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ATTORNEYS AT LAW

SEPTEMBER LEGAL UPDATES: WORKERS' COMPENSATION

CITY OF PITTSBURGH & UPMC BENEFIT MANAGEMENT SERVICES, INC. V. WCAB (FLAHERTY)

Matter

Claimant was an active firefighter for 18 years, when in August 2004 she was diagnosed with cancer and subsequent treatment left her unable to work. Claimant last worked with her employer on September 9, 2004, and it was undisputed that she would have continued to work if not for the diagnosis. On July 7, 2011, the Workers' Compensation Act was amended via Act 46, wherein Section 108(r) and 301(f) were created, which gave a new occupational disease provision to provide a presumption of compensable disability for firefighters who suffer from cancer. In the summer of 2011, the Claimant received a letter from her union describing this new firefighter cancer presumption law. This led her to question whether her cancer was connected to her job.

On September 23, 2011, the Claimant filed a Claim Petition, providing notice to her former employer of the possible connection between her work and cancer. She sought medical bills and full disability benefits from September 10, 2004 and ongoing. The Claimant did not receive actual confirmation of the causal link between her cancer and her occupation until she received a medical report on February 24, 2012.

Resolution

The WCJ granted the Claim Petition, opining that the former firefighter established a direct exposure to a Section 108(r) carcinogen, and had filed her Claim Petition within 300 weeks. This entitled her to the presumption afforded under Section 301(f). However, the WCJ noted that, even in the absence of such statutory presumption, the Claimant had met her burden of proving, by a preponderance of the evidence, that her cancer was caused by her firefighting occupation.

The WCAB reversed, finding that since the Claimant did not file her Claim Petition until 367 weeks after she last worked, she was not entitled to a presumption that the cancer was caused by firefighting. However, the Board did agree that Claimant met her burden of proving that her cancer and disability were caused by her occupational exposure as a firefighter, even in the absence of the presumption. The Board remanded to the WCJ to determine when Claimant first discovered the cancer was possibly related to her work as a firefighter, and when she provided notice of the possible connection to her employer.

On remand, the WCJ found that the Claimant failed to demonstrate she had provided notice within 21 days of discovery that her cancer could be related to her occupation. WCJ Torrey held that the Claimant had provided notice within 120 days, not 21 days. The WCAB reversed, finding that notice was first due once the Claimant received the medical report, because the "mere suspicion or even certain knowledge of a disease or disability does not trigger the notice." The Board concluded that the 21-day and the 120-day periods of Section 133 did not begin to run until the Claimant received the medical report on February 24, 2012.

Before the Commonwealth Court, the only issue was whether the Claimant filed her Claim Petition within 21 days of knowing her cancer was possibly work-related; this would entitle her to compensation from the date of her disability. The Court summarized the notice requirements of Section 311, indicating that if Claimant "[gave] notice within 21 days of the date he knew or should have known of the injury and its relationship to the employment, compensation is payable from the date of the disability." However, if notice comes after 21 days, but within "120 days that he knew or should have known of the injury . . . compensation was payable from the date that notice was given."

The Court noted that in occupational disease cases, notice begins to "run when the Claimant has:

1. knowledge or constructive knowledge
2. of disability
3. which exists
4. which results in an occupational disease, and
5. which has a possible relationship to her employment."

The employer argued that the Claimant learned of the possible work-related and the suffer injury when she received the union letter, thus her Claim Petition was filed after the 21-day period.

The Court surveyed Section 311 case law. The survey demonstrated that the clock on Section 311's notice period begins when a "layperson-claimant has more than just an informed suspicion about the diseases work-relatedness." Thus, "a Claimant does not 'know' of the possible relationship between a disease and work until he is informed by a medical expert." To hold differently would make the Claimant "sort through their symptoms unassisted and essentially self-diagnose."

The Court opined that the rule her former employer was asking the Court to adopt would use Act 46 to impute "actual knowledge" onto the Claimant "that her injury could possibly be work-related." However, the Court rejected this reasoning in City of Erie v. WCAB (Shannon), 607 A.2d 327(Pa. Cmwlth. 2002), aff'd sub nom. Shannon v. City of Erie, 631 1A.2d 595 (Pa. 1993), where the Court did not extend Section 301(e) to input actual knowledge onto an Employer because that extension was not supported by the case law.

