TOM WOLF | GOVERNOR
JERRY OLEKSIAK | ACTING SECRETARY

NEWS & NOTES

VOL. 22 | NO. 3 *"Serving all Pennsylvanians"* FALL 2017

Inside this Issue

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of Aug. 22, 2017:

11,754 committees covering 1,512,125 employees

Cumulative grand total of employer savings:
$667,701,979

Employer Information
717.772.3702

Claims Information Services
Toll free inside PA: 800.482.2383
Local & outside PA: 717.772.447

Only People with Hearing Loss
Toll free inside PA TTY: 800.362.4228
Local & outside PA TTY: 717.772.4991

Email Services
ra-li-bwc-helpline@pa.gov

PA Training for Health and Safety

The Pennsylvania Bureau of Workers' Compensation, Health and Safety Division's PATHS (PA Training for Health and Safety) continues to grow as more and more companies and individuals are realizing the value and effectiveness of this FREE workplace safety resource.

In conjunction with the governor's state-wide Opioid Initiative, the Health & Safety Division has conducted 20 outreach events to date and trained 1,160 employees in such topics as opioid addiction, medical marijuana and drug and alcohol awareness for employees and supervisors.

PATHS now offers 205 topics including the ever-popular topics of Active Shooter, Dealing with Angry People and recent timely additions such as Stress and Worker Safety, Social Media Safety and Fatigue and Worker Safety.

You too can take advantage of this FREE resource by visiting PATHS at **www.dli.pa.gov/PATHS** or by contacting the Health & Safety Division by phone at 717-772-1635. You can also reach us via email at **RA-LI-BWC-PATHS@pa.gov.**

Have you seen our Facebook page? Meet our team and follow us at **www.facebook.com/BWCPATHS** to keep up with all of the latest safety news, tips and ideas.

A Message from the Directors

News & Notes is a quarterly publication issued to the Pennsylvania workers' compensation community by the Bureau of Workers' Compensation (BWC) and the Workers' Compensation Office of Adjudication (WCOA). The publication includes articles about the status of affairs in the workers' compensation community as well as legal updates on significant cases from the Commonwealth Court. Featured is the outstanding article entitled "A View from the Bench," in which judges from the Pennsylvania Workers' Compensation Judges Professional Association summarize recent key decisions from the Commonwealth Court that are of interest to the workers' compensation community.

We trust that stakeholders in the Pennsylvania workers' compensation system will find this publication interesting and informative, and we invite your input regarding suggested topics for inclusion in future publications. Suggestions may be submitted to **RA-LIBWC-NEWS@pa.gov.**

- Scott G. Weiant, Director – Bureau of Workers' Compensation
- Elizabeth A. Crum, Director – Workers' Compensation Office of Adjudication

RECENTLY IN WCAIS

EDI Forms Solution Training Webinar

Implemented in September, Forms Solution offers workers' compensation claim filers the ability to create forms directly from their EDI (Electronic Data Interchange) transactions. The four highest volume forms are now generated from the filer's accepted EDI transactions: The Notice of Compensation Payable, the Notice of Temporary Compensation Payable, the Notice of Compensation Denial and the Notice Stopping Temporary Compensation. If you are in need of support with EDI transactions, there is a wealth of guidance on the EDI website: **www.dli.pa.gov/edi**.

The Forms Solution training sessions are available for viewing in WCAIS. Watch these webinars to learn some tips to enhance your usage of the system and enjoy the highest level of benefit.

The presentation focused on offering suggestions to help avoid rejections as well as answers to commonly asked questions.

The webinar is posted in WCAIS under the Customer Service Center. Click on "Customer Service Center Home" and then "Previously Recorded Training."

Impairment Rating Evaluations

Protz Decision - On June 20, 2017, the Pennsylvania Supreme Court issued its decision in Protz v. WCAB (Derry Area School District), Nos 6 WAP 2016, 7 WAP 2017, holding that Section 306(a.2) of the Workers' Compensation Act (77 P.S. § 511.2) is an unconstitutional delegation of legislative authority. The Court's opinion makes clear that the entirety of Section 306(a.2) is unconstitutional. Therefore, effective immediately, the Bureau of Workers' Compensation will no longer designate physicians to perform Impairment Rating Evaluations.

Please see additional details in *A View from the Bench.*

Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to insure its workers' compensation liability is a criminal offense and classifies each day's violation as a separate offense, either a third-degree misdemeanor or, if intentional, a third-degree felony.

The violators and locations are as follows:

Chester County On Jan. 10, 2017, Dawn M. Taylor-Bell, d/b/a Out of Reach Farm, pleaded guilty to one felony count of Failure to Procure Workers' Compensation Insurance before Jude Jeffrey R., Sommer in the Chester County Court of Common Pleas. Ms Taylor-Bell was sentenced to one-year probation and ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of $3,269.86.

To report suspected workers' compensation fraud, or if you have workers' compensation fraud related questions, please contact the Bureau's Compliance Office by email at ra-liwc-compliance@pa.gov or by telephone at 717-787-3567.

References for Using Forms Solution

EDI Quick Reference Guide for Attorneys (LIBC-145) – This is a **brand new** handout created specifically for attorneys as a cheat sheet for EDI and Forms Solution to assist with viewing and understanding the WCAIS Claim Summary. This guidance lists the basic EDI transactions with which all attorneys should be familiar and explains the purpose of each; provides key codes in EDI; explains what Forms Solution is; and lists useful facts about Forms Solution. The attorney reference guide is now available in the WCOA field offices.

Forms Solution Form to Transaction Guide (LIBC 146) – This handout was updated in February 2017 and is used by insurance adjusters when submitting an EDI transaction; it is a quick reference guide used to identify which bureau form will be generated based upon which transaction and code is submitted. A supply of this handout is also available for attorneys and other stakeholder groups in the WCOA field offices.

Both of these handouts can be downloaded from the EDI webpage at: **www.dli.pa.gov/edi.**

Kids' Chance of Pennsylvania

Hope, Opportunity and Scholarships for Kids of Injured Workers

Paying for college is hard. Paying for college when one or both of your parents have been seriously or fatally injured in a workplace accident seems nearly impossible. For more than 20 years, Kids' Chance of Pennsylvania Inc.

(Kids' Chance of PA) has helped to lessen the impact of these high costs by providing scholarships to the children of these families.

Since its inception in 1997, Kids' Chance of PA has awarded scholarships amounting to over $1 million, and that number continues to grow. During the 2016-2017 academic year, 57 scholarships were awarded to students, totaling $186,500. These scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors.

In addition to monetary assistance, the Kids' Chance national organization has a Planning for College program that helps eligible students connect to the right state organization. Students of any age can register, and when the time is right to apply for college, they will be connected

to their state organization in order to submit a scholarship application. In 2015, the inaugural year of the program, there were 105 submissions. This past year, the program received 313 submissions. We want to see more of these submissions come from Pennsylvania this year!

Everything our organization does is for the students. Kids' Chance of PA is making a significant difference in the lives of these children, helping them to pursue their educational goals.

For more information about how you can help support Kids' Chance, please contact us at 610-850-0150 or **info@kidschanceofpa.org** or visit **www.kidschanceofpa.org.**

Governor's Occupational Safety and Health Conference
October 30 - 31, 2017

Hershey Lodge and Convention Center
Hershey, Pennsylvania

The Governor's Occupational Safety & Health Conference has been Pennsylvania's premier safety and health event for nine decades. This annual conference - where education, innovation, best practices, new products and services come together - has drawn tens of thousands of safety professionals since its inception. The conference has experienced exceptional growth in recent years, and continues to bring new options to safety professionals and vendors.

Over 1,100 safety professionals from the mid-Atlantic states attended this event last year including safety managers, business owners, safety committee members, consultants, union officials, educators and government officials. Workshops, general sessions, and vendors focused on worker safety bring people back year after year. Join us!

