DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION
SINCE 2007

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NOTE

ALL ITEMS IN BOLD PRINT REPRESENT NEW INFORMATION FOR THE CURRENT NEWSLETTER.

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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.

Act 109 of 2006, See 23 Pa. C.S. Sec. 4308 (2006), effective 09/05/06, requires a WCJ before any decision is issued to collect from claimant written documentation of any arrears owed or written indication that no arrears are owed. The Judge is required to order payment of arrears for payment of the lien. The website for the information is located at www. dli.state.pa.us/ and then click on the "workers comp/SWIF quick link, then on the "Office of Adjudication" or "Bureau of Workers' Compensation" link. The Act 109 information can be viewed un the "Announcement" header.

Act 147, signed into law on 11/09/06, has created a fund for claimants to seek recovery from the Uninsured Employers Guaranty Fund. Forty five days notice must be given by the claimant to the Fund from the date the claimant knew of his injury. The Notice shall be filed on a Notice of Claim Against Uninsured Employer. See Sec. 123.802 of the Regs. The Fund will determine whether payment can then be accepted. If not, a "Claim Petition for Benefits Against the Uninsured Employer" may be filed after 21 days of the filing of the Notice of Claim. The regs. describes the procedure to be followed.

The Department of Labor and Industry has issued new final regulations addressing the qualifications of vocational experts. They were published 37 Pa. Bulletin 2804 (published June 23, 2007). Perhaps the most important regulation is 34 Pa. Code Sec. 123.204 which requires the vocational expert to provide the results of the interview or the report to claimants. In addition, the new regulations set forth the minimum qualification of the expert. These regulations had their inception because of Caso v. WCAB (School District of Philadelphia), 790 A.2d 1078 (2002), revised 839 A.2d 219(2003), which held that claimants were not required to attend the vocational interview since there had been no list of approved vocational experts approved by the Bureau.

On September 9, 2008, a new law became effective requiring repayment of amounts paid by the Department of Public Assistance in the settlement of any amounts paid for medical expenses by the DPA. See 62 P.S. Sec. 1409 (2008).

> "(b)(1) When benefits are provided or will be provided to a beneficiary under this section because of an injury for which another person is liable, or for which an insurer is liable in accordance with the provisions of any policy of insurance issued pursuant to Pennsylvania insurance laws and related statutes the department shall have the right to recover from such person or insurer the reasonable value of benefits so provided. The Attorney General or his designee may, at the request of the department, to enforce such right, institute, and prosecute legal proceedings against the third person or insurer who may be liable for the injury in an appropriate court, either in the name of the department or in the name of the injured person, his guardian, personal representative, estate or survivors."

In addition to repayment the statute allows a five year statute of limitations to file its claim to recover. Further notice of the subrogated amount needs to be given by the beneficiary of such payments such to all parties.

PROPOSED DEPARTMENT OF LABOR AND INDUSTRY REGULATION #12-84 (IRRC #2721)

The following is a section from the Pennsylvania Bulletin outlining comments issued by the Independent Regulatory Review Commission on various proposed regulations:

> "Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Appeals Board; Special Rules of Administrative Practice and Procedure Before the Workers' Compensation Judges
>
> November 5, 2008
>
> We submit for your consideration the following comments on the proposed rulemaking published in the September 6, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in section 5.2 of the Regulatory Act (71 P.S. §

745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Labor and Industry to respond to all comments received from us or any other source.

Section 111.3. Definitions, – Implementation procedures; Clarity

The definition of "filing" references the electronic filing of documents, but the regulation does not define that phrase. Additionally, it is our understanding that the Department lacks the technological capability to accept electronic filings, and that it is uncertain when it will be able to do so. While we agree with the Department's assessment that electronic filing will likely result in time and cost savings for all parties, we must also conclude that referencing electronic filing in regulations before such a thing exists will likely result in unnecessary confusion for the regulated community.

The final-form regulation should omit specific references to electronic filing. This concern also applies to sections 111.11, 111.12 and 131.11.

Should the Department retain the phrase "electronic filing," the final-form regulation should further explain what is meant by the term and explicitly state when the Department expects to implement it.

Section 111.11. Content and form.–Clarity

This section references "paper forms or an electronic format prescribed by the Board." As noted in our comments pertaining to section 111.3, we recommend that all references to electronic filing be omitted. The final-form regulation should provide specific instruction as to where the prescribed paper forms (and the electronic format, should the Department choose to retain the reference) may be accessed.

Section 111.12. Filing, service and proof of service.–Clarity.

Subsection (b) requires that "[w]hen filing electronically, an original of each appeal and cross-appeal shall be filed." For purposes of electronic filing, what is an "original"? As noted in our comments pertaining to section 111.3, we recommended that all references to electronic filing be omitted. Should the Department elect to retain them, the final-form regulation should clarify what is required of a document to be filed in this manner.

Additionally, subsection (f) states that is supersedes multiple sections of the General Rules of Administrative Practice and Procedure (GRAPP). Some of the GRAPP

sections mentioned appear to be entirely unrelated to this section. Pursuant to existing regulations of the Joint Committee on Documents, "a superseding special rule shall be limited in scope of subject matter to the scope of the general rule which it is intended to supersede." 1 Pa. Code § 13.38(b). In the final-form regulation, the Department should only list the GRAPP provisions that are actually superseded by the specific regulatory language in that section.

