THE HARTWELL
LAW OFFICES, LLP

OCTOBER 2016 CASE LAW UPDATE

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Pennsylvania State Police v. Workers' Compensation Appeal Board (Bushta) 149 A.3d 118 (Pa. Cmwlth October 26, 2016)

Issues: Whether the Board erred by reversing the WCJ's decision granting Employer's right of Subrogation.

Answer: No.

Analysis: There were actually two main issues in this case. First is whether or not the Employer has a right of Subrogation. Second is whether or not the Claimant was bound by the Stipulation that was executed without knowledge of the Claimant of the change in caselaw as addressed in Stermel v. Workers' Compensation Appeal Board (City of Philadelphia), 103 A.3d 876 (Pa. Cmwlth. 20 14)

On February 25, 2011, Claimant suffered a work-related injury in the course of his employment when his state vehicle was hit by a tractor-trailer. The NCP provided for $858.08 weekly indemnity benefits, but indicated that Claimant was receiving salary continuation under what is commonly referred to as the Heart and Lung Act.

On January 21, 2014, Claimant entered into a Settlement and Indemnity Agreement and Release of All Claims (Settlement Agreement), for $1,070,000.00 ($870,000.00 to Claimant and $200,000.00 for loss of consortium) as a full compromise settlement of his third party claim. The attorney's fee attributable solely to Claimant's recovery totaled $290,000.00. Claimant and his spouse incurred $18,723.68 in litigation costs.

The Settlement Agreement reflected that Claimant "will reimburse any lien holder, known or unknown, for any liens as a result of the above incident." In signing the Settlement Agreement, Claimant acknowledged his understanding that he was "solely responsible for the payment of any ... workers' compensation liens ... incurred as a result of the accident."

On November 19, 2014, Claimant and his counsel signed the Stipulation and Employer's counsel signed it on November 20, 2014. According to the Stipulation, Employer "[paid] Heart and Lung Act wage loss benefits beginning with a pay dated [sic] occurring on [March 3, 2011]." In total, Claimant was paid $94,166.64 in Heart and Lung Act wage loss benefits. The Stipulation also reflected that $56,873.13 in WC indemnity benefits were remitted to Claimant under the Workers' Compensation Act (WC Act) from February 26, 2011 until June 3, 2012. The aggregate amount of medical benefits paid by Employer totaled $110,869.53." Employer and Claimant also executed a Third Party Settlement Agreement calculation sheet which reflected that Employer was entitled to reimbursement of a net lien, calculated based upon the indemnity

and medical benefits payable under the WC Act in the amount of $56,873.13 and $110,869.53, respectively. The accrued lien expense reimbursement rate was 19.2801%. The parties stipulated that the accrued lien was $167,742.66, and did not include $37,293.51 which Employer characterized as Heart and Lung Act wage loss benefits.

On December 4, 2014, the WCJ issued his decision approving the Stipulation. On December 22, 2014, Claimant appealed to the Board, arguing that since all Employer provided benefits were paid pursuant to the Heart and Lung Act, Employer is not entitled to subrogation and, therefore, the Stipulation was contrary to Stermel. On November 3, 2015, the Board agreed, and reversed the WCJ's decision. Employer appealed to this Court.

First, the Commonwealth Court relying upon a body of caselaw concluded that the Claimant was not bound by the Stipulation because of the timing of the Judge's Decision and the date that the case law was interpreted in Stermel.

Second, the Commonwealth reaffirmed the Determination in Stermel that in cases under the Motor Vehicle Financial Responsibility Law (MVFRL) an Employer is not entitled to Subrogation for a Heart & Lung Act case. The current case reiterates the determination in Stermel, but also clarifies an issue that was not definitively clear with respect to the medical. Specifically the Court stated that the employer is not entitled to Subrogation for the medical that was paid as a result of the injury.

Conclusion and Practical Advice: This case is significant to the Commonwealth and municipalities across the Commonwealth. One issue that may still be left outstanding for municipalities is whether or not this case only applies to "self-insured" municipalities. There is verbiage in the case that may draw a distinction.

Demchenko v. Workers' Compensation Appeal Board (City of Philadelphia) -- A.3d -- (Pa. Cmwlth October 26, 2016) WL 6242815

Issues: Whether the WCJ and Board erred by denying a retired firefighter benefits for disability compensation for prostate cancer allegedly caused by exposure to carcinogens.

Answers: No.

