MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 21 | NO. 3 | MARCH 2017

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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

Francis X. Wickersham

The presumption of compensability in Section 301(f) of the Act does not apply to a firefighter who fails to show that his cancer was an occupational disease under Section 108(r).

Eugene Capaldi v. WCAB (City of Philadelphia); No. 787 C.D. 2016; Filed January 9, 2017; by President Judge Leavitt

After working as a firefighter for 34 years, the claimant retired in October 2003. In May 2005, he was diagnosed with squamous cell carcinoma of the right vocal cord. Seven years later, the claimant filed a claim petition in which he alleged that his cancer was caused by his workplace exposure to carcinogens. The employer contested the claim petition, and both sides presented evidence to the Workers' Compensation Judge.

The judge denied the claim petition, holding that the claimant did not prove that his cancer is a type caused by exposure to Group 1 Carcinogens and, therefore, is not an occupational disease under Section 108(r) of the Act. The judge credited the testimony of the employer's experts on the issue of causation. The judge also concluded that the claimant did not prove he was unable to work as a result of his cancer and, therefore, was not entitled to use a presumption of causation set forth in Section 301(e). Further, the judge held that the claimant did not file this claim petition within 300 weeks of his last date of employment, thereby precluding his use of the presumption in Section 301(f). Finally, the judge found that the claimant, who had the opportunity to prove his cancer was an occupational disease without the assistance of a presumption, failed to do so.

The claimant appealed, but the Workers' Compensation Appeal Board affirmed.

The claimant then appealed to the Commonwealth Court, arguing that the tribunals below erred in interpreting the Act to require a firefighter seeking compensation for cancer under Section 108(r) to file his claim petition within 300 weeks of his last day of work. The claimant also argued that, if Section 301(f) imposes a deadline for filing a claim petition, then the discovery rule should apply. The Commonwealth Court affirmed the Appeal Board and the Workers' Compensation Judge. The court agreed with the Board's interpretation of Section 301(f) as requiring a firefighter to file a claim petition within 300 weeks of his or her last day of employment in order to take advantage of the statutory presumption that the cancer was work-related. If a firefighter files a claim petition before 600 weeks have elapsed, however, he or she may still prove the cancer is an occupational disease. According to the court, the claimant did not demonstrate that his cancer was an occupational disease for firefighters under Section 108(r) and, therefore, the Section 301(f) presumption was not available to the claimant.

Nevertheless, the claimant was able to pursue his claim under Section 108(n), which required the claimant to prove all of the elements of the claim petition, including a causal connection between his work and his cancer. However, because the claimant's medical evidence was rejected by the Workers' Compensation Judge, he failed to prove causation. Therefore, the Commonwealth Court dismissed the claimant's appeal. II

The decision of an arbitrator awarding a claimant disability benefits under the Heart and Lung Act does not have a binding effect on the workers' compensation proceedings.

Wayne Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections); No. 493 C.D. 2017; Filed February 6, 2017; by President Judge Leavitt

While working for the employer as a corrections officer, the claimant sustained a work-related injury to his right knee. Following the injury, the claimant returned to work, but he left after several days because of

knee pain. Later, he filed a claim for benefits under the Heart and Lung Act. The employer denied the claim, and an arbitrator was assigned to hear the claimant's grievance, pursuant to a collective bargaining agreement. The arbitrator issued an award granting the claimant Heart and Lung benefits.

The claimant then filed a claim petition for workers' compensation benefits. At a hearing before the Workers' Compensation Judge, the claimant moved for an award of worker's compensation benefits based on the arbitrator's award of Heart and Lung benefits. The claimant argued that the arbitrator's award was binding on the judge. The employer disputed this, and the judge denied the claimant's petition. Additionally, the judge granted the claim petition, but for medical benefits only, finding that the claimant failed to prove a wage loss caused by the injury.

