TR&C

Pennsylvania Workers' Compensation Bulletin

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Editor

Recent Hire Injured??

Calculation of Average Weekly Wage Where Injured Worker Has Not Been Employed for a Complete 13-Week Period

By Margaret M. Hock, Esquire

The method for calculation of an injured workers' average weekly wage (AWW) is set forth in §309 of the Workers' Compensation Act. The Supreme Court noted in the case of Triangle Building Center v. WCAB (Linch), 560 Pa. 540, 746 A.2d 1108 (2000) that the mechanics of the legislative scheme set forth in §309 of the Act demonstrate the General Assembly's intent to establish a baseline figure from which benefits are calculated that *reasonably reflects the reality of the claimant's pre-injury earning experience as a predictor of his or her future earning potential*.

Section 309(d.2) covers "recently hired employees for whom there [is]…no accurate measure of average weekly wage other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment agreement." Reifsnyder v. WCAB (Dana Corp.), 883 A.2d 537 (Pa. 2005). Section 309(d.2) of the Act provides:

> "If the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the average weekly wage shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment."

Unfortunately there are situations which are not covered by the Act. Not every factual scenario falls within the legislative scheme outlined in §309.

For example, in Hannaberry HVAC v. WCAB (Snyder, Jr.), 575 Pa. 66, 834 A.2d 524 (Pa. 2003), a seriously injured full-time teenage worker, had worked part-time while in school. The question before the Court was whether the periods of his part-time employment should be included in his AWW. Recognizing that inclusion of the quarters in which claimant worked part-time after school would result in an underestimation of his actual earning capacity, the Court held that the claimant's AWW was to be calculated using only the quarter in which he had worked full-time. The Supreme Court noted that §309 "was obviously intended to ensure an accurate calculation of wages in the myriad employment scenarios arising in today's workplaces," and was not to be rigidly applied.

(Continued on page 7)

Inside This Issue...

Commonwealth Court Case Reviews

William Logue v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania), No. 1882 C.D. 2014, Filed July 14, 2015.

(Impairment Rating Evaluation—The Act does not require an employer to seek the claimant's agreement regarding the selection of an IRE physician.)

Claimant suffered a work-related injury to his right wrist in 2002, for which he received total disability benefits. On November 2, 2012, employer filed a request with the Bureau for designation of a physician to perform an impairment rating evaluation (IRE) pursuant to §306(a.2) of the Workers' Compensation Act. The Bureau designated Dr. Zhang as the physician to perform the IRE. Claimant objected to the request and designation, asserting that employer was required to attempt to reach an agreement with claimant on an IRE physician before requesting that the Bureau designate an IRE physician. Claimant refused to appear for an IRE with Dr. Zhang. Employer filed a petition seeking an order compelling claimant to appear.

The Workers' Compensation Judge granted employer's petition. The Workers' Compensation Appeal Board affirmed that decision.

Claimant then sought review by the Commonwealth Court. The Court noted that, in pertinent part, §306(a.2) of the Act provides: "The degree of impairment shall be determined based upon an evaluation by a physician...chosen by agreement of the parties, or as designated by the department."

Claimant took the position that this language requires an employer to first seek agreement from the claimant as to an IRE physician before requesting that the Bureau designate the physician. The Court did not agree.

Section 306(a.2) merely lists two alternative methods for selecting the IRE physician and does not state that the designation by the Bureau is limited to the situation where the parties have been unable to agree. If the General Assembly had intended to require the employer to attempt to obtain the claimant's agreement on a physician prior to requesting the Bureau to designate an IRE physician, it would have included language requiring the employer to consult the claimant or restricting the circumstances in which the Bureau may designate an IRE physician. Because no such language appears in the statute, the Court refused to impose such a requirement.

The Court noted that the purpose of §306(a.2) is to reduce workers' compensation costs and restore efficiency to the workers' compensation system. A requirement that employers go through an additional step of seeking agreement on an IRE physician from the claimant before requesting Bureau designation would cause unnecessary delay and inefficiency, contrary to the purpose of the Act.

