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Pennsylvania Workers' Compensation Bulletin

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Child Support Liens

Impact on Workers' Compensation Settlement Awards

By Jillian M. Denicola, Esquire

In Pennsylvania, workers' compensation lump sum settlements must account for existing child support arrears. Injured workers are typically required to sign a Child Support Affidavit and a lien search is required using the injured worker's social security number to ensure that no liens exist. Pennsylvania's Domestic Relations statute provides the following as to child support liens and their effect on a workers' compensation settlement award:

> (f) Workers' compensation awards. – With respect to any monetary award arising under the act of June 2, 1915 (P.L.736, No.338), known as the Workers' Compensation Act, or the act of June 21, 1939 (P.L.566, No.284), known as The Pennsylvania Occupational Disease Act, no order providing for a payment shall be entered by the workers' compensation judge unless the prevailing party or beneficiary, who is a claimant under either or both of the acts, shall provide the judge with a statement made subject to 18 Pa.C.S. §4904 that includes the full name, mailing address, date of birth and Social Security number for the prevailing party or beneficiary who is a claimant under either or both acts. The prevailing party or beneficiary, who is a claimant under either or both of the acts shall also provide the judge with either written documentation of arrears from the Pennsylvania child support or enforcement system website or, if no arrears exist, written documentation from the website indicating no arrears. The judge shall order payment of the lien for overdue support to the department's State disbursement unit from the net proceeds due the prevailing party or beneficiary who is a claimant under either or both acts. *23 Pa.C.S. § 4308.1.*

However, the Domestic Relations statute does not shed any light on how out-of-state child support liens impact an in-state workers' compensation settlement award. Generally, a claimant is required to provide his or her attorney with written documentation of arrears from the "Pennsylvania Child Support Enforcement System website," as noted above. Yet, this website does not provide information as to whether a claimant has an existing child support order in another state. Moreover, the question remains whether

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COMMONWEALTH COURT CASE REVIEWS

David Baumann v. Workers' Compensation Appeal Board (Kellogg Company), No. 2603 C.D. 2015, Filed September 23, 2016.

(Termination—Where there have been prior unsuccessful termination petitions, the employer must demonstrate a change in physical condition since the last disability determination; such a change may exist if there is a lack of objective findings to substantiate a claimant's continuing complaints.)

On May 5, 2007, claimant suffered work-related injuries to his right shoulder and upper back. On March 16, 2009, employer filed a Termination Petition based upon an affidavit of recovery issued by Dr. Bennett. The petition was denied.

On May 4, 2010, claimant underwent a second IME by Dr. Bennett, who again opined that claimant had fully recovered and was capable of returning to work, without limitation. As a result, on July 21, 2010, employer filed a second Termination Petition.

During the litigation, employer presented Dr. Bennett's testimony. The doctor confirmed that he examined claimant for a second time on May 4, 2010. He also reviewed additional records and reports relative to claimant's treatment n 2009. Dr. Bennett testified that, based upon his examination and review of the records, claimant was fully recovered from all aspects of the work injury.

The Workers' Compensation Judge found Dr. Bennett to be credible. She also rejected claimant's testimony that he continued to suffer from the work injury as not credible. The WCJ noted that claimant had travelled to Los Angeles, had gotten multiple tattoos, including one on his injury arm, and had not actively treated since 2009. Based on these factors, the WCJ concluded that employer had established a change in claimant's condition since the prior IME and the last round of litigation. Consequently, the Termination Petition was granted.

Claimant appealed, and the Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that employer had not met its burden of proof as set forth in Lewis v. WCAB (Giles & Ransome, Inc.), 919 A.2d 922 (Pa. 2007). The court acknowledged that, in Lewis, the Supreme Court held:

> In order to terminate benefits on the theory that a claimant's disability has reduced or ceased due to an improvement of physical ability, it is first necessary that the employer's petition be based upon medical proof of a change in the claimant's physical condition. Only then can the WCJ determine whether the change in physical condition has effectuated a change in the claimant's disability, i.e., the loss of his earning power. Further, by natural extension it is necessary that, where there have been prior petitions to...terminate benefits, the employer must demonstrate a change in physical condition since the last disability determination.