The claimant appealed to the Appeal Board, arguing again that the arbitration award was binding on the Workers' Compensation Judge. The Board rejected this argument and dismissed the claimant's appeal.

The claimant renewed his argument on appeal with the Commonwealth Court, which concluded that all of the necessary components of collateral estoppel did not exist and, therefore, the Workers' Compensation Judge was not bound by the decision of the arbitrator. According to the court, the temporary nature of Heart and Lung benefits, as opposed to potential lifetime benefits under the Act, renders the amount in controversy between the two systems incomparable. In addition, the court found that an arbitration proceeding to be more *ad hoc* and informal than a proceeding governed by the Act. **II**

In order to subrogate against all of the claimant's recovery from a third-party tortfeasor, the employer must prove that the fund created by the claimant's tort settlement relates to all of the work injuries.

Jaime Serrano v. WCAB (Ametek, Inc.); No. 2684 C.D. 2015; Filed February 13, 2017; By President Judge Leavitt

The claimant suffered 2nd and 3rd degree burns when a container of metal powders he was working on exploded, resulting in a flash fire. The employer issued a notice of compensation payable and began paying the claimant disability benefits for burns to his face, chest, head, ears, hands, arms and thighs.

Later, the claimant sued Aramark Uniform, alleging that the flame resistant coveralls he was wearing at the time of the accident did not protect him as warranted. Two years later, the claimant settled with Aramark for $2.7 million. The employer asserted a net lien of $620,178.30. In response, the claimant filed a petition seeking to have the amount of the employer's subrogation rights determined, and the employer filed a petition seeking to recover alleged overpayments of disability compensation.

The parties entered into a stipulation that was submitted to the Workers' Compensation Judge, which stated that the claimant was entitled to a specific loss benefit of $27,937.50. The stipulation also said that the parties agreed that the burns to the claimant's torso, shoulder, arms, and legs were worsened and enhanced by the coveralls and that these injuries were made more severe than they otherwise would have been if sufficiently protective coveralls were provided. The claimant, however, maintained that the injuries caused by the defective coveralls were limited to those injuries described as work-related in the stipulation. The employer, while agreeing to the description of those work-related injuries, also maintained that all of the claimant's injuries were caused and/or contributed to by the insufficient/defective coveralls.

The claimant agreed that the employer was entitled to subrogation for the injuries to his torso, shoulder, arms and legs, but disputed the employer's right to subrogation for injuries to his hands, neck, face, head, trachea, larynx and lungs.

The Workers' Compensation Judge held that the employer was entitled to recover all of the wage loss benefits paid to the claimant and medical expenses it incurred for injuries to the claimant's torso, arms and legs. However, the judge excluded recovery of $15,302.31 in medical expenses paid to treat the other injured areas of the claimant's body. Additionally, the judge excluded the specific loss benefit for scarring.

Both parties appealed to the Appeal Board, with the claimant arguing that the employer was not entitled to 100% of the wage loss benefits and all medical benefits paid minus $15,302.31, and the employer arguing that the Workers' Compensation Judge was wrong to deny subrogation with respect to the additional injuries the claimant sustained and the specific loss benefit. The Board reversed the decision of the judge, concluding the employer was entitled to recover all of its compensation expenses from the Aramark settlement because the claimant's discreet work injuries constituted a single compensable injury for purposes of Section 319 of the Act. The case was remanded to the Workers' Compensation Judge, who later issued a decision awarding the employer reimbursement for all wage loss benefits and medical expenses, as well as the specific loss benefit.

The claimant again appealed to the Appeal Board, arguing that the employer's subrogation rights were limited to compensation paid for the discreet work injuries caused by Aramark. The claimant's appeal was dismissed by the Board.

