THE HARTWELL
LAW OFFICES, LLP

# MARCH 2017 CASE LAW UPDATE

PREPARED BY RONALD VARGA

**Starr Aviation v. Workers' Compensation Appeal Board (Colquitt),** __ A.3d __ (Pa. Cmwlth March 7, 2017)

**Issues**: Whether the personal comfort doctrine applies to situations where the claimant was driving a vehicle to secure feminine care products.

**Answers**: Yes.

**Analysis**: Claimant, who was twenty-one years old at the time, arrived at work to begin her 2:00 p.m. to 11:00 p.m. shift. Claimant had started her menstrual cycle after she left home and realized that she had forgotten her wallet when she arrived at work.

Claimant called her mother and requested that she bring feminine products and money to Claimant's work. Approximately, six hours later, Claimant drove a tug from the Airside Terminal to the Landside Terminal to meet her mother. Claimant's supervisor had given her permission to do so. The claimant stated that it would have taken about 10 minutes to secure the items from her mother. Claimant's mother brought feminine hygiene products, lunch money, TV dinners, and cigarettes and parked her car near the Landside Terminal. While Claimant was driving the tug to meet her mother, it flipped and trapped her left leg. An ambulance transported Claimant to the hospital where her left leg was amputated in the area above the ankle and below the knee.

The WCJ found Claimant's testimony credible and convincing. The WCJ found that Claimant forgot her wallet, started her menstrual cycle, while at work, needed feminine products and money, and called her mother to deliver such products and money to her at the airport. Notably, the WCJ found that Claimant's job performance would be affected by her menstrual cycle and would be adversely affected if she did not have feminine products to address the situation." The WCJ further found that Claimant asked for and received permission from her supervisor to take a tug to meet her mother at the Landside Terminal and that Claimant's injury occurred on Employer's premises.

Based on these findings, the WCJ determined that 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 WCJ found that Claimant's departure from work was temporary, Claimant had permission to engage in this departure, and the departure was for the purpose of attending to personal needs and comfort that would allow her to continue her shift with Employer. Therefore, the Claimant remained in the course of her employment pursuant to the "personal comfort doctrine." The Board and the Commonwealth Court affirmed the Decision of the WCJ.

**Conclusion and Practical Advice**: This is a very fact specific case. However, even though the claimant prevailed in this case, it could be helpful to defend a case using a converse argument. Namely, the facts of Starr Aviation are so in the claimant's favor that if the facts do not rise to the level addressed in the Starr Aviation case the Defendant should prevail.

**Steele v. WCAB (Findlay Township),** __ A.3d __ (Pa. Cmwlth March 8, 2017)

**Issues**: Whether a volunteer firefighter in an Act 46 case is required to submit the PennFIRS report.

**Answer**: Yes.

**Analysis**: Decedent joined the volunteer fire department in 1968. Over the course of his career, he served as a lieutenant, assistant captain, captain, assistant chief, and chief. Decedent held the position of fire chief for 20 years before stepping down in 2004 due to high blood pressure. Although he no longer served as chief, Decedent continued to respond to fires and served as captain up until the year before he died. In October 2009, he was diagnosed with stage 4 lung cancer. Decedent died on August 5, 2011.

The WCJ concluded that the lay testimony of Claimant and two fellow firefighters was sufficient to establish that Decedent was directly exposed to Group 1 carcinogens, and PennFIRS reports were not necessary as they were within the control of the Employer Findlay Township (Employer). The WCJ further concluded that Employer successfully rebutted the presumption under Section 108(r) of the Act, but Claimant met her burden of demonstrating a work-related injury caused or contributed to Decedent's disability through the credible testimony of lay and expert witnesses. The Board reversed the Decision of the WCJ.

