THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JULY 2010 AT A GLANCE
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NOTICE

- When a claimant alleges a cumulative trauma injury caused by the claimant's working conditions, the 120-day notice period begins to run on a last date of aggravation, which will normally be the last day of work.

- Section 311 of the Act states in pertinent part:

> *However, in cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, the time for giving notice shall not begin to run until the employe knows, or* ***by the exercise of reasonable diligence should kno****w, of the existence of the injury and its possible relationship to his employment.*

  The reasonable diligence standard is an objective, standard rather than a subjective standard. The elements of knowledge the claimant must possess in order to trigger the running of the notice period are (1) knowledge or constructive knowledge (2) of disability (3) which exists, (4) which results from an occupational disease [or injury], and (5) which has a possible relationship to the employment.

- The claimant did not fulfill her burden under Section 311 that she give notice within 120 days of the date she knew or should have known of the possible connection between her work injury and her work where her last date of employment was June 10, 2003, she gave notice of her injury to the employer on February 17, 2004 and filed her Claim Petition on December 9, 2004.

  This is because the claimant did not produce evidence as to when she knew or should have known of the possible connection between her work and her injury prior to the time she gave notice to the employer.

  There was substantial evidence in the record to indicate that a person in claimant's position, exercising reasonable diligence, should have known of a possible connection between her injury and work within 120 days of the last date she worked for the employer.

This evidence included the following: 1) claimant acknowledged that her pain was worse at work than at home; 2) she noticed the connection between the metatarsal boot she wore at work and her symptoms; 3) claimant's medical expert testified that when he examined the claimant in 1994 he told claimant that her pain was aggravated by work.

Based upon this credited testimony, the claimant, exercising reasonable diligence, should have been aware of a possible connection between her work-related injury and her employment while she was still working for the employer. Thus, the 120-day period within which she had to notify employer for purposes of Section 311 would have began to run on her last date of work.

- The Supreme Court decision Sell v. WCAB (LNP Eng'g), 565 Pa. 114, 771 A.2d 1246 (2001) does not stand for the broad proposition that a claimant may not be charged with knowledge of the connection between an injury and the claimant's work until claimant received an expert medical opinion.

  In this matter, unlike in Sell, the claimant noticed that her symptoms were worse while she was at work but better when she was away. Also, given the undisputed length of the claimant's treatment, which dated back to 1994, and the opinions of her physicians, it was impossible to state that claimant exercised reasonable diligence to discover whether there was a causal connection between her work duties and her injury.

Allegheny Ludlum Corporation v. WCAB (Holmes), No. 1623, C.D. 2009 (decision by Judge Cohn Jubelirer, April 22, 2010). 8/10

IME/VOCATIONAL

- The fact that an IME was in excess of six months old at the time jobs were made available to the claimant within the independent medical examiner's restrictions did not in and of itself render the job offers premised upon the argument that the independent medical examination was stale.

  A holding that IME results become unusable after six months, even where the claimant's condition remains stable, would have the practical result of subjecting a claimant to serial IME's by an employer in order to prevent a staleness claim. This would cause inconvenience to the claimant and additional expense for the employer and would serve no legitimate purpose.

- The WCJ's determination that the IME was no longer valid because it was more than six months old was not supported by substantial evidence where the independent medical examiner opined that the claimant had reached maximum medical improvement and needed no further medical treatment on the date of the examination and this testimony is not refuted by the claimant.

- The need for a new independent medical examination will be different in each case depending on the work injury and depending upon the claimant's physical condition. For example, should a claimant's work-related condition change shortly after an IME, that IME could become "stale" well before six months have passed. On the other hand, if the claimant's condition remains stable, there is no reason why IME results would not enjoy continued validity.

- A vocational expert was not competent to render an opinion that an IME of the claimant, who had reached a maximum medical improvement as the result of her work-related carpal tunnel syndrome, must be done every six months. A witness may only offer expert testimony regarding matters in which he or she is qualified as an expert.

- The employer's requirement to show job availability pursuant to Kachinski v. WCAB (Vepco Construction Company), 516 Pa. 240, 532 A.2d 374 (1987) continues to apply to cases where the claimant's injury occurred prior to June 24, 1996, which was when Act 57 was enacted.