The order of the WCAB was affirmed.

****

Scott Lee Staron, d/b/a Lee's Metal Roof Coatings & Painting, v. Workers' Compensation Appeal Board (Farrier), No. 2140 C.D. 2014, Filed July 17, 2015.

(Independent Contractor v. Employee—Section 3(a)(1) of the Construction Workplace Misclassification Act requires an individual in the construction industry to sign a written contract prior to injury to be considered an independent contractor.)

Claimant, who had 20 years of experience in painting and roof work, had worked for different contractors. He considered himself to be self-employed and usually did his own work. He owned his own truck, tools and some equipment.

Claimant responded to employer's advertisement seeking a painter. Employer met claimant and agreed that employer would pay claimant $100 per day. Employer also told claimant that he would need to sign a document in order to work for employer.

Claimant began working for employer on May 3, 2011, using his own brushes, caulk gun, painter pants and knee pads. Employer provided claimant with ladders and all other necessary equipment. From May 3, 2011 through May 6, 2011, claimant and employer met at employer's home and traveled to the job site together.

On May 6, 2011, while at the job site, claimant slipped and fell off of the roof, striking his head on the sidewalk. He was taken by ambulance to the hospital, where he received stitches in his head and discharged. Thereafter, employer presented the independent contractor agreement to claimant for his signature and claimant signed the agreement.

On October 5, 2011, claimant filed a Claim Petition alleging that he sustained a work-related injury while working as a painter for employer. Employer filed an answer denying an employment relationship.

The Workers' Compensation Judge found that claimant had not entered into the agreement at the time of injury on May 6, 2011 and the claimant was, therefore, employer's employee and not an independent contractor. Benefits were thus awarded. Employer appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, employer argued that the WCAB erred in concluding that claimant was an employee under the

Construction Workplace Misclassification Act (CWMA). Specifically, employer argued that the WCAB erred in concluding that §3(a)(1) of the CWMA requires an individual in the construction industry to sign a written contract *prior to* the injury in order to be considered an independent contractor. The Court did not agree.

A claimant must establish that he sustained injury in the course of his or her employment and that the injury resulted in a loss of earning power. Cruz v. WCAB (Kennett Square Specialties), 99 A.3d 397 (Pa. 2014). An employer/employee relationship is a critical threshold for a determination of liability.

Section 2 of CWMA provides that for purposes of workers' compensation, the term "employee" shall have the same meaning as §104 of the Workers' Compensation Act, which defines "employe" as "all natural persons who perform services for another for a valuable consideration."

Section 3(a) of the CWMA provides:

> For purposes of workers' compensation...an individual who performs services in the construction industry for remuneration is an independent contractor only if:
>
> (1) The individual has a written contract to perform such services.
>
> (2) The individual is free from control or direction over performance of such services both under the contract of service and in fact.
>
> (3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

Here, claimant worked for employer for days in exchange for remuneration and did not sign the agreement until after he was injured. No written contract existed at any time during claimant's work for employer. Although claimant later signed the agreement, his employment status at the time of injury did not change to independent contractor because a written contract for services did not exist at the time of injury.

The WCAB properly concluded that claimant was an employee and not an independent contractor under the CWMA. The decision of the WCAB was affirmed.

****

William Watt v. Workers' Compensation Appeal Board (Boyd Brothers Transportation), No. 53 C.D. 2015, Filed September 15, 2015.

(Extraterritorial Jurisdiction– Claim of interstate truck driver properly dismissed where claimant, a Pennsylvania resident, regularly traveled in Pennsylvania and other states, but signed agreement that employment was located in Alabama and his injury occurred in New Jersey.)