Nevertheless, the court did not agree with the claimant's argument that employer had not met its burden of proof. The court recognized that the employer's necessity to prove a change since a prior adjudication will be different in each case. By accepting the employer's medical evidence of full recovery as credible, a WCJ could properly make a finding that the employer has met the standard set forth in Lewis. Moreover, although the WCJ's findings cannot be based solely on evidence that pre-dates the prior adjudication, it may be based upon a review of such evidence plus a

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post-adjudication examination. Finally, it is not necessary for employer to demonstrate claimant's diagnoses have changed since the last proceeding, but only that his symptoms have improved to the point where he is capable of gainful employment. A change sufficient to satisfy the Lewis requirement exists if there is a lack of objective findings to support a claimant's continuing complaints.

Here, in crediting Dr. Bennett's testimony relative to claimant's symptoms and treatment since 2009, the WCJ properly concluded that employer met its burden of proving a change in claimant's physical condition since the prior decision, rendered in 2009.

The order of the WCAB affirming the WCJ's decision was thus affirmed by the Commonwealth Court.

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City of Williamsport v. Workers' Compensation Appeal Board (Cole (Deceased)), No. 620 C.D. 2015, Filed July 18, 2016, Reported October 7, 2016.

(Occupational Disease—Section 108(r) recognizes the occupational disease of cancer suffered by a firefighter which is caused by direct exposure to a carcinogen recognized as Group 1 by the IARC.)

Claimant, a widow, filed a claim petition alleging that her husband's death from gastric cancer in 2011 was causally related to his employment as a firefighter from 1980 until his death.

Claimant testified before the Workers' Compensation Judge that she and decedent began dating in 1992 and were married in 2000. During the time they were together, she saw him about fifteen times following a fire, when he had not had the opportunity to shower. She noted that he smelled like "smoke" and appeared "like someone who came out of ashes." Decedent had been suffering from stomach discomfort for 3 years when, in 2011, he developed stomach hemorrhaging that led to his hospitalization and cancer diagnosis in July 2011.

In support of her petition, claimant presented testimony from Dr. Gelfand, who opined that decedent had been exposed to a variety of carcinogens during his career as a firefighter, including asbestos, and that his work as a firefighter and these exposures were a substantial contributing factor to his death from gastric cancer. It was Dr. Gelfand's belief that decedent was exposed to asbestos because asbestos was a common building material until the 1980s, and firefighters who have fought fires for any considerable amount of time are generally exposed to asbestos.

The WCJ concluded that claimant had established that decedent contracted gastric cancer as a result of direct exposure to smoke from municipal fires that contained Group 1 carcinogens, as recognized by the International Agency for Research on Cancer (IARC). As such, the WCJ granted the fatal claim petition under §108(r) of the Act. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer appealed to the Commonwealth Court, arguing that claimant did not present sufficient evidence to establish that decedent had "direct exposure" to a carcinogen recognized as Group 1 by the IARC.

The court noted that, in 2011, the General Assembly enacted §108(r) and §301(f), creating a new occupational disease provision to provide a new presumption of compensable disability for firefighters who suffer from cancer.

Section 108(r) recognizes the occupational disease of "cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the IARC." Section 301(f) provides, in relevant part, "compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served 4 or more years in continuous firefighting duties, *who can establish direct exposure to a carcinogen referred to in §108(r) relating to cancer by a firefighter*…."

Here, Dr. Gelfand admitted that he did not examine decedent or speak with claimant, decedent's physicians or any individuals who worked at employer's fire department. Furthermore, Dr. Gelfand did not review any records relating to decedent's experience as a firefighter, such as incident reports. He conceded that the information that decedent was exposed to heat, smoke, fumes,

gases, asbestos and other carcinogens did not appear in decedent's medical records but only in correspondence from claimant's counsel.

As such, the court concluded that the record was devoid of competent evidence that decedent had any direct exposure to a known Group 1 carcinogen as required by §301 (f) of the Act. The sole evidence before the WCJ regarding exposure was claimant's testimony that decedent would smell of smoke and have an ashy appearance. Such testimony is insufficient to meet claimant's burden of proof.

