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APRIL LEGAL UPDATES: WORKERS' COMPENSATION

ZACHARY KRESCHOLLEK V. WCAB (COMMODORE MAINTENANCE CORP.), NO. 297 C.D. 2018

Matter

Claimant worked as an apprentice industrial painter and lived in Philadelphia, Pennsylvania. The Employer was a New York corporation that was hired as a subcontractor to do painting and lead abatement work on the Benjamin Franklin Bridge as part of a larger project to rehabilitate the bridge. The Benjamin Franklin Bridge is co-owned by both New Jersey and Pennsylvania, and Claimant, as part of his work for the Employer, did work on both sides of the bridge. On September 3, 2014, Claimant was working on both sides of the bridge as a vacuumer. However, when the injury occurred, Claimant was on the ground underneath the bridge on the New Jersey side. He was accidentally struck on the back of his left arm by a blast of sand, and in attempting to get away from the blast, he jumped and broke his fall with his right hand, causing his wrist to snap back.

The Employer accepted a workers' compensation claim in New Jersey, and paid Claimant benefits according to New Jersey law. From September 3, 2014 through February 8, 2016, Claimant received temporary total disability benefits in New Jersey before his treating doctor placed him at maximum medical improvement, and as a result, Claimant was no longer eligible for benefits. In April 2016, Claimant filed a Claim Petition in Pennsylvania for the same incident, seeking ongoing disability. Ultimately, the Workers' Compensation Judge (WCJ) denied and dismissed Claimant's Claim Petition, concluding that the injury did not fall under the jurisdiction of the Pennsylvania Workers' Compensation Act. Claimant appealed to the Commonwealth Court based on the Appeal Board and WCJ decisions that the claim fell outside of the jurisdiction of the Pennsylvania Workers' Compensation Act. Claimant specifically argued that both Pennsylvania and New Jersey jointly owned the bridge, adjoining land, and structures near the bridge, and that, as a result, joint territory occurs in both Pennsylvania and New Jersey.

Resolution

The Commonwealth Court, in ultimately finding against Claimant's argument and affirming the lower courts' decisions, began with the joint compact between Pennsylvania and New Jersey regarding rivers and bridges that cross the Delaware River and their operation and maintenance. In reviewing the compact and language of the agreement between Pennsylvania and New Jersey, the Commonwealth Court agreed with the Employer's brief that the compact makes no reference to the jurisdiction for purposes of workers' compensation claims. They noted that there is no doubt that Claimant was injured on the New Jersey side, on New Jersey ground. They pointed out that Section 101 of the Pennsylvania Workers' Compensation Act addresses application of the Act, and that it explicitly states that the Act shall apply to all injuries occurring within the Commonwealth.

Claimant attempted to use Section 305.2 of the Act, which was drafted to allow a claimant to receive workers' compensation benefits from one jurisdiction, and to have the right to file a Petition under PA for the same period covered by the other jurisdiction's benefits in order to recover more generous benefits available in Pennsylvania. However, the Commonwealth Court here noted that Section 305.2 of the Act applies only in limited circumstances as long as Claimant falls under one of four possibilities, which Claimant in his own brief noted that he does not. Claimant relied on a case, which noted that a Pennsylvania resident injured in New Jersey was entitled to relief in Pennsylvania and New Jersey, and was successful at the Appeal Board level. However, because Section 305.2 was not applicable to Claimant in this case, and because the Claimant was standing on the ground in New Jersey, the Appeal Board and WCJ in this case were correct in the fact that the claim fell outside of the jurisdiction of the PA Workers' Compensation Act.

Take Away

Section 305.2 of the Act applies in circumstances where:

1. employment is principally localized in this state or
2. Claimant is working under contract of hire made in this state in employment not principally localized in any state;
3. an employee is working under a contract of hire made in this state and employment is principally localized in another state whose workers' compensation law is not applicable to his employer or
4. he is working under a contract of hire made in this state for employment outside of the United States and Canada.

In this case, the Claimant was a Pennsylvania resident who, through a Union Hall in New Jersey and Pennsylvania, received a call that he could perform this work on the Benjamin Franklin Bridge. However, the employment was not principally localized in Pennsylvania; the hire was not made in Pennsylvania; the company itself was based out of New York; and the Employer agreed that New Jersey law was applicable to the Employer, meaning that Claimant did not fall under any of the limited circumstances of Section 305.2.

VALLEY STAIRS AND RAILS V. WCAB (PARSONS), NO. 1100 C.D. 2017

Matter

Claimant allegedly sustained a low-back strain while working for the Employer on March 27, 2015, a Friday. Claimant was transported by ambulance to a hospital, and did not return to work on that day or any day thereafter. Claimant received his full pay from Employer on the day of the injury. However, that final paystub listed that Claimant was paid seven hours of what was designated "Comp TM" at his regular rate of pay.