On appeal to the Commonwealth Court, they addressed that Act 46 added Section 301(f), which imposed an additional condition on the presumption where the occupational disease is cancer suffered by a firefighter. Section 301(f) provides that a firefighter is entitled to benefits under Section 108(r), provided he can show: (1) employment for four or more years in continuous firefighting duties; (2) direct exposure to an IARC Group 1 carcinogen; and (3) that he passed a physical examination prior to engaging in firefighting duties that did not reveal any evidence of cancer. 77 P.S. § 414. Important for purposes of this appeal, Section 301(f) further provides:

> Any claim made by a member of a *volunteer* 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 [PennFIRS]* and provided that the member's claim is based on direct exposure to a carcinogen referred to in section 108(r).

The Commonwealth Court stated that the Act clearly requires that in addition to the requirements all firefighters must establish, volunteer firefighters *shall* also provide evidence of direct exposure to carcinogens *as documented by PennFIRS reports*. The lay testimony of Claimant and two firefighters who fought alongside Decedent is insufficient to satisfy this requirement.

**Conclusion and Practical Advice**: This is another case limiting the potential exposure of an Act 46 case. Please note there is a difference in a volunteer fighter versus a career fighter relative to the PennFirs report.

**Toigo Orchards, LLC v. Workers' Compensation Appeal Board (Gaffney),** __ A.3d __ (Pa. Cmwlth March 13, 2017)

**Issues:** 1). Whether the claimant was a Seasonal Employee.
2). Whether the WCJ proper calculated the AWW
3). Whether the claimant was entitled to a healing period for the specific loss.

**Answers:** No, Yes and No.

**Analysis:** Claimant worked for Employer at the rate of $9.00 per hour and was hired to drive a tractor and move bins for apple pickers in the orchard. Claimant sustained an injury to his left eye and his Employer issued a TNCP, and filed a Corrected Statement of Wages with the Bureau of Workers' Compensation, providing a wage calculation based on seasonal employment. The resulting AWW was determined to be $35.10 with a compensation rate of $31.59 per week. Employer subsequently issued a Medical Only NCP to Claimant for an injury described as traumatic iridocyclitis with cystoid macular edema of the left eye. Claimant filed a Claim Petition, seeking specific loss benefits for the loss of vision in his left eye, indicating that his injury caused him to stop working, and listing Claimant's job title as "Laborer."

The claimant started working for Employer at the beginning of September as a tractor driver. He did not pick fruit for Employer, but moved bins for the apple pickers as they moved from tree to tree. His normal working hours were 7:00 a.m. to 5:00 p.m., five days a week. He was hired only for the apple season (usually September into November) and was not promised more work by the Employer. His eye injury occurred on October 8 when a tree limb knocked his glasses off and scratched his eye. He did not return to work afterwards.

The WCJ concluded that the claimant sustained a total loss of the eye and was a seasonal employee. As such, the claimant's AWW was $35.10 per week.

On Appeal, the Board concluded "that the WCJ erred by imposing too narrow a construction upon Claimant's employment," and that the inquiry should have focused "on the nature of the work, not the period during which the employer operates. The Board characterized Claimant's employment as "itinerant agricultural labor," and, while it was intended to be temporary during the orchard's period of operation, short-term employment is not synonymous with seasonal occupation.

However, the Board did disagree with the Claimant's requested form of calculation for the AWW who argued that Section 309(d.2) should be used to calculate his AWW because he worked less than 13 weeks and did not have fixed weekly wages, which would result in an AWW of $450.00 (50 hours multiplied by $9.00 per hour). The Board rejected this argument, concluding that a calculation under Section 309(d.2) does not achieve a fair assessment of Claimant's pre-injury earnings, which are known. The Board instead, used an alternative calculation, which divided Claimant's total gross earnings by the weeks worked, which yielded an AWW of $351.00 ($1,755.00 divided by 5 weeks) and a benefit rate of $315.90. The Board also reversed the WCJ and awarded the 10 week hearing period.

