**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:**
**MARCH 2016 AT A GLANCE**
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## COURSE AND SCOPE

- The Supreme Court grants Petition for Allowance of Appeal limited to addressing the following issue

  *Did the Commonwealth Court err because § 601(a)(10),unambiguously provides that the employee must be within the course and scope of his employment at the time he provides aid and is injured, not merely be in the course and scope of his employment at the time of the emergency arose as the Commonwealth Court held?*

- Section 601(a) (ii) provides that an employee 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:

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

  It will be recalled that the Commonwealth Court held under subsection 601(a)(10), an employee who "goes to" the aid of another by performing specifically identified acts enumerated in this section, 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 had a different employer from a concrete hole that was 30 feet from where he worked.

  The Commonwealth Court had reasoned that Subsection 601(a) (10) is focused on specific acts performed by an employee at a specific time. The Commonwealth Court stated that 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, they held that 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.

Put another way, the Commonwealth Court held that 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. This specific reasoning that requires the worker offering the aid be within course and scope is what will be reviewed by the Supreme Court.

*Pipeline Systems, Inc. V. WCAB (Pounds) No. 384 WAL 2015* (PER CURIAM, March 8, 2016) 3/16

**INDEPENDENT CONTRACTOR/ CAPRICIOUS DISREGARD**

- A claimant's employment status is a critical threshold determination for liability under the Act. This is because independent contractors cannot recover benefits under the Act. The existence of an employer-employee relationship is a question of law based on the facts presented in each case.

  While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration. The court will consider many factors including:

  - ✓ control of manner the work is done;
  - ✓ responsibility for result only;
  - ✓ terms of agreement between the parties;
  - ✓ nature of the work/occupation;
  - ✓ skill required for performance;
  - ✓ whether one is engaged in a distinct occupation or business;
  - ✓ which party supplies the tools/equipment;
  - ✓ whether payment is by time or by the job;
  - ✓ whether work is part of the regular business of employer; and,
  - ✓ The right to terminate employment.

  Although no one factor is dispositive, control over the work to be completed and the manner in which it is to be performed are the primary factors in determining employee status.

  Control exists where the alleged employer: "possesses the right to select the employee; the right and power to discharge the employee; the power to direct the manner of performance; and, the power to control the employee."

Moreover, payment of wages and payroll deductions are significant factors, as is provision of workers' compensation coverage. However, payment is not determinative.

In addition, a tax filing denoting self-employment, while a relevant factor, is not dispositive on the issue.

Similarly, the existence of an employment or independent contractor agreement is another factor to consider, but it is not, by itself, dispositive.

In the matter the Commonwealth Court affirmed the WCAB who reversed the WCJ by finding claimant, who worked as a Personal Caretaker assigned to defendants clients was an independent contractor, where: a) the defendants clients paid Claimant directly and determined the rate of pay; b) Claimant also signed a document titled "Independent Contractor Agreement; c) Claimant deducted her own taxes from the payments; d) Claimant identified herself as self-employed on her tax returns; e) defendant did not provide its caretakers with any sick time, vacation or holiday pay ; f) Claimant signed an employment agreement, which provided: (i) caretakers are not employees of Defendant; (ii) caretakers are paid directly by the client; and, (iii) caretakers are responsible for deducting their own taxes; g) Claimant was free to work for other agencies; h) client and not the defendant prescribed actual tasks to be completed or the manner in which work was to be performed; i) Claimant did not check in with Defendant on a daily basis and claimant could take time off at her discretion; j) Defendant did not supply the uniform or other implements of work; and, k) although Defendant matched clients to caretakers, the clients possessed the ultimate power to maintain or discharge the caretakers, and set the final rate of pay.

The was despite the fact Defendant provided guidelines, which included instructions on personal services provided and directed Claimant to wear scrubs, maintained records on arrival and departure times, not to leave client unattended, maintain confidentiality, and not to use cell phones and Defendant established Claimant's hours and wages, and had the ability to terminate her employment.

- A review for capricious disregard of material, competent evidence is an appropriate component of appellate review in any case in which the question is properly raised before a court. A capricious disregard of evidence occurs where the WCJ's findings reflect a deliberate disregard of competent evidence that logically could not have been avoided in reaching the decision. Where substantial evidence supports the findings, and those findings in turn support the conclusions, it should remain a rare instance where an appellate court disturbs an adjudication based on capricious disregard.

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*Edwards v. WCAB (Epicure Home Care, Inc.) No. 1106 C.D. 2015 (Decision by Judge Simpson, March 10, 2016) 3/16*

**TEMPORARY NOTICE OF COMPENSATION PAYABLE/ NOTICE OF DENIAL/ LITIGATION COSTS**

- The employer did not violate the Act when it unilaterally issued a "Corrected" NTCP on August 10, 2004 that paid the claimant a lower compensation rate based upon a lower pre-injury average weekly wage than what was paid pursuant to a prior NTCP.

