THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
NOVEMBER 2014 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY
(W) 215-861-6709

COURSE AND SCOPE

- Claimant who was bit by a co-worker's dog suffered an injury in the course and scope of his employment where the dog bite took place while: 1) the claimant was on an approved break smoking in an approved area "where everybody smoked"; 2) Employer had supplied an ashtray tower for the employees' use; 3) Claimant was approximately three feet away from the ashtray tower; 4) was actually smoking a cigarette when he was bitten by the dog; and 5) at the time he was bitten, there was no written or oral rule from Employer that prevented any employee from bringing a dog to the break area.

  This is because neither small temporary departures from work to administer to personal comforts or convenience, nor inconsequential or innocent departures break the course of employment.

  Moreover, an inconsequential departure from work activities does not take you outside the course and scope of employment an interval of leisure would include a short cessation from work duties.

- Smoking during intervals that do not interfere with work duties have been found to be acceptable deviations from work. These types of "intervals for leisure" are considered to be within the scope of employment.

  Therefore, Claimant's initial smoke break was a temporary departure from his work to administer to his personal comforts and, thus, did not take him out of the course of his employment. Moreover, Claimant's subsequent act of petting his co-worker's dog also did not take him out of the scope of employment because it was an inconsequential departure from his job as a line cook.

- The claimant was engaged in conduct that was in furtherance of the employer's business interests where the Employer had an interest in allowing its employees to take breaks and not having them smoke inside its restaurant. Therefore, Claimant continued to further Employer's interests even though he was on a smoking break.

- It is true that that premeditated, deliberate, extreme, and inherently high-risk behavior can be sufficient to remove the claimant from the course and scope of his employment.

In this matter the claimant did engage in such high risk behavior as to remove him from the course and scope of employment where the Claimant held out his hand to determine whether the dog would be receptive to him and not do anything to antagonize the dog into biting him

1912 Hoover House Restaurant V. WCAB (Soverns), No. 309 C.D. 2014 (Decision by Judge Cohn Jubelirer, November 10, 2014) 11/14

SUBROGATION/ HEART AND LUNG ACT

- An employer cannot subrogate for paid Heart and Lung benefits against the claimant's recovery against a third party tortfeasor whose negligence resulted in a motor vehicle that caused an injury to the claimant, who was a public safety employee notwithstanding the fact that the employer filed a NCP that stated, "Claimant received salary continuation in lieu of PA Workers' compensation for period of lost time under the City of Philadelphia's Heart and Lung Act."

  This is because under Section 1722 of the Motor Vehicle Financial Responsibility Law a Claimant is precluded from recovering the amount of benefits paid under the Heart and Lung Act from the responsible tortfeasors. There can be no subrogation out of an award that does not include these benefits. Likewise, because the tort recovery cannot, as a matter of law, include a loss of wages covered by Heart and Lung benefits, Claimant did not receive a double recovery of lost wages or medical bills.

  The NCP, which was issued unilaterally by Employer, does not transform Heart and Lung benefits into workers' compensation; they are separate.

Stermel v. WCAB (City of Philadelphia), No. 2121 C.D. 2013 (Decision by Judge Leavitt, November 13, 2014) 11/14

ATTORNEY FEES

- The Pursuant to the plain language of Section 1601 of the Act the Pennsylvania Uninsured Employer Guaranty Fund (UEGF) cannot be assessed attorney fees for an unreasonable contest fees.

  Section 1601 states, in pertinent part:

  "The fund shall not be considered an insurer and shall not be subject to penalties, unreasonable contest fees or any reporting and liability requirements under Section 440 of the Act."

Trautman v. WCAB (Blystone Tree Service and Pennsylvania Uninsured Employer Guaranty Fund), No. 389 C.D. 2014 (Decision by Judge Brobson, November 14, 2014) 11/14

LOSS OF USE

- Consistent with Section 306(c) (21) of the Act two or more specific losses resulting from the same injury are to be paid consecutively and not concurrently.

  Section 306(c) (21) provides:

  > *For the loss of, or permanent loss of the use of any two or more such members, not constituting total disability, sixty-six and two-thirds per centum of wages during the aggregate of the periods specified for each.*

- A claimant can choose to receive specific loss benefits rather than total disability benefits

- It is true that pursuant to Section 306(c) (23) of the Act the Board has the discretion to determine that specific loss benefits are superior to total disability benefits in certain situations.

  In those cases where courts have explored the parameters of the Board's discretion under Section 306(c) (23), that discretion has encompassed the discretionary power 1) to limit the presumption of total disability for bilateral losses; and 2) to determine that a claimant with a bilateral loss is entitled to specific loss benefits where those benefits prove to be more advantageous than total disability benefits.

  However, that latter type of discretion has never been construed to mean that benefits for multiple specific losses arising from the same injury be paid concurrently in order to maximize weekly benefits

Fields v. WCAB (City of Philadelphia), No. 42 C.D. 2014 (Decision by Judge Leadbetter, November 14, 2014) 11/14