Claimant, a resident of Pennsylvania, completed an online application for employment on his personal computer in Pennsylvania. After obtaining his CDL license, claimant was contacted by employer by telephone and scheduled for orientation in Ohio. During orientation, employer provided claimant with a packet of documents, including a "Workers' Compensation Agreement," which he signed. He then returned to Pennsylvania and began working as an interstate truck driver for employer. On April 12, 2011, while untarping a cargo load in New Jersey, he felt pain from his right shoulder to his right hand. He stopped working and began receiving workers' compensation benefits through Alabama's workers' compensation system.

Claimant filed a Claim Petition seeking benefits under the Pennsylvania Workers' Compensation Act. The employer denied the allegations of the petition. Employer alleged that Pennsylvania lacked jurisdiction because claimant was not injured or hired in Pennsylvania and he was receiving benefits in Alabama pursuant to the terms of his employment contract.

The Workers' Compensation Judge found claimant sustained a work injury in New Jersey and that claimant worked for employer under a contract of hire entered into in Ohio; however, because the parties agreed in the Workers' Compensation Agreement that employer hired claimant in Alabama and that his employment was principally localized there, the WCJ was constrained to find as fact that claimant's employment was principally located in Alabama for purposes of the Act. Thus, the WCJ concluded that he lacked jurisdiction and denied and dismissed the claim petition. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal before the Commonwealth Court, claimant argued that the totality of the facts lead to the inescapable conclusion that his employment was principally localized in Pennsylvania because he lived in Pennsylvania and worked in Pennsylvania more than any other state. Claimant also argued that the WCJ erred in relying upon the choice of law provision in the Workers' Compensation Agreement because it violated public policy. Finally, claimant argued that §305.2(d)(5) of the Act is unconstitutional because it violates the Full Faith and Credit Clause of the U.S. Constitution. The Court did not agree.

The WCJ did not err in concluding that claimant's employment was not "principally localized" in Pennsylvania. Although the evidence showed that he spent more time and drove more miles in Pennsylvania than in any other state, he did not spend "a substantial part of his working time" in Pennsylvania. Instead, he spent only a small percentage more in Pennsylvania that in some other states, such as Virginia and Ohio. As such, claimant's first argument failed.

In addressing claimant's second argument, the Court noted that a choice of law provision is unenforceable when the work injury occurs in

Pennsylvania. Where, as here, the injury occurs outside the territorial limits of Pennsylvania, such an agreement may be enforced provided the parties agree that the employment is principally located in another state. Here, claimant signed an agreement that his employment was principally located in Alabama and the injury occurred in New Jersey. The Workers' Compensation Agreement entered into by the parties did not abridge claimant's rights under the Act or otherwise violate public policy.

Lastly, claimant's argument that §305.2(d)(5) of the Act violates the Full Faith and Credit Clause also failed. That section provides:

> An employee whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another state, and, unless such other state refuses jurisdiction, such agreement shall be given effect under this act.

When addressing this section, the Courts have held that, even though the parties may enter into a choice of law agreement, the parties may not overcome the Pennsylvania Act's coverage pertaining to an in-state injury.

Claimant maintained that the "majority of aggregation of contacts" is in Pennsylvania such that the choice of law of Alabama is not founded in fact and is fundamentally unfair. Although the Court recognized claimant's contacts in Pennsylvania (i.e., place of residence, spent most of his time and miles in Pennsylvania, kept his truck in Pennsylvania, was occasionally dispatched from his home, received all treatment in Pennsylvania and only went to Alabama four times for work purposes), an employer's place of business is also a significant contact. Employer's headquarters and principal place of business are in Alabama, such that the application of Alabama law is neither unfair nor unexpected. Thus, the Court concluded that §305.2(d)(5) of the Act does not contravene the Full Faith and Credit Clause of the U.S. Constitution.

The decision of the WCAB was, thus, affirmed.

****

Sandra Sloane v. Workers' Compensation Appeal Board (Children's Hospital of Philadelphia), No. 1213 C.D. 2014, Filed October 1, 2015.

