**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:**
**MARCH 2017 AT A GLANCE**
**BY MITCHELL I GOLDING, ESQ.**
**KENNEDY, CAMPBELL, LIPSKI & DOCHNEY**
**(W) 215-861-6709**

## OCCUPATIONAL DISEASE

- The Pennsylvania Supreme Court grants the claimant's Petition for Allowance of Appeal and will address the following issues:

  *(1) Whether the Commonwealth Court, in a case of first impression, committed an error of law by misinterpreting Section 108(r) to require a firefighter diagnosed with cancer caused by an IARC Group I carcinogen to establish exposure to a specific carcinogen that causes his/her cancer in order to gain the rebuttable presumption provided by the law?*

  *(2) Whether the Commonwealth Court committed an error of law by concluding that a legislatively-created presumption of compensability may be competently rebutted by a general causation opinion, based entirely upon epidemiology, without any opinion specific to the firefighter/claimant making the claim?*

- It will be recalled that the Commonwealth had held that to establish that a firefighter's cancer is an occupational disease, pursuant to 108(r) of the Act, the firefighter must show that he has been diagnosed with a type of cancer "***caused by*** exposure to a known carcinogen which is recognized as a Group 1 carcinogen." The court went on to hold that by using the words "***caused by***" it is incumbent upon Claimant to prove that his cancer is a type of cancer caused by the Group 1 carcinogens to which he was exposed in the workplace to establish an occupational disease.

  The Commonwealth court reasoned that only then do the presumptions in Section 301(e) and (f) of the Act come into play.

  The Commonwealth Court had further held that the claimant had to establish that his melanoma was caused by a Group 1 carcinogen, thus rendering it an occupational disease under Section 108(r). Only at that point would the presumption in Section 301(e) comes into play and assist Claimant, who is relieved of having to rule out other causes for his melanoma, such as his outdoor lifestyle.

  The Commonwealth Court reasoned that the WCJ must then determine whether Claimant had "four or more years in continuous firefighting duties, can establish

direct exposure to a carcinogen referred to in section 108(r) and successfully passed a physical examination prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer

*City of Philadelphia Fire Department v. WCAB (Sladek), No. 405 EAL 2016 (PER CURIAM, March 1, 2017) 3/17*

**COURSE AND SCOPE**

- Course of employment embraces intervals of leisure within regular hours of the working day and that momentary departures from the work routine do not remove an employee from the course of his employment .Breaks which allow the employee to administer to his personal comfort better enable him to perform his job and are therefore considered to be in furtherance of the employer's business.

  Therefore, the claimant's injury was compensable under the personal comfort doctrine where her injury occurred while driving on a tug, which was done with Employer's express permission to obtain certain personal items, such as feminine care products .

  An authorized break to retrieve prescription medicines or certain personal items, such as feminine care products, that someone else delivers to the workplace for the employee does fall within the personal comfort doctrine.

  It was immaterial whether a reasonable person in Claimant's shoes would have made other arrangements to meet her personal needs; indeed, any perceived fault in Claimant's decision to call and make arrangements with her mother is no defense to liability under the Act

- The common thread in cases applying the personal comfort doctrine is that the employee, upon request and permission, is administering to his or her own health and comfort, taking measures that are reasonably necessary to alleviate a condition that could potentially interfere with an employee's ability to work and make the employee more effective in resuming and/or completing work duties.

  In this matter the WCJ found that Claimant's job performance would be affected by her menstrual cycle and would be adversely affected if she did not have feminine products to address the situation. The WCJ further found that at the time of the injury, Claimant was attending to her personal comfort so that she could continue to serve Employer's interest.

- It is well established that an employee is considered to have sustained an injury while actually engaged in the furtherance of an employer's business interests and affairs, where the injury occurred during inconsequential or innocent departure from work within the regular working hours.

*Starr Aviation v. WCAB (Colquitt), No. 659 C.D. 2016 (Decision by Judge McCullough, March 7, 2017) 3/17*

**OCCUPATIONAL DISEASE/PLEADING**

- A Volunteer Fireman who files a Claim Petition pursuant to Section 108(r) of the Act has added requirement to show direct exposure to a carcinogen referred to in section 108(r) by submission of reports pursuant to [PennFIRS] that documents direct exposure to a carcinogen referred to in section 108(r).

  The WCJ therefore erred by granting Claimants Fatal Claim Petition pursuant to 108(r) of the Act of the Act since claimant did not submit into evidence the statutorily mandated PennFIRS reports.

- The claimant's failure to fulfill her burden under 108(r) to prove that decedents death from lung cancer was caused by exposure a direct exposure to a carcinogen referred to in section 108(r) does not necessarily mean her Fatal Claim Petition should be dismissed because Sections 301(c)(1) and/or 108(o) might have provided a basis for recovery. Accordingly, this matter was remanded.