Take Away

The Commonwealth Court noted that the Employer knew the Claimant had cancer since 2004, but did not have actual knowledge of the relatedness. The Court noted that, "Section 46's effect does not perfect notice onto the Employer because Section 311 requires actual notice of the injuries work-relatedness." "Claimant's learning of Act 46 effects did not perfect the Section 311 requirement that she actually knows of the possible relationship between her injury and work." Consequently, knowledge of the work-relatedness of the Claimant's disease only occurs when the Claimant receives notice of that "nexus from a medical doctor." The Court also noted that the former firefighter took action after learning of the possible work-relatedness of cancer from the Union Letter, and began investigating the cause—eventually filing the Claim Petition. Her employer did not dispute that she acted with reasonable diligence. Therefore, the Commonwealth Court held that receipt of the Union Letter did not commence Section 311's 21-day notice period, and affirmed the WCAB's granting of the Claimant's benefits retroactive to September 9, 2004.

WHITMOYER V. WCAB (MOUNTAIN COUNTRY MEATS) NO. 52 MAP 2017, J-24-2018

Matter

The PA Supreme Court granted allowance to review whether the Commonwealth Court erred in concluding that the term, "instalments of compensation" in Section 319, encompassed both disability benefits and payment of medical expenses. The Court began by noting that when "compensation" is used elsewhere in the Act, including elsewhere in Section 319, it refers to both disability benefits and payment of medical expenses. However, the Court noted the phrase "instalments of compensation" was a more specific term. The Court opined that this language implicated indemnity because that was paid in "instalments." However, the Court opined that medical expenses are not payable in this way, and when a Claimant recovers under a third-party settlement "following repayment of compensation paid to date as prescribed in Section 319, the Employer is limited to draw down against that recovery only to the extent that future disability benefits are payable to the Claimant." Therefore, the Commonwealth Court was reversed.

In January 1993, the Claimant sustained an amputation of part of his arm, rendering him disabled. Thereafter, there was an agreement to pay disability benefits. While the indemnity portion of the claim was eventually resolved, Defendant/Employer continued to be responsible for the Claimant's ongoing medical bills. The Claimant later "obtained a $300,000.00 settlement from third-parties related to the injury and in April 1999 entered into a third-party Settlement Agreement with the Defendant/Employer providing that as to past paid compensation, Defendant/Employer was entitled to a net subrogation lien of $81,627.87." "This net subrogation lien represented the difference between Defendant/Employer's total accrued subrogation lien ($110,583.73) and selected pro rata share of the third-party litigation expenses ($28,955.86)." The Claimant's balance of recovery was $189,416.27. That term was defined "as a fund for credit against future workers' compensation payable, subject to reimbursement to Claimant of expenses of recovery at a rate of 37% on credit used."

Subsequently, the Claimant's counsel sent two letters to Defendant/Employer's claims adjuster, the first indicating that "'the lien was satisfied with full payment of the $81,627.87' pursuant to Section 319 and asked [Defendant/Employer] remain responsible for future medical expenses." The second letter enclosed a check for that amount, and advised Defendant/Employer that the Claimant's position was that no credit can be applied to future medical bills under Section 319, because such credit applies only to future 'instalments of compensation,' which does not encompass future medical expenses.

Resolution

Defendant/Employer continued to pay Claimant's work-related medical expenses for approximately 13 years, until September 2012 when Defendant/Employer filed a Modification Petition "requesting an adjustment to the TPSA to reflect medical expenses incurred since the parties entered into the Agreement," alleging that the adjuster did not have authority to agree to Claimant's interpretation of "future instalments of compensation." The WCJ granted Defendant/Employer's Petition based on this reasoning, finding that the TPSA made Defendant/Employer liable to Claimant for "37% of future medical expenses up to the balance of recovery." The parties stipulated that Defendant/Employer had paid $206,670.88 for the Claimant's work injury as of February 2013; the WCJ ordered that Defendant/Employer's percentage credit be reduced to 26.9% for future medical expenses up to the balance of the Claimant's recovery of $189,416.27. The WCAB affirmed, as did the Commonwealth Court, which noted that multiple cases concluded that medical expenses constitute compensation under Section 319. In noting the assembly's use of "instalments," the Commonwealth Court noted that medical expenses are not typically paid in a lump sum but are "paid 'periodically over time or in discrete payments.'"