Analysis: Peter Demchenko (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying him compensation benefits for his prostate cancer. The Board affirmed the decision of the Workers' Compensation Judge (WCJ). The Board held that Claimant, a retired firefighter, did not prove that prostate cancer is caused by exposure to IARC Group I carcinogens. The Board also held that Claimant could not use the statutory presumption in Section 301(f) of the Act that assists a firefighter in proving that his occupational disease is compensable as he filed his claim petition more than 300 weeks after his last day of work as a firefighter. Finally, the Board agreed with the WCJ that Claimant did not prove that his prostate cancer was caused by his workplace exposure to Group 2A carcinogens and, thus, an occupational disease under the "catch all" provision in Section 108(n) of the Act. The Commonwealth Court Affirmed.

The City of Philadelphia (Employer) hired Claimant as a firefighter in 1974. By January of 1980, he was working exclusively as a paramedic. In May of 2006 Claimant retired. One month later, Claimant was diagnosed with prostate cancer, which was successfully treated with surgery.
In June of 2012 (more than 300 weeks after being diagnosed), Claimant filed a claim petition alleging that his prostate cancer was caused by exposure to IARC Group 1 carcinogens while working as a firefighter. Claimant sought payment of disability compensation from November 27, 2006, to January 15, 2007, and medical bills.

Following litigation, the WCJ credited the testimony of Dr. Singer and the report of Dr. LeMasters that Claimant had been exposed to Group 1 carcinogens during his career as a firefighter and paramedic. However, the WCJ rejected Dr. Singer's testimony on causation for multiple factual reasons.

Further, the WCJ reached several legal conclusions. First, because Claimant retired prior to his cancer diagnosis, his cancer did not cause a post-retirement compensable disability and, thus, he was not entitled to use the statutory presumptions available to Claimants seeking compensation for an occupational disease. Second, Claimant did not prove that prostate cancer is an occupational disease under Section 108(r) of the Act because his evidence did not show that exposure to Group 1 carcinogens has been linked to prostate cancer. Third, because Claimant did not demonstrate that prostate cancer is an occupational disease for firefighters, he had to prove that his prostate cancer was caused by his workplace exposures, such as Class 2A carcinogens, as allowed under Section 108(n) of the Act; however, his medical evidence was not credited. In any case, assuming Claimant was entitled to a presumption that his prostate cancer was caused by firefighting, the WCJ concluded that Employer's evidence rebutted it.

Claimant appealed to the Board, and it affirmed. It upheld the WCJ's factual findings and agreed with the WCJ that Claimant did not prove that prostate cancer is an occupational disease

under Section 108(r) of the Act. The Board also agreed that Claimant was not entitled to use the statutory presumption to prove his claim, albeit for another reason than used by the WCJ. To use the statutory presumption in Section 301(f) of the Act, a Claimant must file his claim petition within 300 weeks of the last day of occupational exposure to the carcinogen. Claimant retired in May 2006, and he did not file his claim petition until June 13, 2012, which was 315 weeks after his last day of employment as a firefighter. The Board held that Claimant did not satisfy the deadline for being able to use the presumption in Section 301(f) of the Act. Claimant then petitioned for the Commonwealth Court's review. The Commonwealth Court affirmed.

Conclusion and Practical Advice: This case creates further credence that the cases under Act 46 need to be litigated to its fullest extent. The Commonwealth Court (in large part due to the work of Chartwell Law Offices) has now issued multiple Decisions limiting the impact of Act 46.

Jackson v. Workers' Compensation Appeal Board (Radnor School District and ACTS Retirement Community) 148 A.3d 939 (Pa. Cmwlth October 19, 2016)

Issues: Whether employer's Joinder Petition was untimely filed.

Answer: Yes.

Analysis: On September 4, 2002, Claimant while in the course and scope of his employment as a security guard for Radnor. Radnor issued an NCP acknowledging an injury to Claimant's left knee. At the time of the work-injury, Claimant was concurrently employed as a security guard with ACTS.

On April 1, 2013, Claimant filed a Reinstatement Petition against Radnor alleging a worsening of his condition as of that date. Radnor filed an answer denying Claimant's allegations and noting that he soon would receive the maximum 500 weeks of partial disability benefits. At a May 6, 2013 hearing, Claimant testified that he injured his left knee on September 4, 2002, while working for Radnor at a football game. Claimant stated that he never returned to his position at Radnor. However, he returned to his concurrent employment with ACTS from December 15, 2002, to February 5, 2003, and from July 21, 2003, until March 31, 2013. Claimant explained that ACTS allowed him to work modified duties. Claimant only worked as a stationary guard sitting at the gate house. He stated when ACTS adopted new job requirements in February 2013, he was told that he could no longer work modified duty. Claimant did not believe that he could perform the additional duties, such as walking three hours per shift and climbing three or four flights of stairs several times in each of six buildings, and ACTS terminated his employment.

Claimant had surgery on his left knee in late 2002 or early 2003. He said that he returned to his surgeon, Dr. Bosacco, in 2010, when the pain in his left knee began to worsen with increased physical activity. Claimant stated that, the more activity I have, the more pain I have in general .... Claimant also testified that his symptoms were essentially stable until the 2012-2013 holidays.

