Yellow Freight After WCAIS and Beyond
Statute and Case Law Analysis

Philadelphia Bar Association
Friday, March 16, 2018

I. **Employer's Obligation to File a Timely Answer under the Workers' Compensation Act**

a. Section 416 states: "Within twenty days after a copy of any claim petition or other petition has been served upon an adverse party, he may file with the department or its Workers' Compensation Judge an answer in the form prescribed by the department.

Every fact alleged in a claim petition not specifically denied by an answer so filed by any adverse party shall be deemed to be admitted by him. But the failure of any party or of all of them to deny a fact alleged in any other petition shall not preclude the workers' compensation judge before whom the petition is heard from requiring, of his own motion, proof of such fact. If a party fails to file an answer and/or fails to appear in person or by counsel at the hearing without adequate excuse, the workers' compensation judge hearing the petition shall decide the matter on the basis of the petition and evidence presented." 77 P.S. § 821.

b. 34 Pa. Code §131.33: Answers except answers to petitions for joinder and challenge proceedings:

(a) Answers to claim petitions shall be filed in accordance with section 416 of the act (77 P. S. § 821) within 20 days after the date of assignment to the judge. Except petitions for joinder under §131.36 (relating to joinder), and challenge proceedings which require no answer, answers to all other petitions may be filed within 20 days after the date of assignment to the judge.

(b) Any answer filed in accordance with this chapter shall be filed with the Department as prescribed on the answer form. If there is no applicable Department answer form available, an original of the answer shall be filed with the Department.

(c) Concurrently with filing the answer, the responding party shall serve a copy of the answer on unrepresented parties and on counsel of record.

(d) An answer shall admit or deny each averment of fact in the petition or any part of the averment to which it is responsive. A party denying only a part of the averment shall specify so much of it as is admitted and shall deny the remainder. Where applicable, admissions and denials in an answer shall refer to the specific paragraph in which the averment admitted or denied is set forth.

c. Where the substance of two petitions are the same, and the petitions could be considered one, the answer to the first petition has been held to be the answer of the second. O'Boyle v. Harry Seitz & Sons, 160 A. 145.

d. Where Employer fails to file a timely answer, the Workers' Compensation Judge may determine the issue on the "evidence presented," which includes only evidence presented by the Claimant and does not apply to the adverse party. Yellow Freight Systems, Inc. v WCAB (Medara), 423 A.2d 1125 (Pa. Cmwlth. 1981); Hereaus Electro Night Company v. WCAB (Ulrich), 697 A.2d 603 (Pa. Cmwlth. 1997).

e. Where employer fails to file a timely answer, the Workers' Compensation Judge may award full disability benefits based upon the allegations of the Claim Petition alone. Hildebrand v. WCAB (Fire Dept./City of Reading), 532 A.2d 1287 (Pa. Cmwlth. 1987).

II. Procedural Considerations Regarding Service of a Claim Petition

a. Section 404 of the Workers' Compensation Act states:

> The department shall, immediately upon their receipt, properly file and docket all claim petitions and other petitions, notices of compensation payable, agreements for compensation, findings of fact, awards or disallowances of compensation, or modifications thereof, and all other decisions, reports or papers filed with it under the provisions of this act or the rules and regulations of the department or the board. 77 P.S. § 715.

b. Section 406 of the Workers' Compensation Act states:

> All notices and copies to which any parties shall be entitled under the provisions of this article shall be served by mail, or in such manner as the department shall direct. For the purposes of this article any notice or copy shall be deemed served on the date when mailed, properly stamped and addressed, and shall be presumed to have reached the party to be served; but any party may show by competent evidence that any notice or copy was not received, or that there was an unusual or unreasonable delay in its transmission through the mails. In any such case proper allowance shall be made for the party's failure within the prescribed time to assert any right given him by this act.
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> The department, the secretary of the board, and every referee shall keep a careful record of the date of mailing every notice and copy required by this act to be served on the parties in interest. 77 P.S. § 717.

c. Section 414 of the Workers' Compensation Act states:

