

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
OCTOBER 2008 AT A GLANCE
BY MITCHELL I GOLDING, ESQ.
KENNEDY, DANIELS & LIPSKI
(W) 215-430-6362**

OCCUPATIONAL DISEASE

- Commonwealth Court grants the Employer's Request for Reconsideration and withdraws its decision issued on July 8, 2008 that held that a firefighter who is suffering from an occupational disease set forth by Section 108(o) must produce medical expert testimony that the claimant is disabled from firefighting due to his condition. Once the expert testifies as such, there is a presumption set forth by Section 301(e) that the claimant's occupational disease arose out of and in the course of his employment. This is a difficult presumption to rebut though the employer may rebut it through competent medical expert testimony found credible by the WCJ

Repash v. WCAB (City of Philadelphia), No. 114 C.D. 2008 (Order by Judge Leadbetter, October 10, 2008).

COMPROMISE AND RELEASE AGREEMENT/CONTRACT

- A Compromise and Release Agreement that the claimant testified in support of was null and void where the claimant died for non-work related reasons one day before the Judge issued his official Order granting the Agreement and the Agreement contained an addendum stating "Claimant certifies that she is suffering from no known life threatening or terminal illness(es) unrelated to her work injury and agrees that this [C&R] is null and void upon her death if not approved by a judge. See Shaffer v. WCAB (Silver & Silver, Inc.) 183 Pa. Commw. 624; 588 A.2d 1029 (1991)".

This is because the Commonwealth Court has held that approval by a WCJ of a Compromise and Release Agreement must take form of a written decision. In this case, there was no dispute that the WCJ's August 29, 2005 decision and Order approving the Compromise and Release Agreement was issued after the claimant had passed away. Therefore, pursuant to the plain language of the addendum the Compromise and Release Agreement was null and void. The Compromise and Release Agreement further contained a provision stating "the Compromise and Release Agreement is not valid and binding unless approved by a Workers' Compensation Judge in a decision."

- The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties. Generally, the intent of the parties to a written contract is

contained within the contract itself, and when the words are “clear and unambiguous, the intent is to be found only in the express language of the agreement

- Disability benefits serve as compensation for loss of earning power and the need to compensate a claimant for loss of earning power ceases when that loss terminates by the death of the claimant for reasons unrelated to his injuries.

Crawford as personal representative of Josephine Crawford, deceased v. WCAB (Centerville Clinics, Inc.), No. 2331 C.D. 2007 (Decision by Judge Cohn Jubelirer, October 10, 2008).

UNEMPLOYMENT COMPENSATION/CREDIT

- A claimant’s direct testimony in support of the Claim Petition that he received Unemployment Compensation was sufficient to protect the employer’s right to the Unemployment Compensation offset even though the employer did not present evidence in support of the offset. In the context of the claimant testifying that he received Unemployment Compensation it is not necessary that a literal reading of Section 204 be given which states “the employer must present to the WCJ any credit it may have during the initial Claim Petition proceeding.”

This is because the WCJ can rely on evidence in the record regardless of which party presented the evidence and which party benefited by the evidence. Moreover, the WCJ is required to reduce claimant’s award by the amount of unemployment compensation benefits regardless of whether employer had requested the offset because a mandated Section 204(a) credit cannot be waived by the employer.

- Section 204(a) directs the WCJ to credit the amount of a claimant’s Unemployment Compensation benefits against the amount of the compensation benefits awarded by the WCJ. However, if the claimant does not volunteer that he or she received an Unemployment Compensation the employer must raise the issue of entitlement to a Unemployment offset before the WCJ during the Claim Petition proceeding. This requires the employer to raise the issues of offset at the earliest possible stage of the litigation.
- Section 440(a) of the Act provides that a claimant who is successful in whole or in part is entitled to an award of attorney fees, unless the employer’s contest is reasonably based. Whether an employer’s contest is reasonable is a question of law and the employer has the burden of establishing the facts sufficient to prove a reasonable contest. A genuine dispute can be found when medical evidence is conflicting or is susceptible to contrary inferences.