(Statute of Limitations—The issuance of a Medical Only Notice of Compensation Payable does not toll the statute of limitations under §315 or §413(a) of the Act.)

Claimant injured her right elbow in the course of her employment on April 20, 2014. Employer issued a Notice of Compensation Payable and a series of Supplemental Agreements pursuant to which claimant received partial disability benefits.

While working light duty, claimant suffered a second injury to her right elbow on December 3, 2006. Employer accepted this injury through a medical-only NCP. Claimant continued working in her light duty capacity and continued to receive partial disability benefits relative to her 2004 injury until November 16, 2007, when she ceased working in anticipation of right knee surgery. Thereafter, claimant did not return to work

On May 31, 2011, claimant filed a petition seeking reinstatement of total disability benefits as of November 1, 2007. The Workers' Compensation Judge granted the petition, concluding that claimant was totally disabled as of November 17, 2007 based on her 2004 and 2006 work injuries. The WCJ concluded that employer was liable for payment of medical services provided relative to the 2004 and 2006 work injuries, including the December 2007 right knee replacement surgery and subsequent treatment.

Employer appealed and the Workers' Compensation Appeal Board affirmed in part and reversed in part. The WCAB reversed the WCJ's order granting total disability benefits based on the 2006 work injury, concluding that claimant was required to comply with the 3-year limitations period of §413(a) of the Act for modification of a NCP rather than the 500-week period for reinstatement of suspended partial dis-

WCAIS Alert:

The Department has recently received a number of inquiries regarding the Center for Medicare Services' (CMS') upcoming implementation of ICD-10. Please note that the Pennsylvania Workers' Compensation Act's (Act's) Medical Fee Schedule does not rely on ICD-9 or ICD-10 codes to determine appropriate fees for treatment. Instead, the Fee Schedule relies upon HCPCS, CPT, DRG and service/revenue codes to determine that applicable reimbursement rate. Notably, the Center For Medicare Services has reminded providers and payors that "the change to ICD-10 does not affect CPT coding for outpatient procedures and physician services." See, https://www.cms.gov/Medicare/Coding/ICD10/index.html?redirect=/ICD10 Providers and payor should refer to guidance issued by CMS to determine when the use of ICD-10 is appropriate or required. Further, while ICD-10 PCS may result in changes to providers' inpatient billing practices, inpatient acute care providers reimbursed by DRGs must continue to "cross-walk" DRGs to the Frozen Grouper, as set forth in 34 Pa. Code §§ 127.110-.116, 127.154. Of course, implementation of ICD-10, and the additional information that is expected to provide, may also cause payors to alter the means by which they adjust and pay medical bills; however, the Department's review of such bills will continue to take place as described in the Act and regulations promulgated thereunder.

ability benefits. Because claimant's petition was not filed within 3 years of the issuance of the 2006 NCP, the WCAB determined that claimant was barred from receiving total disability benefits for the 2006 injury.

Claimant sought review by the Commonwealth Court, arguing that the WCAB erred and that the issuance of the medical-only 2006 NCP put her disability in a suspended status which could be reinstated within 500 weeks of the 2006 NCP.

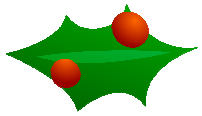
The Court noted that §413(a) of the Act provides a WCJ with broad discretion to amend an award of benefits, an NCP or an agreement of the parties; however, all review, modification or reinstatement petitions under §413(a) must be filed within 3 years after the date of the most recent payment of compensation made prior to the filing of such petition. This provision acts as a statute of repose, cutting off any entitlement to the reinstatement of disability benefits that have been partially or totally suspended at the expiration of the 500 weeks under which partial disability benefits are payable pursuant to §306(b)(1) of the Act. Furthermore, the 500-week and 3-year limitations periods of §413(a) must be construed together and both must be given effect, allowing a claimant whose benefits were suspended or reduced prior to the expiration of the 500-week period to seek reinstatement of total disability payments within 3 years of the last payment of benefits or the maximum 500 weeks allowed for partial disability, whichever is later.