On Appeal to the Commonwealth Court, the Court affirmed the determination from the Board relative to the claimant's status as not being a seasonal employee and the method used to determine the AWW. However, the Commonwealth Court reversed the Board and reinstated the WCJ determination that the claimant is not entitled to the healing period.

**Conclusion and Practical Advice:** This case is significant relative to the determination of whether or not a claimant is a seasonal employee. The determination from the Commonwealth Court makes it extremely difficult for a claimant to be classified as seasonal even if it is a temporary position.

**Lidey v. Workers' Compensation Appeal Board (Tropical Amusements, Inc.),** __ A.3d __ (Pa. Cmwlth March 17, 2017)

**Issues**: Whether the WCJ Erred in determining that the claimant's AWW should be based upon the claimant's fixed wages and not the history of his earnings.

**Answers**: No.

**Analysis**: At the time of the Claimant's August 4, 2013 work-related injury, Claimant was working as a manager/fabricator for Employer, a family-owned business that provides amusement rides to fairs and carnivals. In this position, Claimant was responsible for Employer's day-to-day operations, contract negotiations, representing Employer at conventions and trade shows, buying and selling equipment, and assembling, disassembling, and repairing rides. Claimant explained that he took on the management duties in addition to his regular fabricator duties in the winter of 2012/2013 after his grandfather passed away. Before that time, Claimant had been learning the management duties from his grandfather since approximately 2008 or 2009. Claimant testified further that in 2012, he was paid $1,000.00 per week from the first week in June through the last week of September. Claimant explained that in 2013, his weekly wages were increased from $1,000.00 to $2,000.00 in connection with his additional management duties. Claimant explained further that prior to 2013, his employment duties stopped when the carnival season ended in September. After he took on the additional management duties, however, he was required to work through the winter months, attending conventions and trade shows, performing contract negotiations, buying and selling rides, and finding the best deals on ride parts. Claimant testified that as a result of these wintertime employment duties, his weekly wages of $2,000.00 were supposed to continue beyond the 2013 carnival season.

The Employer testified that although the claimant was being paid $2000.00 a week at the time of the injury there was not assurance provided by the Employer that the claimant would continue to receive those wages in the winter months after the carnival season ended.

The WCJ concluded that the claimant was not a seasonal employee and that the proper approach for calculating wages was based upon the claimant's fixed wages at the time of the injury. Claimant's time of injury AWW was $2,000.00, which resulted in a weekly compensation rate of $917.00.

The Board determined that the WCJ properly concluded that Claimant was not a seasonal employee and the WCJ's calculation of Claimant's AWW using the fixed wages calculation "artificially inflated Claimant's compensation rate in comparison to his pre-injury earning experience;" and modified his AWW to $717.95 to because it "is a more accurate reflection of Claimant's economic reality."

On Appeal to the Commonwealth Court, they concluded the testimony of both Claimant and Employer established that on August 4, 2013, at the time of Claimant's work-related injury, Claimant's wages were fixed by the week at $2,000.00. Contrary to Employer's arguments, it is irrelevant that Claimant was continuously employed by Employer for the fifty-two weeks prior to his August 4, 2013 work-related injury or that he was not paid by Employer during the

winter months, because Claimant's AWW must be calculated based on how he earned his wages on the date of his injury, not at some other point during his employment with Employer. In addition, there is no evidence in the record to suggest that Claimant was paid by the hour at the time of his August 4, 2013 work-related injury. Because Claimant's wages were fixed by the week and he was not paid on an hourly basis at the time of his August 4, 2013 work-related injury, Claimant's AWW must be calculated pursuant to Section 309(a) of the Act. The Commonwealth Court concluded that the Board committed an error of law when it modified Claimant's AWW from $2,000.00 to $717.95. They reinstated the WCJ's determination.

**Conclusion and Practical Advice:** This case serves as a reminder that it may not always be appropriate to default to the claimant's prior years earnings for the calculations. There are circumstances where the claimant as well as the Employer may benefit by asserting that the claimant had fixed wages.