MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 21 | NO. 1 | JANUARY 2017

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Heart and Lung Act benefits are not subject to subrogation under the Act even when the claimant agreed to the employer's lien recovery in a stipulation.

Pennsylvania State Police v. WCAB (Bushta); 2426 C.D. 2015; filed October 26, 2016; by Judge Covey

The claimant, a state trooper, suffered a work-related injury when his vehicle was hit by a tractor trailer. The employer issued a Notice of Compensation Payable (NCP) accepting multiple injuries, and the claimant received workers' compensation benefits. However, the NCP indicated that the claimant was receiving salary continuation under the Heart and Lung Act.

Later, the claimant entered into a third party settlement wherein he and his spouse received in excess of $1 million. A percentage of the settlement proceeds were apportioned to the spouse's loss of consortium claim. The settlement agreement further stated that the claimant would reimburse any lien holder, known or unknown, for any liens as a result of this incident. In signing the settlement agreement, the claimant acknowledged his understanding that he was solely responsible for payment of any workers' compensation liens. Subsequently, the employer filed a petition for review, asserting a subrogation against the proceeds of the claimant's third-party recovery.

Before the Workers' Compensation Judge, the employer and the claimant entered into a stipulation that said the claimant was paid $94,166.64 in Heart and Lung wage loss benefits and $56,873.13 in workers' compensation indemnity benefits. Additionally, the stipulation set forth the agreed amount of medical benefits paid by the employer. A Third Party Settlement Agreement (TPSA) was also executed. It was stipulated that the accrued lien set forth in the TPSA was $167,742.66 and did not include $37,293.51, which was characterized as Heart and Lung wage loss benefits.

The judge issued a decision approving the stipulation. However, the claimant appealed to the Workers' Compensation Appeal Board, arguing that all of the employer-provided benefits were paid pursuant to the Heart and Lung Act and that the employer was not entitled to subrogation. The Board agreed and reversed the decision.

The employer appealed to the Commonwealth Court, which noted that the claimant signed the stipulation that was submitted to the Workers' Compensation Judge after they issued their opinion in *Stermel v. WCAB (City of Philadelphia*, 103 A.3d, 876 (Pa. Cmwlth. 2014), wherein the court held that Heart and Lung benefits were not subject to § 319 of the Pennsylvania Workers' Compensation Act. The employer argued that, despite *Stermel*, the claimant signed the stipulation after it was decided and, therefore, the claimant was bound by the stipulation, notwithstanding the claimant's lack of knowledge of the *Stermel* opinion. The Commonwealth Court rejected this argument, pointing out that *Stermel* was decided before the Workers' Compensation Judge issued his decision and before the matter was appealed to the Board. The court also rejected the employer's argument that the Workers' Compensation Judge's decision was not contrary to *Stermel*, making it abundantly clear that the Heart and Lung benefits paid by the employer were not subject to subrogation. II

A firefighter's claim petition was properly dismissed when filed 315 weeks after last date of employment and where the claimant failed to establish prostate cancer as an occupational disease under the Act.

Peter Demchenko v. WCAB (City of Philadelphia); 2164 C.D. 2015; filed October 26, 2016; by President Judge Leavitt

The claimant was hired as a firefighter by the employer in 1974. Beginning January of 1980, the claimant worked exclusively as a paramedic. He retired in May of 2006, and one month later, he was diagnosed with prostate cancer. In June of 2012, the claimant filed a claim petition alleging the prostate cancer was caused by exposure to Group I carcinogens while working as a firefighter. He sought payment of benefits for the period from

November 27, 2006, to January 15, 2007, and medical bills.

The Workers' Compensation Judge dismissed the claim petition, rejecting the claimant's evidence on causation despite crediting the claimant's testimony as to exposure. The judge also concluded that, because the claimant retired prior to his cancer diagnosis, the cancer did not cause a compensable disability and the claimant was not entitled to the statutory presumptions available to claimants seeking compensation for an occupational disease. Additionally, the judge concluded that the claimant did not prove the cancer was an occupational disease under § 108(r) of the Act since his evidence did not show that exposure to Group I carcinogens has been linked to prostate cancer. Moreover, the judge found that the claimant did not demonstrate that his prostate cancer was caused by his workplace exposures, such as Class 2A carcinogens, under § 108(n) of the Act.

The Workers' Compensation Appeal Board affirmed on appeal, and although they agreed the claimant was not entitled to the statutory presumption, they found it was because the claimant did not file his claim petition within 300 weeks of the last day of occupational exposure to the carcinogen. The claimant had retired in May of 2006 and his claim petition was not filed until June 13, 2012, which was 315 weeks.

The Commonwealth Court affirmed the Appeal Board and dismissed the claimant's appeal. The court noted that the Board also observed that if a firefighter files a claim petition before 600 weeks have elapsed, then the firefighter may still prove that cancer was an occupational disease, although without taking advantage of the presumption in § 301(f) of the Act. The court pointed out that the presumption of compensability in § 301(f) is not available where the claimant fails to establish a causal relationship between the prostate cancer and occupational exposure to a Group I carcinogen. The court concluded that the claimant's medical evidence did not prove a causal relationship in order to establish that it was an occupational disease under § 108(r) of the Act. Consequently, the presumption of compensability in § 301(f) was not available. Further, the claimant's medical evidence was not adequate to prove his particular cancer was caused by workplace exposures to other carcinogens under § 108(n); therefore, the § 301(e) presumption of the Act was not available to assist the claimant in showing that his prostate cancer was a compensable occupational disease. II

The employer's future credit for a third-party recovery in excess of the workers' compensation lien applies to future medical treatment received by the claimant.

