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What's Hot in Workers' Comp

# PENNSYLVANIA WORKERS' COMPENSATION

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

## Because he was urged by employer to report to work although he intended to take a sick day, claimant was in course and scope of employment when car accident occurred.

*Lutheran Senior Services Management Company v. WCAB (Miller)*; No. 1074 C.D. 2016; filed Feb. 15, 2017; Judge McCullough

The claimant worked for the employer as the director of maintenance. He filed a claim petition alleging he sustained multiple injuries as a result of a work-related motor vehicle accident. The employer denied the claim on the basis that the claimant was not in the course of his employment at the time of the accident, which occurred while he was driving to work.

The claimant presented evidence that, on the date of the accident, he was feeling sick and planned to call out from work. While on the phone with his ex-wife discussing his symptoms, the employer's phone call "beeped in." The employer asked if he was available to report to work since their security cameras were down. The claimant told his employer he was not available because he was sick and said that other workers could handle it. The employer responded by telling the claimant that other employees had already called off for the day. Consequently, the claimant decided to report to work. While en route, he began feeling nauseous, which caused him to veer off the road and hit a telephone pole. The employer verified that the claimant was contacted on the date of the accident by cell phone, but he thought the claimant was already at work when he was called. The employer also said that the claimant never advised that he planned on taking a sick day.

The Workers' Compensation Judge granted the claim petition, concluding that the injuries sustained by the claimant while commuting to work fell under the special circumstances exception to the Coming and Going Rule. The judge believed the claimant's testimony, that he planned to take a sick day on the date of the accident and that, but for the employer's special need regarding the surveillance cameras, he would not have gone to work.

The Workers' Compensation Appeal Board affirmed on appeal.

The Commonwealth Court agreed with the Workers' Compensation Judge and the Board, finding the claim compensable. The court pointed out that the claimant was considered an "on-call" employee; one who is paid from door-to-door when responding to on-call assignments or emergencies. According to the court, the claimant was ill and intended to take a sick day and would not be expected to report to work. But, under the circumstances, the employer especially requested the claimant to come to work. Therefore, the court found that the claimant was "on the clock" from the time he picked up the employer's phone call at home and fielded a specific request to fix the security cameras. II

## Claimant's deviation from employment to obtain feminine hygiene products was a temporary departure; therefore, her injuries are compensable.

*Starr Aviation v. WCAB (Colquitt)*; No. 659 C.D. 2016; filed Mar. 7, 2017; Judge McCullough

The claimant worked for the employer at the Pittsburgh International Airport. Her job involved driving a tug (vehicle used to transport luggage) with a cart attached, unloading and reloading baggage onto airplanes, and dropping bags off at a belt so passengers could retrieve them. Most of the claimant's duties were performed at a terminal where airplanes departed, but sometimes she was required to travel to another terminal.

On the date of injury, the claimant reported for her regular shift. Her menstrual cycle began after she left home, and she realized she had forgotten her wallet when she arrived at work. She called her mother and asked that she bring her feminine hygiene products and money.

Approximately six hours into her shift, the claimant drove a tug from the terminal where she was located to another terminal in order to meet her mother. The claimant had received permission to do so from her supervisor. The claimant's mother brought her the feminine hygiene products, money, as well as other items. While the claimant was driving the tug, it flipped and trapped her left leg. After being transported to the hospital by ambulance, the claimant's left leg was amputated below the knee.

Subsequent to the employer's denial of the claim on the basis that the claimant was not in the course of her employment, the claimant filed a claim petition. The Workers' Compensation Judge granted the petition, concluding that the claimant's temporary departure from performing work to administer to her personal needs did not take her out of the course of her employment. The Appeal Board affirmed.

The Commonwealth Court agreed with the judge and the Board that the claimant was in the course and scope of her employment at the time she suffered her injury. According to the court, the claimant's conduct fit within the Personal Comfort Doctrine, which holds that an employee does not fall outside the course of employment for a momentary departure from active work in order to attend to "personal comfort," such as using the restroom, changing contact lenses, etc. II

## Error in granting fatal claim petition because claimant failed to introduce Pennsylvania Fire Information Reporting System Reports to establish that decedent was directly exposed to carcinogens while serving as volunteer firefighter.

*Cheryl Steele and Roy Steele (Deceased) v. WCAB (Findlay Township)*; No. 875 C.D. 2016; filed Mar. 8, 2017; Judge Cohn Jubelirer

The decedent had worked for the volunteer fire department since 1968. He held the position of fire chief for 20 years before stepping down in 2004 due to high blood pressure. In 2009, the decedent was diagnosed with Stage 4 lung cancer. Nevertheless, he continued to respond to fires and served as a captain until the year before he died in 2011.