Registration is now open!
Visit www.pasafetyconference.com to register.
Questions? 717-441-6043
GOSHConference@WannerAssoc.com

Attendee Registration

	On or Before 9/30/2017	Beginning 10/1/2017
Full conference	$ 250	$ 300
Monday only	$ 150	$ 175
Tuesday only	$ 150	$ 175
Full time student	$ 95	$ 95

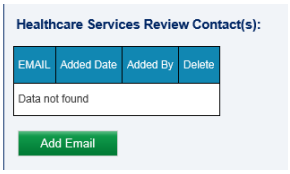
Exhibits

	On or Before 8/31/2017:	Beginning 9/1/2017:
16' x 20'	$ 2,500	$ 2,900
8' x 40'	$ 2,400	$ 2,800
8' x 30'	$ 1,800	$ 2,100
8' x 20'	$ 1,250	$ 1,450
8' x 10'	$ 675	$ 775

Medical Fee Review Correspondences After September 21, 2017

As of Sept. 22, 2017, notifications for all Medical Fee Review correspondence will be available via email and through your WCAIS Dashboard.

PAYERS: It's very important to keep your Healthcare Services Review Contact(s) (HCSRD) email address up to date. Your WCAIS administrator just needs to log into the organization's WCAIS profile and from there they can add or delete the emails listed as HCSRD contacts. Remember, emails listed here will receive notifications regarding ALL HCSRD fee reviews, so it is very important this part of your profile have **at least one valid email**. It is also important that email recipients make sure notifications are sent to the appropriate individual(s) within their organization in a timely manner.



HEALTH CARE PROVIDER ORGANIZATIONS AND FACILITIES: Remember to keep your profile's email address up to date. Simply have your WCAIS administrator log into the organization's WCAIS account, click on Profile, Change Profile and verify the email address within WCAIS is correct. If no email is listed or the email is incorrect, update the information with the email address that should receive notifications relating to fee reviews. It is also important that email recipients make sure notifications are sent to the appropriate individual(s) within their organization in a timely manner.

HEALTH CARE PROVIDER ORGANIZATIONS AND FACILITIES: Remember to keep your profile's email address up to date. Simply have your WCAIS administrator log into the organization's WCAIS account, click on Profile, Change Profile and verify the email address within WCAIS is correct. If no email is listed or the email is incorrect, update the information with the email address that should receive notifications relating to fee reviews. It is also important that email recipients make sure

HEALTH CARE PROFESSIONALS: Remember to keep your profile's email address up to date. Simply log into your WCAIS account, click on Profile, Change Profile and verify the email address within WCAIS is correct. If no email is listed or the email is incorrect, update the information with the email address that should receive notifications relating to fee reviews. It is also important that email recipients make sure notifications are sent to the appropriate individual(s) within their organization in a timely manner.

ADDITIONALLY, your profile allows you to enable the electronic correspondence format. If it does not already indicate a preference for email correspondence, please ensure the radio button on your profile is checked next to "Email." If you do not enable this function, you will continue to receive a paper copy of all the correspondence via the United States Postal Service.

In situations where an email address is not available, a paper copy of correspondence will generate for mailing via the United States Postal Service. Online email notification remains the quickest method of obtaining fee review decisions.

TAKE AWAY TIP: The Customer Service Center has guides, simulations, trainings, and access to WCAIS staff experts who can help you meet your workers' compensation business needs. Remember, you don't need to login to WCAIS to use the Customer Service Center.

SAVE THE DATE!!!!!

Annual Pennsylvania Workers' Compensation Conference

Join us for the 17th Annual Pennsylvania Workers' Compensation Conference, June 7 – 8, 2018, at the Hershey Lodge & Convention Center, Hershey Pennsylvania.

More than 1,400 people registered to attend the 2017 conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor, and others. Attendance at this event promises a sharing of practical, useful and timely information and provides attendees with the unique opportunity to network with other workers' compensation professionals while renewing valuable contacts. Attendees will also have the opportunity to visit with 100 vendors and learn about their workers' compensation-related goods and services.

Questions:
800-482-2383 (Toll Free Inside PA)
717-772-4447 (Local and Outside PA)

Email: RA-LI-BWC-Helpline@pa.gov

It's a conference you don't want to miss!

FUN & GAMES

A View from the Bench

Prepared by the Committee on Human Resource Development of the Pennsylvania Workers' Compensation Judges Professional Association.

Employer's "Absolute" Right to Subrogate Against a Third Party Tortfeasor is Limited by the Extent of Injuries for Which They Are Responsible

In Serrano v. Workers' Comp. Appeal Bd. (Ametek, Inc.), 154 A.3d 445 (Pa. Commw. Ct. 2017), the Claimant was severely injured in a chemical explosion and fire, in which his fireproof suit caused some of his injuries. The employer issued a Notice of Compensation Payable (NCP), accepting liability for burns to Claimant's face, chest, head, ears, hands, arms, and thighs. The claimant also sued the manufacturer of the suit (Aramark) and settled for almost $3 million. Employer then asserted a lien for all of its workers' compensation payments. The WCJ did not allow subrogation for the facial burns or for the medical bills for the injuries that were not actually related to the fire suit (Aramark had not manufactured the face hood or gloves, which also resulted in burns), but did allow full subrogation for the wage loss. Claimant appealed, arguing that the wage loss subrogation lien should be reduced by some percentage because some of the disabling injuries were not due to the third party. Employer also appealed, arguing it was entitled to subrogate everything, as its right was "absolute." The WCAB agreed with employer and reversed, and remanded. The WCJ then awarded additional subrogation payments to employer. Claimant again appealed. The WCAB affirmed without addressing claimant's percentage argument.

Upon claimant's appeal, the Commonwealth Court held that subrogation only applies to the injuries related to the tortfeasor's negligence. They reasoned that Section 319 authorizes subrogation where "the compensable injury is caused in whole or in part" by a third party. 77 P.S. §671.

A View from the Bench
Continued from page 5

Workers' Compensation Word Jumble

aiadcijudotn	--- --- --- --- --- --- --- --- --- --- --- ---
oreingcmo	--- --- --- --- --- --- --- --- ---
ilne	--- --- --- ---
opyereml	--- --- --- --- --- --- --- ---
cidectna	--- --- --- --- --- --- --- ---
emnotnacsoip	--- --- --- --- --- --- --- --- --- --- --- ---
rcntosnvioeor	--- --- --- --- --- --- --- --- --- --- --- --- ---
aitldsiiyb	--- --- --- --- --- --- --- --- --- ---
idtyeninm	--- --- --- --- --- --- --- --- ---
dieniotspo	--- --- --- --- --- --- --- --- --- ---
uadtsrej	--- --- --- --- --- --- --- ---
oigiattlin	--- --- --- --- --- --- --- --- --- ---
inmcatla	--- --- --- --- --- --- --- ---
bnruitgasoo	--- --- --- --- --- --- --- --- --- --- ---
alpnembseco	--- --- --- --- --- --- --- --- --- --- ---
lstenettme	--- --- --- --- --- --- --- --- ---

Workers Compensation Word Search

D	D	Y	R	U	J	N	I	K	F	C	Z	G	Y	G
I	O	I	D	Y	P	R	E	M	I	U	M	S	N	Q
S	P	L	X	M	W	V	Z	D	Y	I	M	M	A	S
A	O	Y	R	A	R	O	P	M	E	T	T	E	P	S
B	K	W	L	Y	O	C	D	J	V	I	N	R	Q	Y
I	C	U	E	A	G	A	T	T	V	X	E	E	T	O
L	O	A	T	S	C	T	C	N	E	D	D	A	S	C
I	E	Y	R	I	E	I	E	W	J	Z	I	A	I	R
T	M	E	U	E	C	O	D	M	V	T	C	L	X	G
Y	O	E	Y	I	J	N	I	E	P	D	C	R	E	C
T	P	P	D	O	W	A	L	D	M	L	A	D	L	I
E	I	B	Q	C	L	L	J	Q	E	K	O	A	T	J
W	I	O	Z	B	H	P	R	O	P	A	I	Y	P	O
C	S	N	S	H	F	B	M	R	N	M	T	M	E	P
M	T	C	A	Q	N	E	P	E	S	B	X	H	Y	R

ACT
EMPLOYER
MEDICAL
ACCIDENT
DEATH
CARE
DISABILITY
INJURY
TEMPORARY
CLAIMS
EMPLOYEE
PREMIUMS
VOCATIONAL

Nothing in Section 319 supports employer's view that "compensable injury" means many "compensable injuries" if they are sustained in a single work accident. The legislature knows the difference between a singular and plural noun. Employer produced no evidence to show that the injuries to claimant's hands, neck, face, head, trachea, larynx, and lungs were caused, even "in part," by Aramark. The Commonwealth Court vacated the WCAB's decision and remanded to the WCAB, not the WCJ, to consider claimant's argument that the wage loss and medical expense subrogation should be reduced by some percentage to account for the fact that not all of claimant's disability and medical care was due to the third party claim against Aramark. Subrogation is allowed only for the injuries actually caused by the fire suit.

