THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MARCH 2015 AT A GLANCE
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ANSWER

- The sanctions of filing a late answer pursuant to Yellow Freight to a Claim Petition did not apply where the Claim Petition listed the employer's address as 72 West Park Avenue rather than the proper address of 71 West Park Avenue even though the property served was alleged on appeal to be property owned by a corporation that was an affiliate of the employer.

  This is because under both the common law "mailbox rule" and the Act, proof of mailing raises a presumption that the mailed item was received only if it is shown that the item was mailed to the party's correct address. This is consistent with Section 406 of the Act, which provides only a mailing to a party's correct address constitutes service on the date of mailing.

  Therefore, where a Claim Petition is mailed to an incorrect address, an answer is not untimely simply because it was filed more than 20 days after that mailing, and Section 416 of the Act does not bar the employer from denying and fully contesting the allegations of the Claim Petition absent other proof that the claim petition was received more than 20 days before the answer.

  Moreover it was not relevant whether the property served was owned by an affiliate of the employer. Service of a document on an address owned by an affiliate of a corporation does not constitute service on the corporation itself.

  The mere fact that one piece of mail sent to an erroneous address successfully reached a party after it knew that its mail was being sent to that address does not support an inference that all mail sent to the erroneous address was promptly received by that party.

- When an employer fails to file an answer within that statutory period without adequate excuse, every well-pleaded factual allegation in the claim petition is admitted as true and the employer is barred from presenting affirmative defenses and from challenging the factual allegations in the Claim Petition. If the employer's answer is found untimely, the employer may challenge only the legal sufficiency of the claimant's claims, elements of the claim that are not well pleaded, and facts, such as continuing disability, with respect to time periods after the date that the answer was due.

Washington v. WCAB (National Freight Industries, Inc.), No. 1070 C.D. 2014 (Decision by Judge Colins, March 4, 2015) 3/15

ATTORNEY FEES/ APPEAL

- The Commonwealth Court may impose sanctions against a claimant and his appellate counsel under Pa. R.A.P. 2744 against a claimant for obdurate and vexatious prosecution of a frivolous appeal.

  Rule 2744, titled, "Further Costs. Counsel Fees. Damages for Delay", states

  In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including

  (1) a reasonable counsel fee and
  (2) damages for delay at the rate of 6% per annum in addition to legal interest, if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

- The order of sanctions that assessed the costs and counsel fees against claimant and his appellate counsel for costs and counsel fees incurred by employer to defend this appeal, was appropriate where the claimant, following dismissal of his Claim Petition and subsequent Petition to Review, filed: 1) Seventeen petitions, which were dismissed based upon res judicata and the statute of limitations; 2) Six appeals to the WCAB; and, 3) Five Petition's to Review to the Commonwealth Court.

  The court reasoned in the absence of the imposition of sanctions there would be no way for the courts to curb the sort of flagrant abuse of the system engaged in this matter.

Smith v. WCAB (Consolidated Freightways, Inc.) No. 606 C.D. 2014 (PER CURIAM, March 9, 2015) 3/15

AVERAGE WEEKLY WAGE

- Section 309(d.2) did not apply to the scenario where the claimant, who worked as a Trucker, was paid 30% of Employer's charges for a load to be delivered, and was only employed by the employer for 2 ½ weeks, this first of which he had no earnings because Employer did not have work available to him.

Moreover, the first week of employment of employment was not to be included in wage calculation since inclusion of the first week of his employment would not accurately reflect the economic reality of his pre-injury ability to generate further earnings.

According, the proper AWW was $810, which was the amount which the WCJ found he earned in the second week of his employment.

This is so even though Section 309(d.2) generally applies to a recently-hired employee for whom there was no accurate measure of AWW other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment agreement.

However, where the Act does not address a method of calculating the AWW for a particular situation, the AWW is calculated using an alternative method which will advance the overall humanitarian purpose of the Act. The AWW should reasonably reflect the economic reality of a claimant's recent pre-injury earning experience, with some benefit of the doubt to be afforded to the claimant in the assessment. In addition, some reasonable assessment must be made of claimants' pre-injury ability to generate further earnings.