The parties deposed Dr. Murphy on October 2, 2013. On October 22, 2013, Radnor filed a petition for joinder against ACTS, alleging that Dr. Murphy related Claimant's current disability in whole or in part to Claimant's concurrent employment with ACTS. ACTS filed an answer denying Radnor's allegations and objecting to the joinder petition as untimely filed. Claimant joined in ACTS' objection.

After additional litigation, the WCJ concluded that Claimant's current disability was a new injury that resulted from an aggravation of his pre-existing degenerative joint disease and was not causally related to his 2002 injury. The WCJ granted Radnor's petition for joinder, treated Claimant's reinstatement petition as a claim petition against ACTS, granted that petition, and ordered ACTS to pay Claimant total disability benefits, including payments for reasonable and necessary medical treatment, effective March 31, 2013.

ACTS appealed to the Board, specifically challenging the factual assertions as well as asserting that the WCJ erred as a matter of fact and law in overruling ACTS' and Claimant's objections to

the Joinder Petition and finding that the Joinder Petition was timely filed. The Board held that Claimant's testimony on May 6, 2013, which attributed an increase in his pain to an increase in his physical duties, was evidence regarding a reason to join ACTS that triggered the 20-day period for filing a joinder petition, 34 Pa. Code § 131.36, and concluded that Radnor's joinder petition was untimely. Accordingly, the Board reversed the WCJ's order. The Commonwealth Court affirmed the Board's Decision.

Conclusion and Practical Advice: The Commonwealth Court affirmed the Boards determination that the Joinder Petition was untimely. This case serves as a reminder that the Act requires the timely filing of a Joinder Petition. Often the decision to file a Joinder can be delayed in either making the recommendation (as sometimes it is better to point at an empty chair) or getting authority to file the Joinder. It should be noted that if there is a basis to file a Joinder this needs to be done timely.

Fargo v. Workers' Compensation Appeal Board (City of Philadelphia), 148 A.3d 514 (Pa. Cmwlth October 11, 2016)

Issues: Whether there was an error of law by the WCJ that the Claimant's Claim Petition was untimely.

Answers: No.

Analysis: Albert Fargo (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision and order of a Workers' Compensation Judge (WCJ), denying a claim petition under Section 108(r), relating to the occupational disease of cancer suffered by a firefighter caused by exposure to a known carcinogen. The WCJ denied the claim petition on the basis that the claim was not brought within 600 weeks of Claimant's last exposure to workplace hazards while working as a firefighter for the City of Philadelphia (Employer), as required by Section 301(f) of the Act. The Commonwealth Court affirmed.

Claimant began working for Employer as a firefighter in 1972. In 1997, Claimant was diagnosed with squamous skin cell carcinoma after a biopsy of a growth on his leg. On July 31, 2001, Claimant injured his back in a motor vehicle accident, and he elected to take sick leave, remaining out of work until he retired on September 16, 2002. In 2005, Claimant was diagnosed with malignant melanoma after a biopsy of a growth on his back. Claimant was diagnosed with bladder cancer on July 6, 2012, and he filed a claim petition seeking medical benefits for the bladder cancer on March 14, 2014. At a hearing on April 25, 2014, Claimant amended the claim petition to include the squamous skin cell carcinoma diagnosis in 1997 and the malignant melanoma diagnosis in 2005. The WCJ directed the parties to brief the issue of whether the claim petition was barred by the 600-week limitations provision of Section 301(f).

On July 15, 2014, the WCJ issued a decision and order dismissing the claim petition as untimely filed. The WCJ found that the claim petition of March 14, 2014 was filed more than 600 weeks after July 31, 2001, the last day that Claimant appeared at work for Employer and therefore the last day that Claimant could have possibly been exposed to a carcinogen in the workplace. The WCJ recognized that while Section 301(f) expanded the time period for filing occupational disease claims under Section 108(r) for cancer suffered by a firefighter to 600 weeks, there is nothing in the Act that would explicitly allow for any extension of time for filing a petition beyond 600 weeks and accordingly concluded that the claim petition was untimely.

Claimant appealed to the Board, and the Board affirmed the determination by the WCJ that the claim petition was untimely under Section 301(f). The Board rejected the argument by Claimant that the 600-week period referred to in Section 301(f) was merely an extension of the 300-week manifestation period of Section 301(c)(2) of the Act, 77 P.S. § 411(2), which only requires that the symptoms of the disease manifest within 300 weeks.

Conclusion and Practical Advice: The Commonwealth again ruled in a manner against an Act 46 case. Please evaluate the precise nature of all cases for possible defenses.