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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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A tractor driver hired to move bins during the apple picking season was not a seasonal employee but an itinerant agricultural laborer and, therefore, entitled to a higher average weekly wage and compensation rates.

Toigo Orchards, LLC and Nationwide Insurance Company v. WCAB (Gaffney), No. 722 C.D. 2016; Filed Mar. 13, 2017; Judge Cohn-Jubelirer

At the time the claimant sustained a work-related injury to his eye while working for the employer, he was earning $9.00 per hour. He was hired to drive a tractor and move bins for apple pickers in an orchard. The employer paid the claimant under a Notice of Temporary Compensation Payable, using an average weekly wage of $35.10, based on seasonal employment. Later, the employer issued a Medical Only Notice of Compensation Payable. The claimant filed a claim petition, requesting specific loss benefits for the loss of vision in his left eye.

The Workers' Compensation Judge first decided the issue of the claimant's employment classification and average weekly wage. He concluded that the job the claimant was hired to perform was exclusively seasonal and that the original average weekly wage calculation of $35.10 was correct. Additionally, the judge awarded the claimant specific loss benefits of 275 weeks, at a $31.59 per week compensation rate.

The claimant appealed to the Workers' Compensation Appeal Board, which reversed the Workers' Compensation Judge, concluding that the judge focused too much on the period of employment and not the nature of the work. The Board characterized the claimant's employment as "itinerant agricultural laborer." According to the Board, short-term employment is not synonymous with seasonal occupation. The Board also concluded that the claimant's average weekly wage should be calculated by dividing the claimant's total gross earnings by the number of weeks that he worked. In doing so, they arrived at an average weekly wage of $351 and a compensation rate of $315.90. The claimant had argued that Section 309(d.2) should be used to calculate his average weekly wage since he worked less than 13 weeks and did not have fixed weekly wages. According to the claimant, his average weekly wage was $450.

The Commonwealth Court agreed that the claimant was not a seasonal employee. They concurred with the Board that the claimant was an itinerant farm laborer, who could travel from state to state to harvest crops or engage in other related work. The court also pointed out that the claimant did not have a contract prohibiting him from finding work as a laborer somewhere else. Additionally, the court agreed with the Board's average weekly wage calculation given that it fairly addressed the claimant's earnings when he was actually working and advanced the humanitarian purpose of the Act, as well as the purpose of Section 309, by accurately capturing the claimant's economic reality. In the court's view, Section 309(d.1) did not apply since that section was intended to govern long-term employment relationships and Section 309(d.2) did not reflect the claimant's economic reality. Finally, the court did reverse the Board's award of a healing period to the claimant because the employer presented evidence that the claimant was retired and collected Social Security Retirement Benefits both prior to and after his work with the employer and had no intention of returning to work after his injury. For this reason, the claimant did not require a period for healing. **II**

The claimant's wages were fixed by the week, and because he was not paid on an hourly basis at the time of his work injury, the claimant's average weekly wage must be calculated pursuant to Section 309(a) of the Act.

Archie Lidey, III v. WCAB (Tropical Amusements, Inc.), No. 726 C.D. 2016; Filed Mar. 17, 2017; Judge Brobson

The claimant worked for the employer as a manager/fabricator. The employer was a family-owned business that provided amusement rides

to fairs and carnivals. On August 4, 2013, the claimant was assembling a carnival ride at a county fair when the ride malfunctioned, causing serious injury to the claimant's right arm. The employer issued a Notice of Compensation Payable, acknowledging a right arm fracture injury. The claimant was paid compensation benefits at the rate of $458.50 per week, based on an average weekly wage of $640. The claimant filed a petition to review, alleging that his average weekly wage was improperly calculated.