  This is because a claimant can proceed under theories of compensability that were not previously pleaded. The form of the petition filed is not controlling where the facts warrant relief, and that if a claimant is entitled to relief under any section of the Act, his petition will be considered as filed under that section.

  This is the case whether or not the claimant attempts to amend the petition.

*Cheryl Steele and Roy Steele (deceased), v. WCAB (Findlay Township), No. 875 C.D. 2016 (Decision by Judge Cohn Jubelirer, March 8, 2017)3/17*

**OCCUPATIONAL DISEASE/STATUTE OF LIMITATIONS/STATUTE OF REPOSE**

- The provision of 301(f) of the Act enacted part of Act 46 on July 7, 2011 that permits a claim to be filed under Section 108(r) within 600 weeks after the last date of exposure to the hazards of the disease is a statue of repose does not apply retroactively.

  Therefore, the claimants Fatal Claim Petition was time barred because the decedent died on August 18, 2009, which was approximately 341 weeks after his retirement, and at the time of Decedent's death Section 301(c) (2) of the Act governed the limitation for the submission of an occupational disease claim and

this provision provided that the employee's disability or death must occur within 300 weeks of his last date of employment for the occupational disease to be compensable

- Act 46 created a new time limitation for a Section 108(r) claim by a firefighter that his cancer is an occupational disease and, thus, compensable. Instead of the limit of 300 weeks that applies to all other occupational diseases, a claim filed under Section 108(r) may be made within 600 weeks after the last date of exposure to the hazards of the disease. It is not necessary that the firefighter sustain disability or die within 600 weeks.

- Section 108(r) requires the firefighter to show that the Group 1 carcinogens to which he was exposed have been shown to cause the type of cancer for which the claimant has been diagnosed. Only after a firefighter establishes that his cancer is an occupational disease under Section 108(r) of the Act do the rebuttable presumptions in Sections 301(e) 8 and (f) come into play.

- A statute of limitations extinguishes the remedy; a statute of repose extinguishes both the remedy and the right. Accordingly, a statute of limitations is procedural, and a statute of repose is substantive.

  The 600-week limitations period of Section 301(f) acts as a statute of repose. This is because the 600-week period of Section 301(f) is triggered by a specific event, i.e., the last day of exposure to a workplace hazard, which is independent of the accrual of a remedy. Because Section 301(f) of the Act is a statute of repose, it effected a substantive change in the law. As such, it cannot have a retroactive effect without a clear directive from the legislature, and Act 46 lacks that clear directive.

  *City of Warren v. WCAB (Thomas Haines, Deceased, by Sharon Haines, Claimant), No. 468 C.D. 2016 (Decision by Judge, March 9, 2017) 3/17*

**AVERAGE WEEKLY WAGE/ SPECIFIC LOSS**

- The focus upon determining whether a claimant was a seasonal employee for the purpose of determined his pre-injury average weekly wage is on the nature of the work and whether it can be carried on throughout the year rather than on the period during which the business operates.

  This is consistent with the language of Section 309(e) of the Act, which provides, as in pertinent part:

> (e) *Except as provided in clause (d.1) or (d.2), in* ***occupations*** *which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth of the total wages which the employe has earned from all occupations during the twelve calendar months immediately preceding the injury, unless it be shown that during such year, by reason of exceptional causes, such method of computation does not ascertain fairly the earnings of the employe, in which case the period for calculation shall be extended so far as to give a basis for the fair ascertainment of his average weekly earnings*.

Therefore the claimant was not a seasonal employee because although he was hired as a tractor driver to move bins during apple picking season from September-November 13, 2013 his proper job titled was itinerant agricultural laborer and, though his employment was intended to be temporary claimant's position as a temporary tractor driver for the apple harvest was not seasonal employment under Section 309(e) of the Act.

This is because itinerant farm laborers travel from state to state to harvest crops or engage in other work related thereto, and although one season may end, laborers' work can still be carried on for pay throughout the year.

It was also relevant that the claimant did not have a contract prohibiting him from finding work as a laborer somewhere else.

- Where claimant was not intended to be a long term employee and he did not have a set number of hours he was expected to work per week the WCAB properly calculated the claimant's pre-injury average weekly wage by dividing his total earnings by 5 of the 9 weeks he worked for the employer.

  This is because Section 309(d.1) of the Act did not apply because that subsection was intended to govern long-term employment relationships, and Section 309(d.2) did not reflect economic reality because the claimant did not have an expected number of weekly hours to work.