The effect of issuing a medical-only NCP is distinct from the effect of a WCJ ruling that a claimant has suffered a loss of earning power and granting a claim petition but immediately suspending benefits. A medical-only NCP allows an employer to accept liability for an injury but not any loss of earning power. Here, because no disability had ever been recognized by employer or established by a WCJ for the 2006 injury, disability had not been suspended when the 2006 NCP was issued. Thus, claimant could not seek to have disability benefits reinstated, and the 500-week period for reinstatement of benefits does not govern.

Section 315 also imposes a 3-year limitations period, measured from the date of injury. Unlike §413 (a), payments of medical expenses may toll the §315 limitations period where those payments were made "in lieu of" workers' compensation benefits. The controlling question is whether the employer intended the payments for medical services to replace disability benefits. Here, by issuing the medical-only NCP, employer made its intent clear that it would pay claimant's medical expenses but accepted no liability for wage loss benefits. Thus, the claimant's petition would also be untimely under §315.

The order of the WCAB was affirmed.

****



Saladworks, LLC and Wesco Insurance Company v. Workers' Compensation Appeal Board (Gaudioso and Uninsured Employers' Guaranty Fund), No. 1789 C.D. 2014, Filed October 6, 2015.

(Statutory Employer—Entity which is in the business of selling franchises is not statutory employer of franchisee's injured worker.)

Claimant was working at a Saladworks restaurant when he slipped and twisted both knees. He filed a claim petition against Saladworks, although the employer was later identified as "G21, LLC d/b/a Saladworks." G21 did not have workers' compensation insurance coverage.

Claimant also filed a claim petition against the Uninsured Employer Guaranty Fund. The UEGF filed a joinder petition against Saladworks, alleging that Saladworks was the claimant's statutory employer at the time of injury. Saladworks moved to strike the joinder petition because it had no relationship with claimant.

At hearings before the Workers' Compensation Judge, a director of Saladworks testified: "We sell franchises to prospective franchisees to open up their businesses with Saladworks' concept." Saladworks does not know the identity of employees at franchise locations, does not do any hiring or firing of employees at franchise locations, and does not provide any training for the day to day operational employees of a franchisee. Saladworks trains the owner of the franchise, assists with marketing and the opening of the location. Further, Saladworks conducts performance reviews of franchisees and provides the franchisee with a confidential business manual which instructs the franchisee how to run the business. Saladworks has the authority to terminate a franchise if the franchisee fails to make a requested model of a store. Franchisees must submit proposed advertising to Saladworks for approval and spend a certain amount for advertising per year. Under the franchise agreement, the franchisee is required to maintain certain types of insurance, including workers' compensation insurance.

The WCJ granted Saladworks' motion to strike the joinder petition and the UEGF appealed. The Workers' Compensation Appeal Board reversed the WCJ's determination, noting that a statutory employer is not established through a "control test" or an actual employment relationship. Rather, a statutory employer is made one under §302 of the Act. Specifically, §302(a) recognizes a class of statutory employers who are not in possession or control of the premises, but who use subcontractors for services that are a "regular or recurrent" part of the business. The WCAB found that the record established that Saladworks, as the franchisor, contracted with G21, as the franchisee, to have work performed which is a regular or recurrent part of Saladworks' business, occupation or trade. Saladworks contracted with G21 to open a

restaurant in accordance with the "unique system" developed and owned by Saladworks. As such, the WCAB concluded that Saladworks was the statutory employer under §302(a) of the Act.

Saladworks then sought review by the Commonwealth Court, arguing that §302(a) of the Act is inapplicable and that the WCAB misunderstood the nature of its business. Saladworks only sells franchises to franchisees who open their own businesses using the Saladworks' concept. Saladworks does not own the location, does not know any of the employees, does not hire or fire employees, and has nothing to do with the day to day operations of the franchise. The work performed by G21 under the franchise agreement was not a regular or recurrent part of the business, occupation, profession or trade of Saladworks.