There were two dissenting opinions. The first noted that "allowing [defendants] to seek reimbursement of a Claimant's third-party recovery, after the accrued subrogation lien was resolved, would turn the statutory scheme on its head," noting that the term "instalments" only applied to wage benefits which were paid in intervals. The second dissent noted that medical benefits are distributed at random or an uncertain basis, and not regularly like wage benefits.

The Supreme Court noted that Section 319 addresses two scenarios, namely that "the compensation paid by the Employer to the date of the third-party recovery constitutes a claim against the recovery, payable immediately upon recovery to the Employer." The Court noted that the General Assembly "chose the word 'compensation' without modifying with 'instalments of.'" Thus, the "Employer's subrogation right 'at the time of recovery are settlement' encompasses all 'compensation' 'thereto paid' or 'payable' to date," which is the total lien. "The second scenario relates to the distribution of net settlement proceeds, namely what is left of the recovery after the Employer has been reimbursed for compensation thereto for paid." Concerning the excess amount, "Section 319 provides that it shall be paid forthwith to the employee to be treated as an advance payment by the Employer . . . on account of future instalments of compensation."

The Supreme Court noted that the unmodified term "compensation" encompasses both medical expenses and disability benefits. However, the term "instalments of compensation" was distinct and needed to be interpreted separately. The Supreme Court opined that concluding that "instalments of compensation" carried the same meaning as compensation "would render the words instalments of meaningless," and the rules of statutory construction do not permit that result.

The Supreme Court noted that the dictionary defined "instalments" as "one of the parts to which a debt is divided when payments are made in intervals." While the Court noted that this definition was not dispositive, examining the "overall statutory scheme confirme[d] what the legislature intended" by using the term instalments of compensation: to limit "compensation paid" to compensation paid at periodical intervals the same way wages are paid, which does not include medical expenses. The Court noted how several other sections of the Act used the term "instalments" to limit the term "compensation" to wages and not medical benefits.

Take Away

In analyzing this Section 319, the Superior Court opined that "construing this sentence to encompass only disability benefits is consistent with the concept of a advance payment." As to disability benefits, which are known amounts paid at established intervals, the "excess recovery" is a true "advance payment. The employee has simply been paid in advance for outstanding instalments owed to him and the money is his to do with as he chooses. A logical corollary is that the employee will not receive any additional disability compensation from the Employer up to the amount of the recovery nor is he obligated to reimburse the Employer for any amount."

The Court noted that, "[u]nlike disability benefits, future medical expenses are unknown at the time of the settlement." The Defendant/Employer conceded that they had paid the medical bills upfront, and thus in order to recoup its costs, Defendant/Employer would have to require employee to relinquish some of its advance payment which, the Court opined, does not work with the plain meaning of the term. Thus, "finding that 'instalments of compensation' encompasses future medical expenses would undermine the clear language of Section 319 by turning the employees 'advance payment' into a type of loan." The Supreme Court opined that "after satisfying the Employer's accrued subrogation lien which encompasses compensation payments, the General Assembly intended the excess recovery to be paid to the Claimant

and to be treated as an advance payment only on account of future disability benefits." Therefore, it is irrelevant that Claimant was not owed any disability benefits.

The Supreme Court held that "in viewing instalments of compensation and context with reference to the surrounding language and overall statutory scheme . . . concluded that the term is clear and unambiguous ... [and] does not refer to medical expenses." Since Defendant/Employer had satisfied its accrued subrogation lien at the time of settlement, the Employer was not permitted to seek reimbursement of future medical expenses from employee's balance of recovery.

WHITFIELD V. WCAB (TENET HEALTH SYSTEMS HAHNEMANN LLC

Matter

The issue before the Court was whether a Claimant was entitled to the benefit of the Protz II case where her disability status had been modified in 2008. Additionally, she had not challenged the constitutionality of her IRE, upon which the modification was based, for more than seven years. The Supreme Court held that since the Claimant "filed her Reinstatement Petition within three years of the date of the most recent payment of compensation," she had a statutory right to seek reimbursement under Section 413(a) of a Workers' Compensation Act.