The claimant filed a fatal claim petition in which she alleged the decedent's cancer was caused by exposure to carcinogens recognized as Group 1 by the International Agency for Research on Cancer. Evidence of the decedent's exposure to carcinogens was presented through testimony from volunteer firefighter witnesses. No Pennsylvania Fire Information Reporting System Reports (Penn FIRS) were introduced by either party. The Workers' Compensation Judge granted the petition, concluding that the testimony of the witnesses was sufficient to establish the decedent's exposure. The employer appealed to the Appeal Board, which reversed.

The Commonwealth Court affirmed the Board, concluding that the Workers' Compensation Judge erred in granting the fatal claim petition. In doing so, the court cited Section 301(f) of the Act, which states that any claim made by a member of a voluntary fire company shall be based on evidence of direct exposure to a carcinogen referred to in Section 108(r) as documented by reports filed pursuant to Penn FIRS. According to the court, this provision of the Act requires volunteer firefighters to provide evidence of direct exposure to carcinogens via these reports and the testimony of the witnesses to be insufficient to satisfy this requirement.

However, the court agreed with the claimant's argument that, regardless of whether Penn FIRS reports were required, relief was still available under Section 108(o) (occupational disease) and/or Section 301(c)(1) (injury) of the Act. Consequently, the court vacated the Appeal Board's order and remanded the case for consideration of whether Sections 301(c)(1) and/or 108(o) provide a basis for recovery. II

## New time limitation created by Act 46 for Section 108(r) claims by firefighters was substantive change, establishing new Statute of Repose that could not be applied retroactively to extend time for bringing firefighter occupational disease cancer claim.

*City of Warren v. WCAB (Thomas Haines, Deceased, by Sharon Haines, Claimant)*; No. 468 C.D. 2016; filed Mar. 9, 2017; President Judge Leavitt

The decedent had worked for the employer as a firefighter from January 1970 until retiring in February 2003. While working at the fire department, the decedent was exposed to smoke, soot and other carcinogens, including asbestos. At the firehouse the decedent was exposed to diesel fumes and cigarette smoke. He passed away on August 18, 2009, approximately 341 weeks after his retirement. The claimant filed a fatal claim petition, seeking benefits as the dependent wife of the decedent.

Finding that the decedent died from colon cancer from exposure to IARC Group 1 Carcinogens, the Workers' Compensation Judge granted the fatal claim petition. The employer appealed to the Appeal Board, arguing that the fatal claim petition was time barred and that, moreover, causation was not proven. The Board affirmed the judge. In doing so, the Board concluded that Act 46—allowing for cancer claims by firefighters to be made within 600 weeks after the last date of exposure—applied retroactively and that the limit of 300 weeks that existed prior to Act 46 did not apply.

The employer appealed to the Commonwealth Court, which held that the Board was wrong to apply Act 46 retroactively to allow for a claim that would have been extinguished under the governing law at the time of the decedent's injury and death. According to the court, Act 46 created a new time limitation for a Section 108(r) claim by a firefighter that his or her cancer is an occupational disease and thus compensable. Instead of the limit of 300 weeks that applied to all other occupational diseases, a claim filed under Section 108(r) may be made within 600 weeks after the last day of exposure to the hazard of the disease. The court interpreted the 600-week limitation period of Section 301(f) as a Statute of Repose and, therefore, a substantive change to the law that could not apply retroactively without a clear directive from the legislature, which Act 46 lacks. At the time of the decedent's death, Section 301(c)(2) of the Act governed the time limitation for an occupational disease claim, which was 300 weeks after the last date of employment to which there was exposure. The court noted that the decedent last fought a fire on December 25, 2002, retired on February 2, 2003, and passed away on August 18, 2009. Assuming December 25, 2002, was the date of the decedent's last exposure, his death was approximately 347 weeks after that date. Consequently, his death did not occur within 300 weeks after the last exposure to a hazard, nor did the decedent suffer a disability within that time period. Under Section 301(c)(2), the decedent's right to compensation for his cancer had extinguished before Act 46 was enacted. II

# Delaware Workers' Compensation

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

Paul V. Tatlow

## Board rules in favor of employer that when filing Petition to Determine Compensation Due, it should contain detailed responses regarding alleged work injury and be personally signed by claimant.