The order of the WCAB was reversed.

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Albert Fargo v. Workers' Compensation Appeal Board (City of Philadelphia), No. 2239 C.D. 2015, Filed October 11, 2016.

(Occupational Disease—Under §301(f), a firefighter asserting a claim pursuant to §108(r) must file it within 300 weeks of the last date of exposure in order to take advantage of the statutory presumption of §301(e); if the firefighter does not file the claim until more than 600 weeks after the date of last exposure, the claim is forever barred.)

Claimant began working as a firefighter in 1972. In 1997, he was diagnosed with squamous skin cell carcinoma. In 2001, he injured his back in a motor vehicle accident and elected to take sick leave until he retired in 2002. In 2005, he was diagnosed with malignant melanoma. In 2012, he was diagnosed with bladder cancer.

Shortly thereafter, a Claim Petition was filed seeking medical benefits for the bladder cancer. The Claim Petition was subsequently amended to include the squamous skin cell diagnosis in 1997 and the malignant melanoma diagnosis is 2005.

The Workers' Compensation Judge dismissed the Claim Petition as untimely filed. The WCJ found that the Petition was filed more than 600 weeks after July 31, 2001, the last day that claimant appeared for work for employer and the last day that claimant could have possibly been exposed to a carcinogen in the workplace.

The Workers' Compensation Appeal Board affirmed the WCJ's decision. The WCAB rejected claimant's argument that the 600-week period found in §301(f) is merely an extension of the 300-week manifestation period of §301(c)(2) of the Act. Instead, the WCAB determined that, because the 600-week period of §301(f) was triggered by a specific event independent of the accrual of a remedy—namely the last day of exposure to a workplace hazard—§301(f) acted as a statute of repose rather than a statute of limitations. A statute of limitations is procedural and extinguishes the remedy rather than the cause of action. A statute of repose may also prevent the accrual of a cause of action. At the end of the time period set forth in the statute, the cause of action ceases to exist.

On appeal to the Commonwealth Court, claimant argued that the WCAB erred by holding that §301(f) requires a claimant to file a §108(r) claim within 600 weeks of the last date of exposure. Claimant argued that the General Assembly intended to extend the 300-week manifestation period of §301(c)(2) to 600 weeks for §108(r) claims to account for the longer latency period in firefighter cancer cases. The Court was not persuaded.

Sections 108(r) and 301(f) were both added to the Act by the General Assembly through Act 46 of 2011. Section 108(r) recognizes the occupational disease of "cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer. Section 301 (f) sets forth three requirements that a firefighter-claimant must show to establish a claim under §108(r):

1) The claimant worked for 4 or more years in continuous firefighting duties;
2) The claimant had direct exposure to a carcinogen classified as Group 1 by the IARC; and,
3) The claimant passed a physical examination prior to engaging in firefighting duties that did not reveal evidence of cancer.

Only after making these showings is the claimant entitled to the rebuttable presumption of compensability set forth in §301(f) and §301(e) of the Act. In addition, §301(f) provides that: "Notwithstanding the limitation under subsection (c)(2) with respect to disability or death resulting from an occu-

pational disease having to occur within 300 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, claims filed pursuant to cancer suffered by the firefighter under section 108(r) may be made within 600 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease. The presumption provided for under this subsection shall only apply to claims made within the first 300 weeks."

By its plain language, §301 (f) mandates that an occupational disease claim pursuant to §108(r) be filed within 600 weeks of the last date of workplace exposure to a known carcinogen classified as Group 1 by the IARC. A firefighter who contracts cancer may file a claim under §108(r) within 300 weeks of the last workplace exposure and take advantage of the statutory presumption of compensability. In addition, a §108(r) claimant has an additional 300 weeks to file a claim, albeit without the benefit of the statutory presumption. However, once the 600 weeks elapse from the date of last workplace exposure, the cause of action under §108(r) ceases to exist.

Because claimant filed his claim more than 600 weeks after his last exposure to carcinogens in the workplace, the claimant's petition was untimely under §301(f). The order of the WCAB was affirmed.