The Claimant was injured within the course of her employment on March 25, 2002, and began receiving TTD benefits on September 29, 2002. On June 13, 2016, she underwent an IRE using the Fifth Edition of the Guidelines, which found she was impaired at a rating of 44%. A WCJ modified Claimant's disability benefits to partial disability as of the date of the IRE, and the WCAB affirmed on June 1, 2009. The parties stipulated that the Claimant did not raise a constitutionality of the IRE during this litigation. She did not return to work, and received benefits at her total disability rate from September 29, 2002 until mid-July 2015, when she received her last indemnity payment. On November 13, 2015, a month after Protz I was decided, the Claimant filed a Petition seeking reinstatement of TTD benefits based on Protz I. Defendant/Employer argued, in relevant part, that Protz I was not retroactive, and that she had waived the constitutional argument.

The Claimant testified that she did not feel fully recovered from her injuries, and was unable to work. Following the hearings, the WCJ denied Claimant's Petition, indicating that Protz I did not void all prior IREs, and that only matters that were "pending in any phase of litigation, including appeal, or future matters were entitled to a benefit of a change in a law" and that "the instant matters litigation ended on June 1, 2009." The WCJ also held that the Claimant did not preserved the underlying constitutional argument. The WCAB affirmed; however, a dissenting opinion distinguished prior precedent, noting that the Claimant here had filed her Petition within a 500-week period following her change of disability status. The dissent also found that Protz II applied retroactively.

Resolution

On appeal to the Commonwealth Court, the Claimant argued that reinstatement Petitions must be filed within three years of the date of the last payment, which was satisfied here, and that the Protz Decisions apply to her "because the IRE upon which the change was based was unconstitutional and invalid." Defendant/Employer argued that reinstatement was not appropriate because "when Protz II was decided, 'Claimant had already litigated the change in her benefits, collected 104 weeks of TTD benefits, and collected the entirety of her 500 weeks of TPD benefits.'" Defendant/Employer also noted that

Employers have heavily relied upon the now invalid IREs which largely went unchallenged until the Protz Decisions. Employer also argued that she never challenged the constitutionality of the agreement.

The Commonwealth Court reviewed Protz I and Protz II, noting that the Protz II Decision struck down the entirety of Section 306(a.2) as unconstitutional. The Court also summarized cases resolved in the interim period between Protz I and Protz II. "[F]ollowing Protz I, but before Protz II, the Commonwealth Court relied upon other subsections of Section 306(a.2), which required Claimant to challenge an IRE within a certain amount of time. If a Claimant did not satisfy those statutory time requirements, the Commonwealth Court held that the Claimant could not challenge the IRE. However, post-Protz II, those statutory time requirements were no longer valid and the Court allowed . . .Claimant['s] to raise the constitutionality of an IRE for the first time outside of those limits, but while litigation involving the changes was still pending."

In the current case, the Claimant argued that she was entitled to a reinstatement of her total disability benefits "because she filed the Reinstatement Petition within three years after the date of her most recent payment of compensation and the IRE upon which the modification was based was invalid." The Commonwealth Court reviewed Section 413(a) of the Act, pertaining to Reinstatement Petitions, noting that a WCJ may reinstate benefits "upon proof that a disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased . . . provided that a Petition is filed . . . within three years after the date of the most recent payment of compensation benefits." The Court noted it was undisputed here that Claimant had filed her Petition within three years after the date of the most recent compensation benefits.

The Court then analyzed whether the Claimant's disability had "increased, decreased, recurred, or temporarily or finally ceased." The Court noted that "disability" may refer to a status which was linked to the rate or amount of compensation which a Claimant is entitled. It also noted that prior precedent had distinguished between the change in disability status under Section 306(b)(2) based upon a change in earning power, and change under Section 306(a.2) based upon an impairment rating. The Court noted that in prior cases, earning power was not a factor in changing disability status under Section 306(a.2). Therefore, "until the IRE provisions are struck down as unconstitutional, a Claimant's disability status could be modified from total to partial disability in one of two ways: based on evidence of earning power under Section 306(b)(2) or based on a Claimant's impairment rating, without regard to his or her earning power under Section 306(a.2). Because the earning power did not play any role in Claimant's change from total to partial disability here, we discern no reason why the term disability in Section 403(a) governs reinstatement from partial to total disability in this case should be restricted to its traditional definition of earning power."

