THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
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OCCUPATIONAL DISEASE/MEDICAL TESTIMONY

- Section 108(r) recognizes the occupational disease of cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

  Section 301(f) provides, in pertinent part, that:

  Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and have successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer

- The WCJ's granting of the claimant's Fatal Claim Petition was not supported by competent and substantial evidence where the decision was premised upon the finding that decedent, who was a fire fighter, contracted cancer due to exposure to a known carcinogen, which is recognized as a Group 1 carcinogen by the International Agency, as required by Section 108(r) and 301(f) of the Act but the sole evidence before the WCJ regarding Decedent's fire department exposure was Claimant's testimony that Decedent came home from fires on more than 15 occasions smelling of smoke and with an ashy appearance.

  While such testimony would be sufficient to show that Decedent was exposed to smoke and ash while working for Employer, by itself it was insufficient to show exposure to asbestos or any other specific Group 1 carcinogens within the smoke.

  Moreover, claimant's medical expert's testimony was not competent where his testimony that Decedent was exposed to Group 1 carcinogens was not competent and lacked a proper foundation upon which that conclusion could be based because he solely relied upon counsels hypothetical and information contained in counsels letter. To be competent, an expert must base his testimony on facts warranted by the record or reasonable inferences drawn therefrom

- Although claimant submitted a monograph reflecting that asbestos, along with radioactive particles, are Group 1 carcinogens that are found in municipal fires

with cancer sites including the gastrointestinal tract, Claimant could not satisfy the requirement of Section 301(f) that she establish direct exposure to a carcinogen recognized as Group 1 by the IARC simply by referencing the IARC monograph itself.

- It is true that that the question of whether a worker has been exposed to hazardous material in the workplace for the purpose of Section 108 of the Act is a question of fact for the WCJ and the claimant may rely on lay testimony, rather than that of an expert, to show the existence of, and exposure to, a hazard.

  Nevertheless, the testimony of exposure to a workplace hazard must be competent and a WCJ must ensure that the evidence presented complies with the rules of evidence related to lay and expert testimony. To be competent, an expert must base his testimony on facts warranted by the record or reasonable inferences drawn therefrom.

  In this matter, claimant's expert professed to have an awareness of the working conditions of municipal firefighters, but he had no knowledge of the facts of Decedent's career or the fires fought in the City of Williamsport. Consequently, the WCJ erred in relying on such testimony to show exposure to a workplace hazard that would support an occupational disease presumption under the Act.

  Claimant's medical expert's testimony that Decedent was exposed to Group 1 carcinogens was not competent and lacked a proper foundation upon which that conclusion could be based because he solely relied upon counsels hypothetical and information contained in counsels letter.

City of Williamsport v. WCAB (Cole (Deceased), No. 620 C.D. 2015 (Decision by Judge Colins, July 18, 2016) 10/16

OCCUPATIONAL DISEASE/STATUTE OF REPOSE/ STATUTE OF LIMITATIONS

- The claimant's Claim Petition was untimely under Section 301(f) where the claimant filed his Claim Petition in March 2014, which was more than 600 weeks after the claimants last date of employment on July 31, 2001 and the last date when the Claimant could have last been exposed to carcinogens in the workplace.

- A firefighter who files a Claim Petition pursuant to Section 108(r) of the Act must show exposure to a Group 1 carcinogen by the International Agency for Research on Cancer.

  For the firefighter to obtain the presumption of 301(e) that the occupational disease arose out of and in the course of his employment the disability or death resulting from an occupational disease must have occurred within 300 weeks after

the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, as required by Section 301(c) (2).

However, Section 301(f) requires that claim itself filed pursuant to section 108(r) be filed within 600 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The claimant is only entitled to the presumption sent forth by 301(e) if the Claim Petition is filed within three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The Claim Petition would still be timely per Section 301(f) if it is filed within six hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease; however, the claimant will not be entitled to the presumption if the Claim Petition was filed more than three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease

- Put another way, .Section 301(f) and Section 301(c) (2) set forth distinct limitations. By their plain text, the limitation period of Section 301(f) requires that claims be made or filed, within 600 weeks while Section 301(c)(2) requires that the disability or death that is the basis for the claim for compensation is "occurring," or manifesting, within 300 weeks.

  The key difference between these two provisions is not the date upon which the limitations periods start but rather what must take place before the periods end; in the case of Section 301(c) (2), disability or death resulting from the occupational disease must occur or manifest within 300 weeks, while in the case of Section 301(f), the claimant must file the claim within 600 weeks.

  Thus, Section 301(f) sets forth a two-tiered limitations period for Section 108(r) claims distinct from the time limit in Section 301(c)(2).