Verizon Pennsylvania, Inc., v. WCAB (Guyders), No. 2477 C.D. 2009 (decision by Judge Leavitt, July 19, 2010). 8/10

REVIEW OF PETITION/STATUTORY CONSTRUCTION

- The claimant's Petition to Review the Notice of Compensation Payable, filed pursuant to the first paragraph of Section 413 of the Act, was barred by the three-year Statute of Limitations where the claimant suffered her work injury of May of 1997, her compensation was suspended by Supplemental Agreement in July of 1998 but she did not file her Petition to Review the Notice of Compensation Payable, that sought to add additional recognized injuries, until August 26, 2002.

  This is because the claimant's Petition to Review the Notice of Compensation Payable was filed more than three years following the suspension of her compensation.

- A party seeking relief under either of the first two paragraphs of Section 413 of the Act must file its petition within three years of the date of the most recent payment of compensation whether a party is seeking either to obtain relief through the correction of a Notice of Compensation Payable under paragraph one of Section 413 of the Act, or seeking to add additional consequential injuries to the claimant's compensable work related injuries under paragraph two of Section 413 of the Act.

- Upon engaging in statutory construction the object of interpretation and construction of statutes is to ascertain the attention of the General Assembly.

Applying the rules of statutory construction, it was noted that the first paragraph of Section 413 provides authority for a Workers' Compensation Judge at any time to "review and modify or set aside" a Notice of Compensable Payable or "an original or Supplemental Agreement." Similarly, the second paragraph of Section 413 of the Act provides authority for a Workers' Compensation Judge at any time to "modify, reinstate, suspend or terminate" a Notice of Compensation Payable or an original or Supplemental Agreement.

Of significance from a statutory interpretation perspective is a fact that the sentence in the second paragraph of Section 413 containing the three-year limitation period provision applies to ***Review***, Modification or Reinstatement of NCPs. Thus, this limitation refers to specific actions (Review, Modification, Reinstatement) that a Workers' Compensation Judge may otherwise be able to take with regard to Notice of Compensation Payables but for the untimely filing of a petition.

Margaret Mary Fitzgibbons v. WCAB (City of Philadelphia), (decision by Judge Brobson, July 16, 2010). 8/08

STATUTORY EMPLOYER

- Section 302(a) and (b) of the Act sets forth the criteria for determining whether an entity is a statutory employer under the Act.

  Pursuant to the second paragraph of Section 302(a) of the Act, an entity may be deemed a statutory employer, regardless of whether the entity was in control of the premises, where that entity contracted to have work performed by another of a kind which is a ***regular or recurrent*** part of the business, occupation, profession or trade of such person. The person with who the entity contracted with shall be deemed the sub contractor.

  The elements of the McDonald test are applicable to Section 302(b) of the Act but not to Section 302(a) of the Act.

  Accordingly, the defendants who owned fields upon which tomatoes were grown, owned a warehouse where they were packed and processing centers to which the tomatoes were delivered was deemed to be the statutory employer of the claimant because the claimant's direct employer, who did not have workers' compensation insurance, contracted with the defendant to provide certain services including the harvesting and hauling of tomatoes.

  Although it is true that the defendant owned the fields where the tomatoes were picked and it has been held that the owner of the premises cannot be considered a statutory employer when it contracts with another for work on its premises, that

proviso emanates out of the McDonald test and only applies to Section 302(b) of the Act but does not apply to Section 302(a).

- The intent of the statutory employer concept is to hold a general contractor secondarily liable for injuries to the employee of its subcontractor with the subcontractor permanently liable does not have workers' compensation insurance.

- Section 203 bestows immunity from tort liability onto a statutory employer.

- Pursuant to the McDonald test set forth by McDonald v. Levinson Steel Company, 302 Pa. 287, 153 A.2d 424 (1930) to qualify as a statutory employer, (1) the employer must be working under a contract with the premises owner; (2) the premises must be occupied or under the control of the employer; (3) the employer has contracted with a subcontractor to do work; (4) part of the employer's regular work is entrusted to the subcontractor; and (5) the injured person is the subcontractor's employee.

- The claimant has the burden to establish an entity was his statutory employer. Pursuant to this burden the claimant must satisfy the criteria set forth by either Section 302(a) or Section 302(b) of the Act. Both provisions contain criteria that must be met to hold a contractor liable for benefits as the statutory employer.