The Court agreed. Saladworks' main business is the sale of franchises. It is not in the restaurant business or the business of selling salads. Because G21 lacked workers' compensation insurance at the time of claimant's injury, UEGF is responsible under §1602(c) of the Act. The decision of the WCAB was reversed.

****

Mary Ellen Chesik v. Workers' Compensation Appeal Board (Department of Military and Veterans' Affairs), No. 758 C.D. 2015, Filed November 9, 2015.

(Suspension—Voluntary Withdrawal from Workforce—Without more, claimant who takes disability pension and moves out of state has not voluntarily removed himself or herself from the workforce.)

Claimant suffered a work-related cervical sprain/strain injury in July 2009. In March 2013, employer filed a petition to suspend claimant's benefits alleging that she had moved to Nevada and had voluntarily removed herself from the workforce.

At deposition, claimant testified that she moved to Nevada in 2012 and that she is living by herself, with no family, dependents or relatives in the area. She moved to Nevada for its warmer climate, which is better suited to her non-work related lupus and fibromyalgia. She did not receive any type of medical recommendation that she should move to Nevada. She has not looked for work in Nevada, nor has she worked for any employer there in any capacity. She testified that she retired from her position with employer in October 2012 and applied for disability pension benefits in December 2012. She acknowledged that by moving to Nevada, she took herself out of the workforce, at least in her hometown of Scranton, Pennsylvania. Nevertheless, she maintained that: "If there's a possibility that I could work, I would love to work."

In March 2014, the Workers' Compensation Judge granted employer's suspension petition, noting that an employer need not demonstrate that a claimant is physically able to work or that available work has been referred to a claimant where she has voluntarily retired or withdrawn from the workforce.

On appeal to the Workers' Compensation Appeal Board, claimant argued that the WCJ erred in concluding that she had voluntarily removed herself from the workforce merely by moving to Nevada, and that the WCJ erred by concluding that her acceptance of her disability pension was further evidence that she removed herself from the workforce. The WCAB rejected these claims, noting that claimant testified that she had not sought employment since her injury and did not assert that she had been forced into retirement. Looking at the totality of the circumstances, the WCAB concluded that the WCJ did not err.

Claimant then sought review by the Commonwealth Court, again arguing that her permanent change of residence from Pennsylvania to Nevada does not constitute a voluntary removal from the workforce, and that there are no other objective facts in addition to her acceptance of a disability pension to support the WCJ's conclusion. The Court agreed.

The Court concluded that the WCJ erred as a matter of law in relying upon claimant's permanent relocation to Nevada, standing alone, to support a determination that she had permanently removed herself from the workforce. Likewise, the WCJ could not rely solely upon claimant's receipt of a disability pension to support the suspension of benefits on the basis that she has permanently separated from the workforce. As a result, the WCJ erred in suspending claimant's benefits in the absence of other evidence or findings to support the determination that she has permanently removed herself from the workforce.

The WCAB's order was reversed.

****

Brenda M. Reichert v. Workers' Compensation Appeal Board (Foxdale Village), No. 2080 C.D. 2014, Filed September 10, 2015, Reported November 9, 2015.

(Course and Scope of Employment—An injury that arises while participating in a pre-employment FCE does not arise in the course of employment.)

Claimant worked for employer as a certified nurse's assistant for nearly 17 when her physician, Dr. Baker, took her out of work in August 2011 for back pain unrelated to any work injury. Dr. Baker referred her to Dr. Evans, a back specialist, for further treatment.