Superior Court Determines that a Workers' Compensation Carrier Can Bring an Action Against a Third Party Tortfeasor if it is Brought "On Behalf of" the Claimant

The Hartford Ins. Grp. on Behalf of Chen v. Kamara, 2017 PA Super 31, 155 A.3d 1108 (2017), reargument denied (Apr. 18, 2017) provides that a workers' compensation carrier can proceed with a negligence action against a third party tortfeasor for a work-related motor vehicle accident even where the injured worker did not elect to do so. The injured worker was employed by Reliance Sourcing, Inc. She was standing in the parking lot of Thrifty Car Rental, waiting to rent a car as part of her job duties, when she was struck by a rental car operated by defendant, Kamara, and owned by defendant, Thrifty Car Rental. Hartford Insurance, the workers' compensation carrier, paid a significant sum in wage loss and medical expenses. As the statute of limitations for a third party claim approached without the claimant taking any action, Hartford Insurance filed suit that was captioned, "The Hartford Insurance Group on behalf of Chunli Chen, versus Kamara and Thrifty Car Rental." The plaintiff's complaint alleged that each of the defendants was liable to plaintiff, Hartford, and to Chunli Chen for injuries caused to her.

The defendants filed preliminary objections on the grounds that Hartford could not be the plaintiff. Since Chen was the injured employee and had neither assigned her cause of action to Hartford nor was a party to the lawsuit, defendants argued that the entire complaint must be dismissed. The defendants also insisted that Chen was obliged to verify the complaint. (The complaint had actually been verified by one of Hartford's subrogation specialists upon "information and belief.") The trial court agreed, but upon appeal, the Superior Court reversed and remanded, finding that Hartford was simply complying with Liberty Mutual. Ins. Co. v. Domtar Paper Co., 631 Pa. 463, 113 A.3d 1230 (2015) in prosecuting its case. Since Hartford filed suit "on behalf of Chen" and was attempting to establish the liability of the third-part tortfeasor to Chen, the Superior Court found that this lawsuit is proper under both the Workers' Compensation Act and the Superior and Supreme Court precedents construing the Act.

A Medical Expert May be Deemed Incredible if His or Her Opinions Are Based on Unreliable Information that the Claimant Provided

In Green v. Workers' Comp. Appeal Bd. (US Airways), 155 A.3d 140 (Pa. Commw. Ct. 2017), Susan (Nawn) Green sought review of the February 9, 2016 order of the WCAB that affirmed the remand decision of the WCJ, denying (for a second time) her reinstatement and penalty petitions. The history is extensive as the claimant was initially injured in 1993. Claimant was a flight attendant who fell onto both knees during turbulence, suffering bilateral knee injuries requiring surgeries. A Notice of Compensation Payable was filed recognizing the work injury as a right meniscus tear. By decision and order of August 28, 2000, the description of the work injury was amended to include a left medial meniscus tear. After further litigation in 2005, the WCJ denied claimant's review petition and granted employer's suspension petition effective August 12, 2003. On appeal, the WCAB affirmed the suspension of benefits, but modified the WCJ's decision, in part, to add a left lateral femoral condyle lesion to the description of the work injury.

On January 7, 2008, Claimant filed a petition to reinstate benefits, asserting that her 1993 left knee injury had worsened as of December 1, 2007, and she could no longer perform her pre-injury job. The WCJ denied the reinstatement finding claimant totally incredible. The WCJ found the claimant's doctor credible, but unpersuasive, because the increased symptoms might be due to degenerative changes. The employer did not offer medical evidence. The WCAB affirmed. The Commonwealth Court vacated and remanded in a reported decision at 28 A.3d 936 stating that the doctor could not be both credible and unpersuasive without contrary evidence. The WCJ's new decision was to be "in accordance with" the court's opinion. On remand, the WCJ made the same decision to deny reinstatement, but elaborated as to why the doctor was not persuasive. The WCJ explained that essentially, his opinion that claimant's condition had worsened was credible, however, his opinion concerning her alleged inability to do her pre-injury job was based in large part on her wholly incredible testimony. His opinion of such disability was not credible and did not warrant reinstatement. Thus, claimant did not meet her burden. The WCAB affirmed.

On appeal to the Commonwealth Court, claimant argued that the WCJ's decision was not a reasoned decision, the WCJ capriciously disregarded unrebutted medical testimony; the WCJ exceeded the scope of the remand order; and the WCJ improperly applied a heightened burden of proof in deciding the reinstatement petition. The Commonwealth Court affirmed after discussing various case citations in explaining why the claimant's appeal arguments failed. First, a reasoned decision is one that provides an adequate basis for appellate review. The WCJ is not required to address all of the evidence presented in a proceeding. The Commonwealth Court also noted that on remand, the WCJ again rejected claimant's testimony, citing, inter alia, claimant's demeanor. The WCJ then rejected as not credible, that portion of Dr. Carson's opinion that relied upon the claimant's subjective and discredited complaints. The WCJ provided additional and more comprehensive explanations as to Dr. Carson's credibility in one aspect (his opinion that the claimant's condition had worsened) while finding him not credible with regard to his opinion that the claimant could not perform her pre-injury job. The decision was reasoned, adequately explained what part of Dr. Carson's testimony was credible and what was not credible and was well within the scope of the remand order.

WCAB May Remand to Same WCJ or Different WCJ at Their Discretion and May Order De Novo Review When WCJ Fails to Consider All of the Evidence in Rendering a Decision.

In McDaniel v. WCAB (Maramont Corporation), No. 797 C.D. 2016, 157 A.3d 544, Pa. Cmwlth., filed Dec. 20, 2016, and ordered Reported on March 16, 2017, Claimant was involved in a work related motor vehicle accident. Following the accident claimant reported the injury and finished out the day. . The following day he reported to a local emergency room and commenced treatment for complaints in his neck, elbow and back.

A View from the Bench
Continued on page 6

During the initial course of treatment claimant tested positive for marijuana and was laid off. Claimant filed a Claim Petition seeking total disability benefits. The first WCJ to hear the case granted a claim petition on January 27, 2012.

Employer appealed, arguing failure to consider all the medical evidence and failure to address the central issue of whether claimant was fired for failing a drug test when work would have remained available without earnings loss. On February 15, 2012, the WCJ rendered an amended decision that addressed some, but not all, of the medical evidence and still did not address the drug test issue. Employer appealed that decision also, arguing that it violated regulation/judge rule 131.112. Specifically, it was not a clerical error and the parties did not agree to an amended decision. The WCAB vacated both decisions and remanded for de novo consideration and recommended that it be reassigned to a different WCJ.

The remand was assigned to the same WCJ, who held a pretrial conference and then recused, stating that both counsel agreed to the recusal and reassignment. The matter was reassigned to another WCJ, who was already assigned a termination petition filed during the earlier appeals. Neither counsel objected to the reassignment.

The second WCJ then rendered a decision that granted the claim, found that the earnings loss was due to termination from employment based on the positive drug test, and not work related disability, and immediately suspended wage benefits, and then granted termination of benefits as of a later date, based on the IME's opinion of full recovery.