*Brian Bryan v. LB Cleaning Services*, (IAB No. 1448945 – Decided Feb. 14, 2017)

This case came before the Board on the employer's motion seeking to compel the claimant to provide full and complete allegations in his petition to determine compensation due, which is, of course, the standard petition filed when a claimant is alleging a work injury. The subtitle to that pleading is Statement of Facts Upon Failure to Reach an Agreement, which is then followed by 20 paragraphs that are to be completed.

The DCD petition alleged the claimant was injured on August 17, 2016, while working for the employer. The petition itself was signed by claimant's counsel with a typed signature, commonly referred to as an electronic signature. The employer argued that many of the responses to the 20 paragraphs were inadequate. For example, when asked to list the body part injured, the response was only "torn meniscus." When asked to list the average weekly wage when injured, the response was only "$10.00 an hour." When asked to list the names and addresses of all treating doctors, the response was only "Premier Orthopaedics" and "St. Francis Hospital," and there were no actual names or addresses for the treating doctors. Likewise, when asked for the names and addresses of all other treating doctors the claimant had seen in the past ten years, no response was given at all. Claimant's counsel argued in opposition to the employer's motion that the responses were adequate and that any incomplete answers could be further supplemented in a request for production.

The Board ruled in favor of the employer and directed that the claimant and his counsel prepare and provide updated responses to the Statement of Facts within ten days from the order. The Board further ruled that in order to show he actively participated in preparing those answers, the claimant should personally sign the response. In making this ruling, the Board commented that a DCD petition should, whenever possible, be personally signed by the claimant. They did recognize that there may be rare instances where counsel needs to sign on behalf of a claimant in order to avoid a statute of limitations issue. Because there have been so many instances where a claimant is confronted with the Statement of Facts in the DCD petition and testifies that he or she has never even seen it or signed it, the Board emphasized that the best practice is for claimants to sign this pleading.

The Board emphasized that counsel for the claimant has the obligation to see that the Statement of Facts in the DCD petition is prepared carefully in order to avoid any misrepresentations that could mislead or obstruct the Board and defense counsel. The Board further commented that listing the injury as only "torn meniscus" is clearly inadequate since it does not even give a hint as to which leg was allegedly injured. Likewise, listing $10.00 an hour as to the average weekly wage inquiry is inadequate since the question is asking for a weekly wage that would include the number of hours allegedly worked per week. The Board also reasoned that providing full and detailed answers to the allegations is in the interest of both the claimant and his or her counsel. Failing to do so is likely to lead to delays in having a hearing on the merits of the claim. II

# News from Marshall Dennehey

**Ross Carrozza** and **Jennifer Callahan** (Scranton, PA) are speaking at the National Business Institute's two-day seminar, *Workers' Compensation from A to Z*, which focuses on handling workers' compensation cases. The seminar will explore the comprehensive nature of a workers' compensation claim from start to finish and provide attendees with the knowledge they need to improve the outcomes of their workers' compensation cases. Jennifer will present "Settlement Options," while Ross will present "Workers' Compensation Medicare Set-Aside Arrangements." This seminar will take place at the Courtyard Scranton Wilkes-Barre, Scranton, PA on Tuesday, April 25 and Wednesday, April 26, 2017. Click here for more information.

**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**.

For the fifth year running, **Kristy Salvitti** (Mount Laurel, NJ) has been selected as a Rising Star in the 2017 edition of *New Jersey Super Lawyers* magazine. From 2005 through 2007, she had been selected as a Rising Star in the *Pennsylvania Super Lawyer* magazine.

**Judd Woytek** (Allentown, PA) successfully litigated a petition for approval of attorney's fees that was untimely filed by a claimant's attorney in a Federal Black Lung case. The attorney filed her application for approval of $11,047.50 in attorney's fees approximately two and one-half years after the deadline granted to her by the Department of Labor. Judd successfully argued to the District Director and the Benefits Review Board on appeal that the application for approval of attorney's fees should be denied and dismissed due to its extraordinarily untimely filing.

**Judd Woytek** (Allentown, PA) obtained a termination of benefits in a case where the claimant had injured his lower back while lifting ramps on a trailer. Judd 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 judge rejected the opinions of the claimant's treating physicians that he had developed lumbar disc protrusions, herniations and radiculopathy as the result of the work injury. **II**

## What is the difference between a Hill and a Mount?

## Oh, about 10 miles!

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## WE ARE MOVING!

Effective in early April 2017, our Southern New Jersey office will be relocating from Cherry Hill to Mount Laurel.

Our new address will be:
15000 Midlantic Drive, Suite 200, P.O. Box 5429
Mt. Laurel, New Jersey 08054

Our phone numbers will remain the same.
Be sure to check our website for further details.