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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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A Workers' Compensation Judge's decision that the claimant sustained a specific loss of the left hand was supported by substantial evidence; the claimant's entitlement to Social Security retirement benefits occurred prior to the date of the work injury and, therefore, the employer was not entitled to a credit and/or offset.

Pocono Mountain School District and Inservco Insurance Services v. WCAB (Easterling); 548 C.D. 2014; *Rick Easterling v. WCAB (Pocono Mountain School District)*; 663 C.D. 2014; filed April 10, 2015; by Judge Covey

The claimant sustained work-related injuries to his head, left shoulder and arm after slipping and falling on ice. The employer issued a notice of temporary compensation payable (NTCP), which later converted to a notice of compensation payable (NCP). The claimant later filed a review petition to amend the NCP to include complex regional pain syndrome (CRPS) of the left upper extremity, left upper extremity cubital tunnel syndrome and loss of use of the left hand. The parties stipulated that the claimant's work injury included the CRPS, and the employer maintained its denial of the specific loss claim. In February 2010—one month after the claimant's work injury—the claimant began receiving Social Security retirement benefits. The employer filed a modification petition requesting an offset and credit for the Social Security retirement benefits received by the claimant.

The Workers' Compensation Judge granted the claimant's review petition as to the specific loss of the left hand. The Judge also dismissed the employer's petition, concluding the employer failed to meet its burden of proving its entitlement to a credit for Social Security benefits received by the claimant. The Workers' Compensation Appeal Board reversed the Judge's denial of the modification petition but affirmed the Judge's decision in all other respects. Both the employer and the claimant filed appeals with the Commonwealth Court.

The Commonwealth Court affirmed the Judge's decision regarding the specific loss claim. In doing so, the court rejected the employer's argument that there was no medical testimony that the claimant lost the use of his left hand for all practical intents and purposes since the claimant's expert made only general references to the claimant's left upper extremity, rather than specifying the claimant's left hand. The court pointed out that the expert specifically testified that the claimant's hand was non-functional and that, during cross examination, the employer's counsel acknowledged a report from the expert contained the opinion that the claimant's left hand was useless.

The court also disagreed with the employer's argument that there was no competent medical evidence that the claimant's left hand condition was permanent. In fact, the employer's medical expert testified that the claimant had limited function of the left upper extremity and his restrictions were permanent. The court additionally rejected the employer's contention that the left hand injury was not separate such that the claimant was entitled to both specific loss and total disability benefits. According to the court's review of the record, the evidence showed that, but for the claimant's loss of use of his left hand, he would still be disabled by the CRPS in his left upper extremity.

The Commonwealth Court reversed the Appeal Board's decision with respect to the employer's entitlement to an offset for Social Security retirement benefits received by the claimant. The court noted that the claimant applied for these retirement benefits in 2009, before he turned 62. The claimant also received a notice of award from the Social Security Administration in November of 2009, specifying the claimant's entitlement date as January 2010. Although Social Security retirement benefit payments did not commence until after his work injury, the claimant was entitled to them when he turned 62—18 days before his work injury occurred—and, therefore, the employer was not entitled to a credit and/or offset. II

Once an employer's burden to pursue subrogation under §319 of the Act is satisfied, subrogation is automatic and a Workers' Compensation Judge's decision to suspend the claimant's benefits for failure to disclose the amount of recovery was proper.

Joseph Reed, deceased, Donna Palladino, Executor of the Estate of Joseph Reed and Alice Reed, deceased v. WCAB (Allied Signal, Inc. and its successor in interest, Honeywell, Inc. and Travelers Insurance Co.); 879 2014; filed April 21, 2015; by Senior Judge Colins

The Commonwealth Court had previously issued an unpublished decision in this same case holding that the Workers' Compensation Judge did not err in suspending partial benefits for a closed period until the claimant disclosed the amount of moneys recovered in a third-party tort action. Not long after circulating the opinion, the claimant filed review, modification and reinstatement petitions, which were dismissed by the Judge on the basis that the claimant had failed to disclose the monetary amount received in a third-party settlement. The claimant testified that she had no knowledge of any recoveries made, contrary to other evidence, including a joint tort release executed by Joseph and Alice Reed, as well as testimony from an attorney for the defendant in the third-party action establishing that there was a settlement and a release signed by Mr. Reed for the amount of one dollar. The witness also said that this was a group settlement common in asbestos litigation cases and that the division of the funds, which were more than one dollar, was left to the discretion of the claimant's attorney. The Judge concluded that the prior Workers' Compensation Judge's decision placed the burden on the claimant to establish the amount of the third-party recovery, that the claimant could not shift this burden onto the employer by filing the petitions, and that the claimant failed to carry the burden of accounting for the moneys. The claimant appealed, and the Appeal Board affirmed.