The same concern applies to sections 131.50a, 131.52, 131.53b, 131.59a, 131.59b, 131.60, 131.111.

Section 131.5. Definitions – Clarity.

The proposed regulation defines "mediation" in part as "a conference conducted by a judge, as authorized by sections 401 and 401.1 of the act..." The terms "judge" and "mediating judge" are separately defined. The final-form regulation should clarify how a mediation could be conducted by a judge other than a "mediating judge".

Section 131.11. Filing, service and proof of service. – Clarity.

Subsections (a)(2) and (b)(2) reference "a format prescribed by the Department and published in the *Pennsylvania Bulletin*," and subsection (e) references "a format as prescribed by the Bureau and published in the *Pennsylvania Bulletin*." Because the *Bulletin* may be an unfamiliar resource for many, we recommend that the Department make the required format readily available on the Department's web site. The final-form regulation should provide specific instruction as to where the prescribed format may be accessed.

Section 131.50a. Employee request for special supersedeas hearing under sections 413(c) and 413(d) of the act. – Clarity.

Subsection (c) limits issues to be determined in a challenge hearing to two: 1) whether the claimant has stopped working; and 2) whether the claimant is earning the wages stated in the Notice of Suspension or Modification. With regard to the first decidable issue, by when must the claimant have stopped working? May the claimant have returned to work at any point? The final-form regulation should include additional detail to fully inform the regulated community of decidable issues at this kind of hearing.

Also, 131.50a(c) refers to a "challenge hearing." The existing regulation defines the term "challenge proceeding." The final-form regulation should use consistent terminology.

Section 131.53. Procedures subsequent to the first hearing. – Clarity; Reasonableness.

This proposal deletes subsection (f), which requires medical examinations to be scheduled within 45 days after the first hearing is actually held. The preamble states that proposed section 131.52 will now govern the scheduling of such examinations; however, that provision does not provide a specific time frame during which the examinations must occur. The final-form regulation should explain why omission of a specific time frame better serves public welfare.

Section 131.59. Alternative dispute resolution. – Clarity.

Although this regulation defines the related terms "mediation" and "voluntary settlement conference," it does not define"alternative dispute resolution." To improve clarity, the final-form regulation should define this term or include a cross-reference to an appropriate statutory definition.

Section 131.59b. Mandatory mediation. – Clarity; Statutory authority.

This section creates new rules governing mandatory mediations. We raise three concerns.

First, the undefined term "mandatory mediation," which appears throughout the regulation and is spotlighted in this provision, is ambiguous. It is unclear when a mediation becomes "mandatory" for purposes of this regulation: it is mandatory pursuant to statute, mandatory pursuant to court order, or both? The final-form regulation should clarify in the definitions section whether a mediation is "mandatory" pursuant to Act 147, or whether another event could make it so for purposes of this regulation.

Second, we note a possible conflict between subsection (a) and the enabling statute. Subsection (a), which may not be waived, prohibits a mandatory mediation from being assigned to the adjudicating judge. Act 147 defines "mediation" as a "conference conducted by a worker's compensation judge, but not necessarily the judge assigned to the actual case involving the parties." From this, it appears that the General Assembly intended to permit adjudicating judges to handle mediations in some circumstances. What is the Department's authority for creating a blanket prohibition against assigning a mandatory mediation to an adjudicating judge?

Third, subsection (b) poses a question of statutory authority. Without this provision, would 42 Pa.C.S. § 5949 (relating to confidential mediation communications and documents) apply to proceedings governed by this section? If so, what is the Department's authority for limiting confidentiality in paragraph (b)(2)?

Section 131.60. Resolution hearings. – Clarity.

Subsection (g) states that the judge "will require proof that a petition has been filed with the Bureau, and will make the proof a part of the record." the final form regulation should clarify what would satisfy the proof requirement. Additionally, it should define "resolution hearing" or include a cross-reference to an appropriate statutory definition."

II. APPELLATE DEVELOPMENTS

ABNORMAL WORKING CIRCUMSTANCES

The Commonwealth Court affirmed the Workers' Compensation Appeal Board and Workers' Compensation Judge denying compensation benefits to a prison nurse at a maximum security prison who failed to prove exposure to abnormal working circumstances that caused her anxiety attacks and psychiatric treatment. The nurse and his family were threatened frequently by inmates. Inmates threw urine and feces on the claimant. The claimant witnessed an inmate who severed his jugular and died. You should note that there were two dissenting opinions. Babich v. WCAB (CPA Department of PA), 1472 of 2006. Filed April 14, 2007.

Claimant filed a Claim Petition alleging work related psychological injuries. She claimed she was the victim of unwanted sexual advances from the employer's president. The Claimant also claimed to be the victim of religious discrimination due to the fact that her boss and fellow employees were Muslim and did things to harass her about her non-Muslim ways. The Claimant saw a doctor who diagnosed her as having major depressive disorder, generalized anxiety disorder and panic disorder with agoraphobia as a result of her work related discrimination. A Workers' Compensation Judge granted the Claimant's Claim Petition and the Board affirmed. A Workers' Compensation Judge has the ability to judge the credibility of witnesses and in this case the Judge found the employer's witnesses to be less than credible. Any departure from the normal business environment can be constituted as abnormal working conditions. Community Empowerment Association v. WCAB (Porch), 499 C.D 2008. Filed on November 25, 2008.