On appeal to the Commonwealth Court, the claimant argued that the employer's subrogation recovery was limited to compensation paid for the work injuries caused, in part, by the third-party tortfeasor. The employer responded by arguing that the claimant's multiple injuries constituted a single "compensable injury" because they all occurred in one accident. According to the court, the issue was whether the subrogation analysis under Section 319 must be done for each "compensable injury" where there was more than one work injury for which the employer has accepted liability. The Workers' Compensation Judge found that the defective coveralls did not cause injuries to the claimant's hands, neck, face, head, trachea, larynx and lungs. The court noted that it is the employer's burden to demonstrate that it was compelled to make payments due to the negligence of a third party and that the fund against which the employer seeks subrogation was for the same injury for which the employer is liable under the Act. The court held that the employer failed to show that the fund created by Aramark was for the same injuries for which the employer was liable under the Act. The court, therefore, vacated the Appeal Board's order and remanded the matter to the Board. **II**

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

Appellate Division addresses the notice provision of N.J.S.A. 34:15-40(f) requiring that an insurance carrier seek permission from the injured worker before initiating a third-party action on his behalf.

Hartford Underwriters Insurance Co. v. Salimente, Docket No. A-3687-14T2, 2017 N.J. Super. Unpub. LEXIS 275 (App. Div., decided Feb. 6, 2017)

On May 18, 2010, Mr. Mishkoff, an employee of Credit Card Processing US, was involved in a work-related motor vehicle accident when Ms. Salimente lost control of her vehicle and collided with Mishkoff. The workers' compensation carrier for Credit Card Processing made medical and indemnity payments to and on behalf of Mishkoff. When Mishkoff failed to bring suit against Salimente, the workers' compensation carrier, Hartford, filed its own complaint against her on the last day of the two-year statute of limitations period.

Salimente moved to dismiss the complaint on the basis that the insurer failed to plead it had obtained Mishkoff's permission to file the suit pursuant to N.J.S.A. 34:15-40(f), which provides:

> When an injured employee . . . fails within 1 year of the accident to either effect a settlement with a third person of his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, ***10 days after a written demand on the injured employee***, can . . . institute proceedings against the third person for the recovery of damages[.]

In granting Salimente's motion dismissing the complaint, the judge noted that Harford failed to cite any case law for the proposition that a failure to serve written demand on the employee may be excused after the employee has failed to file suit within the limitations period. Concluding that Hartford had not given Mishkoff the required notice and the running of the statute made cure impossible, the judge dismissed Hartford's claim. This appeal ensued.

In reversing and remanding the judge's dismissal, the Appellate Division cited *Poetz v. Mix*, 7 N.J. 436 (1951), in which the Supreme Court held that the ten-day written demand can be waived, especially where the carrier's action preserves the subrogor's right of action against the tortfeasor. The Appellate Division concluded that, as a filing on the last day of the limitations period suggests that Hartford was preserving not only its own subrogation claim but also Mishkoff's right of action against Salimente, the plaintiff's complaint should not have been dismissed before discovery could be had as to whether Mishkoff waived his right to the ten-day notice.

The Appellate Division accordingly reversed the dismissal of Hartford's claim and remanded for further discovery findings. II

Side Bar

The Appellate Division's reversal and remand was likely informed by the belated discovery on the part of Hartford of letters in its file suggesting that either notice was given and/or a waiver was granted under the statute. After judgment was entered and the time for reconsideration had passed, Hartford found two letters in its file, one to Mishkoff two months after the accident and the other to Mishkoff's counsel 18 months later. In the first letter, Hartford advised Mishkoff of its subrogation rights and asked him whether he intended to pursue a third-party action. In the second, Hartford again asserted its subrogation rights and asked Mishkoff's counsel to advise as his earliest convenience if Mishkoff was not pursuing a third-party claim.

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board agrees with the employer that the claimant's petition for disfigurement is premature when the claimant has yet to undergo approved medical treatment that is likely to improve his appearance.

Kieran Sniadowski v. Pulte Homes, (IAB No. 1208092 – Decided Nov. 30, 2016)

This writer handled this case on behalf of the employer, which presented an interesting legal issue.

