**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:**
**SEPTEMBER 2016 AT A GLANCE**
**BY MITCHELL I GOLDING, ESQ.**
**KENNEDY, CAMPBELL, LIPSKI & DOCHNEY**
**(W) 215-861-6709**

## OCCUPATIONAL DISEASE/ STATUTE OF LIMITATIONS

- Act 46, amended Section 108 to include: (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.

  Section 301(f) is read in conjunction with claims filed under 108(r). This section requires:

  - A firefighter have at least four years of continuous firefighting duties
  - A firefighter successfully pass a physical examination prior to asserting a claim under 301(f) or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer.
  - The firefighter must be able to establish direct exposure to a Group 1 carcinogen.
  - Claims filed under Section 108(r) must be made within 600 weeks of the last date of employment in which a claimant was exposed to the hazards of the disease.
  - The presumption of compensability afforded firefighters with work-related cancer applies only to claims made within 300 weeks of the last date of employment with exposure to the hazard.

  In this matter the claimant was not entitled to the presumption that his prostate cancer was related to his work as a firefighter because the Claimant's filed his Claim Petition outside of the 300-week period entitling him to the rebuttable presumption of compensability in Section 301(f) of the Act.

  He was still able to pursue his Claim Petition by proving causation since it was filed within 600 weeks of the last date of employment in which a claimant was exposed to the hazards of the disease.

- Regardless of the date a firefighter files a Claim Petition seeking compensation for cancer under Section 108(r), the firefighter must establish that his disease is a type of cancer caused by exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC.

  Only if the claimant can establish his cancer is the type of cancer caused by the Group 1 carcinogens under Section 108(r), will the rebuttable presumptions in Sections 301(e) and (f) come into play. If Section 301(e)'s presumption of

causation comes into play and the claimant is relieved of having to rule out other possible causes for his cancer.

In this matter Claimant failed to establish a causal relationship between his prostate cancer and his occupational exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC. Thus, regardless of the date he filed his claim petition, the presumption of compensability in Section 301(f) of the Act was unavailable to Claimant.

- The WCJ did not commit an error by dismissing the claimant's Claim Petition where the Employer's Expert did not offer an opinion specific to Claimant's individual circumstance because the presumption of compensability in Section 301(f) did not come into play and the WCJ found that the claimant did not meet her burden of proving causation because the WCJ found Claimant's Expert's testimony failed to credibly or persuasively prove that Claimant's exposure to Group I carcinogens constituted a significant contributing factor in the cause of his prostate cancer.

*Hutz v. WCAB (City of Philadelphia) No. 2140 C.D. 2015 (Decision by Judge Simpson, September 7, 2016) 9/16*

**WCJ/ DISMISSAL**

- The WCJ erred in dismissing claimant's Claim Petition with prejudice rather than without prejudice where the Claimant's delay in obtaining an expert opinion consistent with the WCJ's deadline for presenting medical evidence was due to circumstances beyond his control.

- The WCJ's dismissal of the Claim Petition with prejudice rather than without prejudice was also not warranted despite the fact that due to claimant's delay the employer no longer had available two fact witnesses who had since left the employ of the employer.

  This is because since whatever prejudice Employer faced due to Claimant withdrawing the Petition in was not the result of Claimant's disregard of a WCJ's deadlines or orders. Upon reaching this result the court noted in a footnote that notwithstanding the fact that the witnesses had left Employer's employ, Employer could request the WCJ to subpoena them to testify.

*Northtec v. WCAB (Skaria), No. 2488 C.D. 2015 (Decision by Judge Covey, September 14, 2016)9/16*

**TERMINATION/ PENALTY**

- To succeed in a termination petition, an employer bears the burden of proving by substantial evidence that a claimant's disability ceased, or any remaining conditions are unrelated to the work injury. The burden is substantial since disability is presumed to continue unless and until proved otherwise.

  In a case where the claimant complains of continued pain, this burden is met when an employer's medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury. If the WCJ credits this testimony, the termination of benefits is proper.

- In order to terminate benefits on the theory that a claimant's disability has reduced or ceased due to an improvement of physical ability, it is first necessary that the employer's petition be based upon medical proof of a change in the claimant's physical condition. Only then can the WCJ determine whether the change in physical condition has effectuated a change in the claimant's disability, i.e., the loss of his earning power.

  Further, by natural extension it is necessary that, where there have been prior petitions to terminate benefits, the employer must demonstrate a change in physical condition since the last disability determination. The employer's case must begin with the adjudicated facts found by the WCJ in his/her previous Petition for Termination denial and work forward in time to show the required change in condition.

  The evidence necessary to prove a change since a prior adjudication will be different in each case. By accepting the employer's medical evidence of full recovery as credible, a WCJ could properly make a finding that the employer has met the standard requiring that the employer show a change in Claimant's condition

  Moreover, although the WCJ's finding cannot be based solely upon evidence that pre-dates the previous adjudication, it may be based upon a review of such evidence plus a post-adjudication examination.

  It is not necessary for the employer to demonstrate that a claimant's diagnoses have changed since the last proceeding, but only that his symptoms have improved to the point where he is capable of gainful employment.

  A finding that there is a lack of objective findings to substantiate a claimant's continuing complaints is sufficient to satisfy the employer's burden to show a change in claimant's condition.
  Therefore, the WCJ's granting up the employers Petition for Termination was upheld where the employer's medical experts credited diagnosis and opinion of

work ability was supported by other evidence of record, namely Claimant's activities and the WCJ's personal observation of Claimant which suggested that Claimant's subjective complaints were either not accurate, not as severe as described or had improved since the last proceeding since these findings were sufficient to establish a change in Claimant's condition.

The fact that employer's medical expert rendered the same opinion after Claimant's May 2010 IME as he did following Claimant's January 2009 IME did not invalidate the latter opinion, particularly when the WCJ's finding was based upon employer's medical expert's credited medical opinion and Claimant's testimony of his activities since the 2009 Termination Petition was denied.

- Section 435(d) (i) of the Act authorizes WCJs to assess penalties against employers for violations of the Act. Moreover, a claimant who files a penalty petition bears the burden of proving a violation of the Act occurred. If the claimant meets his or her initial burden of proving a violation, the burden then shifts to the employer to prove it did not violate the Act.

  The assessment of penalties, and the amount of penalties imposed are matters within the WCJ's discretion. Thus, absent an abuse of discretion by the WCJ [a penalty award will not be overturned on appeal.

  The WCJ did not abuse her discretion where she found the employer violated the Act by refusing to pay for Claimant's surgery to be performed upon the shoulder, which was a recognized body part, but imposed a 0% penalty

*Baumann v. WCAB (Kellogg Company), No. 2603 C.D. 2015 (Decision by Judge Covey, September 23, 2016) 9/16*