AMENDING THE NOTICE OF COMPENSATION PAYABLE

There are two ways to amend a Notice of Compensation Payable (NCP). One is through a claimant filing a petition to modify the NCP, the other is where the WCJ is authorized to modify the injuries in a later Decision based upon medical proof that the NCP is inaccurate. The Judge had issued a Decision that claimant suffered a herniated disc. Although the offered medical expert was sufficient to terminate claimant's benefits upon the issued NCP, once Judge Guyton found for claimant in earlier litigation that she had sustained a herniated disc, then employer was required to prove that all disability related to the herniated disc had resolved, which it could not do. The Court also required the defendant's medical expert to acknowledge the Judge's finding of herniated disc. Westmoreland County v. WCAB (Fuller), No. 1277 C.D. 2007. Filed January 28, 2008.

AMENDMENT OF DESCRIPTION OF INJURY WITHOUT REVIEW PETITION

The Commonwealth Court decided an often litigated issue of whether a Judge can issue a decision expanding the description of injury beyond that described in the Notice of Compensation Payable when the claimant has not filed a petition for review. The claimant, an industrial plant electrician suffered an injury on February 28, 1998 when lifting an I-beam. The employer presented a panel physician, Dr. William Bonner, who had treated claimant for a lumbar strain and had discharged the claimant on September 2, 1998 based on his exam, treatment, EMG, and MRI which were interpreted as normal. The claimant was examined by Dr. Howard Levin who had conducted a "second opinion examination", as a board certified neurologist, on September 17, 1998 at the request of Dr. Bonner. He confirmed that no complaint or condition was the result of the work injury.

Claimant had testified on June 15, 1998 that due to pain he quit his position after going to the emergency room and treatments at a workmen compensation clinic. On November 2, 1998, claimant began treatment with Dr. Avart, general practitioner, who upon review of X-rays and an MRI opined that claimant had suffered a herniated disc at L5-S-1, L1-2, and radiculopathy. Referral was made to Dr. O'Brien, board certified orthopedist, who began treatment of claimant on November 18, 1999.

Dr. O'Brien performed surgery on April 7, 2000 for stabilization of claimant's back at L5-S-1. The Court had a complete record before it and decided that notwithstanding failure by claimant to file a petition for review the Judge had the authority to include injuries as covered under the Act which the Judge believed were related to the work injury. City of Philadelphia v. WCAB (Smith), No. 768 C.D. 2007. Decision of Cinram Manufacturing, Inc. v. WCAB (Hill), 932 A.2d 3469 (Pa. Cmwlth. 2007) followed by the Court.

AUTHORITY OF THE WORKERS' COMPENSATION JUDGE

Where evidence accepted by the WCJ finds in favor of modifying benefits to claimant, the WCJ has no authority to reduce the hours testified to by the doctor whose opinion was accepted. In the Morella case the defendant expert had testified that claimant was able to work 40 hours/week. The Judge had reduced this to 20 hours/week in the Decision. The Commonwealth Court decided the Judge had erred and reversed to the 40 hour/week holding as testified to by the defendant expert. Morella v. WCAB (Mayfied Foundry Inc and Laundry Owners Mutual Liab.), No 141 C.D. 2007.

AUTOMOBILE ACCIDENT BLOOD TESTS

The Commonwealth Court held that expert testimony establishing that blood tests for alcohol levels after a motor vehicle were not properly done. Clear Channel Broadcast v. WCAB, 179 C.D. 2007. Filed December 7, 2007.

AVERAGE WEEKLY WAGE

Under Section 309(e), board and lodging are, by definition, part of wages. Claimant, a pilot, was required to stay overnight for work. The decedent paid for these expenses and then submitted an expense report. The sole issue was whether board and lodging were within the definition of wages pursuant to Sec 309(e), even when they are reimbursed by the employer. The Court relied upon their decision in Arthur Shelley Trucking v. Workmen's Compensation Appeal Board (Bregman), 538

A2d 604 (1988) in deciding. The Court made clear that the mandatory language of the statute required such inclusion in wages notwithstanding the claimant was simply being reimbursed. Thomas Lennon, Deceased c/o Lara Goldman Lennon v. WCAB (EPPS), No. 757 C. D. 2007. Filed October 10, 2007.

A volunteer fireman injured in the line of duty was not allowed to stack his wages as a truck driver on the statutory formula of Section 601 to create an average weekly wage greater than his actual earnings. Ballerino v. WCAB (Darby Borough), 1113 C.D. 2007. Filed December 13, 2007.

BAD FAITH CONDUCT

Whether the termination of an employee was bad faith conduct on the employer's part is dependent upon a factual determination by the WCJ. The employer must present conclusive evidence of the violation of a company policy to establish that a loss of earnings is through fault of claimant. The violation herein was excessive absenteeism. The testimony of the employer left the possibility that some of the excessive absences were the result of calling off without sick days remaining. The Court, in a befuddled opinion, held that claimant was entitled to miss work because of her work injury as "illness" has been viewed as a defense to the claim of bad faith conduct by claimant. The question of bad faith is a question of fact. Shop Vac Corporation v. WCAB (Thomas) No. 217 C. D. 2007. Filed July 25, 2007.