In January 2012, claimant informed Dr. Evans that she felt that she was able to return to work. Dr. Evans then referred her back to Dr. Baker for a release to return to work. Claimant contacted employer's Human Resource Director, who provided her with a written job description of the essential functions of her job for Dr. Baker's review. Dr. Baker then contacted employer for further clarification, after which he recommended that claimant com-

(Continued from page 1)

Subsequently, in Burkhart Refractory Installation v. WCAB (Christ), 896 A.2d 9 (Pa.Cmwlth. 2006), the claimant did not have an expected number of work hours, and earned wages during only 12 weeks of his 16-week employment. The Court determined that the correct method of calculating the claimant's AWW would be to exclude the 4 weeks in which the claimant had no wages, and to divide his gross wages by the 12 weeks in which he actually earned wages. The Court concluded that doing so would fairly assess the claimant's earnings when he was actually working and would advance the humanitarian purpose of the Act.

A more recent example of a factual situation that does not fit the mold of §309 can be found in the case of Anderson v. WCAB (F.O. Transport and UEGF), 111 A.3d 238 (Pa.Cmwlth. 2015). In that case, the claimant, who had been employed for only 2½ weeks, did not have a fixed hourly wage and had earned no wages during his first week of employment. Moreover, his "expected number of weekly hours" could not be determined because he was only to work when needed to do so by employer. Hence, his AWW could not be calculated under §309(d.2).

Relying upon its decision in Burkhart Refractory, the Court determined that inclusion of the first week – during which claimant earned no wages because employer did not have work available to him – would not "accurately reflect the economic reality of the claimant's pre-injury ability to generate future earnings." As such, the Court based the claimant's AWW solely upon the wages earned during his second week of employment.

The bottom line is that the calculation of an injured worker's AWW, especially when dealing with a short-term employee, will be done on a case-by-case basis. In addressing this situation, the Courts will look to their prior decisions which hold that "§309 is not to be interpreted narrowly or strictly when the result would be an artificially low AWW, unreflective of the reality of a claimant's pre-injury earnings experience." The humanitarian purpose of the Act – which is always to the benefit the employee – will be a determinative factor.

---

plete a functional capacity evaluation (FCE). Employer agreed to pay for the test.

Claimant completed the FCE on February 17, 2012 and later testified that she "was in so much pain at the end of the test" that she "could hardly move that whole weekend." As a result, she filed a claim petition alleging that, on February 17, 2012, she had suffered a work-related injury in the nature of a thoracic strain and aggravation of a pre-existing degenerative condition.

The Workers' Compensation Judge determined that Moberg v. WCAB (Twining Village), 995 A.2d 385 (Pa.Cmwlth. 2010) was controlling and concluded that "having a functional capacity evaluation as a pre-condition of return to work following a period of non-work related disability is not in the course and scope of employment under the Act. Thus, the claim was dismissed.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, noting that Moberg stands for the proposition that merely satisfying the prerequisites of working for an employer does not place a claimant in the course and scope of employment. Claimant did not and could not establish that her injury occurred while actually engaged in the furtherance of the business or affairs of employer.

Claimant appealed to the Commonwealth Court, contending that the WCJ and WCAB failed to note a critical distinction between her case and the facts presented in Moberg. Unlike the claimant in Moberg who was an applicant for employment at the time of injury, claimant was an employee, albeit an employee who had been out on long-term medical disability at that time of her injury, who was simply following employer's instructions to return to employment by having a mandated FCE.

The Court did not agree. Claimant, who had been out on non-work related long-term disability, may have indicated her desire to return to work, but it was not a foregone conclusion that employer would be able to provide her with employment, either in her former position or in a modified duty position. Significantly, employer only required claimant to obtain a fitness for duty certificate from her physician. It was her physician—not employer—who ordered the FCE. Employer neither directed nor mandated claimant's participation in the FCE. Moreover, the fact that claimant was an employee prior to her non-work related long term disability is not dispositive, because claimant may not have returned to employer if she was unable to complete any of employer's other pre-requisites for employment. Hence, an injury that arises while participating in a pre-requisite for employment may alter the employment relationship, but does not arise in the course of employment.

The order of the WCAB was affirmed.

Thomson, Rhodes & Cowie, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219

TR&C

ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

Prior issues are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, hwr@trc-law.com.