  This means in contrast to the amendment of a NCP, which cannot be unilaterally "corrected" to reflect a lower rate, a TNCP may be unilaterally amended to reflect the lower rate during the 90 day period and the last TNCP in effect at the expiration of the 90 days will the document converted to become the NCP

- The modification of a TNCP is provided by Bureau Regulation 121.7a(c) and directs the employer who modifies the NTCP to file an amended NTCP form, to be clearly identified as "amended". This amended form need only contain the insurer's signature and does not require the signature of the employee.

  When an amended NTCP is filed, the employer must also file a new Statement of Wages pursuant to 34 Pa. Code 121.7a(c) (1).

  In this matter the first NTCP was properly amended and there was no conversion of NTCP to NCP. Accordingly, Claimant's contention that the first NTCP converted to a NCP and therefore Employer was obligated to pay benefits at the higher rate for all periods of time where Claimant was not working was held to be without merit

  Significantly, subsection 121.7a(c) (2) makes clear that the subsection dealing with modification does not apply upon the conversion of a NTCP to a NCP.

- Nothing in the Act or the Bureau Regulations can be interpreted to have required Employer to file a NSTC or NCD at the time it properly amended the 1st NTCP and contrary to Claimant's argument, the court found there is no conflict between Section 406.1 of the Act, and Bureau Regulation Section 121.71a.

- Bureau Regulation Section 121.17 addresses changes in compensation, and with respect to the stopping of temporary compensation under a NTCP, directs that an employer who ceases such temporary payments must file either: (i) a NSTC, together with a Notice of Workers' Compensation Denial (NCD), within a prescribed time frame; or (ii) a NCP; or (iii) an Agreement for Compensation for Disability or Permanent Injury. 34 Pa. Code §121.17.

  In this matter the employer did not violate the Act by issuing the amended TNCP because, up until the time Claimant returned to work, Employer did not cease making temporary compensation payments, but rather made a correction to the 1st NTCP and filed the 2nd NTCP, together with filing a replacement Wage Statement, pursuant to the requirements set forth in Sections 121.7a(c) and 121.7a(c) (1), 34 Pa. Code §§121.7a(c) and 121.7a(c) (1).

  Employer did not cease making temporary compensation payments until October 11, 2004 when, in accordance with Subsection 406.1(d) (5) (i) of the Act, it duly notified Claimant that payments were being stopped by filing a NSTC and a NCD as prescribed by the Department.

- By contrast, an amended NCP cannot be issued to reflect a lower compensation rate based upon a lower pre-injury average weekly wage pursuant to Bureau Regulation Section 121.7 that provides when such amendment results in a ***decrease*** in the employee's wage or compensation, the employer is required to file a Supplemental Agreement.

  Similarly, Bureau Regulation Section 121.12 specifically addresses the correction of errors in computing wages in a compensation agreement or NCP, and also directs that in instances where changes result in a decrease in the employee's wage or compensation, the employer shall file the Supplemental Agreement.

- The WCJ, with the WCAB's affirmation, did not improperly find that the Box 4 Notice of Denial was akin to a Medical Only Notice of Compensation Payable and therefore the claimant was not time barred for failure to file a Claim Petition within 3 years of the date of injury and the for a Petition for Reinstatement filed more than 3 years after the injury was not time barred.

- Where a claimant is only partially successful, before litigation costs are awarded, a determination must be made as to whether the costs were incurred on the winning issue or the losing issue. This is because a claimant must prevail on the contested issue in order to be awarded litigation costs

*Church v. WCAB (Landscaping and Fleming Termite and Pest Control), No. 1068 C.D. 2015 (Decision by Judge Colins, March 18, 2016) 3/16*

**IMPAIRMENT RATING EVALUATION**

- The Pennsylvania Supreme Court grants the Petition for Allowance of Appeal filed by the claimant and the employer.

  The employer's granted Petition for Allowance of Appeal will address the following issue:

  > *Does Section 306(a.2) of the Pennsylvania Workers' Compensation Act unconstitutionally delegate the State Legislature's lawmaking authority in violation of Article II, Section 1 of the Pennsylvania Constitution by incorporating the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment?*

  The claimant's granted Petition for Allowance of Appeal will address the following issue:

  > *Whether the Commonwealth Court - after properly determining that Section 306(a.2) of the Workers' Compensation Act was unconstitutional - erred in remanding the case to the Workers' Compensation Judge with instructions to apply the Fourth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment when neither Section 306(a.2) nor any other section of the Act ever references the Fourth Edition and its usage was not sanctioned by the Pennsylvania Legislature?*

- It will be recalled that in Protz the Commonwealth Court had held that Section 306(a.2) of the Act was an unconstitutional delegation of legislative authority insofar as it proactively approved versions of the AMA Guides beyond the Fourth Edition, which was the edition of the AMA Guides in existence at the time the Pa. Legislature enacted Section 306(a.2) regarding IRE's.