Whitmoyer v. WCAB (Mountain Country Meats); No. 614 C.D. 2015; filed December 1, 2016; by Judge Simpson

In this case, the claimant sustained an injury in 1993 that resulted in the amputation of one half of his right arm. In 1994, the claimant commuted his wage loss benefits, but treatment for medical benefits remained open.

Approximately five years later, the claimant settled a third-party case in the amount of $300,000. The employer's lien was $111,000. The parties entered into a Third Party Settlement Agreement (TPSA) that contained a future credit for the employer. The TPSA was forwarded to the insurance adjuster, who was informed by the claimant and his counsel that the § 319 credit applied only to future installments of compensation and that future medical benefits are not installments of compensation.

The employer continued paying for the claimant's medical treatment without taking a credit. Thirteen years later, the employer filed a petition for their subrogation rights as to medical expenses they paid. Interestingly, by February 2013, another $207,000 in medical bills had been paid, with no credit or contribution made by the claimant.

At the Workers' Compensation Judge level, the claimant argued that § 319 applies only to future payments of indemnity since only indemnity benefits can be paid in "installments." The judge, however, granted the employer's petition, and the decision was affirmed by the Appeal Board.

The claimant appealed to the Commonwealth Court, arguing that under § 319 of the Act, the employer's future credit did not apply since the payments for medical expenses could not be made in installments. This argument was rejected. According to the court, "installments" in § 319 of the Act could be reasonably explained to include future medical expenses, which can occur periodically over time, requiring the employer/insured to make discreet payments on an ongoing basis. The court further rejected the claimant's argument that the employer tacitly agreed that the future credit did not apply to medical expenses because they did not respond to letters from counsel stating that the insurance company remained responsible for payment of the claimant's future medical expenses in full. The court also dismissed the claimant's argument that the employer was estopped from asserting a claim for a credit since they had paid the claimant's medical bills in full for thirteen years. II

An employer not insured in Pennsylvania but insured in another state is principally liable for payment of benefits with proper certification under Section 305.2(c) of the Act.

Mark Salvadori v. WCAB (Uninsured Employers Guaranty Fund and Farmers Propane, Inc.); 2166 C.D. 2015; filed December 5, 2016; by Judge McCullough

The claimant worked as a truck driver for the employer, almost exclusively in Pennsylvania. He suffered injuries when his truck was rear ended by another truck. The claimant filed a claim petition, but no insurance was identified. Consequently, the claimant filed an additional claim petition against the Uninsured Employers Guaranty Fund (UEGF). The Workers' Compensation Judge granted the claim petition against the employer and the UEGF, finding the UEGF secondarily liable since the employer did not have Pennsylvania workers' compensation insurance coverage at the time of the accident.

However, during the proceedings, the UEGF submitted into evidence a certification form from the employer stating that the claimant was covered by the employer's Ohio workers' compensation carrier and entitled to benefits under Ohio's law. The UEGF argued that under § 305.2(c) of the Act, if an employer fails to secure workers' compensation coverage in Pennsylvania but maintains insurance in another state, it may file a § 305.2(c) form with the Department of Labor and Industry, certifying that the employer had secured payment of compensation under the workers' compensation law of another state and that with respect to said injury, such employee is entitled to benefits provided under such law.

Although the Workers' Compensation Judge was not persuaded by this evidence, the Appeal Board was, and they reversed the judge's decision. The Commonwealth Court affirmed, finding that the employer was not uninsured, and in light of the § 305.2(c) certification, the UEGF was dismissed. II

News from Marshall Dennehey

At the firm's December 2016 annual shareholder meeting, **Shannon Fellin** (Harrisburg, PA) was among ten attorneys elected as shareholders of the firm.

Andrea Rock (Philadelphia, PA) has been named Co-Chair of the Philadelphia Bar Association's Workers' Compensation Section for 2018. She will act as Co-Chair elect in 2017, before serving as Co-Chair in 2018.

On Wednesday, January 18, 2017, **Jessica Julian** (Wilmington, DE) is presenting at the Workers' Compensation Breakfast Seminar hosted by the Delaware State Bar Association. Jessica will be discussing *Nally* and successive carrier liability. For registration information, click here.