Claimant appealed on the merits and also argued that WCAB had exceeded its authority in recommending reassignment and in ordering de novo consideration. Claimant's brief was silent as to the merits of the case and focused solely on whether or not the WCAB had exceeded its authority in recommending the reassignment and calling for a de novo review.

The Commonwealth Court discussed Section 419 of the Workers' Compensation Act, 77 P.S. §852 as well as Joseph v. WCAB (Delphi Co.), 522 Pa. 154, 560 A.2d 755 (1989) and Boyd v. WCAB (Eichleay Corp.), 631 A.2d 1111 (Pa. Cmwlth 1993) and held that WCAB has broad authority on remands and can order a remand to the same WCJ or to a different WCJ at its discretion. Here, it only "recommended" a different WCJ, and the Office of Adjudication did not assign a different WCJ, and, further, counsel agreed to the reassignment. On the de novo issue, this was not an improper rehearing or "second bite of the apple." The first WCJ did not consider all the evidence in either decision, so that a complete re-review was required. The second WCJ's decision was affirmed. The Opinion was originally issued as a memorandum Opinion on December 20, 2016 and was later reported by Order dated March 16, 2017.

Arbitrator's Award of Heart and Lung Benefits does not Collaterally Estop the WCJ From Making Her Own Determination as to the Claimant's Claim for Disability Benefits under the Workers' Compensation Act

In Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections), No. 493 C.D. 2016, ___ A.3d ___, Pa. Cmwlth., filed April 3, 2017, the Commonwealth Court held that the workers' compensation judge was not collaterally estopped from making her own determination as to the claimant's disability, notwithstanding an arbitrator's prior award of heart and lung benefits.

Claimant, a Department of Corrections trainee, alleged he injured his knee at work on October 12, 2013. He filed a claim for benefits under the Heart and Lung Act, which was denied by the employer. Under the terms of a collective bargaining agreement, an arbitrator was assigned to hear claimant's grievance and the denial of heart and lung benefits. The parties presented depositions and exhibits at a hearing before the arbitrator. Claimant submitted his deposition testimony and a medical report from his orthopedic surgeon. Employer submitted the deposition of its medical expert, a board certified orthopedic surgeon. On September 24, 2014, the arbitrator issued an award granting claimant heart and lung benefits. The arbitrator credited the testimony of claimant and the opinion of his treating surgeon.

In the meantime, on April 28, 2014, claimant had filed a claim petition under the Workers' Compensation Act. At a hearing before the WCJ, claimant offered only the arbitrator's award, claimant's deposition from the arbitration, and no medical evidence. Employer offered the deposition testimony of its medical expert. Claimant moved for an award of workers' compensation benefits, arguing the arbitrator's award was binding on the WCJ under the doctrine of collateral estoppel. The WCJ denied claimant's motion for an award of disability benefits, holding that she was not collaterally estopped by the arbitration award. The WCJ granted claimant's claim for medical benefits for a closed period but did not award disability benefits. Claimant appealed to the board, which affirmed the WCJ.

Before the Commonwealth Court, claimant argued that the arbitrator's award precluded the WCJ from finding claimant was not disabled. The court observed that collateral estoppel, also known as issue preclusion, prevents relitigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication is identical to the one presented in the later action; (2) there was a final judgement on the merits; (3) the party against whom the plea is asserted was a party to the prior litigation; (4) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in a prior action; and (5) the determination in the prior proceeding was essential to the judgment. The employer agreed that four of the elements were satisfied; however, it argued that it did not have a full and fair opportunity to litigate the issue of disability in the heart and lung arbitration.

The court determined that controlling precedent focused on two inquiries: the amount at risk financially and the type of procedural rules governing each proceeding. Regarding the former, the court found that the temporary nature of heart and lung benefits, as opposed to potential lifetime benefits under the Workers' Compensation Act, renders the amount in controversy between the two schemes incomparable. The court then compared the procedural rules and concluded that an arbitration proceeding is more informal than a proceeding governed by the Workers' Compensation Act. This is most notable with regard to the standards for admission of medical evidence and the level of detail required in a WCJ's decision. In summary, collateral estoppel did not apply because an arbitration and workers' compensation proceeding are substantially different; Employer did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

A View from the Bench
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Penalties: Non-Payment of Medical Bills for Physical Therapy Addressed in Two Opinions Involving the Same Insurer and Medical Provider

In New Alexandria Borough and Selective Insurance Company of America v. WCAB (Tenerovich), No. 567 C.D. 2016,157 A.3d 549, Pa. Cmwlth., filed January 5, 2017 and ordered published on March 17, 2017, the issue was whether a joint venture arrangement between the billing entity and the actual physical therapy facility justified the insurance carrier's refusal to pay the submitted bills for physical therapy.

In 2010, the claimant suffered an acknowledged injury to his right shoulder and underwent physical therapy. The insurer, Selective Insurance, was billed by the "Physical Therapy Institute (PTI)". The insurer denied payment, contending that PTI was not the provider of the billed services, but that another entity, the "pt Group" was the actual provider. The insurer further contended that it was being billed at the incorrect rate under 77 P.S. § 531(3)(iii) enacted on January 1, 1995.

When the insurer refused to pay the bill, the claimant filed a Penalty Petition, which was later amended to include a Petition for Review of Medical Treatment and/or Billing. The Commonwealth Court noted that the amendment of the petition was based upon the 2014 opinion of the Commonwealth Court wherein the Court held that the Bureau of Workers' Compensation Fee Review Hearing Officer lacked jurisdiction to determine whether an entity was a "provider" of medical services or a billing agency, reasoning that this was a question of liability that must be determined by a WCJ. See Selective Insurance Company of America v. Bureau of Workers' Compensation Fee Review Hearing Office (The Physical Therapy Institute), 86 A.3d 300.

The WCJ found that the pt Group and PTI operated a contractual joint venture, that PTI leased space and therapists from the pt Group, and PTI billed the insurer. The insurer refused to pay the bill, arguing that PTI was not the "provider." Before the WCJ, the claimant testified that he thought the pt Group was the provider. Claimant also called to testify the lawyer who set up the joint venture, drafted the agreement and represented the enterprise. The court summarized the lawyer's testimony at length, which included testimony that various government agencies knew and approved of the joint venture operation. Claimant also called PTI's president, who testified to the arrangement and said that the services were provided by PTI. Claimant also called Selective Insurance representatives, who explained why they were not paying the bills. With respect to this testimony, the court's summary included the following: "Mr. Smith testified that from his review of the bills pertaining to Claimant's care, it was unclear as to who was providing the service, but that he believed PTI was not the actual health provider… Mr. Smith further testified that he had no information from any state or federal law enforcement agency indicating that the arrangements between PTI and the pt Group was unlawful, that he had no information from CMS or the Bureau that the arrangement was unlawful, and that he had no information from any fraud investigative unit that the arrangement was unlawful." The insurer offered testimony from pt Group representatives, and from a Selective representative who testified to discrepancies in the bills. Insurer also presented testimony from an investigative company representative who indicated, in the Court's words: "that she was aware of the leasing arrangement for space and employees between PTI and the pt Group, but that she had never come across this type of leasing arrangement in her twenty-three years of work."

The WCJ found the lawyer witness credible and found that the joint venture arrangement was recognized as legal. The WCJ therefore found that the employer had no basis to refuse payment. The WCJ ordered a penalty equal to fifty percent of the amount of the outstanding medical bills, awarded unreasonable contest counsel fees in the amount of $8,217 and directed the insurer to pay litigation costs in the amount of $2,915. On appeal, the WCAB affirmed the Decision and Order of the WCJ.