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Jeffrey Lynn Nagle, Executor of the Estate of Douglas Edward Bell, Deceased v. True Blue, Inc., Labor Ready, Inc. and Labor Ready Northeast, Inc. and Rye Township, No. 247 C.D. 2016, Filed October 24, 2016.

(Employer Immunity—Where temporary employment agency assumes liability for and pays injured worker benefits, both the temporary employment agency and employer are entitled to immunity from civil action under §303(a) of the Act.)

Bell was hired by Labor Ready, an employment agency, to furnish temporary services. Labor Ready and Rye Township had an agreement under which Labor Ready would furnish the Township with temporary labor. Bell was instructed by Labor Ready to report to work for the Township. He was assigned to work on the back of a Township trash truck. He fell while the truck was moving and sustained serious injuries that ultimately resulted in his death. As a result, Labor Ready's workers' compensation insurance carrier paid approximately $770,000 in workers' compensation benefits.

Nagle, the executor of Bell's estate, filed a civil action asserting negligence, wrongful death and survival claims against Labor Ready and the Township. Both Labor Ready and the Township filed Motions for Summary Judgment asserting they were entitled to immunity under §303(a) of the Act, which provides:

> The liability of an employer under this Act shall be exclusive and in place of any and all other liability...on account of any injury or death as defined in §301(c)(1) and (2) of the Act.

The trial court granted the Motions and dismissed the Complaint. Nagle appealed to the Commonwealth Court.

The court noted that the undisputed facts established that Labor Ready hired Bell and had authority to fire him, Bell reported to Labor Ready for his daily assignments, Labor Ready provided him with general safety training and gloves for the jobs, Labor Ready paid Bell's wages and workers' compensation benefits, and Bell expressly acknowledged Labor Ready was his employer at the time of hire. At the same time, the Township had the right to direct, control and supervise Bell's work. Because the entity with the right to control Bell's work and his manner of performing it is the leading indicator of his employer, the court held that the Township was clearly Bell's borrowing employer at the time of his work injury. Thus, the Township is entitled to immunity under §303(a) of the Act.

Nevertheless, the existing case law did not address whether **both** Labor Ready and the Township are immune from tort liability.

The court addressed this issue by reviewing §303(a) of the Act. First, the General Assembly did not specify that only a single employer is immune from civil liability. Section 303(a) does not refer to the

liability of *the* employer, but *an* employer.

Second, the Act is remedial in nature and must be construed in the injured worker's favor; however, the Act does not authorize windfalls. Considering the Act's overall purpose of providing workers expeditious coverage for their medical expenses and financial stability during their work-related disability in exchange for not suing their employer in court, affording the Township immunity from civil liability for Bell's injury but authorizing Nagle to seek tort damages from Labor Ready (which has fully compensated Bell as required) would lead to an absurd and unreasonable result, rendering §303(a) meaningless. A reasonable interpretation, consistent with the General Assembly's intent, is that **both** Labor Ready and the Township are immune from Nagle's actions.

The trial court's order was affirmed.

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Pennsylvania State Police . Workers' Compensation Appeal Board (Bushta), No. 2426 C.D. 2015, Filed October 26, 2016.

(Subrogation—Third Party Recovery—Employer, who paid benefits under the Heart & Lung Act, is not entitled to subrogation from claimant's third party recovery pursuant to §1720 of the MVFRL.)

Claimant suffered a work-related injury in the course of his employment when his state vehicle was hit by a tractor-trailer. Employer issued a Notice of Compensation Payable, accepting the injuries and indicating that claimant was receiving salary continuation under the Heart & Lung Act.