  One of those elements that must be proven is that the claimant's direct employer did not have insurance. The express language contained in Section 305(c) provides a way that the claimant may prove that his direct employer did not have worker's compensation insurance. In particular, this provision provides:

  > *In any proceeding against an employer under this section, a certificate of non-insurance issued by the official Workmen's Compensation Rating and Inspection Bureau and a certificate of the department showing that the defendant has not been exempted from obtaining insurance under this section shall be prima facie evidence of the facts therein stated.*

  If the claimant presents *prima facie* evidence pursuant to Section 305(c) that employer did not have insurance for workers' compensation purposes, the alleged "statutory employer" could present rebuttal evidences if the primary employee did possess workers' compensation insurance

- Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding if it is corroborated by any competent evidence of record. But, a finding based solely on hearsay will not stand.

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Six L's Packing Company v. WCAB (Williamson) No. 686 C.D. 2009 (decision by Judge Flaherty, July 23, 2010). 8/10

CREDIT

- The claimant, who was a Pennsylvania state police, was employed by the Commonwealth and the Commonwealth was entitled to an offset for 100 percent of the retirement pension received by the claimant, notwithstanding that fact that approximately 75 percent of the monies funding the claimant's pension came from the Motor License Fund because all sources of funds for the claimant's pension came from revenues collected by the Commonwealth, appropriated by the General Assembly and thereafter paid to the Commonwealth Coffers.

  It was irrelevant that the source of the money comprising the Motor License Fund is a specifically designated set of taxes and fees while the General Fund comes from other taxes and revenue sources. Both funds come from revenues collected by the Commonwealth, appropriated by the General Assembly and thereafter paid to the Commonwealth's coffers.

- Section 204(a) of the Act provides in pertinent part:

  > *… the employer liable for the payment of compensation and the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the award…*

- An employer bears the burden of establishing entitlement to the pension benefit offset. Credible actuarial evidence is sufficient to meet the employer's burden of proving the extent to which it funded a defined benefit plan that formed the basis for the calculation of the pension offset.

- A "defined benefit plan" is one "in which the benefit level is established at the commencement of the plan and actuarial calculations determine the varying contributions necessary to fund the benefit at an employe's retirement.

Gaughan v. WCAB (Pennsylvania State Police), No. 2472 C.D. 2009 (decision by Judge Leadbetter, July 28, 2010). 8/10

SUPERSEDEAS /SUBROGATION

- An employer who received payment of its nets lien pursuant to its subrogation interest against a claimant's third party recovery was still entitled to reimbursement from the Supersedeas Fund, for monies paid following denial of its request for supersedeas through the date its Petition for Termination was granted, reduced by the proportion of the net lien attributable to the same period for which it was seeking reimbursement from the Supersedeas Fund.

- The WCJ did not commit an error using the following formula upon calculating the entitlement to Supersedeas Fund reimbursement reduced by the proportion of

subrogation that employer received attributable to the period that the employer sought reimbursement from the Supersedeas Fund:

> 1) Total amount of compensation in medical paid to the claimant from the date the employer requested supersedeas per its Petition for Termination through the date the Petition for Termination was granted ($22,271.91) divided by the total amount of compensation and medical paid by the employer over the course of claimant's claim ($68,849.36), which equaled .32.
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> 2) Multiply the net lien received by the employer ($39,329.96) by .32, which results in $12,585.30.
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> 3) Subtract $12,585.30 from $22,271.91, which was the amount of medical and compensation paid to the claimant from the date the employer requested supersedeas through the date the Petition for Termination was granted, , which results in $9,686.61.

Based upon this calculation the Supersedeas Fund reimbursement was awarded at the employer was $9,686.61 based upon the WCJ's belief that the employer's Supersedeas Fund reimbursement should be reduced by the net subrogation lien payment attributable to the compensation paid during the eligible period of December 2, 2005 through January 3, 2007.

- Both the Supersedeas Fund provision of Section 443(a) and the subrogation provision of Section 319 of the Act advance different interests.

  The Supersedeas Fund's purpose is to provide a means to protect an employer who makes compensation payments to an employee who ultimately is determined not to have been entitled to those payments. Upon interpreting 443(a) of the Act, in order to obtain reimbursement from the Supersedeas Fund it must be established (2) the request for supersedeas was denied; (3) the request was made in a proceeding under Section 413, or 430 of the Act, (4) payments were continued because of the order denying the supersedeas; and (5) in the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable.