The claimant said that in 2012, he was paid $1,000 per week from the first week of June to the last week of September. In 2013, his weekly wages were increased from $1,000 to $2,000 in connection with additional management duties he took on. When the carnival season ended, he was required to work through the winter months attending conventions and trade shows, negotiating contracts, buying and selling carnival rides, and finding deals on ride parts. As a result of these duties, the claimant said his weekly wages of $2,000 were supposed to continue beyond the 2013 carnival season. He claimed that, had he not been injured, he would have expected his weekly pay to continue through the end of 2013 and 2014.

The employer presented testimony from the claimant's mother, the president of the company. She said that her son was mistaken about being paid for attending conventions during the winter months and received money only when he sold equipment for the company. According to her, the claimant was just trying to help the family business by working over the winter. She also confirmed that the claimant was paid $2,000 per week beginning in 2013.

The Workers' Compensation Judge granted the claimant's petition. In doing so, the judge concluded that the claimant was not a seasonal employee and that his average weekly wage was improperly calculated. The judge found that the claimant's average weekly wage was $2,000, resulting in a compensation rate of $917 per week. On appeal to Appeal Board, the Board affirmed but modified the claimant's average weekly wage to $717.95, concluding that Section 309(d) of the Act should be used to calculate the claimant's average weekly wage since it was a more accurate reflection of the claimant's economic reality.

The Commonwealth Court reversed the Board's average weekly wage calculation and granted the claimant's appeal on this issue. Citing the Supreme Court's interpretation of Section 309 in the case of *Lancaster General Hospital v. WCAB (Weber-Brown)*, 47 A.3d 831 (Pa.2012), the court noted that Section 309(d) of the Act should only be utilized to calculate the average weekly wage of claimants who are paid by the hour. The court pointed out that both the claimant and his mother testified that his wages were fixed by the week at $2,000 at the time of the injury and that Section 309(a) provides for a straight-forward method for calculating the average weekly wage of employees who have fixed weekly wages. Therefore, the court found that the claimant's average weekly wage must be calculated pursuant to Section 309(a) of the Act. **II**

News from Marshall Dennehey

John Zeigler (Harrisburg, PA) is speaking at the *3rd Annual A Jackpot of Topics* presented by Magee Rehabilitation Hospital, Genex and RedMed. This day-long conference will be held on **May 12, 2017**, at Hollywood Casino at Penn National Race Course, Grantville, PA. John will participate in a panel discussion entitled "Minimizing Workers' Compensation Risk and Loss in an Aging Workforce Era." Other sessions include "Oh My Ethics! Ethical Challenges for Case Managers and Rehabilitation Counselors," "Best Efforts to Control Excess Narcotic Prescribing," and "Demonstrating Progress and Preserving Stability: Measuring Outcomes in Brain Injury Treatment." For more information or to register, contact Lexi Barnes at 484.595.9300 or e-mail info@redmed.com.

Michele Punturi (Philadelphia, PA) is speaking at the *2017 CLM & Business Insurance Workers' Compensation Conference*, which will be held at the Chicago Marriott Downtown on **May 24 and 25, 2017**. This conference offers unprecedented knowledge access to leaders in the workers' compensation profession. Michele will join a panel of industry professionals to discuss "Today's 'Medical Only' Claim is Tomorrow's 'Indemnity Claim.'" The challenges faced by employers, insurance carriers and third-party administrators are mounting in the workers' compensation arena. More often than not, claims initially identified as "medical only" are increasingly being categorized as "indemnity" claims. What can be done to better protect companies? Clearly, injury prevention is key. And while each claim has its unique facts and not all will be handled in the same manner or by the same claims professional, setting and maintaining strategic goals in every case will avoid unnecessary costs. What are the factors that give rise to these ever-expanding claims? Do such claims share common characteristics? Are there ways to identify, prevent and limit them? How can the use of predictive analytics, which allows organizations to identify troublesome claims before they become complex and costly, support a positive outcome? This session will provide valuable insights about preventing medical-only claims from becoming indemnity claims. Attendees will recognize the issues and causes that arise and learn how to mitigate the costs of such claims to achieve the most favorable results. For more information and to register, **click here**.