> Whenever a claim petition or other petition is presented to the department, the department shall, by general rules or special order, assign it to a workers' compensation judge for hearing. When assigning petitions, including those for resolution hearings, the department shall not assign to a particular workers' compensation judge more than seventy-five per centum of the petitions from a particular county.
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> The department shall serve upon each adverse party a copy of the petition, together with a notice that such petition will be heard by the workers' compensation judge to whom it has

been assigned (giving his name and address) as the case may be, and shall mail the original petition to such workers' compensation judge, together with copies of the notices served upon the adverse parties. 77 P.S. § 775.

d. Claim Petitions are filed with the Bureau who has been empowered with, under the Act, assigning Petitions to workers' compensation judges who conduct hearings. 34 Pa. Code § 131.32 provides that notice shall be served upon **all** parties named in the Petition. The Regulation specifically states:

34 Pa. Code § 131.32: Petitions except petitions for joinder and challenge proceedings

(a) Petitions shall be in the form prescribed by the Department.

(b) Any petition, filed in accordance with this chapter, shall be filed with the Department as prescribed by the form. If there is no applicable Department petition form available, an original of the petition shall be filed with the Department. The Department will serve a notice of assignment specifying the judge to whom the petition has been assigned. The notice will be served on the parties named in the petition.

(c) Concurrently with filing the petition with the Department, the moving party shall serve a copy of the petition on all other parties, including the insurance carrier, if the insurance carrier is known, and on the attorneys of all other parties, if the attorneys are known.

(d) The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.

e. 34 Pa. Code § 131.5 defines "party" as a "claimant, defendant, employer, insurance carrier, additional defendant and, if relevant, the Commonwealth."

f. The Bureau under the statutory scheme when promulgating Notice of Assignments identifies the employer and their carrier.

i. Correctly Identifying and Naming the Employer: Employees often receive paychecks that have the identity of their employer. In addition, the employer frequently has signage in front of their building identifying them and provides on-boarding information to employees with the identity of their employer.

ii. Correctly Identifying and Naming the Carrier: All carriers in Pennsylvania are to maintain workers' compensation insurance. The Bureau in conjunctions with the ratings bureau maintains declaration sheets of all policy of insurances held on file with respect to employers and that information is locatable on the Bureau website by locating the identity of the employer.

g. Pursuant to 34 Pa. Code §131.34: Other Filings, Claimant has an obligation to serve a copy of the Claim Petition on employer or their attorney.

i. 34 Pa. Code §131.34 states:

(a) Unless otherwise specifically provided by this chapter, the party filing or submitting a document to the judge shall serve an original on the judge and shall serve a copy on unrepresented parties and counsel of record.

III. The Meaning of "Yellow Freight"

a. Section 416 of the Act provides that the filing of an Answer is required within twenty days of service of a Claim Petition. When an employer fails to file an answer within the statutory period and/or fails to appear in person or by counsel at hearing without adequate excuse, employer is bared from challenging any factual allegation in the Claim Petition that is well pled. Yellow Freight Systems, Inc. v WCAB (Medara), 423 A.2d 1125 (Pa. Cmwlth. 1981); Chik-Fil-A v. WCAB (Mollick), 792 A.2d 678 (Pa. Cmwlth. 2002). Since the advent of the seminal Decision in Yellow Freight, the body of law with respect to the issue of purported untimely answers under Section 416 of the Act has evolved. An employer's admissions are limited to the specific allegations included in the Claim Petition and in order for the Petition to be granted the allegations must be legally sufficient to support the claim. The failure to file a timely Answer does not forfeit questions of law. Employer is only barred from asserting affirmative defenses to factual allegations of the petition. Hereaus Electro Night Company v. WCAB (Ulrich), 697 A.2d 603 (Pa. Cmwlth. 1997).

b. The grant of a Yellow Freight Motion is not equivalent to the entry of a default judgment. Claimant maintains the burden to establish all elements of a Claim Petition. Factual allegations, not conclusions of law, are admitted by virtue of a late Answer. Neidlinger v. WCAB (Quaker Alloy/CMI Int'l), 798 A.2d 334 (Pa. Cmwlth. 2002); D'Errico v. WCAB (City of Phila.), 735 A.2d 161 (Pa. Cmwlth. 1999); Greeley v. WCAB (Matson Lumbar Co.), 647 A.2d 683 (1994).