  - First, a claimant must file the claim within 300 weeks of the last date of work with exposure to a known Group 1 carcinogen; if the claimant fails to do so, he is not foreclosed from bringing a claim by Section 301(f), but he loses the statutory presumption of Sections 301(e) and 301(f).

  - However, if the claimant does not file the claim until more than 600 weeks after the date of last workplace exposure, the claimant is foreclosed from bringing that claim in its entirety

- It is true that the three-year statute of limitations of Section 315 of the Act7 for filing a claim for compensation does not begin to run in occupational disease

cases until the claimant knows or should know that he is disabled as a result of an occupational disease, which is presumed to occur only when the claimant receives a competent medical diagnosis that his illness is work-related.

However, the 600-week limitations period of Section 301(f) acts as a statute of repose and is not subject to a discovery rule. These means that once 600 weeks elapse from the date of the last workplace exposure, the cause of action under Section 108(r) ceases to exist.

The discovery rule to Section 315 may still toll the three-year limitations period of Section 315 in Section 108(r) cases where the claimant was not aware of the nature of his occupational disease, provided that the claim is filed before the expiration of the 600-week period.

Fargo v. WCAB (City of Philadelphia) No. 2239 C.D. 2015 (Decision by Judge Colins, October 11, 2016) 10/16

JOINDER PETITION

- Pursuant to Regulation §131.36 a Joinder Petition must be filed no later than 20 days after the first hearing at which evidence regarding the reason for joinder is sought and that a WCJ can extend the time to file a joinder petition for good cause shown.

  The 20-day time period begins when evidence is presented regarding the reason for which joinder is sought, not evidence establishing a reason for requesting joinder.

  In this matter the WCJ abused her discretion where she granted the employer's joinder as timely where the claimant's testimony established a reason for the filing of the joinder when he testified credibly on May 6, 2013 but the Joinder was not filed until 20 days after the claimant's medical expert testified on October 2, 2013.

- The Commonwealth Court notes in a footnote that the regulation does afford a WCJ discretion to extend the filing deadline for good cause shown, but the employer in this matter did not assert good cause or request an extension of time to file the joinder petition.

Jackson, Jr. v. WCAB (Radnor School District and ACTS Retirement Community), No. 228 C.D. 2016 (Decision by Judge Wojcik, October 19, 2016) 10/16

SUBROGATION/ STIPULATION / CHANGE IN DECISIONAL CASE LAW

- The employer was not entitled to subrogation against the claimant's third party recovery resulting from a motor vehicle accident although the claimant stipulated to such right where Claimant was a public safety employee and his benefits fell under the Heart and Lung Act.

  This is because pursuant to Section 1722 of the MVFRL 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.

- The Commonwealth Court decision of Stermel v. Workers' Compensation Appeal Board (City of Philadelphia), 103 A.3d 876 (Pa. Cmwlth. 2014) applied to the parties stipulation even though the Stipulation was executed and approved by the WCJ after Stermel was decided.

  The Stermel Court held that a city employer was not entitled to recover a portion of the Heart and Lung Act benefits it paid a police officer from the officer's third-party tort claim settlement. Therefore, there would be no subrogation right resulting from payment of those benefits.

- Changes in decisional law which occur during litigation will be applied to cases pending on appeal. Further, where decisional law relies on a statutory interpretation which was not wholly without precedent, such decisions are treated as relating back to the original statute because they are nothing more than interpretations of existing legislation

Pennsylvania State Police v. WCAB (Bushta), No. 2426 C.D. 2015, (Decision by Judge Covey, October 26, 2016) 10/26

OCCUPATIONAL DISEASE

- 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. Where the firefighter fails to show that his cancer is an occupational disease under Section 108(r) of the Act, he may not use the presumption in Section 301(f) and 301(e).

- The inability of the firefighter to prove that his cancer is an occupational disease under Section 108(r) of the Act does not mean that he cannot pursue a claim for compensation. The Act allows any employee to pursue compensation for any disease causally related to his industry or occupation.
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- In this matter Claimant's medical evidence did not establish a causal relationship between prostate cancer and Group 1 carcinogens, and this was necessary in order to establish that his prostate cancer is an occupational disease under Section

108(r) of the Act. As a result, the presumption of compensability in Section 301(f) of the Act was unavailable to Claimant.

Claimant's medical evidence was also inadequate to prove his particular cancer was caused by workplace exposures to other carcinogens under Section 108(n) of the Act. As such, the presumption in Section 301(e) of the Act was not available to assist Claimant in making a case that his prostate cancer was a compensable occupational disease.

- Section 108(r) provides:

Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

Demchenko v. WCAB (City of Philadelphia), No. 2164 C.D. 2015 (Decision by Judge Leavitt, October 26, 2016) 10/16