  Subrogation is an equitable remedy that prevents double recovery and ensures that the party at fault, rather than an innocent party, be held responsible for the claimed injury. An employer has an absolute right to immediate payment of its past due lien from the recovery fund after a payment of attorney fees and expenses.

- An insurer is not required, in the context of Supersedeas Fund reimbursement, to assume the cost of recovering a third-party settlement for periods in which there has been a determination that compensation was not, in fact, payable. Section 319

does not convert the compensation paid for wage loss and medical benefits into something else for the purposes of the Section 443(a).

Commonwealth of Pennsylvania v. WCAB (Old Republic Insurance Company), No. C.D. 2009 (decision by Judge Flaherty, July 28, 2010). 8/10

JURISDICTION

- Pursuant to Section 305.2(a) (1) and 305.2(d) (4) (iii) Pennsylvania had jurisdiction over the claimant's work injury where the claimant who was a truck driver paid by the mile, lived in Williamsport, Pennsylvania, drove 38% of his miles in Pennsylvania, which was greater than any other state, suffered his work injury in Vermont and his employer, who based in Ohio, did not have a place of business in Pennsylvania.

  Notwithstanding the fact that the claimant's work injury occurred outside of Pennsylvania and his contract of hire was not in Pennsylvania, Section 305.2(a) (1) will confer jurisdiction in Pennsylvania if the claimant's employment is ***principally localized*** in Pennsylvania.

- Although the employer did not maintain a place of business in Pennsylvania and the claimant did not work out of the employer's premises in Pennsylvania, which would satisfy the "principally localized" requirement of Sections 305.2(d)(4)(i) or (ii), the claimant employment was principally localized pursuant to Section 305.2(d)(4)(iii) which provides that:

  > *(iii) if clauses (1) and (2) foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.*

  The claimant was domiciled in Pennsylvania and the fact that 38% of his miles were logged in Pennsylvania, which was greater than miles logged in any other state, satisfied the requirement that a "***substantial part of his working time***" would be in the service of his employer in Pennsylvania.

- The term "substantial" is defined as "considerable in quantity" or "being largely but not wholly that which is specified." The Act does not require that the claimant spend a majority of his working time in Pennsylvania but rather only a "substantial part of his working time". Determining what a substantial part is requires a comparison with the working time spent elsewhere. Since the greatest part of the claimant's time is spent working in Pennsylvania, he satisfied the "substantial part" standard.

- Section 305.2(d)(4)(i), which requires that the employer have a place of business in Pennsylvania from which the claimant regularly works at, uses different terminology compared to Section 305.2(d)(4)(iii) to establish jurisdiction.

  Section 305.2(d) (4) (i) requires the place of business be in Pennsylvania and proved that the claimant "regularly works" at or from that place of business. To satisfy the requirement that the claimant regularly works at or from a Pennsylvania location, this Court has required proof that the injured worker worked at that location as a general rule, not as an exception.

  To satisfy 305.2(d)(4)(iii) the claimant must merely show that he is domiciled in Pennsylvania and that he spends a substantial part of his work time within Pennsylvania.

- The claimant has a burden of proof to establish jurisdiction in Pennsylvania for his workers' compensation claim. The focus of Section 305.2 of the Act is on the claimant's employment, not on the employer. An award of workers' compensation benefits in another state does not preclude an employee from seeking benefits in Pennsylvania. The claimant must still meet his burden proving he is entitled to benefits under Pennsylvania law i.e. that he is disabled by a work-related injury.

- The three clauses of Section 305.2(d) (4) of the Act are all separate and distinct methods for determining jurisdiction under the Act.

  In finding employment is principally localized in a given state pursuant to Section 305.2(a)(1) and (d)(4)(i) of the Act in terms of whether a claimant regularly works at a place of business within that state, one must consider whether the claimant worked at that location as a rule and not as an exception.

  If the injured worker's employment is determined to be principally localized in this state or another by either clause (i) or (ii) of Section 305.2(d) (4) of the Act, there is no need to proceed to clause (iii).

  In the event the facts warrant application of the (iii), it must be determined whether the claimant is domiciled in Pennsylvania and spends a "substantial part of his working time" in the Commonwealth.

Williams v. WCAB (POHL Transportation) No. 2422 C.D. 2009 (Decision by Judge Flaherty, July 29, 2010. 8/10