c. The grant of a Yellow Freight Motion does not deprive the WCJ of their power to assess the \ credibility of the presented evidence. Rather, the Workers' Compensation Judge must determine whether the evidence offered by Claimant is sufficient to satisfy their burden of proof under the Claim Petition. Dandenault v. WCAB (Philadelphia Flyers, Ltd.), 728 A.2d 1001 (Pa. Cmwlth. Ct. 1999).

i. Credibility falls within the sole purview of a Workers' Compensation Judge and is not a matter of factual allegation. Lehigh County Vo-Tech Sch v. WCAB (Wolfe), 652 A.2d 797 (Pa. 1994).

ii. Workers' Compensation Judge may deny any award under a Claim Petition despite the filing of a late Answer where Claimant presents additional evidence that rebuts the allegations in the Claim Petition. Greeley v. WCAB (Matson Lumbar Co.), 647 A.2d 683 (1994).

iii. Late Answer does not seize from Workers' Compensation Judge the authority to find

Claimant's medical expert legally incompetent. Chick-Fil-A v. WCAB (Mollick), 792 A.2d 678 (Pa. Cmwlth. Ct. 2002).

d. Claimant must raise Yellow Freight Motion during the pendency of proceedings.

i. Claimant was barred from raising the issue of Yellow Freight before the Commonwealth Court where Claimant failed to raise the issue previously. Smith v. WCAB (Dept. of Labor and Industry), 632 A.2d 1033 (Pa. Cmwlth. 1993); Hemer v. WCAB (Phillis & J. Miller Express, Inc.), 454 A.2d 225 (1983).

IV. Elements of a Claim Petition

a. An employer's failure to file a timely Answer does not satisfy Claimant's burden of proof on a Claim Petition. Rather, Claimant maintains the burden to prove all elements of a Claim Petition including proof of (1) a compensable injury that is (2) suffered while in/arising within the course of employment (3) related thereto, and (4) results in disability. (Section 301 (c)). This burden also includes proving extent of disability. Inglis House v. W.C.A.B. (Redy), 634 A.2d 592 (PA. 1993). If there is no obvious connection between an employee's medical condition and his work activities, the claimant has the burden of establishing such a connection through unequivocal medical testimony. Lewis v. WCAB (Pittsburgh Board of Education), 508 Pa. 360, 498 A.2d 800 (1985); Fotta v. WCAB (U.S. Steel/USX Corp.), 534 Pa. 191, n.2, 626 A.2d 1144 n.2, (1993); and Cardyn v. WCAB (Heppenstall), 517 Pa. 98, 534 A.2d 1389 (1987). A finding of a work-related injury by a WCJ requires a mixed determination of fact and law and is not simply a factual matter.

V. Award of Claim Petition

a. In order to grant a Claim Petition, the assigned WCJ must issue a well reasoned decision. Section 422(a) of the Act grants the WCJ the authority to make findings of facts and conclusions of law based upon the evidence presented and to issue a well reasoned decision based upon substantial evidence of record. Specifically, Section 422(a) states:

> Neither the board nor any of its members nor any workers' compensation judge shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same. All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge

must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review. 77 P.S. § 834.

b. Finding of Fact

i. Pleadings contain allegations of fact as set forth by the moving party. Any fact not specifically denied by an adverse party in their Answer is deemed admitted. 77 P.S. § 821.

ii. What is a Fact?

1. Definitions:

a. Fact: "A thing done; an action performed or an Incident transpiring; an event or circumstance; an actual occurrence." Black's Law Dictionary (10th ed. 2014).

b. Factual Allegations: "the recitation of all of the factual details by a party to a law suit that sets forth what actually happened while dealing with the other party." Black's Law Dictionary (10th ed. 2014).

2. Although "well-pled facts" is the basis for determination in Yellow Freight cases, a concise definition of the term has not been carved out by the Court. However, Section 422(a) of the Act requires the WCJ to issue findings of facts and conclusions of law based upon substantial evidence of record. Accordingly, one can deduce that a well-pled fact must be such that a reasonable fact finder could offer findings of fact supported by substantial evidence of record.

3. Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985), (quoting Murphy v. Commonwealth, Department of Public Welfare, 480 A.2d 382, 386 (Pa. Cmwlth. 1984)), See Also Daniels v. WCAB (Tristate Transport), 828 A.2d 1043 (Pa. 2003).

c. Conclusions of Law

It is well established by the Pennsylvania Courts that matters involving legal conclusions are not admitted by virtue of a late answer. Questions of law are fully reviewable and cannot be waived by the failure to file a timely answer. Chik-Fil-A v. WCAB (Mollick), 792 A.2d 678 (Pa. Cmwlth. 2002). In Dandenault v. WCAB (Philadelphia Flyers LTD), 728 A.2d 1001 (Pa. Cmwlth. 1999), the Court noted that a WCJ remains duty bound to determine whether the totality of the evidence is legally sufficient to satisfy Claimant's burden of proof. The Dandenault Court reiterated the proposition that a late answer "does not operate to automatically satisfy a Claimant's burden of proof."

i. What is a Conclusion of Law?

a. "Whether the facts found by the Judge reflect thmet its burden of proof in a workers' compensation proceeding is a conclusion of law." Meadow Lakes Apts. v. WCAB (Spencer), 894 A.2d 214 (Pa. Cmwlth. 2005).

ii. Cases that have identified Conclusions of Law

1. Course and scope: Whether injuries sustained were sustained in the course of employment requires a legal conclusion and is not admitted by virtue of a late answer. WCAB (Slaugenhaupt) v. U.S. Steel Corp., 376 A.2d 271 (Pa. Cmwlth. 1977); Bensing v. WCAB (James D. Morrisey, Inc), 830 A.2d 1075 (Pa. Cmwlth. 2003); Dandenault v. WCAB (Philadelphia Flyers LTD), 728 A.2d 1001 (Pa. Cmwlth. 1999). Whether the injury "arises" from the employment requires a conclusion of law and is not admitted by virtue of a late answer. Hepp v. WCAB (B.P. Oil Co.), 447 A.2d 337 (Pa. Cmwlth. 1982). For example, assuming Claimant alleges an injury, evidence is required to establish that the injury occurred while in the course and scope of employment, while furthering employer's interest or while on employer's premises. The fact that an injury occurred does not tie that occurrence to Claimant's work duties.

2. Causation: Whether an injury allegedly sustained in the course of employment is "related thereto" requires a conclusion of law and is not admitted by virtue of a late answer. WCAB (Shremshock v. Borough of Plum, 340 A.2d 637 (Pa. Cmwlth. 1975); Crenshaw v. WCAB (Hussie Copper), 645 A.2d 957 (Pa. Cmwlth. 1994). In Crenshaw v. WCAB (Hussey Copper), 645 A.2d 957 (Pa. Cmwlth. 1994), the Commonwealth Court held that "it is well established that where there is no obvious causal connection between the employee's disability and his employment…the causal connection must be established by unequivocal medical testimony." See also Povanda v. WCAB (Giant Eagle), 605 A.2d 478 (Pa. Cmwlth.), petition for allowance of appeal denied, 617 A.2d 1276 (Pa. Supreme 1992). Thus, for Claimant to be deemed to have met his burden of proof as to this issue, there must necessarily be not only credibility determinations made, but also a determination as to whether or not his medical evidence is "unequivocal." Whether or not medical testimony is unequivocal is a conclusion of law, not strictly a factual matter. Terek v. WCAB (Somerset Welding & Steel, Inc.), 668 A.2d 131 (Pa. 1995). For example, assuming Claimant alleges that he fell from a ladder, medical evidence is required to establish that the height from which he fell, the manner in which he fell and the nature of the surface upon which he fell can result in the specific injuries alleged by Claimant.

3. Disability: A Claimant's assertion to entitlement of disability benefits as contained in a Claim Petition is not a factual allegation admitted by virtue of a late answer but a conclusion of law that must be proven. Guard Insurance

Group v. WCAB (York & TIG Premier Insurance), 864 A.2d 1285 (Pa. Cmwlth. 2005). In the Guard Insurance case, it was held that a late answer required only that the Workers' Compensation Judge find the Claimant sustained an injury, but did not require the WCJ to find that Claimant's alleged disability was related to the injury.