The Commonwealth Court affirmed the decisions below and dismissed the claimant's appeal. According to the court, the employer satisfied its burden that it was entitled to subrogation under §319 of the Act, thereby triggering the automatic subrogation provision. The Act does not make subrogation contingent upon an employer demonstrating the amount of recovery. The court held that the Judge correctly placed the burden on the claimant to establish the amount. II

Supreme Court holds that §319 of the Act does not confer on employers or their workers' compensation insurers a right to pursue a subrogation claim directly against the third-party tortfeasor when the compensated employee who was injured has taken no action against the tortfeasor.

Liberty Mutual Insurance Co. as subrogee of George Lawrence v. Domtar Paper Co. v. Commercial Net Lease Realty Services, Inc., and Commercial Net Lease Realty Trust, and Commercial Net Lease Realty, Inc. and National Retail Properties, Inc. and National Retail Properties Trust; 19 WAP. 2014; decided April 27, 2015; by Mr. Justice Baer

The claimant suffered a work-related injury when he slipped and fell in a parking lot leased by Domtar Paper that was owned and maintained by other entities. As a result of the injury, the claimant's workers' compensation insurance carrier paid the claimant $33,929.23 in benefits. Almost two years from the date of the December 13, 2009, work injury, the insurance carrier filed a legal action against the owners of the property, seeking to recover the amount paid to the claimant in workers' compensation benefits. The claimant did not file suit or pursue a settlement, nor did he assign his cause of action to the insurance carrier or join in the insurance carrier's suit.

The defendant field preliminary objections, contending that in the absence of an injured employee filing a suit in his own right, the workers' compensation carrier has no independent ability to bring a subrogation claim against the third-party tortfeasor. The trial court granted the preliminary objections. The insurance carrier filed an appeal to the Superior Court, arguing that §319 of the Act provided an absolute right to subrogation and that it should not be denied that right because the claimant declined to bring legal action. The insurance carrier relied on language from a 1930 Supreme Court case stating that the employer is not to be denied the right of suit because the employee does not sue, but may institute the action in the latter's name.

The court held that the right of action against a third-party tortfeasor under §319 of the Act remained in the hands of the injured employee and that the employer/insurer's right of subrogation must be achieved through a single action brought in the name of the injured employee or joined by the injured employee. Because the claimant did not commence an action, was not named in the action filed by the insurance carrier and did not join the action, the court held that the preliminary objections were properly granted and properly affirmed by the Superior Court. II

Side Bar

This was a 3-to-2 decision of the court. Chief Justice Saylor and Justice Todd pointed out, in dissenting opinions, that the caption as stated (*Liberty Mutual as Subrogee of George Lawrence*) indicated that it was standing in the shoes of the employee and was asserting the employee's rights and not suing in its own capacity. Consequently, the dissenters thought that the preliminary objections should have been overruled.

A claim petition litigated by an unrepresented claimant who was given more than adequate time to present evidence was properly dismissed.

Deborah Roundtree v. WCAB (City of Philadelphia); 1182 C.D. 2014; filed May 8, 2015; by President Judge Pellegrini

In this case, the claimant filed a claim petition alleging that she sustained psychiatric injuries as a result of her exposure to harassment, a hostile work environment, and race, gender and age discrimination while working for the employer. The claimant was not represented, and she failed to attend the first hearing conducted by the Workers' Compensation Judge. She appeared at the second hearing without counsel, at which time the Judge told her that she could testify at another hearing in 30 days and present medical evidence at that time. The claimant did testify at that hearing but did not offer any medical evidence. The Judge informed the claimant that another hearing would be scheduled in 90 days for her medical evidence. At that hearing, the claimant attempted to submit medical records into evidence, which the employer objected to as hearsay. The Judge explained that the medical records could come in if the claimant limited her claim to 52 weeks or less. Otherwise, a deposition would be needed. The Judge gave the claimant another 30 days to decide on taking a deposition and instructed the claimant to schedule it in the next 30 days if she planned on doing so. At the next hearing, the claimant told the Judge that she had not scheduled the deposition of a medical expert and she did not have any additional evidence. A motion to dismiss the case was made by employer's counsel and granted by the Judge without

prejudice, giving the claimant the opportunity to re-file the claim petition.