  This alternative calculation fairly assessed the claimant's earnings when he was actually working and advanced the humanitarian purpose of the Act, as well as the purpose of Section 309 to accurately capture economic reality when calculating a claimant's AWW

- The claimant who was 70 and was a retiree collecting Old Age Social Security prior to and returned to retirement following his employment with the employee was not entitled to a healing period due to his specific loss of use of his eye.

This is because the entitlement to a healing period applies any period of ***disability necessary*** and required as a healing period shall be compensated in accordance with the provisions of this subsection. In this matter the claimant was admittedly retired. The claimant, who retired before his specific loss benefits began, was not entitled to the payment of a healing period because he did not require a period for healing.

- A claimant's entitlement to a healing period is not automatic, and it is the employer's burden to present evidence to rebut the presumption of the claimant's entitlement to a healing period. The employer rebutted the presumption that Claimant was entitled to the 10-week healing period because he was retired and collected Social Security retirement benefits both prior to and after his work with Employer, and he had no intention of returning to work after his injury.

*Toigo Orchards, LLC  Nationwide Insurance Company v. WCAB (Gaffney), No. 722 C.D. 2016 (Decision by Judge Cohn Jubelirer, March 13, 2017) 3/17*

**APPEAL/REMAND/WCJ**

- The WCAB has broad discretionary authority under section 419 of the Act to remand a matter to a WCJ. The language of section 419 imposes no requirement that the Board remand a matter to the same WCJ who issued the underlying decision.

  More succinctly, Section 419 is neither a statutory mandate that a case be remanded to an original WCJ, nor is it a statutory prohibition on remanding the matter to a new WCJ.

  Therefore the WCAB did not exceed its authority by recommending that this matter being remanded for a third time go to a new Judge for a de novo hearing where the original WCJ failed to conduct a complete review of all of the evidence submitted by the parties when rendering her original decision.

*McDaniel v. WCAB (Maramont Corporation), No. 797 C.D. 2016 (Decision by JUDGE McCullough, December 20, 2016) 3/17*

**AVERAGE WEEKLY WAGE**

- Where the claimant's wages are fixed by the week Section 309(a) of the Act must be used to perform the wage calculation. Section 309(a) of the Act states in pertinent part:

*(a) If at the time of the injury the wages are fixed by the week, the amount so fixed shall be the AWW;*

Section 309(d) of the Act should only be utilized to calculate the average weekly wage of claimants who are paid by the hour. Section 309 states in pertinent part:

> *(d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the [AWW] shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods.*

Therefore, where claimant's wages were fixed by the week at $2,000.00 on the date of his injury Section 309(a) was the section to be used to calculate his wages and $2,000.00 was his pre-injury average weekly wage. It was irrelevant that Claimant was continuously employed by Employer for the fifty-two weeks prior to his August 4, 2013 work-related injury at a lower wage in 2012 or that he was not paid by Employer during the winter months, because Claimant's AWW must be calculated based on how he earned his wages on the date of his injury, not at some other point during his employment with Employer.

*Archie Lidey III v. WCAB(Tropical Amusements, Inc.), No. 726 C.D. 2016 (Decision by Judge Brobson , March 17, 2017) 3/17*

## MEDICAL BILLS/ATTORNEY FEES

- The employer had no basis to deny payment of physical therapy bills solely based upon its contention that the provider/billing entity was not the provider that performed the physical therapy where the WCJ found that the agreement between billing entity and the provider who were a joint venture to perform the services, under which the billing entity leased space and staff from the provider and billed insurance carriers for the services provided to patients, was acceptable under the applicable law.

  The WCJ relied on and found as entirely credible testimony that established that CMS and the Bureau are aware of the joint venture between the billing entity and the provider, and that the joint venture had been investigated by the Attorney General's office with no finding of illegality. Moreover, the WCJ found that the evidence produced by Employer did not contradict the finding that the joint venture was lawful.

- The employer presented an unreasonable contest against the claimant's Petition for Penalties where it failed to provide any evidence that established the alleged illegality of the joint venture or the billing entities status as a health care provider.

  This is because Pursuant to Section 440(a) of the Act, in any contested case where an insurer contests liability in whole or in part, a WCJ shall award counsel fees to an employee in whose favor the matter has been finally adjudicated unless the employer provides a reasonable basis for the contest. Section 440 is intended to deter unreasonable contests of workers' claims and to ensure that successful claimants receive compensation undiminished by costs of litigation. The reasonableness of an employer's contest depends on whether the contest was prompted to resolve a genuinely disputed issue or merely to harass the claimant. Id.

*New Alexandria Borough and Selective Insurance Company of America, v. WCAB(Tenerovich), No. 567 C.D. 2016 (Decision by Judge Pellegrini, January 5, 2017) 3/17*