THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MAY 2017 AT A GLANCE
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OCCUPATIONAL DISEASE/ STATUTE OF REPOSE/MEDICAL TESTIMONY/DEATH CLAIM

- A claimant can establish a right to benefits for an 'injury' in the nature of a work-related disease as an injury claim under Section 301(c)(1) of the Act. This would include a repetitive/cumulative death claim that alleges exposure to carcinogenic agents in the workplace over an extended period of time resulted in decedent's bladder cancer and death.

  This in consistent with the law that provides that for an injury to be compensable under the Act, it is not required that the injury resulted from any sudden occurrence or accident; it may be due to daily trauma

  In order for a fatal claim to be compensable under Section 301(c) (1) of the Act, an employee's death must occur within three hundred weeks after the injury. For a fatal disease as injury claim to be compensable under Section 301(c) of the Act, the employee's hazardous exposure is the injury from which the 300 week look-back period must be calculated.

  A claimant who litigates a death claim resulting from exposure to chemicals as an injury claim under Section 301(c)(1) of the Act must prove the death of decent occurred within 300 weeks of the last date of injurious exposure to the agent causing the disease, whether or not such last exposure was disabling.

  Therefore, where decedent died on June 23, 2006 the claimant had the burden to prove that decent was exposed to chemicals at work resulting in his bladder cancer up to 300 weeks prior to the date or up to September 22, 2000.

- Whether a hazard exists is a question of fact for the WCJ to determine. Since claimant's exposure is a factual question, the claimant need not present scientific evidence or expert testimony to prove the existence of the hazard in the workplace. The WCJ may rely solely on the testimony of the claimant or other witnesses to prove the existence of and exposure to the hazard.'

  Lay testimony of first-hand knowledge of a hazard gained from practical experience can be sufficient to prove the existence of and exposure thereto. However, the testimony of a lay person appears to require testimony of personal experience with the illness-causing element and personal knowledge.

- In the case of a Fatal Claim Petition, the surviving family member has the burden to prove that the injury or disease was a substantial contributing cause in bringing about the death of the employee. If the causal connection is not obvious, the connection must be established by unequivocal medical testimony.

  Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a fact exists."

- In this matter the WCJ issued a reasoned decision supported by substantial evidence where she found that the claimant fulfilled her burden of proof by presenting credible fact witnesses who worked in the same environment as the claimant and who testified credibly based on their first-hand knowledge of chemical and environmental hazards, gained from there experience working for the employer, that the decedent was exposed to within 300 weeks of his death.

  The claimant's medical expert the proceeded to testify credibly that the environment in which the claimant worked played a substantial contributing factor toward development of the bladder cancer that resulted in his death.

Kimberly Clark Corporation v. WCAB (Bromley), No. 656 C.D. 2016 (Decision by Judge Covey, May 4, 2017) 5/17

INDEPENDENT CONTRACTOR/ CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT/ LATE ANSWER

- Employment status is a critical threshold determination for liability. Independent contractors are not eligible for workers' compensation. The nature of a working relationship "is a question of law based on the facts presented in each case. It is the claimant's burden to prove the existence of an employer-employee relationship.

- The WCJ did not commit an error of law by determining that the claimant was an Independent Contractor consistent with the Misclassification Act that sets forth the criteria for determining whether a construction worker is an independent contractor or an employee for purposes of workers' compensation and unemployment compensation:

  (1) The individual has a written contract to perform such services.

  (2) The individual is free from control or direction over performance of such services both under the contract of service and in fact.

(3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

In this matter the defendant satisfied all three elements where the evidence reflected:

- First, there was a written contract between the clamant and defendant to perform work as a roofer. It was not that the contract was of indefinite duration. The Misclassification Act does not require a contract of specified duration; it requires only a written contract.

  The court further disagreed that it is impossible for contracts of indefinite duration to have a defined scope of work, as required by Section 3(b) (2), of the Misclassification Act.

  The court also disagreed that is "impossible" to maintain liability insurance during the term of a contract with indefinite duration, as required by Section 3(b) (6). The court pointed out the absence of a fixed contract period is irrelevant to maintenance of a liability insurance policy. Insurance is governed by a totally separate contract and may change from time to time for reasons having nothing to do with the agreement between construction contractors.

- Second, the WCJ did not err where she concluded the claimant was free from control or direction over performance of the roofing services. Control exists where the putative employer possesses the right to select the employee; the right and power to discharge the employee.

  Here, though the defendant expected the clamant to be present to do his work, they did not direct the manner in which Claimant did the work. This is a critical feature of the master-servant relationship.

  Per the court, "Expecting an independent contractor to meet quality standards as a condition of being compensated is the mark of prudence by any person who engages a contractor to do construction work."

- Third, the WCJ did not err by determining claimant was customarily engaged in an independently established trade.

  The fact defendant allowed Claimant to use his tools did not negate the fact that Claimant brought necessary tools to the job. Claimant also had to fix any mistakes in his work at his own expense pursuant to the January 2012 contract, which stated that "Kriner's Quality Roofing Services shall not pay for mistakes made by hired Contractors. Contractors will fix mistakes at own expense and recover materials or property if necessary."

The record also established that Claimant performed the same or similar services for two other roofing companies. Moreover, Claimant's Facebook page stated that he was an independent roofing contractor.

- The defendant was not barred by the filing of a late answer to the claimant's Claim Petition from raising the defense that the clamant was not an employee but rather an independent contractor.

  This is because conclusions of law are not deemed admitted by a late answer to the claim petition. It is well settled that the existence of an employer-employee relationship is a question of law based on the facts presented in each case.

  Accordingly, although Claimant filed a claim petition identifying defendant as his employer, defendants failure to file a timely answer to the petition did not constitute an admission on this point and did not did not obviate Claimant's burden of establishing an employer/employee relationship.

  The question of whether the claimant was an employee or an independent contractor was is a question of law that is to be decided by a tribunal.

Hawbaker v. WCAB(Kriner's Quality Roofing , Services and Uninsured Employer Guaranty Fund), No. 224 C.D. 2016 (Decided by Judge Leavitt, Filed February 13, 2017, Ordered reported May 10, 2017) 5/17