THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
OCTOBER 2018 AT A GLANCE

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COURSE AND SCOPE

- The Pennsylvania Supreme Court grants employer's Petition for Allowance of Appeal limited to the issue:

> *Is the Commonwealth Court's order contrary to long-standing case law from the Commonwealth Court holding that an employee is not in the course and scope of employment while traveling between a parking lot and the workplace unless the employer mandates how an employee commutes to work and/or where the employee must park his/her vehicle?*

It will be recalled that the Commonwealth had held that the claimant, who was employed as a Flight Attendant, suffered an injury in the course as scope of employment although at the time of the injury she was not actually engaged in the furtherance of Employer's business where the claimant injured herself after slipping on the wet floor of a shuttle bus, not owned by the employer, that she was on to return to her car in the employee parking lot following a return flight.

The Commonwealth Court had reasoned, in part, that Claimant's presence on the shuttle bus was a necessary part of her employment, because it was the means by which she traversed between her work station (i.e., the terminal) and the parking lot designated for airport employees. Claimant's utilization of the shuttle bus service was expected, so long as she elected to drive to work. Claimant's presence on the shuttle bus, therefore, was so connected to her employment relationship that it was required by the nature of her employment.

US Airways, Inc. v. WCAB (Bockelman), No. 185 WAL 2018 (PER CURIAM, October 3, 2018) 10/18

FEE REVIEW/UTILIZATION REVIEW

- The carrier could not defend against a Fee Review filed by a provider by arguing the frequency of the prescribed device was beyond Medicare policy.

This is because the scope of the Fee Review arena is limited to timeliness of payment and amount of payment. The Fee Review process presupposes that liability has been established and is not designed to encompass an inquiry into the insurer's reasons for denying liability.

Further, a Hearing Officer in a Fee Review proceeding does not have jurisdiction to determine reasonableness and necessity of medical treatment

If the carrier wishes to challenge the frequency of the prescription its remedy was to file a Utilization Review. The carrier cannot do so in a Fee Review proceeding irrespective of the fact the frequency of the prescription might be in excess of Medicare policy.

Section 306(f.1)(3)(1) of the Workers' Compensation Act (Act) limits rates of reimbursement by citing Medicare reimbursement rates but it does not to preempt determinations of reasonableness and necessity of treatment under the Utilization Review process with regards to frequency of a prescription.

- Per the plain language of Section 306(f.1)(6)(i) the remedy of seeking utilization review belongs to Insurer, and not Provider.

Workers' Compensation Security Fund v. Fee Review Hearing Office (Scomed Supply, Inc.), No. 429 C.D. 2018 (Decision by Judge Leadbetter, October 5, 2018) 10/18

IRE/CONSTITUTIONALITY

- Protz II applies retroactively to cases where claimant's change in disability status based upon an IRE was still being litigated at the time Protz II was decided.

- The employer was not entitled to a credit towards 500 weeks of partial for the period the IRE was in effect prior to the Supreme Court's decision in Protz II.

  This was because in this matter the IRE determination was never final since the parties were actively litigating their appeal of the WCJ's granting of the employer's Petition for Modification based upon the IRE. Accordingly, the time period between the date of the IRE and the decision in Protz II was not be counted against Claimant's 500-week period of partial disability.

- The constitutionality of a statute need not be raised before an administrative agency.

  Section 703(a) of the Administrative Agency Law provides, in pertinent part: "A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal."

  2 Pa. C.S. § 703(a). Rule 1551(a)(1) of the Pennsylvania Rules of Appellate Procedure contains a similar provision, providing: "No question shall be heard or considered by the

court which was not raised before the government unit except: (1) Questions involving the validity of a statute." Pa.R.A.P. 1551(a)(1).

- As a general rule, the Pennsylvania Supreme Court has held that an appellate court should apply the law in effect at the time of appellate review. This means that a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occurred before the judgment becomes final.

  However, this general rule is not applied rotely and whether a judicial decision should apply retroactively is a matter of judicial discretion to be decided on a case-by-case basis.

  In considering whether a decision announcing a new rule of law is to be applied retroactively, the court should consider: (1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect on the administration of justice by the retroactive application of the new rule.

- The Commonwealth Court had previously held that claimants could seek reinstatement of total disability status based on Protz II within 3 years of the date of the most recent payment of compensation, even if they had already exhausted their 500 weeks of partial disability benefits

Dana Holding Corporation v. WCAB (Smuck), No. 1869 C.D. 2017 (Decision by Judge Cohn Jubelirer, October 11, 2018) 10/18

OCCUPATIONAL DISEASE/ MEDICAL EVIDENCE

- Pa. Supreme Court holds that pursuant to Section 108(r) of the Act the claimant has an initial burden to establish that his or her cancer is a type of cancer that is capable of being caused by exposure to a known IARC Group 1 carcinogen.

  It will be recalled that 108(r) provides:

  > *The term "occupational disease," as used in this act, shall mean only the following diseases.*
  >
  > > *(r) 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.*

This section clearly imposes an initial burden of causation on the claimant. Importantly, however, the provision only requires the claimant to establish a general causative link between the claimant's type of cancer and a Group 1 carcinogen.

This means that the claimant must produce evidence that it is possible that the carcinogen in question caused the type of cancer with which the claimant is afflicted. It does not require the claimant to prove that the identified Group 1 carcinogen actually caused claimant's cancer.

The "general causation" requirement under Section 108(r) constitutes a recognition that different types of cancers have different etiologies and it weeds out claims for compensation for cancers with no known link to Group 1 carcinogens.