Costa v. WCAB (Carlisle Corporation), No. 822 C.D. 2008 (Decision by Judge Leavitt, October 14, 2008).

OCCUPATIONAL DISEASE/REASONED DECISION

- The rebuttable presumption set forth by 301(e) did not apply where the WCJ rejected the claimant's medical expert's opinion that incidence of the decedent's lung disease was substantially greater in the industry or occupation where the claimant worked than in the general population thereby resulting in the finding that Section 108(n) did not apply.

This is because the WCJ credited employer's medical witnesses and rejected the assertion that the claimant suffered from an occupational disease. Therefore, the rebuttable presumption requested by the claimant was inapplicable because the rebuttable presumption of Section 301(e) requires a finding that the claimant was employed in an occupation or industry in which the occupational disease was a hazard.

- A death certificate in a workers' compensation case is admissible as proof, though not conclusive proof, both the fact and cause of death. The WCJ did not commit an error of law where, though admitting the death certificate into evidence, rejected the cause of death on the certificate due to his finding that the contrary testimony of the employer's medical expert was more credible.
- Absent the circumstance where a credibility assessment may be said to have been tied to the inherently subjective circumstance of witness demeanor, some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a 'reasoned' one which facilitates effective appellate review. Where the factfinder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately reasoned.

Larry Patton, widow of Audley K. Patton v. WCAB (Lane Enterprises, Inc.), 2363 C.D. 2007 (Decision by Judge McGinley, October 22, 2008).

COURSE AND SCOPE

- A claimant was not in the course and scope of her employment when she was struck by a car as she was crossing the street from the employer-owned parking garage to the employer's office. This holding was reached notwithstanding the fact that the employer encouraged its employees to park in its garage and the employer had a voluntary transportation program that permitted the claimant to pay for parking with pre-tax earnings.

The claimant was not in the course and scope of her employment because she was not required to park in employer's garage and the employer neither issued parking

directives nor exercised control over the mode of transportation the claimant chose to commute to and from work. The claimant was free to park her vehicle where she chose. Moreover, the municipality where the employer operated and where claimant worked did not ban on-street parking. There was no necessity for employer to provide private parking. Therefore, the employer's parking garage was not integral to the employer's business and, therefore, he was not part of the employer's premises.

- Injuries may be sustained in the course of employment where the employee, whether on or off the employer's premises, is injured while actually engaged in the furtherance of the employer's business or affairs.

Additionally, injuries may be sustained in the course of employment where the employee, although not actually engaged in the furtherance of the employer's business or affairs, is (1) on the premises occupied or under the control of the employee; (2) required by the nature of his employment to be present; and (3) sustains injuries caused by the condition of the premises or by operation of the employer's business thereon. *Id.* Whether an employee is in the course and scope of employment when an injury occurs is a question of law to be determined on the basis of the findings of fact.

- A standing principle is that the term "premises," as contemplated by Section 301(c)(1) of the Act, is not limited only to property owned by the employer, rather it may include any area "owned, leased, or controlled by the employer to a degree where the property could be considered an integral part of the employer's business." Upon determining whether an injury occurring at a particular area is on the "premises" of an employer, and hence compensable under the Act, Pennsylvania Courts have examined the control exerted by the employer over the area and looked to whether the area was so connected with the employer's business or operating premises as to form an integral part thereof.

Waronsky v. WCAB (Mellon Bank), 367 C.D. 2008 (decision by Judge McGinley, October 22, 2008).