  The Commonwealth Court proceeded vacate the WCJ's granting of Employer's Petition for Modification premised upon the IRE based upon the Sixth of the AMA Guides and remanded this matter to the WCJ with instructions to apply the Fourth Edition of the AMA Guides in adjudicating the same.

*Protz v. WCAB(Derry Area School District), No. 412 WAL 2015 (Per Curiam March 22, 2016) 3/16*

**COMPROMISE AND RELEASE AGREEMENT/PENALTY**

- The WCJ did not err by dismissing the Penalty Petition filed by the Medical Provider for non-payment of his bills where the provider treated the claimant for an alleged work injury that was resolved by no admission of liability C&R that provided for no payment of medical bills.

  This is because pursuant to Section 449(b) of the Act the proposed C&R that must be explicit with regard to the payment, if any, of reasonable, necessary and related medical expenses. In this case Employer and Claimant entered into a C&R agreement that was approved by the WCJ. The C&R agreement stated that it was not an admission of liability by Employer and did not require the employer to pay past or future medical.

  The Employer denied that Claimant suffered a work injury and never admitted liability by issuing a document such as a NCP. Further, there was no finding or adjudication that Claimant's injury was work-related. Thus, Employer was not obligated at any time to pay Claimant's medical bills.

*Schatzberg, DC and Philadelphia Pain Management v. WCAB No. 1914 C.D. 2015 (Decision by Judge Friedman, March 30, 2016) 3/16*

**PENALTY/NOTICE OF SUSPENSION**

- The employer violated the Act resulting in the assessment of Penalties where Claimant's Challenge Petition in response to employer's Notice of Suspension where the employer did not reinstate the claimant's compensation within 21 days of the filing of the Challenge where the WCJ did not schedule a hearing within 21 days, though was one scheduled outside of the 21 day period.

  This is consistent with Section 413(c)(1) of the Act that provides in pertinent part:

  > *The special supersedeas hearing shall be held within twenty-one days of the employe's filing of the notification of challenge.*

  The assessment of penalties was also consistent with Section 131.50a of the WC Regulations that provides in relevant part:

  > *(a) This section governs the disposition of an employee's request for a special supersedeas hearing made in connection with a challenge to the suspension or modification of WC benefits under Sections 413(c) and 413(d) of the ACT*
  >
  > *(b) A special supersedeas hearing will be held within 21 days of the employee's filing of the notice of challenge.*

*(f) If the WCJ fails to hold a hearing **within 21 days** or fails to issue a written order approving the suspension or modification of benefits within 14 days of the hearing, the insurer shall reinstate the employee's WC benefits at the weekly rate the employee received prior to the insurer's suspension or modification of benefits under Sections 413(c) or 413(d) of the Act*

In this matter because the WCJ failed to hold a hearing within 21 days the Employer was required to reinstate Claimant's benefits . Accordingly, Employer violated the Act when it did not reinstate Claimant's benefits when a hearing was not held within 21 days of the date Claimant filed his Challenge Petition.

- The WCJ did not err by failing to grant Claimant's Penalty Petition because Employer failed to begin to pay awarded disfigurement benefits after Claimant's temporary total disability benefits had been suspended July 25, 2011 through August 2, 2011 where by WCJ order dated September 7, 2011 total disability benefits were reinstated beginning August 3, 2011

  Section 306(d) of the Act, which provides that when a claimant has a specific loss but is receiving total disability other injuries in addition to the specific loss the benefits for the specific loss will not begin until the period of temporary total disability has ended, is a timing provision established to make sure claimants do not receive both temporary total disability and disfigurement benefits simultaneously.

  In this matter the original suspension was only a temporary suspension of Claimant's WC benefits on account of Claimant returning to work, and did not mandate Employer to begin Claimant's disfigurement benefits. Claimant's temporary total disability benefits were not terminated until the WCJ's January 9, 2013 order granting Employer's Suspension Petition as of July 25, 2011. Therefore, Employer was not required to begin Claimant's disfigurement benefits until that date.

*Dixon v. WCAB( Medrad, Inc.), No. 1700 C.D. 2014 (Decision by Judge Covey, March 30, 2016) 3/16*