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What's Hot in Workers' Comp

# PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

## Employer met its burden of proving change of condition in second termination petition proceeding by presenting evidence that there was lack of objective findings to substantiate claimant's continuing complaints.

*David Baumann v. WCAB (Kellogg Company)*; 2603 C.D. 2015; filed September 23, 2016; by Judge Covey

Following a May 5, 2007, right shoulder and upper back injury from a work-related car accident, the employer filed a termination petition, based on the opinion of an IME physician, that the claimant was fully recovered. A Workers' Compensation Judge dismissed the termination petition. Thereafter, a second IME was performed on the claimant by the same physician, who again concluded that the claimant was fully recovered from his work injury. The employer then filed a second termination petition. The claimant also filed a penalty petition, alleging the employer violated the Act when it notified the claimant's surgeon that they would not pay for his right shoulder surgery.

The Judge granted the second termination petition, finding the IME physician's testimony to be more credible then the testimony of the claimant and his medical expert. Additionally, the Judge deemed the claimant's testimony of ongoing shoulder pain not credible given that he had not treated for it since December of 2009, his activities included playing guitar and video games, and he was able to get a tattoo on his right arm. Although the Judge granted the penalty petition, she awarded a zero percent penalty.

The claimant appealed to the Workers' Compensation Appeal Board, which remanded the case to the Workers' Compensation Judge for a determination on whether the employer met its burden of proving a change in condition from the prior termination petition. The Judge then granted the termination petition, concluding that the employer was able to show a change in condition. The Board affirmed this decision, and the claimant appealed to the Commonwealth Court.

In his appeal, the claimant argued that the termination petition should not have been granted because the employer did not show a change in condition from the prior termination petition. Pointing out that a change exists if there is a lack of objective findings to substantiate continuing complaints, the court noted that the Judge specifically found that the employer showed a change in condition, considering the claimant's incredible testimony regarding his activities in relation to his shoulder pain, the lack of medical treatment since 2009, and the additional studies on his shoulder that were performed after the first IME and prior to the second IME. The court affirmed the decision to terminate the claimant's benefits and sustained the zero percent penalty, holding that the amount of the penalty was within the Judge discretion. II

## Claim for benefits under § 108(r) for cancer suffered by firefighter must be brought within 600 weeks of last exposure to work-related hazards while working as firefighter or be subject to dismissal.

*Albert Fargo v. WCAB (City of Philadelphia)*; 2239 C.D. 2015; filed October 11, 2016; by Senior Judge Colins

In 1972, the claimant began working for the employer as a firefighter. In 1997, he was diagnosed with squamous skin cell carcinoma. On July 31, 2001, the claimant took sick leave after injuring his back in a motor vehicle accident, and he retired on September 16, 2002. In 2005, he was diagnosed with malignant melanoma, and on July 6, 2012, he was diagnosed with bladder cancer. On March 14, 2014, he filed a claim petition seeking benefits for the bladder cancer. At a hearing on April 25, 2014, he amended the claim petition to include the 1997 skin cell carcinoma diagnosis and the 2005 malignant melanoma diagnosis.

The Workers' Compensation Judge dismissed the petition as untimely, finding that the claim petition of March 14, 2014, was filed more than 600 weeks after July 31, 2001, the last day that the claimant appeared at work for the employer and, therefore, the last day of possible exposure to a carcinogen in the work place. According to the Judge, there was nothing in the Act that explicitly allowed for an extension of time for filing a petition beyond

600 weeks. The claimant appealed, and the Appeal Board affirmed.

The Commonwealth Court affirmed the decisions below, concluding that the claim petition was not timely filed. In doing so, they rejected the claimant's argument that the legislature intended § 301(f) of the Act to be an extension of the 300-week "manifestation" period of § 301(c)(2) for § 108(r) cases to 600 weeks. According to the claimant, he was entitled to pursue his claims for the squamous cell cancer and malignant melanoma—which were diagnosed in 1997 and 2005—because the diagnoses occurred within 600 weeks of his last work place exposure in 2001. The claimant conceded he was not entitled to a presumption for the bladder cancer because the diagnosis did not occur within 300 weeks of his last exposure. The court also rejected the claimant's argument that a discovery rule would be attached to § 301(f) if it was determined that § 301(f) required a claim under § 108(r) to be filed within 600 weeks of the last date of work place exposure. According to the court, the 600-week limitation period of § 301(f) acts as a Statute of Repose and is not subject to a discovery rule.