BAD FAITH FAILURE TO ACCEPT EMPLOYMENT

Once a claimant refuses to accept a job within his restrictions, claimant remains ineligible to receive benefits after the claimant becomes totally disabled once again. The claimant had an injury in April, 2006, He refused a modified job in November, 1997 and his benefits were suspended. Thereafter three years passed and claimant underwent surgery. Again the claimant recovered sufficiently to work at the original modified job, but it was not offered. Although claimant acknowledged he was capable of working the modified job, the Judge suspended his benefits. The PA Supreme Court found that claimant's bad faith relieved the employer to re-establish the existence of an available job. Pitt Ohio Express v. WCAB (Wolff) : Appeal of Wolff 912 A2d 206 (Pa. 2006).

BENEFIT OFFSET

Claimant filed a Petition to Review Benefit Offset. The Claimant alleged that the employer was taking an improper credit with his pension benefits he was receiving. The Workers' Compensation Judge granted the Review Petition stating that the collective bargaining agreement involved could not supersede the Workers' Compensation Act. The employer was taking a credit that was against the Act. The Act provides for an employer to be able to offset compensation benefits when a Claimant also receives money in form of a pension. A Workers' Compensation Judge has the jurisdiction over issues that would normally be outside of their jurisdiction when the case involves issues of entitlement to workers' compensation benefits. Jones v. WCAB (City of Chester), No. 262 CD. 2008. Filed on November 12, 2008.

BUREAU POLICY CHANGE FOR REQUESTING RECORDS

The Bureau changed its policy for record request effective August 1, 2007. When requesting non-

public records in a workers' compensation case, one of the following must be met in order for the bureau to honor the request:

- Bureau records indicate that the requester is a party to the case.
- The requester enters an appearance on behalf of a party when asking for the records.
- Request includes a signed and dated authorization release from the claimant (authorization release is valid if submitted within 60 days of the date on form.)
- Requester submits a subpoena.

Remember to include the following information when requesting records: claimant's name, social security number, injury date(s), and party representation. The request should be mailed to the Bureau of Workers' Compensation, Attention: Records Unit, 1171 South Cameron Street, Room 109, Harrisburg, PA 17104-2501, or fax to 717-705-1629.

CLAIMANT'S BURDEN IN A PENALTY PETITION

When a Claimant files a Penalty Petition for the employer's failure to pay medical bills, the Claimant has the burden "to submit medical invoices on the proper form and with all the information needed to permit an employer to ascertain readily that the billed treatment is related to the work injury. The medical bills must be "either the HCFA form 1500, or the UB 92 form". Sims v. WCAB (School District of Philadelphia #1), 265 C.D. 2006. Filed June 1, 2007.

CLAIMANT'S BURDEN REGARDING NOTICE OF ABILITY TO RETURN TO WORK

Where an employer has not filed a Notice of Ability to Return to work with the Bureau and is prosecuting a Suspension Petition, the Claimant waged the issue as to whether the employer can prosecute the Suspension Petition. The Claimant must raise issues regarding the Notice of Ability to Return to Work to the Workers' Compensations Judge. Payne v. WCAB (Elwynly, Inc.), 216 C.D. 2007. June 8, 2007.

COMMON LAW MARRIAGE

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. Filed February 13, 2007.

CORRECTION OF NOTICE OF COMPENSATION PAYABLE

The Pennsylvania Supreme Court has stated that the holding in Jeanes Hospital v WCAB (Hass), 872 A.2d 159 (2005) (which required a claimant to file a Review Petition to correct a Notice of Compensation Payable (NCP) to include additional work related injuries) is dictum. A Review Petition is not required with regard to a correction of the NCP of injuries existing at the time a NCP is issued, although the employer is entitled to notice and an opportunity to defend the corrective amendment under section 413 (a) first paragraph, with the claimant having the burden to establish a correction of the NCP. With regard to consequential conditions, as opposed to injuries existing at the time of the NCP issuance, the Supreme Court holds that a Review Petition must be filed by the claimant. Cinram manufacturing, Inc. And PMA Group v. WCAB (Hill), No. 37 MAP 2008. Decided July 21, 2009.

COURSE OF EMPLOYMENT

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. Filed December 19, 2006.

Claimant had an altercation with another employee and the other employee proceeded to act in a threatening and intimidating manor towards the claimant, who tried to avoid conflict. Upon the beginning of another altercation at the employer's building, the employer escorted both employees out of the work building. The claimant saw the other employee waiting for him outside of the employer's premises. The workers' compensation judge granted the Claim Petition concluding that the claimant had established that his injuries arose as a result of his performance of regular job duties. The Board reversed this opinion due to the fact that the claimant was assaulted after work on a public street or alley off of the employer's premises. Whether an employee was acting during the course of employment is up to the judge to decide. The Commonwealth Court held that notwithstanding the fact that it was off the premises, but nearby, claimant was entitled to benefits, although the issue was personal, because the Court felt that is was sufficiently connected to the employer's premises to allow recovery. Johnson v. WCAB (Ferderal Bond Collection Service et. al.), No. 2986 C.D. 2008. Filed July 25, 2008.