In its opinion, the Commonwealth Court affirmed the decision of the WCAB. The court first addressed the employer's contention that it was being billed at the incorrect rate under Section 306(3)(iii). With respect to whether the billing rate was correct, the court stated:

"Not withstanding that we are unable to find any exception to this provision requiring billing based on Medicare fee schedule, there apparently is one because the parties assumed that if a provider was in existence on January 1, 1995, when the Cost Containment provisions were enacted, that provider is grandfathered and still allowed to bill on a cost-plus formula. In this case, if the pt Group is the provider, because it was apparently not in existence in 1995, the billed services would be billed at 113% of Medicare fee schedule. However, if PTI is the provider, because it apparently was in existence in 1995, the services can be billed using the cost-plus method."

The court concluded, as had the WCJ and the WCAB, that the joint venture had been approved and was not illegal and therefore, the Employer had no basis to refuse to pay. With respect to the unreasonable contest, the court wrote: "Given Employer's failure
to provide any evidence that establishes the alleged illegality of the joint venture or PTI's status as a health care provider, we agree with the WCJ that Employer engaged in an unreasonable contest and the award of attorney's fees is proper. Accordingly, the Board's Order is affirmed."

In Derry Township Supervisors and Selective Insurance Company of America v. WCAB(Reed), No. 751 C.D. 2016,158 A.3d 194, Pa. Cmwlth., filed January 30, 2017 and ordered reported on April 11, 2017, the issues were identical to the issues in the New Alexandria Borough case discussed above. This Derry Township Supervisors and Selective Insurance Company decision involves the same insurer, same provider/joint venture and the same fact witnesses for both parties as appeared in the New Alexandria Borough litigation. Once again, penalties, unreasonable contest and litigation expenses, had been ordered by the WCJ and this was affirmed by the WCAB and then by the court. The Commonwealth Court panel of judges was the same in this opinion as in the New Alexandria Borough opinion and the reasoning of the court in the Derry Township Supervisors decision was identical to the reasoning in the New Alexandria Borough opinion.

Personal Comfort Doctrine; Small Departure Still in Course of Employment and Injury is Compensable

In Starr Aviation v. WCAB (Colquitt), No. 659 C.D. 2016, filed March 7, 2017, 155 A.3d 1156, the Commonwealth Court affirmed the decision of the WCAB that affirmed the order of a WCJ, granting a claim petition and holding that a claimant was in the course of her employment when she was injured during a temporary departure from her duties to retrieve personal hygiene products, as well as other items, from her mother in a different area from her work duties.

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Claimant worked as a "ramp agent lead" at the Pittsburgh International Airport. Her job duties involved driving a tug with a cart (a vehicle used to transport luggage bags), unloading and reloading bags on to airplanes, and dropping bags onto the baggage claim belts.

The facts are important in this case. On Sept. 2, 2014, the claimant, who was 21 years old, arrived at work for a 2 p.m. to 11 p.m. work shift. After leaving her home, she started her menstrual cycle and realized she had forgotten her wallet. She called her mother near the beginning of her work shift to ask her to bring feminine products and money to claimant's work. At around 8:30 to 9 p.m. the claimant's mother arrived. Claimant received permission from her supervisor to drive a tug from one area of the airport to another in order to meet her mother to pick up the feminine hygiene products, money and some other items. While claimant was driving the tug, it flipped and trapped her left leg. Claimant was transported to the hospital via ambulance where her left leg was amputated above the ankle and below the knee. Employer issued a Notice of Compensation Denial stating, in part, the claimant's injury was not in the course of her employment. Claimant filed a Claim Petition.

During the litigation, employer presented several co-workers witnesses. One witness testified that she saw the claimant in the break room a few hours before the injury and claimant told her she had cramps and was hungry. She offered claimant food and money, but claimant declined telling her that her mother was bringing her these items. The witness also testified that the restroom and break room contained feminine products. Another witness testified that claimant was operating the tug too fast when the accident occurred. A third witness testified that when he saw the claimant during a break, she offered him crackers.

In a decision dated January 7, 2015, the WCJ found the claimant's testimony credible and convincing. The WCJ found claimant's job performance would be adversely affected by her menstrual cycle if she did not have feminine products to address the situation. It was noted that claimant received permission from her supervisor to take the tug to meet her mother and the injury occurred on the employer's premises. The WCJ found that claimant's temporary departure from work to attend to her personal needs did not take her out of the course of her employment, applying a personal comfort doctrine. Regarding the three lay witnesses, the WCJ noted that she considered their testimony, but did not find their testimony to be relevant to the issues in the matter.

The employer advanced several arguments on appeal to the Commonwealth Court. First, it argued that the personal comfort doctrine did not apply because the claimant's departure from work was not a small or temporary departure and she was furthering her own interests. The court disagreed. Employer next argued that the WCJ erred in finding the claimant was injured on employer's premises. The Court noted that as it was determined that claimant was furthering the employer's interests at the time of the accident, it did not matter whether claimant was injured on or off the employer's premises, as the injury would be compensable either way.

Employer also argued that the WCJ erred in dismissing the testimony of the three lay witnesses as irrelevant and inconsequential. The court disagreed and cited from the WCAB opinion stating: "We do not interpret the WCJ's ruling as finding [Employer's] witnesses not credible, nor their testimony excluded from consideration due to lack of competency…[W]e conclude the WCJ was ruling that even if she were to fully credit the testimony of all three witnesses, as a matter of law, it does not change the outcome." The Court further states that none of the employer's witnesses negated, or called into question, the testimony of the claimant, particularly that she began her menstrual cycle at work. The court noted that the witness testimony focused on a collateral issue of whether it was necessary for claimant to meet her mother. The court stated it is well-settled that "it is immaterial whether a reasonable person in claimant's shoes would have made other arrangements to meet her personal needs; indeed, any perceived fault in claimant's decision to call and make arrangements with her mother is no defense to liability under the Act."

Employer's final argument was that the WCJ and board erred in awarding claimant total disability benefits rather than specific loss benefits. The court notes that employer did not raise that specific issue in its appeal to the board, and does not even mention the words "specific loss benefits" in its appeal, therefore, it concluded that the issue was waived for purposes of the appeal.

Average Weekly Wage Calculation under 309(e) "Seasonal Employee," or 309(d.2) "Expected Earnings" or Burkhart Refractory Inst. v. WCAB (Christ), 896 A.2d 9 (Pa. Cmwlth. 2006) "for recently hired employee with sporadic hours, the proper calculation is total pre-injury earnings ÷ number of weeks worked."

In Toigo Orchards, LLC v. WCAB (Gaffney), No. 722 C.D. 2016, 156 A.3d 407, Pa. Cmwlth., filed March 3, 2017, claimant came out of Social Security retirement to work as a tractor driver at an apple orchard, where he had previously worked for many years as a picker. He suffered total vision loss in his left eye when a branch knocked off his glasses and scratched his eye, resulting in traumatic iridocyclitis with cystoid macular edema. The issues before the WCJ were whether claimant was a seasonal employee, with his average weekly wage (AWW) calculated under 309(e), or a "regular" employee working less than 13 weeks in which case his AWW should be calculated under 309(d.2), and whether claimant was entitled to a healing period. There was testimony from both parties about his work status, quoted at length by the Commonwealth Court, and the WCJ found that claimant was a seasonal employee and thus his AWW was calculated as $35.10 per week based on the fact that claimant had no other income during the prior 52 weeks. The WCJ did not award a healing period. Claimant promptly appealed.

The WCAB reversed, finding that, while claimant's specific job was of specific short-term duration, the nature of the work that he did, "itinerant agricultural labor," was not seasonal employment. The board concluded that claimant's AWW was not properly calculated under 309(e). Claimant had argued for 309(d.2) - expectations of 50 hours per week multiplied by $9.00 per hour; or $450. WCAB rejected claimant's numbers and applied Burkhart Refractory Installation v. WCAB (Christ), 896 A.2d 9 (Pa. Cmwlth. 2006), averaging claimant's 5-week gross income to arrive at an AWW of $351. The board also awarded a 10-week healing period. Employer appealed.

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Claimant did not cross-appeal, but filed a "designation of additional issue" regarding the proper AWW calculation. Employer sought to quash it, arguing waiver, but the Commonwealth Court denied that motion and considered the issue.