4. Extent and duration: The grant of a Yellow Freight Motion may admit liability for disability up to the last date that the Answer could have been filed, however, an employer may challenge a Claimant's ongoing entitlement to disability beyond the last date that an Answer could be filed. Heraeus Electro Nite Co. v. WCAB (Ulrich), 697 A.2d 603 (Pa. Cmwlth. Ct. 1997); William J. Donovan Sheet Metal v. WCAB (McCollum), 789 A.2d 344 (Pa. Cmwlth. Ct. 2001). In Cognex v. WCAB (Scott), 2010 Pa. Commw. Unpub. LEXIS 96, medical evidence was presented in addition to the allegations of the Claim Petition and the WCJ found that the medical testimony presented supported an award of ongoing disability.

5. Repetitive Stress Injury: When claimant alleges a repetitive stress type of injury, the "related thereto" requirement cannot be waived by the "obvious causal connection" doctrine. Rather, expert testimony is required for claimant to meet his burden of proof. In Crenshaw v. WCAB (Hussey Copper), 645 A.2d 957, 962 (Pa. Cmwlth. 1994), the Commonwealth Court held that "it is well established that where there is no obvious causal connection between the employee's disability and his employment, such as is the case here where the injury resulted from the cumulative effect of recurring, significant, miniature impacts or traumas, the causal connection must be established by unequivocal medical testimony." (Emphasis added.) Thus, for claimant to be deemed to have met his burden of proof as to an allegation of repetitive stress injury, there must necessarily be not only credibility determinations made, but also a determination as to whether or not his medical evidence is "unequivocal". Whether or not medical testimony is unequivocal is a conclusion of law, not strictly a factual matter. Terek v. WCAB (Somerset Welding & Steel, Inc.), 668 A.2d 131 (Pa. 1995).

6. Average weekly wage: Questions as to the average weekly wage are governed by Section 309 of the Act, and require conclusions of law as to which method of calculation is to be utilized under the particular circumstances, and even if the wage pled is deemed to be admitted, it does not meet Claimant's burden of proof for compensability of the alleged injuries. 77 P.S. § 582. Anderson v. WCAB (F.O. Transport), 111 A.3d 238 (Pa. Cmwlth. 2015).

    a. Section 309 of the Act includes various methods for calculating the average weekly wage. In, Hannaberry HVAC v. WCAB (Snyder), 834 A.2d 524 (Pa. 2003), the Supreme Court recognized that strict application of one method of calculation would lead to an "unrealistic assessment of wages."

b. Issues that need to be considered in making a conclusion of law regarding average weekly wage include:

i. Whether the employee has been employed for more than three consecutive periods of 13 calendar weeks;
ii. Whether the employee has been employed for at least one period of 13 weeks;
iii. Whether the employee worked overtime;
iv. Whether the employee is a seasonal worker;
v. Whether a continuous employment relationship exists despite periods of layoffs;
vi. Whether the employee is employed hourly or salaried;
vii. Whether the employee received bonus, incentives, vacation pay or gratuities.

7. Notice: Section 311 and Section 312 of the Act requires Claimant to provide timely notice to employer of the occurrence of a work injury in order to be entitled to benefits. Claimant bears the burden of establishing timely notice. 77 P.S. § 631; 77 P.S. § 632; Gribble v. WCAB (Cambria County Association for the Blind), 692 A.2d 1160 (Pa. Cmwlth. 1997). In Gentex Corp. v. WCAB (Morack), 23 A.3d 528 (2011), the Court found "the question regarding whether proper notice was provided under Section 312 is heavily fact-intensive due to the particularities inherent in a given employee communicating the existence of an injury to his or her employer." Id. at 534.

a. Section 311 states:

> Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe or someone in his behalf, or some of the dependents or someone in their behalf, shall give notice thereof to the employer within twenty-one days after the injury, no compensation shall be due until such notice be given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed. However, in cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, the time for giving notice shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment. The term "injury" in this section means, in cases of occupational disease, disability resulting from occupational disease. 77 P.S. §631.

i. Issues that need to be considered in making a conclusion of law regarding average weekly wage include:

a. Whether notice was provided within the required time deadline;

b. Whether notice was provided to a co-worker or agent of employer;

c. Whether a reasonable precise description of injury was provided;

d. Whether notice was provided that the injury was related to a work accident

b. In Cognex v. WCAB (Scott), 2010 Pa. Commw. Unpub. LEXIS 96, the Court found that notice was established through allegations of a Claim Petition where notice was alleged to be provided to a specific individual where that individual was linked to Employer's address but their relationship to employer was not specified.