The claimant sustained a compensable work injury on March 9, 2002, that resulted in two lumbar surgeries. Unfortunately, the claimant ultimately had Failed Back Syndrome. One of the complications from that condition included failing dentition, which was due to extensive use of narcotic medications. In a prior petition, the Board had ruled in favor of the claimant, holding that restorative dental care, including dental implants, was necessary, reasonable and related medical treatment.

At issue here was the claimant's petition to determine disfigurement for the loss of his teeth. After meeting with the claimant and his counsel to view the disfigurement, I advised the employer that the exposure was significant in that, although the claimant had removable dentures, he had only six of his original bottom teeth. My assessment was that this disfigurement claim

would certainly be worth close to the 150-week maximum.

On behalf of the employer, the defense was raised that the disfigurement petition was premature since the claimant had yet to receive the dental implants that had been determined to be compensable and recommended by his own treating dentist. Claimant's counsel countered that the Board typically evaluates disfigurements without the use of prosthetics. He further argued that the dental implants will not be natural and that the claimant's actual teeth will never grow back. The Board addressed this threshold issue of whether the disfigurement claim was ripe for a ruling and agreed with the employer that the petition was premature since the claimant had not yet reached maximum medical improvement.

The important distinction made by the Board was between a removable prostheses and those things that become a permanent part of the body. A removal prosthesis would include such things as a brace or a wheelchair, and the disfigurement claim is to be considered without them. However, the Board agreed with the employer that dental implants become a permanent part of the body and, until the claimant gets them, the condition of his teeth and mouth have not reached maximum medical improvement. Accordingly, the Board dismissed the petition for disfigurement without prejudice. ||

Side Bar

As an aside, I would note that the Board's ruling was not only, in my assessment, legally correct but also, as a practical matter, prevents the claimant from delaying receiving approved treatment such as dental implants in order to first maximize a disfigurement award, which would have the practical effect of requiring the employer to pay not only for a significant disfigurement award but then to later pay for the very expensive dental implants.

News from Marshall Dennehey

Niki Ingram (Philadelphia, PA), Director of the Workers' Compensation Department, is speaking at the *2017 Smith College Women's Leadership Conference*. In "Shifting a Male-Dominated Work Culture," Niki shares strategies for thriving and excelling in today's male-dominated business culture. Drawing from career experiences, she discusses how communication, behavior and leadership are the keys for women to succeed in the modern workplace. For more information, click here.

Robin Romano (Philadelphia, PA) will be a panelist at the Pennsylvania Bar Institute's *Tough Problems in Workers' Compensation 2017* on April 3. The program will explore how workers' compensation practitioners across the state are handling the year's toughest issues, and what judges think. Attendees will also gain insight into the cases that have been decided and their impact. For more information, click here.

Tony Natale (Philadelphia, PA) is speaking at *Pennsylvania's 2017 Insurance Fraud Conference*, jointly hosted by the Pennsylvania Insurance Fraud Prevention Authority and the Delaware Valley and Greater Pittsburgh Chapters of the International Association of Special Investigation Units. The conference runs April 6 – 7 at the Hershey Lodge and Convention Center in Hershey. In "If You See Something, Say Something – Detecting Workers' Compensation Fraud," Tony will explore the red flags for fraud unique to workers' compensation cases and provide techniques to report, combat and prosecute fraudulent claims. For more information, click here.

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.

John Swartz (Harrisburg, PA) successfully defeated a review and reinstatement petition and prevailed on a termination petition for a work injury resulting from exposure to sulfur dioxide. The claimant had an accepted work injury for exposure to sulfur dioxide. He filed a reinstatement petition and a review petition to add post traumatic stress disorder. The review petition was granted in part for transient adjustment disorder, but the Workers' Compensation Judge found that the claimant did not incur post traumatic stress disorder, and the reinstatement petition was denied. John prevailed on the termination petition, with the judge finding that the claimant was fully recovered from the all accepted physical and mental claims resulting from the work injury. ||