Overall, the Commonwealth Court held that the date of filing is determinative in § 301(f) rather than the date that disability manifests itself. According to the court, § 301(f) sets forth a two-tiered limitation for § 108(r) claims that is distinct from the time limit in § 301(c)(2). First, the claimant must file the claim within 300 weeks of the last date of work with exposure to a known Group 1 carcinogen. If the claimant fails to do so, he is not barred from bringing the claim by § 301(f), but he loses the statutory presumption in § 301(e) and § 301(f). However, if the claimant does not file the claim until more than 600 weeks after the date of the last work place exposure, he is forever barred from bringing that claim in its entirety. II

### A joinder petition will be deemed untimely if not filed within 20 days of "triggering event" in litigation.

*John Jackson Jr. v. WCAB (Radnor School District and ACTS Retirement Community)*; 228 C.D. 2016; filed October 19, 2016; by Judge Wojcik

The claimant injured his knee on September 4, 2002, while working for Employer A, a school district. He was concurrently employed with Employer B, a retirement community. After his work injury, the claimant never returned to his position with Employer A. However, he did return to work for Employer B, working there through March 31, 2013. On April 1, 2013, the claimant filed a reinstatement petition against Employer A, alleging a worsening of his condition.

According to the claimant, after the 2002 work injury, Employer B permitted him to work modified duty. However, in February of 2013, the claimant was told he could no longer work modified duty, and, ultimately, this employer terminated his employment.

During the course of litigation, the claimant's medical expert was deposed on October 2, 2013. During that deposition, the expert testified that the claimant had advanced degenerative joint disease that was aggravated by his original work injury and his subsequent work activities with Employer B. On October 22, 2013, Employer A filed a petition for joinder against Employer B. The Workers' Compensation Judge found the claimant's testimony credible to establish that his increased knee pain was related to his work with Employer B and not to his original work injury. The Judge also found the claimant's expert's testimony credible to establish that the claimant's left knee was aggravated by his continued work with Employer B. The Judge also found that the joinder petition was timely because the evidence on which it was based was known to the parties at the claimant's medical expert's deposition. Employer B and the claimant were seeking a dismissal of the joinder petition on the basis that it was untimely.

Employer B appealed to the Appeal Board, which reversed the Judge's decision, concluding that the joinder petition was not filed timely. According to the Board, the joinder petition should have been filed after the claimant gave his testimony on May 6, 2013, at which time he said his physical duties with Employer B were causing an increase in his pain. The claimant appealed to the Commonwealth Court, but they affirmed the Board. The court pointed out that the testimony given by the claimant on May 6, 2013, was summarized by the Workers' Compensation Judge in his decision. That testimony credibly established that the claimant had increased pain over the years from performing his job duties with Employer B. This finding was not challenged by the claimant on appeal, and the court held that this testimony was the "trigger" for filing a joinder petition. II

### Special Announcement

The Supreme Court of Pennsylvania will be hearing oral argument in the IRE case of *Protz v. WCAB (Derry Area School District)*. The Justices will decide whether § 306(a.2) violates the Pennsylvania Constitution by delegating law making authority to the American Medical Association and will further consider whether the Commonwealth Court improperly remanded the *Protz* case so THAT the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment could be used for an IRE.

# New Jersey Workers' Compensation

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Dario J. Badalamenti

### The Appellate Division affirms a Judge of Compensation's dismissal of petitioner's occupational claims due to petitioner's failure to establish that her disability was due in a material degree to conditions at work that were characteristic of or peculiar to her employment.

*Scafuri v. Sisley Cosmetics, USA*, Docket No. A-2065-14T3, 2016 N.J. Super. Unpub. LEXIS 1457 (App. Div., decided June 24, 2016)

In May of 2004, the petitioner began working as a dual employee for Employer A Cosmetics and Employer B Department Store. As an Employer A counter person, the petitioner's responsibilities included receiving, cataloguing and stocking product; sales; calling customers; and applying make-up to potential customers. She was also occasionally required to transport product to and from the stockroom. On March 18, 2005, the petitioner slipped and fell in the stockroom, striking her head. Following the injury she saw a doctor, who recommended that she avoid stockroom

work and lifting. However, she continued to perform her duties with Employers A and B as before.