VI. **Adequate Excuse**

a. The failure to file a timely answer may be corrected upon proof of an "adequate excuse". Section 416, 77 P.S. §821; Straub v. WCAB (City of Erie), 538 A.2d 965 (Pa. Cmwlth. 1988).

b. The following cases are known instances where the Court has found adequate excuse to exist for employer not filing Answer within 20 days:

i. Claimant's failure to send the Claim Petition to employer can constitute adequate excuse to a late answer. Abex Corp. v. WCAB (Scears), 665 A.2d 845 (Pa. Cmwlth. Ct. 1995).

1. In Abex, Claimant did not send a copy of the Claim Petition to employer or employer's counsel and when the Bureau issued notice of hearing, it was not sent to employer's attorney. Notice to the carrier was also sent to an inaccurate address. Based on findings that a copy of the Claim Petition was not received by employer's counsel or carrier, Employer's late answer was excused. The Abex Court noted that Claimant was obligated to send a copy of the Claim Petition to both Employer and their carrier under 1 Pa. Code 33.22, which has been replaced by 34 Pa. Code § 131.32 requiring that a copy of petitions be served on all parties. The Court further noted that Claimant knew the identity of employer's attorney, had been in communication with that attorney and Claimant failed to provide the Bureau with a complete address for employer or the identification of the carrier.

ii. A request for an extension of time to file an Answer will extend the period of time in which an Answer must be filed. Metro Ambulance v. WCAB (Duval), 672 A.2d 418 (Pa. Cmwlth. Ct. 1996).

iii. Improper service of a Claim Petition excuses a late Answer. Washington v. WCAB (National Freight Industries, Inc.), 111 A.3d 214 (Pa. Cmwlth. 2015).

1. In Washington, the Court specifically considered whether an employer's answer was late in a case where the claimant mailed notice of the claim to the wrong street address. As a result, notice of the claim was not received by the employer. In determining whether the claimant was entitled to the presumption of a late answer, the Court found that the claimant failed to show, under 77 Pa. Stat. Ann. §§ 717 or 821, that the employer's answer was late because the Claim Petition was not mailed to the employer's correct address and thus, it did not constitute service as of the date of mailing. Under the Court's holding in Washington, the determination of whether an employer's Answer is filed timely depends on whether notice of the claim was provided to the correct address of the employer. Under the Act, a mailing addressed to a party's incorrect address, does not constitute service on the date of mailing. 77 P.S. § 717; 34 Pa. Code § 111.3(a). Section 406 of the Act provides that service is only affected when the mailing is properly stamped and addressed. 77 P.S. § 717.

2. When it is established that the Claim Petition was improperly served, the Court will consider whether notice of the claim was effectuated by receipt of Notice of Assignment. Evidence that Employer did not receive Bureau Notice of Assignment and the incorrect carrier is on the Bureau Notice of Assignment, Employer will have sufficient evidence to establish adequate excuse for filing late Answer.

iv. An excuse for delay in filing that is within the control of the answering party is not an "adequate excuse" as per City of Philadelphia v. WCAB (Candito), 734 A.2d 73 (Pa. Cmwlth. 1988). The corollary to this is that if the late answer is caused by the petitioning party's actions and adequate excuse may be found.