On April 13, 2015, Employer sent a Notice of Temporary Compensation Payable stating that a low-back strain occurred on March 27, 2015, and noting that the 90-day period, under Section 4061(d)(6) of the Act, ran from March 30, 2015 through June 27, 2015. On June 27, 2015, Employer filed a Notice of Workers' Compensation Denial, and on the 28th the Employer filed a Notice Stopping Temporary Compensation Payable and another Notice of Workers' Compensation Denial. The following day, the Bureau of Workers' Compensation issued a Notice of Conversion of Temporary Compensation Payable. On July 13, 2015, Claimant filed a Penalty Petition alleging that Employer violated the Act by stopping payment on the benefits after the NTCP had converted.

Resolution

At the hearing before the WCJ, Claimant testified that, on the morning of Friday, March 27, 2015, he sustained an injury and was taken by ambulance to a hospital and did not return to work. In her opinion, the WCJ noted that for the purposes of the Act, disability is defined as wage loss. She determined that, because Claimant received his full pay for the date of the injury on Friday, March 27, 2015, Claimant's disability commenced on Monday, March 30, 2015, the day he began receiving indemnity benefits, and that as a result, Employer's Notice of Stopping Temporary Compensation Payable was properly issued. The WCJ also noted that the Notice of Conversion was, therefore, improperly issued and thus void. As a result, Claimant failed to prove a violation of the Act and denied Claimant's Penalty Petition.

Claimant appealed to the Appeal Board, asserting that the WCJ erred in the finding that the first date of disability was March 30, 2015, and as a result overturned the WCJ's Decision, and remanded the claim to the judge for determination of an appropriate penalty amount, if any, to be awarded.

The Commonwealth Court began its discussion of the matter with the relevant provisions of the Act, namely Sections 306(a)(2) and 406.1(d). Section 306(a)(2) states that "nothing in this Act shall require payment of total disability compensation benefits under this clause for any period during which the Employee is employed or receiving wages." Notably, Claimant attempted to argue that because he was treated for his work injury on March 27, 2015, the compensation benefits were not only payable but paid, because the Employer had paid for medical treatment on that day. Employer, however, correctly asserted that payment of Claimant's medical treatment on the date of the injury does not mean that it paid Claimant compensation benefits, and the Employer asserted that compensation, which is not defined by the Act, includes only wage loss benefits. The Commonwealth Court also relied on Section 121.15(a) of the Bureau's regulations, which notes in computing the time when the disability becomes compensable, the day the injured employee is unable to continue work by reason of that injury shall be counted as the first day of disability in the seven-day waiting period. However, the regulation also states that, *if the injured employee is paid full wages for the day, shift, or turn on which the injury occurred, the following day shall be counted as the first day of disability.*

The Commonwealth Court noted that the interpretation of a statute by an administrative agency (in this case the Bureau), by means of its regulations, is entitled to great weight unless it was erroneous or inconsistent with the statute under which it was promoted. The Commonwealth Court found that neither was the case, and that as a result, because Claimant was paid for the rest of the day on March 27, 2015, and because Claimant did not work Saturdays and Sundays, the first day of wage loss, the triggering date of his disability, was the next work day, or March 30, 2015.

Take Away

The Employer was correct in starting the 90-day trigger on March 30, 2015, and filed their Notice Stopping Temporary Compensation Payable and Denial within the 90-day period. As a result, the Notice of Conversion issued by the Bureau was void, and Claimant failed to prove that a penalty occurred.

THOMAS KURPIEWSKI V. WCAB (CARETTI, INC.), NOS. 158 C.D. 2018, 194 C.D. 2018

Matter

Claimant in this matter was a union bricklayer who worked on a job site from October 2009 through April 16, 2012. At some point in April 2012, while Claimant was working for the Employer, he broke out into a rash on various parts of his body. On April 16, 2012, Claimant left work and did not return at the instruction of his physician. He was diagnosed with allergic contact dermatitis arising from long-term work exposure to chromium, found in bricks, concrete, and mortar. Employer had an IME performed on November 6, 2012, which found that Claimant had chromium-induced occupational contact dermatitis, and stated that Claimant would never work as a bricklayer again.

Claimant had experienced this allergic reaction previously while working for another employer, prior to his current employment. Claimant ultimately filed a Claim Petition and a Penalty Petition. The Penalty Petition was filed based on the allegation that Employer violated the Workers' Compensation Act by not accepting or denying liability of the injury. There was also disagreement regarding the workers' compensation average weekly wage calculation, due to Employer's occasional layoffs when Claimant would work for another employer instead of receiving unemployment benefits. The WCJ found that Claimant's injury was an aggravation of preexisting dermatitis, and that benefits should be paid moving forward. The WCJ additionally found that the average weekly wage should include Claimant's previous concurrent employment, and accepted Claimant's evidence that the average weekly wage should be increased. Finally, the WCJ denied the Penalty Petition because Employer ultimately issued a denial through its answer to the petitions.

