THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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STATUTE OF LIMITATIONS/REINSTATEMENT/MEDICAL ONLY NOTICE OF COMPENSATION PAYABLE/MEDICAL TESTIMONY

- Claimant's Petition for Reinstatement filed in 2011 that sought to reinstatement of benefits referable to a Medical Only Notice of Compensation Payable issued December 28, 2006 that recognized a December 3, 2006 injury in the form of an exacerbation of right elbow epicondylitis and flare up of preexisting degenerative joint disease in her right knee was untimely pursuant to the three year statute of limitations of Section 315 and three year statue of Section 413(a), that requires filing of Petition for Reinstatement within three years of last payment of compensation.

  This is because the effect of issuing a Medical Only Notice of Compensation Payable is distinct from the an ongoing Suspension of benefits, which would occur if the claimant returned to work at no loss of earnings following the receipt of indemnity and issuance of a Notice of Compensation Payable. The Medical Only Notice of Compensation Payable was created in 2004 to allow an employer to accept liability for an injury but not any loss of earning power. This understanding of the effect of a Medical Only Notice of Compensation Payable is evident in this case where Employer checked the portion of the NCP form which states "check only if compensation for medical treatment (medical only, no loss of wages) will be paid subject to the Workers' Compensation Act" and did not complete the portions of the form related to wage-loss benefits, including the weekly compensation rate.

  Accordingly, because no disability had ever been recognized by Employer or established by a WCJ for the 2006 injury, disability had not been suspended when the 2006 NCP was issued. Claimant therefore could not seek to have disability benefits reinstated, and the 500-week period for reinstatement of benefits did not govern this case.

- It is true that payments of medical expenses may toll the Section 315 limitations period where those payments were made "in lieu of" workers' compensation benefits. The controlling question in this analysis is the intent of the employer, i.e. whether the employer intended the payments for medical services to replace disability benefits.

By issuing the Medical Only Notice of Compensation Payable Employer made its intent expressly clear that it would pay Claimant's medical expenses but accepted no liability for wage-loss benefits. Thus, the Petition would also be untimely under Section 315.

- Although liberal pleading rules apply in workers' compensation matters the principles of fairness and due process require that the party against whom relief is awarded must have been on notice of the theory of relief and had an opportunity to respond.

  Thus, where the parties expressly stipulated that a 2004 injury was excluded from the current proceedings involving a 2006 injury and Employer relied on that agreement to not present medical evidence related to that injury, the WCJ acted outside his authority by ordering benefits related to the 2004 injury

- An expert may base his opinion in part on the notes of others on which he customarily relies in his professional practice. Therefore, claimant's medical expert's testimony was not incompetent where he based his diagnosis and opinion on causation on the notes of Claimant's other doctors.

- Greater credence may be given to the testimony of a treating physician than to a physician who examines simply to testify for litigation purposes. Therefore, the WCJ did not commit an error by finding claimant's medical expert more credible than employers, in part, based upon claimant's expert was a treating physician despite the fact the claimant's doctor first saw her in connection with litigation and he admitted that he was only "monitoring" Claimant's condition.

Sloane v. WCAB (Children's Hospital of Philadelphia), No. 1399 C.D. 2014 (Decision by Judge Colins, October 1, 2015)10/15

REASONED DECISION/ATTORNEY FEES/APPEAL

- The WCJ did not issue a reasoned decision where the claimant alleged injuries to the lumbar and thoracic spine and the WCJ, upon issuing its decision that denied claimant's petition found "the only issue is whether there is a lumbar injury at L5-S1 in addition to the fractures accepted by the employer" and did not address the status of the thoracic spine.

  One cannot assume that the judge addressed both the lumbar and thoracic spine solely because he found credible employers medical expert, who addressed the lumbar and thoracic spine, more credible than claimant's expert where the WCJ's credibility determinations only addressed the experts testimony pertaining to the lumbar spine

- Upon performing its appellate review the court/WCAB "should not infer from the absence of a finding on a given point that the question was resolved in favor of the party who prevailed below, for the point may have been overlooked.