Take Away

In analyzing whether the Claimant's disability had recurred, the Court related the Claimant's situation to when a claimant is seeking reinstatement of benefits currently under suspension. The Court noted that in those situations, a claimant is only required to demonstrate that the reasons for the suspension no longer exist, and does not have to demonstrate with medical evidence that the work-related injury continues. The Court opined that this was the best way to analyze the current case because the claimants had already established a work-related injury, and thus, it was presumed. The Court cited the Claimant's testimony that she has been unable to work since 2002, and the Employer did not present any evidence to the contrary. However, since the WCJ did not make any findings as to the Claimant's credibility, the Commonwealth Court vacated the Boards Order. Further, the Court remanded the WCJ to make factual findings related

to whether Claimant credibly testified that she was totally disabled, and if that "testimony is credited and because Employer did not present any contrary evidence, Claimant [would be] entitled to reinstatement of her TTD benefits from the date that she filed her Petition." The Court also cited the humanitarian objective and remedial purpose of the Workers' Compensation Act in reaching such a decision.

DEPARTMENT OF LABOR & INDUSTRY, UEGF V. WCAB (LIN & EASTERN TASTE)

Matter

The case concerned the Construction Workplace Misclassification Act (CWMA) and whether or not it precluded Claimant's classification as an independent contractor. At issue, was whether an individual contracted to perform renovations for an unopened restaurant falls within the WCMA, and thus, is an employee under the Workers' Compensation Act. The Supreme Court held that the CWMA was inapplicable under these circumstances and that the Claimant failed to establish that he was an employee of the restauran

The Claimant was hired to perform remodeling work for Eastern Taste Restaurant by the restaurant's owner. There was no written contract, but the Claimant was "paid for his services on a per diem basis." The owner told Claimant the work that "needed to be done, but did not direct specific activities because the Claimant was a "seasoned remodeler" with 15 years of experience. The owner "purchased materials necessary for the project," but the Claimant used his own tools, was only hired "to complete the remodeling work," and "was not expected to work at the restaurant after it opened." Eastern Taste had yet to open for business.

On March 28, 2011, the Claimant was repairing a chimney when he sustained an injury. On December 22, 2011, he filed a Claim Petition. On February 27, 2012, he filed an additional Claim Petition against the UEGF because Eastern Taste did not have workers' compensation insurance.

Resolution

The WCJ made the following findings:

"Eastern Taste was a restaurant not a construction business; [Claimant] was hired to do remodeling before the restaurant opened; the most experienced person on the job was [Claimant]; the owner's husband was in charge of what needed to be done; [Claimant] was paid on a per diem basis along with three others; and, [Claimant] used his own tools and van; owner's husband provided some tools and materials."

The WCJ further found that the Claimant's "work was not conducted 'in the regular course of Eastern Taste's Business and that [Claimant] was employed in a casual character.'" The WCJ concluded the Claimant failed to prove he was an employee of Eastern Taste, and was ineligible for workers' compensation benefits.

The WCJ noted that the case would be different if the WCMA applied, which "prohibits the improper classification of employees as independent contractors to avoid workers' compensation benefits." This statute notes that, "'an individual who performs services in the construction industry for remuneration' may be classified as an independent contractor only if certain conditions were met." The WCJ held that the CWMA was inapplicable because Eastern Taste was "in the restaurant business and not a construction business." Concerning the relationship between the remodeler and the business owner, the WCJ noted that the owner "merely informed Claimant about the task to be completed and it was Claimant's job to do

them," which was "essentially the same relationship that a property owner has with a painter, plumber, electrician, carpenter, and other remodelers who are specialists bringing their time and expertise." Consequently, the WCJ "concluded that, although these can contractual relationships may involve construction activities, the individual who hires such a specialist is not in the construction industry for purposes of the WCMA." The WCJ determined that the Claimant was properly classified as an independent contractor.