Claimant and his spouse subsequently entered into a settlement agreement, resolving all claims against the tractor-trailer driver and his company. Pursuant to the settlement agreement, $200,000 was apportioned for claimant's spouse's loss of consortium claim; $870,000 was attributed to claimant. The attorney's fees attributable to claimant's recovery totaled $290,000

Employer filed a Petition for Review asserting a right of subrogation against the proceeds of claimant's third-party recovery. The parties stipulated that, in total, claimant had been paid $94,166.64 in Heart & Lung wage loss benefits. Of that amount, $56,873.13 was attributable to the amount of benefits that would have been paid to the claimant under the Workers' Compensation Act, had he not been paid Heart & Lung benefits. Additionally, medical benefits paid by employer totaled $110,869.53. The accrued lien was then $167,742.66, which did not include $37,293.51, which employer characterized as Heart & Lung wage loss benefits.

The Workers' Compensation Judge issued a decision approving the stipulation of the parties. Claimant appealed to the Workers' Compensation Appeal Board, arguing that since all employer provided benefits were paid pursuant to the Heart & Lung Act, employer is not entitled to subrogation. The WCAB agreed and reversed the WCJ's decision.

Employer appealed to the Commonwealth Court. The court noted that the court addressed the issue of whether Heart & Lung benefits are subject to subrogation in the case of Stermel v. WCAB (City of Philadelphia), 103 A.3d 876 (Pa.Cmwlth. 2014). The Stermel court held that a city employer was not entitled to recover a portion of the Heart & Lung benefits it paid to a police officer from the officer's third party tort claim settlement. This holding resulted from the court's interpretation of the interplay between the Motor Vehicle Financial Responsibility Law (MVFRL) and Act 44.

Section 1720 of the MVFRL was construed to prohibit a claimant from including, as an element of damages, payments received in the form of workers' compensation benefits or other "benefits paid or payable by a program or other arrangement." Section 25(b) of Act 44 changed the §1720 of the MVFRL paradigm for workers' compensation benefits, but not Heart & Lung benefits. Thus, a claimant continues to be precluded from recovering the amount of benefits paid under the Heart & Lung Act from the responsible tortfeasors.

The Court rejected employer's argument that a portion of claimant's Heart & Lung Act benefits were, in fact, workers' compensation benefits. Accordingly, the WCAB did not err in reversing the WCJ's decision.

Moreover, the Heart & Lung Act clearly provides for medical expenses as well as wage loss. Section 25(b) of Act 44 makes no distinction between wage loss or medical benefits. Consequently, pursuant to §1720 of the MVFRL, employer is not entitled to subrogation from claimant's third-party recovery for any of the benefits paid to or on behalf of claimant.

The order of the WCAB was affirmed.

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CHILD SUPPORT LIENS

(Continued from page 1)

an order enforceable in another state has an effect on a Pennsylvania workers' compensation settlement award. The Uniform Interstate Family Support Act, however, may shed some light on this issue. It provides the following:

(a) General rule. – Except as otherwise provided in section 77A06 (relating to registration of convention support order), a support order or income-withholding order of another state or a foreign support order may be registered in this State by sending all of the following records to the appropriate tribunal in this State:

(1) A letter of transmittal to the tribunal requesting registration and enforcement.

(2) Two copies, including one certified copy, of the order to be registered, including any modification of the other.

(3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage.

(4) The name of the obligor and, if known:

(i) The obligor's address and Social Security number;

(ii) The name and address of the obligor's employer and any other source of income of the obligor; and,

(iii) A description and the location of property of the obligor in this State not exempt from execution.

23 Pa.C.S. §7602. The Uniform Interstate Family Support Act further provides that "[a] registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state." *23 Pa.C.S. §7603.*

Another chapter of the Domestic Relations statute provides that the domestic relations section shall have the power to expedite the establishment and enforcement of support to "respond to a request for assistance from another state." *23 Pa.C.S. §4305 (12).* It further provides that the response shall "confirm the receipt of the request, the action taken and the amount of support collected" and specify any additional information that may be necessary to obtain enforcement of the child support obligation. *Id.*

Therefore, when looking at the above-referenced statutory provisions together, it seems as though a child support lien from another state may affect a Pennsylvania workers' compensation settlement award. However, the state attempting to enforce the support order must register it in Pennsylvania in order for the above statutory provisions to take effect. With that, it would be wise to inform clients of this possibility and urge them to be forthcoming with any information they have as to possible support orders in Pennsylvania or elsewhere.

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

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