Claimant was hit by a car while crossing the street prior to starting work for the day. She sustained head injuries and asked for temporary total disability. The workers' compensation judge dismissed her Claim Petition since she was not hurt in the course and scope of her employment. The judge concluded that the Claimant was injured on a public street that was not part of the employer's premises, therefore, the Claimant cannot receive compensation for her injuries. The parking garage from which the Claimant was walking from was not a required parking location of her employer. She

was free to park wherever she wanted. Waronsky v. WCAB (Mellon Bank), 367 C.D. 2008. Filed October 22, 2008.

CREDITS

The Commonwealth Court holds that an employer subject to a collective bargaining agreement is not entitled to a credit against disability benefits for holiday and vacation payments made to a workers' compensation claimant. ESAB Welding & Cutting Products v WCAB (Wallen), No 60 C.D. 2009. Unreported May 22, 2009. Published August 10, 2009.

DEATH BEFORE APPROVAL OF A COMPROMISE AND RELEASE AGREEMENT

The Claimant signed a Compromise and Release Agreement prior to her death, however, the Decision approving the Agreement was not issued until a day after her death. The issue was whether the Agreement was considered void due to it not being approved prior to her death. The parties had included an addendum in paragraph 18 of the Agreement that stated the Agreement was null and void if she died before it was approved by a judge. Had the parties not included the addendum in paragraph 18, the workers' compensation judge may have ruled differently, but because the Claimant testified that she fully understood the Agreement in its entirety, the judge had to void the agreement. Crawford v. WCAB (Centerville Clinic Inc), 2331 C.D. 2008. Filed on October 10, 2008.

DEATH BENEFITS

The Commonwealth Court held that a decedent's death due to an occupational disease beyond the 300th week statute of limitations set forth in Section 301(c)(2) regarding death benefits was barred and further, the decedent received a lump sum settlement for the alleged occupational disease with a Compromise and Release Agreement. Ingram v. WCAB (Ford Electronics and Refrigeration Corp.), 491, 492, 493 C.D. 2007. Filed December 12, 2007.

DEATH DUE TO INJURY v. OCCUPATIONAL DISEASE

A claimant who was awarded disability benefits for Lymphoma as a result of exposure to solvents at work (on the theory of "injury" versus "occupational disease") and then died five years later, his widow is not entitled to fatal claim benefits because of the language of §301(c)(2) with regard to the requirement that death due to an "occupational disease" must occur within 300 weeks. Brockway Pressed Metals & Ace USA v. WCAB (Holben), 43 C.D. 2008. Filed May 12, 2008.

Query: Does the widow have a right of action against the employer at common law or does the employer have immunity?

DENIAL OF A DIAGNOSTIC TEST

A diagnostic test, although causing no increased risk of harm to claimant, may not be allowed if the Judge finds that it will provide little helpful information on the condition of claimant. The employer petitioned for claimant to submit to a diagnostic test which had been prescribed by the employer's expert. This expert had conducted an exam of the claimant, but had not been able to perform the diagnostic test. The testimonies of both the employer and employee's experts were taken and the Judge found that the test would provide no useful information. The employer's expert had failed to

provide specific reasons for its usefulness. The employer argued that the test could probably be useful if it was negative. The Commonwealth Court did not find that the Judge has misconstrued Sec. 314 which simply requires employer to sustain the burden of "reasonable and necessary". The Court believed that the employer had not been deprived of the right to the physical exam because claimant had been examined and had the opportunity to read "voluminous" records of treatment byclaimant. Peters Township School District v. WCAB (Anton), No. 2084 C.D. 2007. Filed on April 2, 2008.

DEPARTMENT OF PUBLIC WELFARE (DPW) PAYMENTS

The Claimant was hurt on the job and filed a Claim Petition. The employer denied liability for the injury. The Claimant had surgeries on his back but the carrier denied the bills. The Claimant did not have any other insurance therefore the doctors billed the Claimant's secondary insurer, the Department of Public Welfare (DPW). DPW paid the bills, but at a lower amount. The DPW asserted a lien for the payment of the Claimant's medical bills paid. The employer paid the lien. The Claimant filed a Penalty Petition alleging that the employer only paid the DPW lien and did not pay the re-pricing amount of the medical bills. Claimant's medical provider at hearings testified that they would accept DPW's payment as a full satisfaction of the bills, however, the provider testified that the workers' compensation carrier should pay the difference between what the DPW paid and what the workers' compensation carrier would have been required to pay according to the higher re-pricing schedule. The workers' compensation judge granted the Penalty Petition against the employer for violating the Act. The Commonwealth Court decided that in accepting a payment from the DPW, a Medicaid payment, the provider is choosing to accept that payment as full satisfaction of services rendered and agreeing to not look to any other entity for the balance of the payment that would have been owed for services rendered. The Court determined that the employer did not violate the Act and therefore did not owe any penalties. Nickel v. WCAB (Agway Agronomy), No. 719 C.D. 2008.