MEDICAL PAYMENTS/FEE REVIEW/PENALTY

- Pursuant to Federal Law and Federal regulation a health care provider who accepts Medicaid payments through the DPW is required to accept those payments as payments in full and is precluded from going against the employer for the difference between payments made under the Medicaid fees schedule and the PA Workers' Compensation fee schedule if the claimant's injuries later determined to be compensable or the parties subsequently agree that the injury was compensable pursuant to a Compromise and Release Agreement.
- The fee review process presupposes that liability has been established either by voluntary acceptance by the employer or determination by a WCJ. Neither the

Act nor the medical cost containment regulations provide any authority for a fee review officer to decide the issue of liability in a fee review proceeding. The reason that the department will not entertain A Fee Review Application where the insurer denies liability is because there is no authority for a Fee Review Officer to decide the issue of liability in a Fee Review Proceeding. Before the fee review officer may determine the “amount and timeliness of the payment made by an insurer,” there must be a preliminary determination or agreement that the injury and the bills in dispute are work-related.

In the case of the Compromise and Release Agreement where the employer denies liability, but nevertheless agrees to remain responsible for Claimant's reasonable and necessary medical expenses, the Department may proceed so long as the parties agree that the bills are related to the work injury.

- The issue before the Fee Review Agency is the “amount or timeliness of the insurer’s payment” as contemplated by Section 306(f.1) (5) of the Act. The WCJ would have jurisdiction over the issue of whether a health care provider was entitled to the difference between the health care provider’s charges as corrected by the Workers Compensation Fee Schedule and a DPW lien.
- It is well settled that a medical provider is prohibited from attempting to collect from the claimant/employee the difference between the provider’s charge and the amount paid by the employer or the workers’ compensation carrier. This is set forth by Section 306(f.1) (7) and 34 Pa. Code Section 127.211(a).
- A claimant who is not the aggrieved party resulting from the non payment of the full amount of a medical bill may nevertheless file a penalty petition because the issue is whether a health care provider. The Act does not require a claimant suffer economic harm before a penalty can be imposed. Rather, penalties may be imposed to secure compliance with the Act

Nickel v. WCAB (Agway Agronomy), No. 719 C.D. 2008 (decision by Judge McGinley, October 22, 2008.) 11/08

TERMINATION/MEDICAL TESTIMONY

- An employer who files a Petition for Termination following with a denial of a prior Petition for Termination must present medical evidence that the claimant’s current physical condition has changed from what it was at the time of the previous termination proceeding. A change of condition is defined as any change in the claimant’s physical wellbeing that affects his ability to work. This requires the employer to accept the adjudicated decision and prove recovery from it at a later date.
- Although the employer’s medical expert is not required to believe a condition existed, the expert is required to accept as true the adjudicated fact that a

condition existed and opine as to whether the condition continues to exist at the time of the examination. Therefore, even though the employer's medical experts denied that all of the claimant's injuries resulted from work injury, they acknowledged each and everyone of claimant's adjudicated work injuries and testified that the claimant was fully recovered from each. This credible testimony was sufficient to support the employer's Petition for Termination.

Folmer v. WCAB (Swift Transportation), No. 596 C.D. 2007 (decision by Judge Leavitt, October 22, 2008). 11/08

NOTICE/OCCUPATIONAL DISEASE/REASONED DECISION

- A claimant who filed a Claim Petition, alleging an injury caused by chemical exposure pursuant to Section 301(c)(1), gave timely notice to the employer where he gave notice within 120 days of the date that his doctor told him that his disease was job related. Therefore, the claimant gave timely notice where he last worked for the employer on June 1, 2002 following a layoff and first saw a kidney specialist in July 2002 but was not told that his kidney problems were work related until March 2005 and gave notice to the employer in July 2004.
- Section 311's discovery rule calls for more than an employee suspicion, intuition or belief; by its terms the statutory notice period is triggered only by an employee's knowledge that he is injured and that his injury is possibly related to work.
- A decision is reasoned for purposes of Section 422(a) if it allows for adequate review by the Board without further elucidation and for adequate review by the Appellate Courts under applicable review standards.

The Bullen Companies v. WCAB (Hausmann) No. 409 C.D. 2008 (decision by Judge Smith Ribner, October 23, 2008).