The Commonwealth Court affirmed that claimant was not a seasonal employee, with a detailed discussion of the case law and the humanitarian purposes of the Act. See, Froehly v. T.M. Harton Co., 291 Pa. 157, 139 A. 727 (1927), Ross v. WCAB (Arena Football League), 702 A.2d 1099 (Pa. Cmwlth. 1997), Statlers Family Fun Center v. WCAB (Sarnese) (Pa. Cmwlth., No. 1414 C.D. 2009, 2010 WL 9511442, filed Mar. 17, 2010), Keenan v. WCAB (Cocco) (Pa. Cmwlth., No. 1061 C.D. 2014, 2015 WL 5453116, filed July 10, 2015), Reifsnyder v. WCAB (Dana Corporation), 584 Pa. 341, 883 A.2d 537, 545 (2005) and Hannaberry HVAC v. WCAB (Snyder, Jr.), 575 Pa. 66, 834 A.2d 524, 532–534 (2003). The WCJ is to look at the nature of the work being done, not the particular claimant's work. If the work can be done all year, it is not seasonal. The court also discussed why Burkhart was the proper AWW calculation. There was not a fixed number of hours to be worked or expected to be worked. Finally, the court reversed the healing period award. The court indicated that as claimant was retired for a long time before he got hurt and immediately returned to SS retirement status as soon as he got hurt, the employer rebutted the presumption of claimant's entitlement to a healing period. See, Sun Oil Company v. WCAB (Carroll), 811 A.2d 1131 (Pa. Cmwlth. 2002).

Act 46 Claim Barred Because Firefighter's Death Occurred More Than 300 Weeks After Last Exposure

In City of Warren v. WCAB (Haines), No. 468 C.D. 2016, 156 A.3d 371, Pa. Cmwlth., filed March 9, 2017, the Commonwealth Court, interpreting Act 46 (firefighter's cancer), has barred the claim of a firefighter's widow where the firefighter died from colon cancer more than 300 weeks after last exposure, at a time before the 2011 enactment of Act 46.

A career firefighter, Haines, labored for the City of Warren from 1970 to late 2002, at which point he retired. Later, some 342 weeks following last exposure, he developed colon cancer and died of the same in 2009. Two years later, the legislature enacted Act 46 of 2011.

In 2012, the widow filed a claim petition under Section 108(r). In the litigation which followed, both sides submitted expert medical evidence. Ultimately, the WCJ granted the petition and the Appeal Board affirmed. The board, for its part, held that Act 46 was retroactive in application. It theorized that because abdominal cancers from hazards like asbestos and soot could already potentially be recovered under Sections 108(l) and 108(n), Act 46 merely changed the manner in which recoveries could be achieved. As far as the board was concerned, the changes to the law, allowing a presumption of causation if the claim was filed within 300 weeks, and expanding the overall limitation period to 600 weeks, were retroactive and applied to the claim.

Commonwealth Court reversed. It held that the 2011 enactment of Act 46's 300- and 600-week requirements could not be applied retroactively. Because this was so, the statute of repose existing in 2009, also 300 weeks, applied. That rule required that for a death to be compensable, it had to occur within 300 weeks of last exposure, and the claim in the present case did not meet that requirement.

The new 300-week period, the court held, was a "statute of repose," and hence a substantive enactment. It was not, as held by the board, a merely procedural change that could be applied retroactively. Precedent also held that "legislation that purports to revive an expired claim violates the constitutional guarantee of 'due process of law.'" It was also notable that Act 46 had no clause inserted by the legislature purporting to establish the new law as retroactive in operation.

Pennsylvania Supreme Court Accepts Claimant's Appeal in Sladek

City of Philadelphia v. WCAB (Sladek), 144 A.3d 1011 (Pa. Commw. 2016), appeal granted, ___ A.3d ___, 2017 WL 816877 (Pa. 2017).

In the Sladek case, the Commonwealth Court, interpreting Act 46 (firefighter's cancer), held that a claimant must prove that the carcinogens to which he was exposed caused the cancer in question. On March 1, 2017, the Supreme Court accepted the claimant's appeal. It phrased the issues as follows: "(1) Whether the Commonwealth Court, in a case of first impression, committed an error of law by misinterpreting Section 108(r) to require a firefighter diagnosed with cancer caused by an IARC Group I carcinogen to establish exposure to a specific carcinogen that causes his/her cancer in order to gain the rebuttable presumption provided by the law?; and (2) Whether the Commonwealth Court committed an error of law by concluding that a legislatively-created presumption of compensability may be competently rebutted by a general causation opinion, based entirely upon epidemiology, without any opinion specific to the firefighter/claimant making the claim?"

Pennsylvania Supreme Court Denies Appeal in Fargo

City of Philadelphia v. WCAB (Fargo), 148 A.3d 514 (Pa. Commw. 2016, filed October 11, 2016), appeal denied, ___ A.3d ___, 2017 WL 1275167 (Pa. 2017).

In the Fargo case, the Commonwealth Court, interpreting Act 46 (firefighters' cancer), held that the "discovery rule" of limitations of actions does not apply to the 600-week limitation. Thus, a claimant, who suffered from bladder cancer, and who did not initiate his claim petition until more than 600 weeks after last exposure, was barred from recovery. On April 5, 2017, the Supreme Court denied the claimant's appeal.

Construction Workplace Misclassification Act Does Not Apply if Defendant is Not in Construction Industry; Casual Employment

In Department of Labor and Industry, Uninsured Employers Guaranty Fund v. WCAB (Lin and Eastern Taste), No. 627 C.D. 2016, filed February 17, 2017, 155 A. 3d 103, the Commonwealth Court held that a claimant, who was hired to perform remodeling work for a restaurant, was an independent contractor and not an employee under Section 103 and 104 of the Act, and thus not eligible for workers' compensation benefits. The court also determined that the claimant would not be classified as an employee pursuant to the Construction Workplace Misclassification Act (CWMA).

On March 28, 2011, claimant was injured while performing some remodeling work for Eastern Taste, a restaurant. Claimant subsequently filed a Claim Petition against Eastern Taste, and later, a Notice of Claim against the uninsured employer, Eastern Taste. A Claim Petition was then filed against the uninsured employer and the Fund.

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The issue of whether the claimant was an employee of Eastern Taste was bifurcated from the medical issues. In a fact specific analysis, the WCJ determined that claimant was not an employee of Eastern Taste, claimant's work was not in the regular course of business of Eastern Taste, and claimant's employment was casual in nature. In addition to concluding that claimant failed to prove he was an employee of Eastern Taste, the WCJ determined that claimant was not an employee under the CWMA, reasoning that the CWMA does not apply because Eastern Taste is not in the construction industry.

Claimant appealed the WCJ's denial of the Claim Petitions against Eastern Taste and the fund. The board issued an opinion concluding that claimant was an employee of Eastern Taste, and his employment was not casual in nature. The board reversed the WCJ's decision and remanded for findings and conclusions for an award of compensation and litigation costs. On remand, the WCJ entered an order granting the Claim Petition and awarding benefits to the claimant. The fund appealed to the board, and requested that the board's opinion be made final for the purpose of appealing to the Commonwealth Court. The board issued a decision making its January 6, 2015 order final, affirming the WCJ's decision dated October 28, 2015.

The fund then appealed to the Commonwealth Court, arguing that the WCJ's original decision was supported by substantial evidence, and that the board exceeded its authority in reweighing the evidence, relying on its own impermissible fact finding.

In reviewing the record, the court noted that its scope of review required it to determine if the evidence of record supported the WCJ's findings. The court noted it was irrelevant whether the record contained evidence to support findings other than those made by the WCJ, and that the critical inquiry was whether there was evidence to support the findings actually made. The court found that the WCJ made specific findings that supported the denial, and then the board impermissibly made its own findings.