DEPENDENCY OF A PARENT

The Commonwealth Court affirmed the Workers' Compensation Appeal Board and Workers' Compensation Judge who awarded partial dependency benefits to a mother whose daughter had been killed during the course of employment. A parent must establish that he or she is dependent on the financial contributions of the deceased child "to any extent". Wyoming Valley Health Care Systems v. WCAB (Kalwaytis), 2109 C.D. 2006. Filed April 9, 2007.

DISFIGUREMENT

The Workers Compensation Appeal Board can increase the number of weeks for disfigurement, but it must "explain adequately its decision to increase the disfigurement benefits". City of Pittsburgh v. WCAB (McFarren), 1701 C.D. 2007. Filed June 4, 2008.

The Claimant suffered a work related injury and received total disability benefits. The Claimant had surgery that left a scar on the neck and she asked for disfigurement benefits. The workers' compensation judge determined that the Claimant was indeed scarred and she was entitled to 22 weeks of disfigurement benefits. The Claimant appealed this decision for being too low. The Board agreed and awarded the Claimant 70 weeks of compensation. The employer argued that the Board's

determination was excessively above that of the judge's. The employer argued too that the Board did not have the ability to change the judge's original award unless the judge ignored competent evidence or awarded outside of the range of benefits most judges would award. The Commonwealth Court decided that the Board did not describe the Claimant's scar, why it did not agree with the judge's description of the scar or why most judge's would award between 60-75 weeks as it stated. The case was remanded to the Board for further explanation of its decision. Dart Container Corporation v. WCAB (Lien), 550 C.D. 2008. Filed October 23, 2008.

EARNING POWER ASSESSMENT

Where an employer's Labor Market Survey reflects higher wages than the actual job, wages claimant receives which he obtained after the Notice of Ability to Return to Work and before being advised of the positions in the Labor Market Survey, the employer is permitted to have the earning power assessment introduced into evidence and accepted as credible by the WCJ. The Commonwealth Court determined that notwithstanding Kupchinsky, the post Act 57 era permits use of the earning power assessment and a Judge's finding based on that assessment. Here the WCJ believed the earning power assessment over the actual wages which was the basis for the WCJ's decision. CRST v. WCAB (Boyles) No. 1954 C. D. Filed July 30, 2007.

ENTITLEMENT TO A PHYSICAL EXAM

An employer was entitled to a physical exam although initially denied by the WCJ. The claimant and defendant had settled the indemnity issues for $36,000, but defendant remained liable for reasonable and necessary medical expenses. The prescriptions of claimant were not paid and thus she filed a UR. The UR found the expenses reasonable and necessary. The employer filed a Petition to Compel the Physical Exam of the claimant. The WCJ had initially refused the exam on the basis defendant's reason for the exam was to find a change in the claimant's condition which had been found by the UR to be reasonable. Since the UR found such treatment reasonable, it was unnecessary for such exam. The Commonwealth Court determined the employer was entitled to the exam and it was so ordered. Davis v. WCAB (Woolworth Corporation) No. 1873 C. D. (2006). Filed July 5, 2007.

EXECUTIVE OFFICER'S AFFIDAVIT WAIVING RIGHTS TO WORKERS COMPENSATION

Claimant's widow filed a fatal claim for benefits when her husband died from cardiac arythmia due to electrocution. Martin Schafer was the sole shareholder of the Defendant "S" corporation and served as its president and chief executive officer. Pursuant to Section 104, claimant had elected to waive his rights to compensation. The Court believed that claimant had the burden to show that decedent had not signed the affidavit. The Commonwealth Court found that claimant had the burden of establishing the lack of decedent's signing the waiver and that it was not the burden of the employer to prove he did. Completion of Form LIBC-513 having been established, the claimant had the burden to show its lack of validity. Schafer v. WCAB (Martin Schafer, Inc., Selective Service), No. 88 C.D. 2007. Filed on November 2, 2007. Originally filed on August 2, 2007.

EXPERT ACTUARIAL OPINION

Claimant was injured and received total disability compensation. The employer filed a notice of

pension offset claiming a credit for contributions made by the employer. The claimant filed a review petition to challenge this offset. The workers' compensation judge denied the Claimant relief and the Claimant appealed to the Board, who then remanded the matter back to the judge. The employer appealed to the Commonwealth Court. The Claimant argued that the employer could not appeal the remand decision because it was an interlocutory decision, however, the Commonwealth Court held that the remand order could be appealed under Rule 311(f)(2). The Commonwealth Court could not find an actual basis for which the Board was able to remand. The judge made credibility determinations in the original decision and backed up why he decided that way, and he also made all necessary critical findings of fact in his decision of the case. The employer was allowed to use an expert actuarial opinion to establish its contribution to the Claimant's retirement annuity. The basis in this case was that the Court had already established that expert evidence used in past cases were legally sufficient as precedent in order to decide this case. Commonwealth of Pa. DPW v. WCAB (Harvey), 802 C.D. 2008. Filed on November 26, 2008.