- To prove causation epidemiological evidence is clearly relevant and useful in demonstrating general causation. Epidemiology deals with the identification of potentially causative associations in various populations between possible causative agents and the resulting incidence of particular diseases and seeks to generalize those results.

  In so doing, epidemiology may provide useful information as to whether there is a relationship between an agent and a disease and, when properly interpreted, can provide insight into whether the agent can cause the disease.

  Given its focus on identifying generalized causal relationships between potential causative agents and the resulting incidence of disease, epidemiology's focus on statistical analysis may be uniquely suited to illuminate whether there is a general causal relationship between types of cancer and Group 1 carcinogens

- While epidemiological evidence supports the burden of establishing general causation, where the claimant has established an entitlement to the evidentiary presumption of compensability, such epidemiological evidence is not sufficient for the employer to rebut the evidentiary presumption under Section 301(f), which provides:

  > *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 presumption of this subsection may be rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting.*

As the language of Section 301(f) plainly provides, the evidence required to rebut this presumption must show that the firefighter's cancer was not caused by the occupation of firefighting.

The phrase "the firefighter's cancer" refers to the claimant's cancer, and thus requires the employer to sustain its burden of proof upon rebuttal by demonstrating:

> (1) The specific causative agent of claimant's cancer, and
> (2) Exposure to that causative agent did not occur as a result of his or her employment as a firefighter.

This means the language of Section 301(f) requires the employer to produce a medical opinion regarding the specific, non-firefighting related cause of claimant's cancer.

At the rebuttal stage, the issue relates not to "types of cancer" relative to potential carcinogens, but rather requires proof of that the cancer from which the claimant suffers was not caused by his occupation as a firefighter.

- The Act was amended in 2011 to add two provisions, Sections 108(r) and 301(f), dealing specifically with firefighters claiming benefits for cancer alleged to be caused as a result of performing the duties of firefighters.

  Generally, reading the sections together, the statutory framework for litigation of claims for workers' compensation benefits by firefighters afflicted with cancer proceeds in the following stages.

  > First, the claimant must establish that he or she has an "occupational disease," as that term is defined in Section 108(r)
  >
  > Second, to establish an evidentiary presumption of entitlement to compensation in accordance with section 301(f), the claimant must establish that he or she:
  >
  > > (1) Served four or more years in continuous firefighting duties;
  > > (2) Had direct exposure to a Group 1 carcinogen; and
  > > (3) Passed a physical examination prior to asserting a claim or prior to engaging in firefighting duties (and the examination failed to reveal any evidence of cancer).

  If the claimant succeeds in demonstrating an occupational disease and an entitlement to the evidentiary presumption of compensability, then the burden of proof shifts to the employer, who must offer "substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting

City of Philadelphia Fire Department v. WCAB (Sladek), No. 13 EAP 2017 (Decision by Justice Donohue1, October 17, 2018) 10/18

COURSE AND SCOPE

- The claimant, who worked as a Training Supervisor at the Philadelphia International Airport suffered an injury on the employer's premises where he fell and injured himself in the parking lot designated for employees but owned the Department of Aviation (DOA) though he did not actually park in the parking lot that day but was dropped off in the parking lot by his wife.

  It was not a determinative fact that the claimant was not required to park in the DOA parking lots. This is because even if an employee is not required to use the premises, if a means of access is customarily used by employees for ingress and egress, that property can be such an integral part of an employer's business as to be considered part of the employer's premises.

  In this matter, there was no dispute that the Airport parking lot owned by the DOA was a customary means of ingress and egress for its employees, making it part of its premises.

  Therefore, the Claimant was injured on Employer's premises, his presence was required due to the nature of his employment and the condition of the premises caused the injury.

- Upon construing the term "premises" as contemplated by Section 301(c)(1) of the Act, the determinative question is not who owns or controls the premises but whether the site of the accident is so connected with the employer's business as to form an integral part thereof. The critical factor is not the employer's control over the area, but whether the employer caused the area to be used by employees in the performance of their assigned tasks.

  A reasonable means of access to the workplace is considered an integral part of the employer's business, and, therefore, is part of the employer's premises.

- It was not relevant that the claimant did not park in the parking low but, rather his wife dropped him off. In this case, Claimant was dropped off at the parking lot to board a shuttle bus to arrive at work. In order to do so, Claimant had to walk through the employee lot using his security badge – a badge that only granted him clearance to enter the lot, not his wife who had driven him to the lot.

  Therefore, the Claimant's presence in the parking lot to get the employee shuttle bus was so connected with his employment relationship that it was required by the nature of his employment.

- Pursuant to Section 301(c) (1) of the Act the term "injury" includes all injuries caused by the condition of the premises or by the operation of the employer's business or affairs

thereon, sustained by the employee, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employee's presence thereon being required by the nature of his employment.

Under this provision, where an employee is not directly engaged in the performance of his duties, an injury still may be compensable if the claimant establishes that: (1) the injury occurred on employer's premises, (2) the claimant's presence thereon was required by the nature of his employment, and (3) the injury was caused by the condition of the premises or by operation of employer's business thereon.

Applying the facts to this provision, there was no dispute that the Airport parking lot owned by the DOA was a customary means of ingress and egress for its employees, making it part of its premises.

Therefore, the Claimant was injured on Employer's premises, his presence was required due to the nature of his employment and the condition of the premises caused the injury.

Piedmont Airlines, Inc. and New Hampshire Insurance Company c/o Sedgwick Claims Management Services, Inc. v. WCAB(Watson), No. 468 C.D. 2018 (Decision by Judge Pellegrini, August 20, 2018; Decision ordered published October 29, 2018)10/18