The court then considered whether the evidence was sufficient to legally conclude claimant was an employee of Eastern Taste, which, being a question of law, the court was able to conduct a de novo review. The court agreed with the Fund that the WCJ properly concluded the claimant was not an employee of Eastern Taste, but rather was an independent contractor. The court noted the factors that are considered in making such a determination, and noted that the primary factor is which party had control over the work and the manner in which it was to be completed. It was noted that the owner of Eastern Taste told the claimant "what he wanted done," and it was then the claimant's job to do it. The Court quoted the WCJ that "this is essentially the same relationship that property owners typically have with painters, plumbers, electricians, carpenters and other remodelers," noting that "these specialists bring their time and expertise." The court noted that the reasonable inference from the evidence is that Eastern Taste's owner was in charge of the overall goals of the project, but did not control the manner in which the work was to be completed or performed. The court further noted the nature of Eastern Taste's business as a restaurant, not a construction business, and claimant was hired to perform remodeling with no expectation to continue working in the restaurant after the remodeling was finished.

The court also considered whether the claimant would be defined as an employee under the CWMA. The court noted that the CWMA sets forth criteria under which an individual performing services in the construction industry will be deemed as an independent contractor for purposes of workers' compensation. If a worker falls within the purview of the CWMA, but does not meet the requirements to be considered an independent contractor, the worker will be deemed to be an employee for purposes of workers' compensation. The court emphasized that the language in section 3 of the CWMA applies only to an individual performing services in the construction industry. Whereas, in this case, Eastern Taste is in the restaurant business and not in the construction business, the court determined that the CWMA would not be applicable, which it noted was a question of first impression. The court stated that when this question arises, it will be necessary to look at the facts of each particular situation. Under these particular facts, the court agreed with the WCJ that Eastern Taste was in the restaurant business, not the construction business, so the CWMA did not apply.

Construction Workplace Misclassification Act; Late Answer is Not Admission of Questions of Law

In Hawbaker v. WCAB (Kriner's Quality Roofing Services and Uninsured Employer Guaranty Fund), No. 224 C.D. 2016, filed February 13, 2017, and ordered reported on May 10, 2017, 2017 WL 2022943, the court considered an appeal from the WCAB opinion affirming a decision of the WCJ that claimant was an independent contractor and not an employee of Kriner d/b/a/ Kriner's Quality Roofing Services (Kriner). The injury occurred on November 19, 2013, when claimant sustained fractures of his leg and vertebrae when he fell off a roof. Claimant subsequently filed Claim Petitions against Kriner, and then the Uninsured Employer's Guaranty Fund (UEGF). The claimant contended that despite a written contract with Kriner identifying him as an independent contractor and a requirement that he carry liability insurance in the amount of $50,000, he was actually an employee of Kriner.

Claimant began performing work for Kriner in 2011, and was compensated on an hourly basis. In January of 2012, he signed a contract entitled "Independent Contractor Agreement." In December of 2012, he stopped showing up and stopped calling about work, which he attributed to substance abuse problems. In March 2013, he contacted Kriner about returning to work. At that time, Kriner required him to provide proof of liability insurance before he could work on Kriner jobs, and he signed an addendum to the 2012 contact stating that he would be paid by the assigned task.

As is typical for an independent contractor/employee case, the WCJ performed a fact specific analysis in reaching the determination that claimant was customarily engaged as an independent roofing contractor. Important facts considered by the WCJ include that claimant agreed that roofing work requires skill, he used many of his own tools, he listed himself as an independent roofing contractor on his personal Facebook page, he signed an Independent Contractor Agreement to work for Kriner, as well as an addendum to obtain general liability insurance, and on his liability insurance policy he listed his business name as his name.

On appeal to the board, the claimant argued that the WCJ erred in finding him to be an independent contractor. Claimant further argued that the WCJ was required to hold the claimant was an employee of Kriner because Kriner's Answer to the Claim Petition was not timely filed.

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In arguing that the evidence did not establish that he was an independent contractor, the claimant argued that he did not execute a written contract when he returned to work for Kriner in 2013, he stated that Kriner had complete control and direction over his work, and he argued that he was not engaged in an independent established trade. Kriner contended that the evidence established that all of the criteria of the Construction Workplace Misclassification Act (CWMA) were met to classify claimant as an independent contractor.

The court provides an overview of Section 3(a) the CWMA, which states that an individual who performs services in the construction industry for remuneration is considered an independent contractor if the following criteria are met:
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 under both the contract and in fact.
3. As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

The court then lists the criteria in Section 3(B) of the CWMA, setting forth the criteria of "an independently established trade, occupation, profession or business. There are six criteria including that the individual possesses the essential tools, and equipment for the job, the arrangement with the person for whom the services are performed is such that the individual may make a profit or suffer a loss as a result of performing the services, the individual performs the services through a business in which he or she has a proprietary interest, the individual maintains a business location separate from the location of the services being performed, the individual has performed the services free from direction or control or holds himself out as being able to perform the services free from direction or control, and the individual maintains liability insurance of at least $50,000 during the terms of the contract. In this case, the claimant let his liability insurance lapse, but he did not inform Kriner of such.

In reviewing the evidence, the court found that the WCAB did not abuse its discretion or err in affirming the decision of the WCJ that claimant did not establish an employer/employee relationship based on the record.

On the issue regarding the untimely Answer, the court affirmed the WCAB which held that whether an individual is an employee or independent contractor is purely a legal question. The effect of an untimely answer is only to admit facts, not legal conclusions, therefore, the legal question of employment status is not admitted or otherwise effected by a late answer.

Claimant Awarded Benefits for Injuries Sustained While Commuting to Work; Special Circumstances Exception to Coming and Going Rule Applies Where Claimant Called in to Perform Emergency Repairs While on Sick Leave

In Lutheran Senior Services Management Company v. WCAB (Miller), No. 1074 C.D. 2016, 154 A.3d 892, Pa. Cmwlth., filed November 4, 2016, the Commonwealth Court held that the special circumstances exception to the coming and going rule applied, and thus the injuries the claimant sustained in a motor vehicle accident while commuting to work were compensable.

The employer maintained a housing campus for senior citizens. The claimant was the employer's Director of Maintenance, a salaried employee in charge of three hourly employees. Claimant testified that when he was called in to work outside of his normal working hours, he received "comp time." This "comp time" was for the same time as the hourly employees he supervised; that is, door-to-door, from home to work and back. The WCJ credited claimant's testimony that he awoke feeling ill and intended to take a sick day but was called in by a supervisor to perform emergency repairs to the facility's security camera system. While driving to work, claimant sustained serious injuries in a motor vehicle accident. The WCJ awarded benefits, concluding claimant was not barred by the coming and going rule due to special circumstances that caused claimant's commute to work that day to be a "special mission" for employer. The board affirmed the WCJ on appeal, concluding that claimant was not so much on a special mission for employer as he was in special circumstances in his employment.

The Commonwealth Court observed that as a general rule, commuting to and from work is not in the course of employment ("coming and going rule"). There are, however, four recognized exceptions: (1) the employment contract includes transportation to and/or from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special assignment or mission for the employer; or, (4) special circumstances are such that the claimant was furthering the business of the employer. The court focused on the fourth exception, the special circumstances exception, relied upon by the board. The court noted that special circumstances have rendered an injury sustained during a commute compensable where: (1) the employee is requested by the employer to come in; (2) the request is for the convenience of the employer or in furtherance of its business; and (3) the trip is not simply for the convenience of the employee.

In this case, the court reasoned that but for the emergency with the security cameras, the claimant would not have made the trip to work due to his illness. The security cameras were an important priority for employer. Employer did not dispute claimant's testimony regarding its "comp time" policy and method of calculating the "comp time." In the court's view, claimant was "on the clock" from the moment he received the request from his supervisor to come in to work. Claimant's injuries were held compensable because these special circumstances surrounding claimant's injuries fall within an exception to the coming and going rule.