  Therefore, it cannot be assumed that the WCJ would have credited employer's expert over claimant's expert and Claimant on the alleged thoracic injury.

  Where the WCJ has failed to address a crucial issue, a remand for a specific credibility finding on the issue and an explanation of the decision is required.

- The claimant was entitled to reimbursement of the deposition fee of his medical expert where the clamant filed a Claim Petition alleging multiple lumbar fractures and a sprain/strain of his back and scheduled the deposition of his medical expert but after the occurrence of two hearings but before the deposition took place the employer issued the NCP recognizing the lumbar fractures but not the sprain and strain of the back. This is despite the fact the medical expert's testimony was not found credible that the claimant had lumbar injuries beyond those noted on the NCP

  This is because claimant was required to file his Claim Petition because Employer refused to accept liability for any work injury. To support his claim petition, Claimant scheduled his doctor's deposition on May 30, 2012 to take place on July 19, 2012 and prepaid his deposition fee. On July 19, 2012, four months after litigation on the claim petition began, Employer issued an NCP recognizing liability for a work injury. The occurrence of a work injury was an issue litigated before the WCJ. The fact that Employer issued an NCP just prior to claimant medical expert's scheduled deposition, for which Claimant had already paid, did not transform the entirety of the litigation into a Review Petition, which the WCJ's credibility determinations ultimately addressed

  Thus, the fact that the WCJ ultimately ruled against Claimant with regard to other injuries not listed on the NCP is irrelevant to Claimant's entitlement to his litigation costs.

Boddie v. WCAB(Crown Distribution Center) No. 1866 C.D. 2014 (Decision by Judge Leavitt, July 28, 2015) 10/15

STATUTORY EMPLOYER

- The Franchisor, Saladworks, LLC was not the statutory employee of the injured claimant pursuant to Section 302(a) where it's uninsured franchisee, G21 LLC d/b/a Saladworks (G21), did not perform a regular or ***recurrent part of the business, occupation, profession, or trade*** of Saladworks. ***(Emphasis added.)***

  Although Saladworks and G21 were connected through its Franchise Agreement, Saladworks, LLC was not in the restaurant business or the business of selling

salads. Saladworks' business was the sale of franchises to franchisees that desire to use its name and "System" and marketing expertise.

While Saladworks and G21 were connected through the Franchise Agreement it was not in the restaurant business or the business of selling salads, which Franchisee G21 was.

In this matter, Saladworks was in the business of selling franchises that used its unique system. Claimant was injured while working for a franchisee that was in the business of selling salads and other food products

- Section 302(a) of the Act provides that a an entity must subcontract to have work performed that is a regular or recurrent part of its business in order to be considered a statutory employer:

> *All or any part of a contract and his insurer shall be liable for the payment of compensation to the employes of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured its payment as provided for in this act. Any contractor or his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses from the subcontractor primarily liable therefor.*
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> *For purposes of this subsection, a person who contracts with another . . . (2)* ***to have work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person shall be deemed a contractor, and such other person a subcontractor. (Emphasis added.)***

Saladworks, LLC v. WCAB (Gaudioso and Uninsured Employers Guaranty Fund), No. 1789 C.D. 2014 (Decision by Judge McGinley, October 6, 2015) 10/15

CLAIM PETITION/ MEDICAL ONLY NOTICE OF COMPENSATION PAYABLE/REASONED DECISION/EVIDENCE/MEDICAL TESTIMONY

- The employer by issuing a Medical Only Notice of Compensation Payable acknowledges a work injury and agrees to pay for medical expenses but does not accept liability for or agree to pay any wage loss benefits for disability.

  A claimant who believes that a work injury is causing a loss of earning power, following the issuance of a Medical Only Notice of Compensation Payable must file a Claim Petition.

  The claimant upon filing the Claim Petition must prove all elements necessary to support an award of benefits. The claimant must prove that he sustained a work injury which resulted in disability, i.e., a loss of earning power. Unless the causal

connection between an injury and disability is obvious, unequivocal medical evidence is needed to establish that connection.