The WCAB reversed, finding that the Claimant's employment "was not 'casual' in nature and that [he] was an employee of Eastern Taste." The WCAB made the decision based on the general definition of employee under the Act, and not based on the WCMA. The Board remanded to the WCJ to make necessary findings and to render an award for compensation. The WCJ complied, to which Defendant/Employer appealed eventually up to the Commonwealth Court. The Commonwealth Court reversed, finding that the "Board relied on facts that were inconsistent with the WCJ's findings." In analyzing whether the Claimant was an independent contractor, the Commonwealth Court used the multi-factor test in Universal AM-Can. The Court noted that the remodeler was not controlled 'in the manner which the work was' meant to be done, and reiterated the WCJ's comparison of contractual relationships between "property owners and painters, plumbers, electricians, carpenters and other remodelers who have the status of independent contractor not employees." Additionally, the Court noted that "Eastern Taste was a restaurant, not a construction business and that [Claimant] was hired to do remodeling work and not work in the restaurant when it opened." The Court found it significant that the Claimant used his own tools, and held that there was no error in the WCJ's original determination that Claimant was an independent contractor.

Upon review in the Supreme Court, both parties maintained their arguments. The Supreme Court began by reviewing the text of the CWMA, which provides three criteria which must be met for "an individual who performs services in the construction industry for remuneration" to be an independent contractor. The question presented here was how an individual who "performed services in a construction industry" should be interpreted, namely: Should it involve individuals who "work for a construction business or individuals who work a job merely involving construction activities?" The Court noted that in using this phrase, "the CWMA appeared to focus on the nature of the punitive Employer's business." The Court noted that the CWMA's legislative history was clear that it was intended to combat "the deceptive business practice of classifying employees as independent contractors as to avoid the expenses and responsibilities of the employment relationship - a practice which was more widespread in the construction industry than other industries." The Supreme Court noted that this specific identified problem suggested that the CWMA was intended to regulate those entities, and not entities such as restaurants undertaking remodeling projects. The legislative history also indicated that legislators reiterated that an Employer was "someone with a business in the construction," which "would not include a homeowner who hires someone to build a porch." This further indicates the CWMA was not intended to apply to relationships like this one.

The Supreme Court also noted that materials issued by the Department of Labor further support this finding; complaint forms requesting names and contact information for a business suspected of a WCMA violation ask "[w]hat type of construction service does the business perform?" It was also noted that the Department "rejected several referrals," finding "no violation of the Act" because "Employers were not in the construction industry," noting that the CWMA prohibited "construction Employer's from classifying as independent contractors, workers who do not satisfy all the definition criteria for an independent contractor."

Finally, the Supreme Court opined that applying the remodeler's requested interpretation of the CWMA would lead to an absurd result. The Supreme Court noted that the relationship in this case was "'essentially the same as a relationship that property owners have with painters, plumbers, electricians, carpenters, and other remodelers.'" The Claimant's interpretation would apply the CWMA "to all those contractual arrangements so long as the contemplated work involves some manner of construction activity." Therefore, any individual whom might be hired to complete a project would then be an employee unless the parties satisfy the "stringent" requirements of the CWMA. Violations of the CWMA could also lead to civil and criminal liability. The Supreme Court noted that it cannot assume that the "General Assembly intended . . . to so drastically alter the scope of employment law or attach the severe consequences to relatively ordinary contractual relationships such as the one at issue" here.

Take Away

The Supreme Court held that:

"when determining whether the CWMA is applicable to a situation, the construction activity must be analyzed and considered in the context of the punitive Employer's industry or business, specifically in confining its applicability to individuals who perform services in the construction industry, referring only to those individuals who work for a business and performed construction services, namely 'erecting, reconstructing, demolishing, altering, modifying, custom fabricating, building, assembling, site preparation, and repair work.'" (internal revisions made).

Thus, "the CWMA is inapplicable where the punitive employer is not in the business of construction." Since Defendant/Employer was not in that business, Claimant was not an employee, but an independent contractor.