Section 319 Subrogation and the Heart and Lung Act; Pennsylvania Supreme Court Grants Allowance of Appeal

The opinion of the Pennsylvania Commonwealth Court in Pennsylvania State Police v. WCAB (Bushta), filed October 26, 2016, 149 A.3d 118, was the subject of the following per curiam order issued by the Pennsylvania Supreme Court on April 18, 2017, No. 483 WAL 2016, 2017 WL 1397531(Table)

AND NOW, this 18th day of April, 2017, the Petition for Allowance of Appeal is GRANTED. The issues, as stated by petitioner, are:

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(1) Is compensation payable pursuant to Article III of the Pennsylvania Workers' Compensation Act, when the Claimant suffers a work related injury and is concurrently entitled to benefits under the Pennsylvania Workers' Compensation Act and the Heart and Lung Act?

(2) Did the Commonwealth Court err in its determination that a self-insured municipality [sic] is not entitled to subrogation, to the extent of the compensation payable pursuant to Article III of the Pennsylvania Workers' Compensation [Act], when it has concurrent obligations to an injured State Trooper under the Pennsylvania Workers' Compensation Act and the Heart and Lung Act?

In Bushta, the Commonwealth Court, relying on its 2014 opinion in Stermel v. WCAB (City of Philadelphia), 103 A.3d 876, held that heart and lung benefits were not subject to subrogation under Section 319 of the Workers' Compensation Act, where the claimant's injury was sustained in a motor vehicle accident.

Section 303(a) Exclusivity Does Not Apply When Section 301(c)(2) Occupational Disease Limitation Precludes Workers' Compensation Relief; Employer Has Common Law Duty to Employee to Provide Safe Work Space

Geier, et al. v. Board of Public Education of the School District of Pittsburgh et al., No. 625 C.D. 2016, 153 A.3d 1189, Pa. Cmwlth., filed January 25, 2017

Although this Commonwealth Court decision does not involve an appeal from the Workers' Compensation Appeal Board, and the issues discussed were not primarily workers' compensation issues, it is relevant to the workers' compensation community. It follows the reasoning of the Supreme Court's 2013 decision in Tooey v. AK Steel, 81 A.3d 851 (Pa. 2013), in which that court overruled Superior Court precedents, and held that where the §301(c)(2) 300-week statute of limitations/repose has run on a late-manifesting occupational disease claim, the exclusivity doctrine does not apply, and the injured worker can sue the employer in tort. This statutory section provides that, for a claimant to have a valid claim, the disability or death must occur within 300 weeks of the last exposure to the hazardous material that precipitated the disease. If the disability or death occurs beyond the 300 week 'window', the claim is barred. Earlier decisions had held that, despite not having a valid workers' compensation claim, the claimant/plaintiff was also barred, due to the exclusivity doctrine, from pursuing a civil action against the employer sounding in negligence. Tooey permitted such civil actions to proceed.

Here, plaintiff/decedent was a school teacher for the Pittsburgh Board of Education (PBE) in 1958-59, when she was allegedly exposed to asbestos dust from the high school building's pipe coverings. She was diagnosed with mesothelioma in 2013, more than 50 years later. She and her husband/now widower sued in tort in common pleas numerous defendants, one of whom was PBE, her employer at the time of her exposure. Although PBE raised several defenses to the action, it did not raise the workers' compensation exclusivity defense. Commonwealth Court cited Tooey.

Of additional interest, the court held that an employer has a common law duty to provide its employees a safe place of employment, including the buildings and structures where they perform their work tasks. Therefore, if there is a lengthy passage of time, exceeding the occupational disease statute of limitations, thus precluding a workers' compensation remedy, before an occupational disease manifests, a plaintiff's common law negligence claim is revived and can proceed, despite the exclusivity provision of §303(a). Of course, the plaintiff must still prove the elements necessary to prevail in a negligence action.

Average Weekly Wage Is Based upon Earnings Arrangement as of the Injury Date

Lidey v. WCAB, (Tropical Amusements, Inc.), No. 726 C.S. 2016, 157 A.3d 22, Pa. Cmwlth., filed March 17, 2107

Claimant worked as a long-time manager for an amusement company when he was hurt. The injury was accepted. Based on an average weekly wage (AWW) of $640, which it calculated under §309(e) of the Act, for seasonal employment, Employer paid benefits of $458.50 per week (50% of the statewide AWW for 2013.) Claimant filed a review petition to amend/increase his AWW and resultant temporary total and temporary partial disability benefit rates. He testified that, on the date of his injury, his wages were fixed at $2,000 per week under §309(a). Employer testified that the $2,000 per week arrangement was only for a limited time and not for the entire work year, so that its seasonal employment calculation was accurate. The WCJ granted the review petition and amended claimant's AWW to $2,000 and the TTD rate to $917 per week (the 2013 maximum.)

Upon employer's appeal, the Workers' Compensation Appeal Board agreed that claimant was not a seasonal employee under subsection (e), as his occupation could be performed year-round, but it also found that the subsection (a) calculation artificially inflated his earnings when compared to his pre-injury earnings, as he was generally an hourly employee, had worked more than 52 weeks, and had only recently been paid $2,000 per week. It recalculated his AWW under §309(d), finding that to be a more accurate reflection of his economic reality, resulting in a reduction to $717.95 (which would provide a weekly TTD benefit rate of $478.63).

Commonwealth Court reversed the WCAB and reinstated the WCJ's $2,000 AWW calculation. Citing the Supreme Court's language in Lancaster General Hospital v. WCAB (Weber-Brown), 47 A.3d 831 (Pa. 2012) it said that subsection (d) only applies to hourly rate employees. Since the credible testimony from both witnesses was that, on the day of the injury, claimant's wages were fixed by the week, subsection (a), not (d), applied. It did not matter how his earnings were calculated at a different point in time.

Impairment Rating Evaluations Declared Unconstitutional

In Protz v. WCAB (Derry Township), Nos. 6 and 7 WAP 2016, 2017 WL 2644474, filed June 20, 2017, the Pennsylvania Supreme Court, in a 6-1 decision, has declared the Workers' Compensation Act's impairment rating evaluation process under §306(a.2) unconstitutional in its entirety. There was one concurring opinion and one dissenting opinion.

In its March 2016 opinion, the Pennsylvania Commonwealth Court, nearly 20 years after the passage of Act 57 of 1996, found that Section 306(a.2) was unconstitutional. This section provides for impairment rating evaluations to determine degree of impairment for the purpose of limiting disability benefits from total (potentially lifetime) to partial (maximum of 500 weeks) and authorizes the use of "the most recent edition of the AMA Guides" in making that determination. The Commonwealth Court found Section 306(a.2) unconstitutional because it improperly delegated legislative authority to the American Medical Association, a non-governmental body. The Commonwealth Court concluded that using the updated Guides, issued by the AMA since the enactment of Section 306(a.2) in 1996, without legislative or regulatory oversight, was unconstitutional. The Commonwealth Court vacated the modification of Ms. Protz' status from total to partial disability pursuant to the 6th edition of the Guides.

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Instead of simply reinstating her to total disability status, it remanded for consideration under the 4th edition, as that was the edition in effect when the legislature enacted this section in 1996. Protz v. WCAB (Derry Township), 124 A.3d 406 (Pa. Cmwlth. 2015).

The Supreme Court granted the parties' cross appeals in March 2016, heard oral argument in November 2016, and has decided that Commonwealth Court did not go far enough. There are two essential holdings. First, in a lengthy analysis, the Supreme Court agreed with the Commonwealth Court that the legislature had improperly delegated its legislative authority to the AMA, a private entity. Thus, Ms. Protz' status change premised upon the Guides was disallowed. The second and really significant holding, because of its practical result, is that the Supreme Court found that Commonwealth Court should not have remanded the matter for consideration under the 4th edition. It found that, because the legislature utilized the phrase "the most recent edition" of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, the legislature could not have meant only "the 4th edition." Under the severance doctrine, once the offending broad language is removed, and not replaced with the limited language as apparently implied by lower court, the section becomes incomprehensible. Thus, the entirety of Section 306(a.2) has to be stricken, and, with it, impairment rating evaluations are entirely removed from the Act.

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