Niki Ingram, Director of the Workers' Compensation Department, is a presenting "Analytics Overload! How Much Is Too Much?" at the National Council of Self Insurers annual conference on June 7, 2017. Data and analytics are essential elements of the claims handling process today, and self-insureds are increasingly judging their law firm's performance based on them. But how do analytics impact a self-insured's relationship with defense counsel? How are good results defined – as a closed file or a win? What is the best way to ensure that you get quality service while paying attention to the numbers? Niki will answer these questions and more during her engaging presentation. **Click here** for more details.

Kacey Wiedt and **Shannon Fellin** (Harrisburg, PA) are presenting a live webinar, "Best Practices to Avoid Common Workers' Compensation Mistakes," on June 29, 2017. One of the most difficult challenges

facing employers today is the management of sky-rocketing workers' compensation costs. While avoidance of litigation is always the goal, it is not always possible. When litigation ensues, steps can be taken to avoid common workers' compensation litigation mistakes to help contain and mitigate costs. This webinar will benefit those involved in the claims handling process by identifying these common mistakes, as well as the solutions to remedy them. You will also benefit from learning best practices in risk management to avoid mistakes in the first place. When the employer, insurance claims adjuster and defense attorney align toward the goal of reducing workers' compensation litigation costs, a company is well-positioned for future growth and success. For more information or to register, **click here**.

Tony Natale (Philadelphia, PA) successfully prosecuted a termination petition and defended both a petition to review and a petition to reinstate on behalf of a Berks County canning, mushroom and food processing distribution facility. The claimant had injured her bi-lateral upper extremities doing assembly line work in 2013. She underwent bi-lateral upper extremity surgery and returned to work only to abandon the job one year later. Subsequently, an extremely sedentary duty job was offered to her (visually examining mushrooms), which was refused. After litigation, indemnity benefits were suspended based upon the claimant's unjustified refusal of available employment. The claimant then alleged that her condition severely worsened to such a degree that she was incapable of performing the job she had previously refused. Tony offered evidence to support the fact that the claimant's injuries had fully recovered and that her work injuries did not prevent her from viewing mushrooms in a sedentary capacity. The claimant responded, arguing that her upper extremity injuries had "moved" into her shoulders bi-laterally and totally disabled her from employment. The Workers' Compensation Judge reviewed the medical evidence presented by the parties and found the claimant to be fully recovered from her work injury, while further finding the claimant did not sustain any additional injuries or disabilities.

Ashley Talley (Philadelphia, PA) was successful in defending against a claim petition and a penalty petition for right shoulder injuries the claimant alleged were caused by repetitive, cumulative trauma at work. The claimant was employed as an assembly line worker for the insured, a thermometer manufacturer. Her specific job was to assemble various thermometer parts. During her testimony, the claimant described this work to be very physical and high volume. However, Ashley was able to undermine these allegations by presenting fact witness testimony, and a live demonstration of the claimant's pre-injury duties, to show how little physical exertion was actually required. This made a lasting impression on the Workers' Compensation Judge, who also found testimony from the employer's orthopedic expert to be more credible than the claimant, who relied upon the opinions of a well-recognized, vetted shoulder expert. The judge issued a complete denial of the claim and penalty petitions.

John Zeigler (Harrisburg, PA) obtained a termination of benefits and a denial of claim and penalty petitions in a case where the claimant had injured his lower back from a slip and fall while working as a forklift operator. John presented credible testimony from our medical expert that the claimant's injuries were limited to a lumbar sprain/strain and that the claimant had fully recovered as of the date of the IME. The Workers' Compensation Judge rejected the opinions of the claimant's treating physician that he had developed a "floating" discogenic radiculopathy as the result of the work injury and that the claimant was disabled from employment. The judge credited the employer's supervisor's testimony that the claimant had returned to full-duty work without apparent production issues and without any physical limitations for a significant timeframe prior to his treating physician taking him out of work. ||