

**MARGOLIS
EDELSTEIN**

**RECENT DEVELOPMENTS IN
PENNSYLVANIA WORKERS'
COMPENSATION
2007**

FRED C. TRENOR AND JAMES S. EHRMAN

PHILADELPHIA OFFICE
The Curtis Center, 4th Floor
601 Walnut Street
Independence Square West
Philadelphia, PA 19106
215-922-1100

HARRISBURG OFFICE
P.O. Box 932
Harrisburg, PA 17106-0932
717-975-8114

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

**MARGOLIS
EDELSTEIN**

**Fred C. Trenor, Esquire
James S. Ehrman, Esquire
525 William Penn Place
Suite 3300**

Pittsburgh, PA 15219

412-281-4256

412-642-2380 (fax)

**ftrenor@margolisedelstein.com
jehrman@margolisedelstein.com**

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-224-2119

WESTMONT OFFICE
P.O. Box 2222
216 Haddon Avenue
Westmont, NJ 08108-2886
856-858-7200

BERKELEY HEIGHTS OFFICE
300 Connell Drive
Suite 6200
Berkeley Heights, NJ 07922
908-790-1401

WILMINGTON OFFICE
1509 Gilpin Avenue
Wilmington, DE 19806
302-777-4680

February 2007

RECENT DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION BY FRED C. TRENOR AND JAMES S. EHRLMAN

Fred C. Trenor, Esquire
MARGOLIS EDELSTEIN
525 William Penn Place, Suite 3300
Pittsburgh, PA 15219
412-355-4935 (office)
412-443-5649 (cell)
412-642-2380 (fax)
ftrenor@margolisedelstein.com

James S. Ehrman, Esquire
MARGOLIS EDELSTEIN
525 William Penn Place, Suite 3300
Pittsburgh, PA 15219
412-355-4980 (office)
412-491-0954 (cell)
412-642-2380 (fax)
jehrman@margolisedelstein.com

I. LEGISLATIVE DEVELOPMENTS

PASSED LEGISLATION

The Pennsylvania Legislature passed a new Workers' Compensation Amendment H.B. No. 2738 which became effective on 10/16/06 and requires a mandatory trial schedule at the first hearing setting forth deadlines for evidence and future hearings. The deadlines will be enforced. Mediations will now be required no less than 30 days before Findings of Fact are due. Finally there is the creation of a resolution hearing procedure for Compromise and Release Agreements requiring a hearing within 14 days. There will be a requirement for the WCAB members to respond to a circulated draft Opinion within 30 days as a push for more prompt WCAB decisions. Two opinion writers have been assigned to each Board member to assist in drafting Opinions. The new act also establishes an uninsured guarantee fund for handling of uninsured employers.

PROPOSED LEGISLATION

There are two pending legislative bills which merit mention: (1) H.B. No. 218, referred to committee on 02/07/07, allows an injured party to sue an employer in Common Pleas Court if the employer has acted with reckless, willful or wanton disregard for the safety of the employee; (2) H.B. No. 292, referred to committee on 02/07/07, contemplates including first responders in disaster response with the definition of employees under the Act and those who voluntarily help responders after completing a community emergency response team program; (3) H.B. 465, referred to committee on February 26, 2007, amends section 108(m.1) in reference to the compensability of Hepatitis C to include Capitol Police, the Bureau of Narcotics Investigators, The Liquor Control Enforcement officers employed by the Pennsylvania State Police, Sheriffs and Deputy Sheriffs.

II. APPELLATE DEVELOPMENTS

COMMON LAW MARRIAGE

On February 13, 2007, the Commonwealth Court reversed the Workers' Compensation Appeal Board and recognized a common law marriage that occurred after the decision of the Commonwealth Court in PNC Bank Corporation v. WCAB (Stanos), 831 A.2d 1269 (Pa. Commw. 2003) that prospectively abolished common law marriages effective September 17, 2003. Subsequently, the legislature by statute abolished common law marriages effective January 1, 2005 as follows:

No common-law marriage contracted after January 1, 2005, shall be valid. Nothing in this port shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January, 2005, invalid.

The Commonwealth Court held that the legislature in effect had suspended the PNC decision. Costello v. WCAB (Kinsley Construction, Inc.), 831 C.D. 2006.

COURSE OF EMPLOYMENT

On December 19, 2006, Judge Mary Leavitt wrote an Opinion holding that an employee walking to work was a covered employee even though a third party tort feasor had struck the employee while intoxicated and claimant was walking on a public sidewalk. The Judge determined that claimant had parked at a lot for employees and had taken the public sidewalk in conformity with the employer's lack of opposition. Thus claimant was in furtherance of the employer's business under Sec. 301. A major reasoning of the Court was based on the fact that claimant was on the employer's premises. Allegheny Ludlum Corporation v. WCAB (Hines) No. 1022 C.D. 2006.

JURISDICTION

On November 22, 2006, an Opinion by President Judge James Collins found that a Judge had jurisdiction to determine a UR notwithstanding the medical records sent by the medical provider more than 30 days after the assignment in contradiction to the *County of Allegheny v. WCAB (Geisler)* 875 A. 1222 (2005) which held that a judge had no jurisdiction to review the UR where the provider reviewed has failed to send medical records within 30 days. The Commonwealth Court found the WCJ was required to inquire and hold hearings to determine what efforts were to comply with the URO regulations and in effect overturning the automatic dismissal by Geisler, supra.

UNREASONABLE CONTESTS

On December 5, 2006, Judge Bonnie Brigance Ledbetter wrote an Opinion that an employer who defends a Reinstatement Petition by relying solely on the credibility and cross examination of the claimant's medical expert risks an award of attorney's fees if the reinstatement is granted. The

Commonwealth Court found that when claimant met her burden on the reinstatement, the employer then was required to show that its contest was reasonable. The significance of the Opinion is the careful scrutiny given the Court on counsel fees awarded as the rule in cases as opposed to the exception and that an employer, to avoid counsel fees, has burden of showing a reasonable basis. *Virna Wood v. WCAB (Country Care Private Nursing)* 1272 C.D. 2005.

UTILIZATION REVIEW DETERMINATION

On February 12, 2007 the Commonwealth Court affirmed the Workers' Compensation Appeal Board setting aside a Utilization Review Determination when the Utilization Review report discussed the medical treatment provided by another physician associated with the same practice but did not present any evidence with regard to the named provider. The employer had requested a Utilization Review of the medical treatments of Dr. A, but relied on the office notes and records of his associate, Dr. B, without providing any office notes or records of Dr. A. The employer has requested the review of the medical treatments of Dr. A and "all other providers under the same license and specialty." According to the Commonwealth Court the employer should have specifically named all doctors whose medical records were under review. *Bucks County Community College v. WCAB (Nemes, Jr.)* 950 C.D. 200.

III. BUREAU DEVELOPMENTS

1. On December 5, 2006, Judge Ledbetter was appointed President judge of the Commonwealth Court.
2. A new WCJ has been appointed to the Erie District – Jean Best, formerly of Dallas Hartman's office, will shortly be announced as Judge.

IV. LITIGATION DEVELOPMENTS AND RESULTS

For the period from September through December, 2006, the Pittsburgh office results were as follows:

Wins	31.25%
Losses	6.25%
Settlements	62.50%

The average settlement was \$27,550 per case with average litigation time 43 weeks.