The claimant appealed to the Appeal Board, which affirmed the Judge. The Commonwealth Court did as well, holding that the Judge did not abuse her discretion in denying a further continuance of the claimant's case. The dismissal of the claim petition was solely the result of the claimant's repeated failure to adhere to deadlines imposed by the Judge, even when extended multiple times. The court also rejected the claimant's argument that her lay testimony alone supported her claim. According to the court, although medical evidence may not be necessary in cases where causal connection is obvious, this was not one of those cases. ||

Delaware Workers' Compensation

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Paul V. Tatlow

Superior Court affirms the Board's denial of the claimant's DCD petition based on its determination that substantial evidence supported the finding that the claimant did not prove a work-related accident.

Hardy v. Eastern Quality Vending, Superior Ct. C.A. No. S14A-10-003 THG (Decided 5/12/15)

This case involved the claimant's appeal of a Board decision that had dismissed his DCD petition in which the claimant alleged a work-related slip and fall on February 14, 2013, injuring his back and seeking temporary total disability as of March 4, 2013, and ongoing. The employer denied the occurrence of a work injury on that date.

The claimant was a unit manager for the employer. His duties included hiring and training staff, and he was in charge of food preparation and inventory. The claimant's evidence was that he slipped and fell at the Millsboro facility and injured his back and buttocks. He finished his shift and worked the next day, but by February 16, he was so sore he went to the ER. Thereafter, the claimant treated with several physicians and eventually had lumbar fusion surgery on January 27, 2014.

The issue before the Board was whether the claimant did, in fact, have a work-related accident on February 14, 2013. Both parties presented fact witness testimony and the depositions of medical experts. The employer's evidence included testimony that the incident did not occur as alleged; that the claimant had a prior slip and fall at a Christmas event in December 2012 after which he jumped right back up, saying he was not injured. Evidence also indicated that the work facility used on the day in question was Selbyville not Millsboro. Also, the claimant did not report the alleged injury for two months, despite being familiar with the need to do so since he filled out injury reports for his subordinates. The Board's decision denied the petition, finding that the claimant failed to meet the burden of proving that he sustained a work injury on the alleged date.

The Superior Court affirmed the Board based on its conclusion that there was substantial evidence to support the determination that no workplace accident occurred. The court reasoned that the claimant did sustain an injury, as evidenced by his medical treatment and surgery. However, what was disputed and found not to be established was whether the injury was from a workplace accident. The court noted that the claimant's own evidence gave conflicting dates as to when the injury occurred, including February 12, 13, 14, 15 or 16. Likewise, the employer's records did not show any events being held at its Millsboro facility in the month of February 2013. Therefore, the court stated that the claimant failed to establish a definite "time, place and circumstance" as required regarding an alleged work accident. ||

Side Bar

The claimant argued in his appeal that the employer has the duty pursuant to §2313 of the Act to file a First Report of Injury and that the claimant's credibility should not be affected when the employer fails to do so. The court agreed that an employer cannot ignore an injury reported by an employee stemming from a work accident it witnessed or was made aware. However, the court made a key distinction and points out that there must be an injury. That is, if the employer witnesses an accident, such as a slip and fall, they have no duty to file the First Report of Injury until the claimant notifies them that he was in fact injured. Since legally the First Report of Injury is not admissible as evidence against the employer in any Board proceeding, the practice of completing one, even where the injuries are unclear or unknown, is still an acceptable practice.

News from Marshall Dennehey

Frank Wickersham recently presented at the CLM 2015 Medical Legal Summit in Chicago. "Marijuana in Workers' Compensation—Medical and Legal Challenges" provided an overview of marijuana and its medical efficacy—especially pertaining to those diagnoses often seen within the workers' compensation industry. Additionally, a legal update and interpretation of recent rulings were presented, as well as strategies and solutions when marijuana is present on a workers' compensation claim. Frank was joined on the panel by Marcos Iglesias from The Hartford and Scott Yasko from Ameritox.

Niki Ingram authored an article in the April/May Edition of *Workers' Compensation* magazine, published by the CLM. Her article, "Three Things We Can Count On: Death, Taxes and Rising Workers' Compensation Costs," can be viewed here. ||