- Section 309(d.2) provides in pertinent part:

"if the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the AWW shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment."

Anderson v. WCAB (F.O. Transport and Uninsured Employer Guaranty Fund), No. 181 C.D. 2014 (Decision by Judge Leadbetter, March 10, 2015) 3/15

INJURY/OCCUPATIONAL DISEASE/ EVIDENCE/TERMINATION

- The WCJ's determination that Claimant fully recovered from her work injury without any residual impairment from Occupational Asthma was contrary to the credited evidence of record and erroneous as a matter of law where the evidence reflected that the claimant had ***no prior*** history of suffering from asthma prior to her occupational exposure to Di-Isocyanate and, although credited testimony found her recovered from the occupational asthma, it was not disputed that the claimant could not return to her pre-injury work environment as a result of her cumulative occupational exposure to Di-Isocyanate.

The holding in this matter should be distinguished from the holding in the Pennsylvania Supreme Court case of Bethlehem Steel Corporation v. WCAB (Baxter), 708 A.2d 801 (Pa. 1998), where the court held that once the claimant had fully recovered from his work-related aggravation and returned to his ***pre-***

occupational exposure medical baseline, he became ineligible for workers' compensation benefits regardless of his inability to return to his pre-injury work place because of his preexisting asthma.

- Where a claimant's claim exceeds 52 weeks, the claimant could not rely on medical reports (Toxicologist) alone for purposes of any award of further benefits after the employer objected to their admissibility.

Little v. WCAB (Select Specialty Hospital) No. 1401 C.D. 2014 (Decision by Judge Simpson, March 25, 2015) 3/15

SUBROGATION/CONTRACT LAW

- The claimant, who did not witness the negotiations pertaining to employers subrogation rights and main evidence was her testimony based upon what her initial attorney told her, did not produce sufficient evidence to prove that the employer/carrier waived its future subrogation rights where the initial Third Party Settlement Agreement (TPSA) provided for payment of monies to the employer in excess of its net lien and specifically stated that the employer waived its future subrogation rights but the parties subsequently entered into a "corrected" TPSA based upon the employer's larger net lien and this agreement provided for exact payment of the employer's net lien but contained no language stating the employer waived its future subrogation rights.

  This is because an employer only waives past and future subrogation rights when the release agreement relates to both sets of rights, and a release of one set of rights does not require a release of the other. In this context the "corrected" TPSA was susceptible to different interpretations, and the Claimant failed to present evidence to support her understanding of the agreement.

  The Court, upon reaching its ruling noted that the initial TPSA contained consideration for the waiver of future subrogation rights whereas the "corrected TPSA" provided no consideration for waiver of future subrogation rights. Moreover, the express language found in the Original SA waiving Employer's future subrogation rights was deleted from the Corrected SA.

  The lack of consideration in the "corrected" TPSA is significant because all essential elements, including consideration, must be present for a valid contract to exist. In order for a valid contract to exist, there must be adequate consideration beyond what the parties are already legally bound to render or perform.

  Since the Claimant was already legally obligated to pay the net lien, there was no consideration present for any waiver of future subrogation rights.

- It is true that where the contract terms are ambiguous and susceptible of more than one reasonable interpretation, however, the court is free to receive extrinsic

evidence, i.e., parol evidence, to resolve the ambiguity. Here, the "corrected" TPSA was susceptible to different interpretations, and Claimant failed to present evidence to support her understanding of the agreement, and there was no consideration for Employer's waiver of future subrogation rights.

- An employer's subrogation right is both automatic and absolute and can be abrogated only by choice.

  There are two aspects to an employer's subrogation rights: the compensation previously paid to a claimant by an employer is the accrued lien or "past" aspect and the credit toward compensation payable is the "future" aspect to be paid subsequently upon settlement of the accrued lien.

  An employer's settlement of its accrued lien for a lesser sum of money has no bearing on the calculation of the employer's future subrogation rights because the settlement does not change the amount of compensation that the employer previously paid.

Fortwangler v. WCAB (Quest Diagnostics) 1085 C.D. 2014 Decision by judge McCullough, March 31, 2015) 3/15