledge of an injury's work-relatedness. Therefore, although claimant would be entitled to a presumption that her cancer was caused by his work as a Firefighter for the purpose of supporting her claim, was is not entitled to such a presumption for the purpose of imputing actual knowledge on employer.

  Likewise, the Claimant, learning of Act 46's effect from a Union Letter did not perfect Section 311's requirement that she actually knew of the possible relationship between her injury and her work thereby triggering the notice provision. However, because the Union Letter awakened in Claimant the need to promptly investigate the cause of her injury, she had to abide by Section 311's mandate that she exercise "reasonable diligence" to become aware of the existence of the injury and its possible relationship to her employment. She did that in this matter by seeking out a medical opinion. Here, the Claimant acted with reasonable diligence when she obtained counsel and filed her claim petition in the months following receipt of the Union Letter, prior to receiving medical confirmation of the relationship between her cancer and her work.

- If the claimant gives notice within 21 days of the date he knew or should have known of the injury and its relationship to his employment, compensation is payable from the date of disability. If, however, the claimant gives notice after the 21 days has elapsed but within 120 days of the date he knew or should have known of his injury, compensation is then payable from the date that notice was given.

City of Pittsburgh and UPMC Benefit Management Services, Inc., v. WCAB (Flaherty), No. 29 C.D. 2018 (Decision by Judge Pellegrini FILED, June 1, 2018)6/18

IMPAIRMENT RATING EVALUATION

- Where a claimant's compensation was modified from total to partial on the basis of an IRE, in light of the Supreme Court decision of Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.), 161 A.3d 827, (Pa. 2017) (Protz II) claimant is entitled to Reinstatement of Compensation providing she filed for reinstatement within three years of the most recent payment of compensation and fulfills her modest burden of showing that the reasons for the suspension no longer exist.

  Claimant's burden may be satisfied by her own testimony without the necessity of producing medical proof. The claimant will be entitled to reinstatement providing the WCJ credits her testimony over any evidence that an employer presents to the contrary.

- The court reached this holding where a prior Petition for Modification following the performance of an IRE was successfully litigated by the employer following an IRE performed on June 13, 2006 and the parties stipulated that Claimant did not previously raise the constitutionality of the IRE before the original WCJ or the Board, who affirmed the WCJ's granting of the employer's petition on June 1, 2009.

Whitfield v. WCAB (Tenet Health System Hahnemann LLC), No. 608 C.D. 2017 Judge Cohn Jubelirer, June 6, 2018) 6/18

SUBROGATION

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds that an employer's lien against future compensation does not include medical but only future indemnity. This is because 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 only encompasses indemnity benefits.

  This is because under Section 308 of the Act, disability benefits are required to be paid in periodical installments, as the wages of the employee were payable before the injury. Medical expenses are not required to be pain in periodic installments. Accordingly, when a workers' compensation claimant recovers proceeds from a third-party settlement, following repayment of compensation paid to date as prescribed by section 319, the employer or carrier is limited to drawing down against that recovery only to the extent that future disability benefits are payable to the claimant.

- The lien at the time of settlement that needs to be paid, subject claimant's obligation to pay its pro-rata share of attorney fees and costs, does entail medical and indemnity that was paid up to the date of settlement of the third party action.

Whitmoyer v. WCAB (Mountain Country Meats), No. 52 MAP 2017 (Decision by Justice Donohue, June 19, 2018) 6/18

CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT (CWMA)/ INDEPENDENT CONTRACTOR

- The Pennsylvania Supreme Court affirms the Commonwealth Court and holds that the Construction Workplace Misclassification Act (CWMA) is only applicable where the putative employer in in the business of construction.

  Accordingly, the CWMA did not apply to the factual scenario where the claimant was injured while performing remodeling for the defendant, who was a restaurant that had not yet opened.
- In confining its applicability to individuals who perform services in the ***Construction Industry*** the CWMA refers only to those individuals who work for a business entity that performs construction services, namely erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work. For an employee to be covered by the Construction Workplace Misclassification Act (CWMA) the construction activity must be analyzed and considered in the context of the putative employer's industry or business.

- Upon determine whether a claimant was an Independent Contractor the Court will consider control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time

Department of Labor and Industry, Uninsured Employers Guaranty v. WCAB (Lin and Eastern Taste), No. 27 EAP 2017 (Decision by Justice Wecht, June 26, 2018) 6/18