Resolution

Both the Employer and Claimant appealed to the Appeal Board. The Board found that a remand was necessary with regard to Claimant's ongoing benefits, as it required the WCJ to make a finding regarding when Claimant advised the Employer that the rash was work related. The Board agreed with the Employer's argument that Claimant had fully recovered from the aggravation of the preexisting dermatitis, finding the WCJ's Decision should reflect a termination of benefits. The Board additionally opined that the WCJ's use of concurrent employment was not supported by Claimant's testimony, where he stated that he was not working for another employer at the time of the injury. As a result, they vacated the WCJ's calculation and remanded to the WCJ for a new calculation. Finally, the board argued that the WCJ erred in denying the Penalty Petition, and remanded the case back to the judge for her to issue a reasoned decision regarding why she denied the Penalty Petition.

In the WCJ's remand Decision, she found that Claimant did not inform the Employer that his inability to return to work was due to a work-related condition in his April 2012 statement to Employer. As a result, she found that the Employer received notice of the injury when Claimant filed the Claim Petition. The WCJ held that the Employer's obligation to accept or deny liability for the injury arose only after it received a notice of the injury. Because this did not occur until the Claim Petition, the Employer's timely answer to the Claim, denying the pertinent allegations, was sufficient for the WCJ to conclude that Claimant did not establish that Employer violated the Act. Therefore, the WCJ denied the Penalty Petition. Finally, the judge reviewed the evidence regarding the Claimant's wages from the last four completed 13-week periods of employment, and calculated a reduced average weekly wage and compensation rate.

Claimant again appealed the WCJ's Decision to the Appeal Board, arguing that the WCJ erred in terminating benefits and recalculating the average weekly wage to a lower amount. The Appeal Board, however, refused to address these issues again, believing they addressed these issues in its prior opinion. Claimant also challenged the WCJ's conclusion that the Employer did not violate the Act by not issuing a Notice of Compensation Payable once Employer's IME found a work-related injury had occurred. In reviewing this, the Appeal Board relied on the PA Code, which notes that failure of an employer to issue appropriate document within 21 days of receiving notice of a work injury, is a technical violation of the Act. Further, the Appeal Board found that the WCJ's conclusion (that because the Employer filed an Answer denying the Claim Petition's allegations they were excused from the obligation under the Act) was incorrect. The Employer had technically violated the Act. The Appeal Board, therefore reversed the denial of the Penalty Petition and awarded Claimant a 10% penalty.

On appeal to the Commonwealth Court, Claimant argued that the Appeal Board erred in terminating his benefits because he did not suffer from a preexisting condition, and had no work-related medical restrictions at the time that he developed his chromium allergy. Employer argued that Claimant suffered an aggravation of a chromium allergy diagnosed in 2008, and that this was a preexisting condition not caused by his work with the Employer. The Employer argued that the aggravation of the work injury he experienced while working for the Employer was resolved, and that he returned to baseline when he stopped working. As a result, Claimant's benefits should have been terminated as the WCJ found and the Appeal Board affirmed.

The Commonwealth Court, however, found that Claimant's injury was an aggravation of a preexisting condition, but that when Claimant began working for the Employer the preexisting condition was not at the point where he was unable to ever work as a bricklayer, which is what occurred after his exposure with the Employer. As a result, Claimant did not return to his preexisting baseline but a new baseline, one which would not allow him to work as a bricklayer in the future. Therefore, Claimant was entitled to ongoing benefits.

With regard to the average weekly wage calculation, Claimant argued that his work in the previous 52 weeks with other employers should be included (as concurrent employment) in the calculations, while the Employer argued that he did not have a concurrent employer at the time of the injury. The Commonwealth Court ruled that, because the Claimant himself testified that he was only working for one employer at the time of the injury, and because pertinent case law has decided that for a concurrent employment to exist, a claimant must be working for the other employer at the time of the work injury, there was no concurrent employment. As a result, the Commonwealth Court noted that the Appeal Board did not err in concluding that Claimant did not have concurrent employment at the time of his work injury. With regard to the penalty imposed on the Employer, the Commonwealth Court agreed with the Appeal Board in finding that the Employer's failure to issue a document accepting or denying Claimant's injury as work-related violated Section 406.1(a) and (c) of the Act. However, the Commonwealth Court also noted that every violation of the Act, as a matter of law, did not result in an automatic imposition of a penalty. The Court found that it is at the discretion of the WCJ as to whether a penalty is appropriate, and remanded that portion to the WCJ to make the ultimate decision regarding whether penalties would be awarded and, if so, how much.

Take Away

The Commonwealth Court confirmed the importance of issuing either a denial or acceptance of an injury after an employer is advised of an injury occurring at work. The court also emphasized and confirmed that for an employee to have concurrent employment, the employee must actually be working for another employee at the same time that the injury occurs for the primary employer.