FAILURE BY AN EXPERT TO KNOW OF PREEXISTING CONDITION

Claimant filed a petition on August 27, 2004 alleging a low back injury and a herniated disc at L5-S1 while at work on November 7, 2003. On February 3, 2006, the WCJ denied her benefits stating that claimant's medical expert was equivocal because the expert had no knowledge of claimant's prior medical records, treatment, or any of the prior diagnostic tests. Where a medical expert has an incomplete history, that is relevant, then the opinions expressed are not competent. Claimant acknowledged that she had suffered from back injuries prior to November 7, 2003. The claimant's expert, a board certified neurosurgeon, failed to appreciate that claimant had complained of back pain since November 3, 2006. The defendant introduced the emergencyroom reocrd for 11/10/03 which disclosed complaints beginning November 3, 2006. Julie Marconi v. WCAB (United Disability Services) 21 PAWCLR 268 (2007).

FAILURE TO FILE AN APPEAL TO THE BOARD WITHIN 20 DAYS

The Board has quashed an appeal which was mailed within the 20 days but not received by the Bureau until after the 20 days. On March 24, 2006, the Board received a Notice of Appeal from the WCJ decision. The WCJ rules require the filing of the notice of appeal shall be in person or by mail. 34 PS. Sec 111.3. If by mail it is deemed complete upon deposit into the mail. The US Postal Service postmark is sufficient when the appeal is properly stamped and addressed but not received by the WCAB. Here the notice of appeal had a Pitney Bowes U.S.Postal Mark and was received 4 days after the 20 day period. Without the proper U.S Postal Service mark the appeal was untimely and was quashed. Vacca v. Philadelphia Gas Works, 22 PAWLCLR 56 Decided April 17, 2007 by Commissioner Wilson.

FAILURE TO FILE A TIMELY ANSWER

In two Commonwealth Court decisions a strict interpretation of the infamous Yellow Freight rule was imposed. (1) The Court's Opinion held that a Claim Petition and correspondence from the insurer were sufficient evidence to find employer/insurer liable for the allegations in the Claim Petition. Specifically, claimant filed a Claim Petition on February 25, 2003 when he alleged an attack on May 17, 2002 as the employee was making a delivery in the scope of his employment. The

Claim Petition was served on the employer, U.S. Specialty, and the carrier claimant believed was the insurer. No Answer was filed. A hearing was held on April 16, 2003, at which the claimant appeared but the employer and carrier did not. The case was continued for claimant's counsel to investigate the proper insurer. A second hearing was held on June 9, 2003. Only the Claimant appeared. Claimant's counsel brought two letters from U.S. Specialty denying coverage and one an admission of coverage. The WCJ continued the hearing a second time for claimant to contact the Bureau to find out who the proper carriers was. The WCJ then dismissed the Petition believing the claimant had failed in his duty to find out who the insurer was. The Board remanded back to the Judge for a reasoned decision. On remand the Judge found the Claim Petition together with a letter by the carrier to a police department asking for a report wherein it stated that it was the carrier for the employer as sufficient for liability. The insurer appealed to the Board. The WCAB reversed stating that the claimant had the burden of proving the insurer was the proper party and when reviewing the Bureau records, along with the referred to correspondence above, did not believe claimant had met his burden of proof. The Commonwealth Court reversed finding substantial evidence (the Petition and letter by the carrier to the local police dept) as sufficient to sustain the claimant's burden of proof applying on the Yellow Freight principles. Brady v. WCAB (Morgan Drive Away, Inc. And U.S. Specialty),1713 C.D. 2006, 22 PAWCLR 49, decided on April 16, 2007 by Senior Judge Flaherty. (2) A claimant suffering hearing loss was awarded 260 weeks of disability based on the failure of the employer to file an Answer to the claimant's Petition notwithstanding evidence submitted by employer to the contrary. The facts of "permanent" loss of hearing due to prolonged exposure to high levels of noise without adequate ear protection was a fact admitted by the failure to Answer by employer. PIAD Precision Casting v. WCAB(Bosco), 379 C.D. 2006, 22 PAWCLR 50 decided April 27, 2007.

FAILURE TO ISSUE NOTICE OF COMPENSATION PAYABLE

A claimant that had received compensation under a Temporary Notice of Compensation Payable for injuries sustained on May 14, 2003 to claimant's head, neck and back when struck by a bundle of newspapers. The claimant returned to work for 2 1/2 hours on July 19, 2003, and a Notice of Denial was issued acknowledging an injury but no disability. The employer was sanctioned 50% penalties on the indemnity payments owed. The Commonwealth Court found that an Notice of Compensation Payable should have been issued and not a denial, which required the claimant to litigate the claim and retain counsel. George Jordan v. WCAB (Philadelphia Newspapers Inc.0 2007 Pa. Comm., LEXIS 128 FILED March 28, 2007. Judge McGinley's strict interpretation needs to be carefully considered in light of recent decisions regarding both penalties and attorneys fees. The Commonwealth Court held, on August 13, 2007, that an employer is not entitled to recoupment of indemnity benefits paid to a claimant because of an error in the calculation of the average weekly wage because the employer failed to issue a Notice of Compensation Payable or an Agreement. Dollar Tree Stores, Inc. v. WCAB (Reichert), 797 C.D. 2007.

NOTE: In the Pitfalls of Pennsylvania Workers' Compensation, failure to issue a Notice of Compensation Payable results in the employer being liable for all injuries claimed by the claimant to be work related.