1. Claimant's counsel's failed to notify defense counsel of the filing of the Claim Petition and failure to notify and serve defense counsel the Claim Petition may constitute an adequate excuse.

a. When facts establish that defense counsel informed Claimant's counsel in writing of their involvement in the case, Claimant's counsel is duty bound to forward defense counsel the initiation of litigation when filing the Claim Petition under the ethical rules. Pa. R.P.C. 4.2. That rule states that in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. As stated in University Patents, Inc. vs. Klingman, 737 F. Supp. 325 (E.D. Pa 1990), the underlying policy and official comment to this rule made it clear that it was intended to forbid ex parte communications with all institutional

employees whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organization. Claimant's counsel filing of the Claim Petition and serving only the employer when he knew of defense counsel's representation flies precisely in the face of the reasoning behind Rule 4.2. Indeed, had defense counsel been served with the Claim Petition as required by Rule 4.2, there would almost certainly be no late Answer filing.

b. The following cases are known instances where the Court has found reasonable excuse did not exist for employer not filing Answer within 20 days:

v. The inability to secure an attorney, the incarceration of the party responsible to file an Answer and the lack of sufficient funds does not excuse the filing of a late Answer. Metro Ambulance v. WCAB (Duval), 672 A.2d 418 (Pa. Cmwlth. Ct. 1996).

vi. Employer was properly served but carrier was not. Courts have held that service on an employer constitutes service on the carrier.

1. In Manolovich v. WCAB (Kay Jewelers, Inc.), 694 A.2d 405 (Pa. Cmwlth. Ct. 1997), the Court held that a carrier cannot claim they did not receive actual notice of a claim when the employer is properly served. The Court placed on employer the duty to forward notice of petitions to their carrier. In Manolovich, the WCJ noted that service to employer was not returned by the US Postal service as undeliverable.

2. In Hereaus Electro Night Company v. WCAB (Ulrich), 697 A.2d 603 (Pa. Cmwlth. 1997), the Court held that "not every failure by the Department to properly serve an adverse party automatically results in an adequate excuse." Id. at 607. More specifically, "when there is service of a claim on the employer by the Department, the Department's noncompliance with statutory formality by failing to notify the employer's insurance carrier does not provide an adequate excuse to forgive an employer for filling a late answer." Id. The Court noted that the employer itself was in the best position to identify their carrier and that employer is responsible to provide actual notice to the carrier.

3. In Ghee v. WCAB (University of Pennsylvania), 705 A.2d 487 (Pa. Cmwlth. 1997), adequate excuse was not found where Claimant failed to serve a copy of the petition on employer but the Bureau properly served a copy of the petition on employer in a timely fashion.

vii. Bureau's failure to serve employer copy of Claim Petition is not *alone* sufficient to establish adequate excuse.

1. In the unreported decision, Cognex v. WCAB (Scott), 2010 Pa. Commw.

Unpub. LEXIS 96, the Bureau did not serve employer with a copy of the Claim Petition but the Petition was served on the insurer and both employer and their carrier were properly served by the Bureau with the Notice of Assignment. Considering these facts, the Court found that "[w]hile a copy of the petition was only served on the insurer, not Employer, such omission on its own does not automatically excuse the delay." The Court reasoned that the notice of assignment placed the employer on notice of its duty to defend. The Court further noted that service of the Claim Petition was made on the employer and carrier by the Claimant.

viii. Claimant's failure to serve employer's attorney is not *alone* sufficient to establish adequate excuse.

1. In Cognex, the Court found that service upon employer's counsel is only required under 34 Pa. Code 131.32(c) where the attorney is known. In Cognex, employer did not establish that Claimant knew the identity of their attorney.

ix. Delay of receipt because of employer's mailroom practices does not constitute adequate excuse. Ghee v. WCAB (University of Pennsylvania), 705 A.2d 487 (Pa. Cmwlth. 1997).

x. Proof that late Answer resulted in no prejudice to Claimant is not sufficient to establish adequate excuse. Straub v. WCAB (City of Erie), 538 A.2d 965 (Pa. Cmwlth. 1988).

c. Employer Tool: Means to establish notice of a claim was not received, mailed to the incorrect address, mailed to the wrong carrier or improperly served:

i. Affidavit of Employer
ii. Affidavit of Carrier
iii. Notice of Assignment
iv. Employer's Certificate of Insurance
v. Claim Petition
vi. Prior WCJ Decision establishing Claimant's counsel was aware of correct employer/carrier address/identity
vii. Correspondence between parties establishing Claimant was aware of identity of employer's counsel
viii. WCAIS
ix. Claimant's counsel knew from prior state forms correct employer and carrier contact information omitting same