Kacey Wiedt (Harrisburg, PA) successfully defended a penalty petition in which it was alleged that the defendant failed to pay the terms of a Compromise and Release Agreement seeking more than $100,000 in unpaid medical bills. The claimant alleged the parties entered into a Compromise and Release Agreement that obligated the defendant to continue to pay ongoing medical treatment if the defendant chose not to proceed forward with payment of a Medicare Set-Aside proposal of $78,624.36. Pursuant to the terms of the agreement, if the amount of the Medicare Set-Aside was found by CMS to be greater than the proposed recommendation, the defendant retained the right to cancel funding of the annuity and continue paying the claimant's reasonable and necessary medical expenses related to the work injury. The claimant alleged that there was more than $100,000 in medical expenses that were not paid by the defendant after they retained their right to cancel funding of the annuity due to CMS finding an amount higher than the MSA proposal. Kacey presented medical evidence supporting that the medical treatment and ongoing treatment for the claimant were not associated with the accepted injury. Additionally, Kacey argued that the description of the injury in the Compromise and Release Agreement limited the claimant's claim that the medical bills were related to the accepted injury. The judge dismissed the penalty and review petitions and granted termination of benefits.

Ashley Talley (Philadelphia, PA) successfully defended a national broker of delivery services. The claimant was a contract delivery driver for our client. While en route to a delivery, he was involved in a motor vehicle accident and sustained injuries, which resulted in surgical intervention. After receiving the maximum duration of benefits under a personally-funded Truckers Occupational Accident Insurance Policy, the claimant filed a claim petition alleging that he was an employee of the defendant. Ashley argued that the claimant was an independent contractor rather than an employee, thereby barring his ability to pursue benefits under the Workers' Compensation Act. The parties presented testimonial and documentary evidence on this issue, and the Workers' Compensation Judge ultimately accepted the defendant's argument, denying the claim petition in its entirety.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based university in litigation involving an allegation by an employee that lifting a five-gallon bucket of paint caused or aggravated numerous disc herniations in the claimant's spine. The litigation centered on expert testimony of orthopedic surgeons. Tony was able to convince the Workers' Compensation Judge via his cross examination of the claimant's medical expert that, at most, the claimant sustained a strain injury and had recovered completely. All allegations as to disc herniations, surgery for those herniations, and ongoing medical treatment were dismissed in their entirety.

Tony Natale (Philadelphia, PA) successfully defended a national thermographic inspection company in litigation surrounding an employee's alleged stroke and disability. The claimant asserted that, while on a job for the company, he suffered a work-related stroke, secondary to long periods of travel. It was discovered that the claimant had a congenital hole in his heart. He alleged that travelling for the company caused plaques in his circulatory system to dislodge and damage his heart, leading ultimately to a stroke. Tony presented evidence which proved that the claimant was not travelling long distances prior to the occurrence of the stroke and that the stroke condition itself did not arise from a work-related cause or injury. Additionally, Tony argued that the claim had no jurisdictional nexus to the Commonwealth. The Workers' Compensation Judge dismissed the claim based on lack of causal medical evidence and lack of jurisdiction.

Michele Punturi (Philadelphia, PA) successfully defended a national car company in workers' compensation litigation. The claimant alleged thoracic and cervical injuries with radiculopathy due to repetitive/heavy lifting in his job. He was seeking total disability benefits. Michele defeated this claim with live testimony before the Workers' Compensation Judge from four fact witnesses, including the employee's supervisors and two plant nurses, who established that the claimant did not report a work injury and never indicated that he had an injury related to work until 10 days after the fact. Michele also successfully refuted the claimant's allegation of the repetitive and heavy duty lifting aspect of his job as he had switched positions where he lifted lighter weights. Michele also presented a Board Certified Orthopedic Surgeon who testified that the claimant had degenerative disc disease and radiculopathy, but there was no correlation of the claimant's alleged injury to his work.

Tony Natale (Philadelphia, PA) succeeded in terminating a claimant's right to benefits on behalf of a large southeastern Pennsylvania transportation authority. The claimant alleged injuries to her upper extremities from continually turning the steering wheel on a large bus. The claimant had wrist/elbow surgery and then claimed ongoing residuals, plus a need for shoulder reconstruction. The parties presented conflicting medical testimony and fact witness depositions which outlined the physics of the injury (including the centripetal, centrifugal and torque forces). The Workers' Compensation Judge found the claimant to be fully recovered from her wrist injury and dismissed the shoulder injury as not work related.

Tony Natale (Philadelphia, PA) successfully defended a large Berks County mushroom factory in a claim involving a shoulder injury, with shoulder reconstructive surgery. The claimant sustained bi-lateral shoulder injuries during her course and scope of employment. She was offered modified duty employment and then claimed that she became totally disabled due to shoulder reconstruction surgery. Tony argued the surgery at issue was not related to the work injury. The parties presented renowned orthopedic surgeons on the issue of causation and disability. The Workers' Compensation Judge found that, based upon Tony's cross examination of the claimant's expert, the claimant failed to meet her burden of proof, and the claim was dismissed.

Judd Woytek (Allentown, PA) successfully defended a claim for Federal Black Lung benefits filed by a coal miner with over 10 years of employment in the coal mining industry. The miner had been awarded benefits by the Administrative Law Judge, but Judd successfully obtained a reversal of the award on appeal to the Benefits Review Board, which remanded the claim for further findings by the judge. On remand, Judd's arguments persuaded the judge to find that the miner's treating physician's opinion on total disability due to coal workers' pneumoconiosis was not well-reasoned and could not support an award of benefits to the miner. ||