Where employer issued a Medical Only Notice of Compensation Payable, acknowledging that Claimant had sustained a non-disabling neck and lumbar strain/sprain work injury, the employer was responsible for paying medical expenses for that injury, but nothing more.

- Section 422(a) of the Act requires the WCJ to issue a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The WCJ must give reasons for accepting or rejecting evidence. This is to ensure that a legally erroneous basis for a finding will not lie undiscovered but, rather, such legal error will be evident and can be corrected on appeal.

  The WCJ also has a duty to make crucial findings of fact on all essential issues necessary for review by the Board and this Court. A decision is reasoned for purposes of Section 422(a) if it allows for adequate appellate review without further elucidation.

  WCJ is permitted to reject even uncontroverted evidence presented by the party bearing the burden of proof, but he must make a specific finding and articulate a reasonable explanation for doing so.

- Upon deciding a Claim Petition, the WCJ is free to determine the chronological length of the disability.

- Claimant's medical expert's lack of personal knowledge of Claimant's condition prior to seeing him in March 2012 was not fatal to her medical opinion. This is because a medical expert is permitted to base her opinion on the medical reports of other doctors, which the expert customarily relies upon in the practice of her profession.

Ingrassia v. WCAB (Universal Health Services, Inc.) No. 1212 C.D. 2014 (Judge Leavitt, October 26, 2015) 10/15

COURSE AND SCOPE

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds that the Claimant, who was the caretaker for her son who was designated as her employer pursuant to accessAbilities, a state-funded program under the Department of Public Welfare that paid her to care for her son (employer), did not suffer an injury in the course and scope of employment where the son

(employer), who lived claimant' s house , injured claimant after stabbing her at 11:30 pm in her bedroom after the claimant had gone to sleep.

To suffer an injury with the course and scope of employment an employee must establish eligibility for workers' compensation under two distinct circumstances.

- First, an employee will be awarded benefits if he or she sustains an injury while engaged in the furtherance of the employer's business or affairs, regardless of whether the injury occurred on the employer's premises

- Second, If the employee was not furthering the employer's affairs, the employee may only receive compensation if the employee was (1) injured on premises occupied or under the control of the employer, (2) required by the nature of his employment to be present on the premises; and (3) sustained injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

The first scenario did not apply because the Claimant had clearly departed from her work duties and was engaged in a purely personal activity when she was attacked while sleeping in her bedroom in her home in the middle of the night.

The second scenario did not apply because the Claimant's presence in her bedroom at the time of the attack was not required by the nature of her employment

This was because the service plan that the claimant entered into with accessAbilities did not contain any requirement that Employer's /son's service provider sleep overnight in his home, the employer/son did not qualify to receive overnight care and even if employer /son qualified for 24-hour care, the claimant would have been required to remain awake during the overnight shift.

Claimant was not required by her contract or the nature of her job as caretaker to live with Employer or provide him housing; the parties' living arrangement arose out of their familial relationship as mother and son.

- The Bunkhouse rule did not bring the claimant's injury within the course and scope of employment solely because she was injured while sleeping in her house where she provided care to her son/employer

The bunkhouse rule imposes workers' compensation liability on an employer who requires his workers to live in employer-furnished premises, which the employer controls, maintains, and uses for his benefit. The bunkhouse rule covers situations in which an employee's living arrangement on the work premises is reasonably necessary to perform the tasks required by the employer.

Another rationale underlying the bunkhouse rule is an employee's reasonable use of the employer's premises constitutes a portion of the employee's compensation.

The bunkhouse rule did not apply here because Claimant's presence in her bedroom in the middle of the night was not reasonably necessary for her to complete her tasks as Employer's caretaker. Moreover, the convenience of the parties' living arrangement did not establish Claimant was required to live with Employer in order to provide him care under the accessAbilities program.

Furthermore, Employer did not supply living quarters for Claimant. On the contrary, employer lived in the claimant's home. Employer had no ownership or lease of Claimant's home, did not control or maintain the premises, and did not have any responsibility to ensure the premises were safe.

O'Rourke v. WCAB (Gartland) No. 27 WAP 2014 (Decision by MR. Justice Stevens, October 27, 2015) 10/15