



225 Market Street  
Suite 304 • P.O. Box 1245  
Harrisburg, PA 17108-1245  
PHONE: 717-233-6633  
FAX: 717-233-7003  
www.laverylaw.com

## **WORKERS' COMPENSATION CASE LAW UPDATES** **February and March 2017**

### **Calculation of Average Weekly Wage (AWW):**

The Commonwealth Court found that a Claimant, hired as a tractor driver to move bins during the apple-picking season, was not a seasonal employee for purposes of calculating his pre-injury Average Weekly Wage (AWW). The Court notes in its Opinion that the circumstances where a Claimant will be considered to be a "seasonal employee" are very limited. Toigo Orchards, LLC and Nationwide Insurance Co. v. WCAB (Gaffney), (Pa. Cmwlth. 2017) March 13, 2017.

### **Firefighter Cancer Claim:**

The Court held that the 600 week statute of repose under the Firefighter Cancer provisions of the Act do not apply retroactively. Accordingly, the Court found that the Claimant was not entitled to the 600 week limitation, but rather, had to file a claim within 300 weeks of his last exposure, which was the applicable statute of repose at the time of the Claimant's death. City of Warren v. WCAB (Haines), (Pa. Cmwlth. 2017), March 9, 2017.

The Court held that in the context of a *Volunteer* Firefighter Cancer Claim, the Claimant must present evidence in the form of PennFIRS reports to establish direct exposure to Group 1 carcinogens as a result of firefighting duties. Steele v. WCAB (Findlay Township), (Pa. Cmwlth. 2017), March 8, 2017.

### **Course of Employment:**

The Claimant sustained injuries while operating a "tug" on Employer's premises to meet her mother for feminine hygiene products and money. The Court found that the Claimant's injuries were sustained in "the course of employment" as she was engaged in a "momentary departure" to attend to "personal comforts", and such activities are found to be compensable under the Act in accordance with the so-called "personal comfort doctrine". Starr Aviation v. WCAB (Colquitt), (Pa. Cmwlth. 2017), March 7, 2017.

The Court found that the Claimant's injury sustained on the way to work was within the "special circumstances" exception to the "coming and going" rule as the Claimant intended to take a sick day on the day of injury and was traveling to work to respond to an Emergency call made by the Employer. Accordingly, the Claimant's

injuries were found compensable. Lutheran Senior Services Management Company v. WCAB (Miller), (Pa. Cmwlth. 2017) February 15, 2017.

**WCJ's Discretion on Remand:**

The WCJ must restrict the decision on remand to the instructions within the remand order; however, the WCJ is not required to produce the same result as the initial decision and may change witness credibility determinations on remand. Green v. WCAB (U.S. Airways), (Pa. Cmwlth. 2017), February 24, 2017.

**Employee/Independent Contractor:**

The Court found that the Claimant was not an employee of the Employer but rather an Independent Contractor. Significant to the Court was the fact that the Employer was a Restaurant and the Claimant was hired to perform remodeling work. Further, the Claimant was not hired to work in the restaurant following the completion of the remodeling project. Department of Labor and Industry, Uninsured Employers Guaranty Fund v. WCAB (Lin and Eastern Taste), (Pa. Cmwlth. 2017) February 17, 2017.

**Subrogation:**

Only workers' compensation benefits paid for injuries caused by the negligent third party are recoverable in subrogation. The Court rejected Employer's argument that it was entitled to subrogation for all benefits paid on account of the work injury. Serrano v. WCAB (Ametek, Inc.), (Pa. Cmwlth. 2017) February 13, 2017.

**Heart and Lung Act v. Workers' Compensation Act:**

An arbitrator's award of Heart and Lung benefits does not collaterally estop the WCJ from making his/her own determination as to the Claimant's claim for disability benefits under the Workers' Compensation Act. Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections), (Pa. Cmwlth. 2017) February 6, 2017.