VII. **Well Pled**

a. The Heraeus Court specifically held that an employer's failure to timely file an Answer to a Claim Petition is not the equivalent of a default judgment. Rather, Claimant still bears the burden of proving all elements necessary to support a compensation award. They clarified that the only possible admission made by virtue of a late Answer are admissions of well pled facts. To the extent that a Claim Petition does not allege all the facts necessary, or allege them improperly to support all elements necessary in presenting of the claim, a claimant must offer actual proof before a WCJ to sustain her burden. A Defendant cannot be deemed to have admitted, by operation of law, specific facts or averments not present in the Claim Petition itself. Heraeus Electro Night Company v. WCAB (Ulrich), 697 A.2d 603 (Pa. Cmwlth. 1997).

b. The following cases have helped to define "well pled facts":

i. Vague Description of Injury/Injury without a Medical Diagnosis: In Ascencio v. WCAB (Commonwealth/Dep't of Corr.), 2017 Pa. Commw. Unpub. LEXIS 886 at 6 (Cmwlth. Ct 2017), the Claimant filed a Claim Petition alleging an "injury to his heart while exerting himself." On appeal to the Commonwealth Court, it was held that the allegation of injury description in Claimant's Claim Petition was not well-pled. Rather, the description was not a medical diagnosis, no pathology was defined. Accordingly, it was found to be too vague and Claimant did not present additional evidence to support his claim.

1. Practical Note: Assessing whether the allegations of a Claim Petition are "well pled":

a. Paragraph 1 and 3: where a Claim Petition alleges only body parts allegedly affected without providing any diagnoses, the allegations of injury are not well-pled. Where diagnoses are provided but there is no allegation as to the connection between these diagnoses and the job responsibilities, the allegation does not amount to a well-pled allegation of work-related injury.

b. Paragraph 5: where the injury occurred is insufficient as a factual allegation to meet claimant's burden of proof based upon the "arises out of" and "related thereto" requirements.

c. Paragraph 6: Paragraph 6 alleges whether notice was provided, but unless it indicates to whom notice was given, the title of that person and their relationship to Employer as well as the date notice was provided, it is not a well-pled factual allegation. Also, timely notice alone does not create a compensable claim, even if deemed admitted.

d. Paragraph 8 alleges only whether the problem caused claimant to stop working, but the underlying necessary allegations as to work-relatedness must still be proven, as set forth above.

e. Paragraphs 10 and 13 address only whether or not the claimant returned to work and not "why" he is or is not.

f. Paragraph 11 alleges an average weekly wage, which requires a conclusions of law as to which method of calculation is to be utilized under the particular circumstances, and even if the wage pled is deemed to be admitted, it does not meet claimant's burden of proof for compensability of the alleged injury.

g. Paragraph 15 simply asserts what is being sought via the litigation, and does not set forth factual allegations.

h. Paragraphs 2, 4, 7, 9, 12, 14, 16 and 17 even if deemed admitted, do not prove a compensable claim.

ii. Causation: Where Claimant alleges a generic "injury," the "related thereto" requirement cannot be waived by the "obvious causal connection" doctrine. Rather, expert testimony is required for Claimant to meet his burden of proof. In Ascenico, the Claim Petition alleged that the injury occurred in 2010 while the alleged disability was more than two years later. The Claim Petition did not allege a clear relationship between the alleged injury and disability. The Court found that the causal relationship between Claimant's alleged injury and work duties was not obvious requiring Claimant to establish causation through unequivocal medical evidence. While employer waived the right to submit evidence in opposition to the Claim Petition by failure to file a timely Answer, the Court found no well-pled allegation causally relating the alleged injury to the alleged period of disability. Accordingly, Claimant failed to sustain his burden.

VIII. **If a Yellow Freight Motion is granted, as of what date does employer have ability to defend disability?**

a. The Heraeus Court determined that the failure to file a timely answer only admits well pled facts up to the last date upon which the answer could have been filed in a timely fashion. Heraeus Electro Night Company v. WCAB (Ulrich), 697 A.2d 603 (Pa. Cmwlth. 1997). Thereafter, Employer has "every opportunity to prove events that may have occurred after the period when the late answer should have been filed, such as, changes in disability." Id. at 609.

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