On August 3, 2005, the petitioner underwent an MRI of the cervical spine, which evidenced C3-4 and C4-5 disc herniations. She underwent a cervical fusion at the C4-5 and C5-6 levels in February 2006. She was out of work for approximately five months following the surgery and returned to Employers A and B in or about July 2006.

In November of 2006, the petitioner underwent another MRI of the cervical spine, which revealed myelomalacia, a softening of the spinal cord, as well as additional cervical disc pathology. The petitioner continued her employment with Employers A and B until January of 2007.

In or about May of 2007, the petitioner began working for Employer C Department Store as a sales associate in the cosmetics department. The petitioner testified that her job duties with Employer C were essentially the same as those when she worked with Employers A and B. The petitioner's employment with Employer C continued through November of 2007, at which time she underwent a second cervical fusion surgery to address the C3-C4 level. The petitioner never returned to work and in 2008 was awarded total and permanent disability by the Social Security Administration.

In June of 2008, the petitioner filed separate occupational exposure claims against Employers A and B with the Division of Workers Compensation. In September of 2011, she filed an occupational claim against Employer C. At the conclusion of trial, the judge of compensation dismissed with prejudice the petitioner's claims against Employers A, B and C. In doing so, the judge found that the petitioner failed to meet "her burden of establishing that her disability was due in a material degree to conditions at work that were characteristic of, or peculiar to her occupation." This appeal followed.

In affirming the judge of compensation's dismissal, the Appellate Division relied on an analysis of N.J.S.A. 34:15-31(a), which provides in relevant part, that:

> [T]he phrase "compensable occupational disease" shall include all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment.

The term "material degree" is defined as "an appreciable degree or a degree substantially greater than de minimis." See N.J.S.A. 34:15-7.2.

The Appellate Division found that the petitioner failed to meet her burden of establishing causation in this matter. The judge of compensation characterized the attempts of the petitioner's expert, Dr. Vaccaro, to relate the petitioner's disability to her work activity with the respondents as being problematic. Rather, the judge found Sisley's expert, Dr. Effron, to be significantly more credible and compelling on the issue. Dr. Effron flatly rejected allegations that working as a cosmetic sales associate entailed the type of bending and lifting that caused or materially contributed to the petitioner's disability. In quoting the judge of compensation, the Appellate Division concluded that:

> [P]etitioner's work activities, including make-up application, facials, packing and unpacking, stocking and even lifting boxes containing small cosmetic products, essentially involved the same types of activities that she would undertake in the course of any ordinary day or week, and could not have placed any additional stress upon her body, and as such, did not materially contribute to her disability under N.J.S.A. 34:15-31(a). II

## Side Bar

Of significance here, the judge of compensation found that there was overwhelming evidence showing that the petitioner's cervical disability was related to her March 18, 2005, work-related incident and resulting fusion, for which no claim was ever filed. [Apparently, the petitioner was concerned that filing a workers' compensation claim at that time would have jeopardized her continued employment.] Rather, the petitioner filed claims against the companies that employed her following her return from surgery in July of 2006, alleging that working for them caused her to suffer an occupational disease. As the judge of compensation stated:

> The issue in this case is whether the petitioner's occupational disease claims against the respondents . . . can survive if her cervical disability is found to be related to her March 18, 2005, accident while in the stockroom at [Employer B], for which no claim was ever filed.

The judge of compensation properly concluded that the petitioner's occupational claims could not survive.

# News from Marshall Dennehey

**Michele R. Punturi** (Philadelphia, PA) secured a favorable decision on two petitions to review utilization review determinations. The initial utilization review determinations found the treatment of three providers to be unreasonable and unnecessary. These were challenged by the claimant, for which he submitted medical reports of the providers. We submitted utilization review determinations that were favorable, along with the CVs of those utilization reviewers, and the medical reports from each responding in opposition to the medical reports submitted by the claimant. We also received an IME evaluation that found the claimant to be fully recovered, and we presented the testimony of the IME expert. Finally, we submitted surveillance favorable to the defense. The judge ultimately found our evidence to be credible and persuasive and that the claimant had fully recovered from the work injury. He further found that the claimant was not in need of medical treatment.

**Estelle McGrath** (Pittsburgh, PA) and **Audrey Copeland** (King of Prussia, PA) obtained the Commonwealth Court's affirmance of the denial of a claim petition and termination of benefits in an employer's favor in an alleged occupational exposure case. The court rejected the claimant's assertion that the Workers' Compensation Judge failed to make essential findings as to the experts' testimony. Even without a specific finding, it could reasonably be inferred that the judge rejected the testimony of the claimant's family physician because the judge had rejected the opinion of the claimant's occupational medicine expert upon whom the family physician had relied. Nor was any error found on the basis of the judge's failure to make a credibility determination as to the employer's expert pulmonologist, as the claimant bore the burden of proof, and the expert's opinion was that the claimant did not suffer from occupational asthma.

**Ashley Talley** (Philadelphia, PA) successfully defended a national broker for delivery services in a workers' compensation claim. The claimant was a contract delivery driver for our client. While in route to a delivery, he was involved in a motor vehicle accident and sustained injuries that 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 accepted Ashley argument and denied the claim petition in its entirety.

**Tony Natale** (Philadelphia, PA) successfully defended a national thermographic inspection company in litigation surrounding an alleged employee stroke and disability. The claimant alleged 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, and he alleged that travelling for the company caused plaques in his circulatory system to dislodge and damage his heart, leading to a stroke. Tony presented evidence which proved that the claimant was not travelling long distances prior to the stroke and that the stroke 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. ||

# Delaware Workers' Compensation

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

**The Board grants the employer's termination petition and holds that the agreement as to compensation is null and void since the evidence showed the claimant committed fraud in claiming the work injury.**

*Armstrong Agbortabi v. Resources for Human Development*, (IAB No. 1431894 – Decided October 5, 2016)

This *pro se* claimant alleged he had been injured on June 19, 2015, while working for the employer as a certified nursing assistant/residential assistant when he fell as he stepped out of a van and sustained injuries to his jaw and face. The employer accepted this claim as compensable and paid compensation for temporary total disability from June 20, 2015, to February 22, 2016, with the total of the wage loss benefits being $15,347.94. In addition, the employer paid medical benefits on behalf of the claimant totaling $19,183.03.

The litigation before the Board was on the employer's termination petition in which it was alleged that the claimant committed fraud and that his claim and any agreements issued for the work injury should be deemed void. The claimant testified before the Board that his job duties required him to drive residents/clients to various locations. On June 19, 2015, he had picked up a client and was taking him to the bank. The claimant testified that as he stepped out of the van, he tripped and fell against the door of the van, hitting the left side of his face against the door handle. The claimant stated that he struck his jaw and was dazed and "blacked out" as everything became blurry. The claimant did acknowledge that he returned to the employer's facility and had a second incident that day.

The second incident occurred when the claimant drove the van, again with the same resident, to a pharmacy where the claimant made a personal transaction to obtain money from the Western Union desk in that store. The evidence showed that the claimant presented false identification in an effort to get this money and that the police were called and confronted the claimant. When the Delaware State Police Officer began to question the claimant and then search him, the claimant ran out of the store. The officer pursued him and tasered him, causing the claimant to fall face first into a curb and a mud puddle. The officer testified that the claimant was taken to the hospital by ambulance with lacerations and multiple face fractures.

The employer presented a fact witness who testified that further investigation into the alleged work injury determined that the claimant had never completed an incident report and did not make a timely report of the incident to his manager. Furthermore, the resident/client who was in the van with the claimant that day stated that the only incident he had observed was the one with the police officer at the pharmacy.

The applicable legal standard, as recited by the Board, is that, when an employer seeks to terminate benefits, the Board will not revisit final matters resolved by an agreement unless there has been a mutual mistake or a finding of fraud. In this case, the Board concluded that the alleged work incident, in fact, never happened and that the employer had, therefore, met the burden of showing fraud since the claimant had deliberately engaged in misrepresentation of facts to try to establish a non-existent work injury so as to receive benefits. Accordingly, the Board granted the employer's petition and declared that any agreement with regard to the alleged work injury was null and void. The Board further referred this matter to the Fraud Prevention Bureau for further proceedings. ||

## Side Bar

This case illustrates the importance of fully investigating all alleged work injuries in order to determine whether it is, in fact, a valid claim. Such an investigation involves taking a statement not only from the claimant but also from any witnesses or supervisors with the employer. In addition, in this case, it was through the medical records that it was determined that, following the alleged work injury, the claimant never received any medical treatment and that the hospital records showed that the only incident reported by the claimant was being tasered by the police officer following his fraudulent Western Union transaction.