FAILURE TO PAY MEDICAL FEES

The WCJ has jurisdiction of awarding penalties and counsel fees when carrier fails to timely pay medical bills under the fee review provision of the Act. The Commonwealth Court has determined that if a defendant/carrier fails to pay a medical fee pursuant to the fee review section 306(f.1)(5), the WCJ has jurisdiction to award penalties despite the fact that the fee review procedure has not been exhausted prior to filing the penalty petition. Claimant was injured in 2003 with the partial amputation of her right middle finger. A Notice of Compensation Payable was issued. Claimant developed RSD, which injury was included in the work injury. The carrier repeatedly failed to timely pay the medical providers. As a consequence claimant retained counsel and filed a Penalty Petition. The WCJ awarded a 50% penalty. The Commonwealth Court believed that although the fee dispute provision of the Act requires the provider to file a fee dispute to recover fees, the claimant has the ability to pursue a Penalty Petition when these expenses are not paid timely. The Court held that the WCJ did have jurisdiction of the issue and had the authority to award penalties and counsel fees to claimant. Hough v. WCAB(AC&T) No. 2198 C.D. Filed July 17, 2007.

FEE DISPUTE APPLICATION

A provider must timely file a fee dispute application in accordance with Section 306(f.1)(5) and while an insurer is not obliged to pay medical bills until the proper forms and reports have been submitted, if the insurer does pay without the proper forms and reports, the provider must timely file a fee dispute application. University of Pennsylvania Hospital v. Bureau of Workers' Compensation (Tyson Shared Services, Inc.), 508 C.D. 2007. Filed August 23, 2007.

FEES

Attorneys fees paid to an attorney continue to be owed after his death and to his estate. Angino v. Franks Beverages, 22 PAWCLR 58 decided April 27, 2007 by Chairperson McDermott.

HORSEPLAY

The Commonwealth Court allowed recovery by a claimant for workers compensation benefits where an employee was injured as the result of horseplay. Thus, horseplay can be compensable. The injured worker filed a Claim Petition for injuries sustained on April 1, 2004 (April Fools's Day) which included low back and reflex sympathetic dystrophy. Claimant testified that he was grabbed from behind and from the front. After a forklift operator told the men to get out of the way one of the pranksters fell on claimant causing his injuries. Although each witness had a variation on the facts, generally it was simply horsing around. The WCJ granted the petition by finding that claimant was a victim of horseplay and not an active participant. The employer filed an appeal to the Workers' Compensation Appeal Board. The argument raised by the employer was the violation of a positive work order prohibiting horseplay, that the claimant was aware of the work order, and that the cause of the injuries were a direct result of the horseplay. The appeal board affirmed the WCJ.

The Commonwealth Court distinguished the facts in the present case from the facts of Johnson v. WCAB (Union Camp Corp.), 749 A.2d 1048 (Pa. Cmwlth 2000). The Commonwealth Court found sufficient facts showing claimant as engaged in the roughhousing The Court wrote its opinion on whether the horseplay was so disconnected with the job so as to render him a trespasser or stranger. The Johnson case, supra., was clearly distinguishable to the Court as the

injured worker had been an instigator of a intended malicious behavior towards another employee. The employee was outside his assigned area. Further, the horseplay had the element of hostility. The Commonwealth Court states that horseplay alone will not typically remove claimant from compensation. The result is that successfully applying the positive work order rule will not work unless exceptional circumstances exist for a defense of claimant's work injury. Sysco Food Services of Philadelphia v. WCAB (Sebastiano), No. 817 C.D. 2007. Filed January 14, 2008.

IMPAIRMENT RATINGS EVALUATION (IRE)

If an employer seeks and obtains an IRE during the pendency of the employer's Termination Petition, the employer is not precluded from obtaining a termination of benefits. Weismantle v. WCAB (Lucent Technologies), 1393 C.D. 2006. Filed June 18, 2007.

An employer is not precluded from filing a Modification Petition based on a Labor Market Survey after an IRE (Impairment Rating Evaluation) that established a claimant was totally disabled with a whole body loss of 50%. Sign Innovation v. WCAB (Ayers), 681 C.D. 2007. Filed December 4, 2007.

The Supreme Court reaffirmed that the employer and its insurance carrier must seek an independent rating evaluation within 60 days after 104 weeks to obtain an automatic self-execution reduction; however, an IRE can be requested after the 60 day window, but to change benefits requires a Decision from a Workers' Compensation Judge. Dowhower v. WCAB (Capco Contracting), 94 M.A.P. 2006. Filed April 17, 2007.

The Commonwealth Court decided the issue of whether an IRE filed after the initial 104 weeks from date of injury requires the employer to follow the traditional Kachinski burden of finding work available for the claimant or Labor Market Survey. The Commonwealth Court holds that if an employer files the IRE after the 104 weeks has expired then the employer filing a modification petition has the burden of going forward with the proof required in Kachinski. If an employer has paid compensation for 104 weeks believing that it was owed, it cannot thereafter take advantage of the IRE. Diehl v. WCAB (IA Construction and Liberty Mutual), No. 1507 C.D. 2007. Filed on April 28, 2008.

The claimant was injured and received total disability benefits. The employer filed a Modification Petition based on an IRE that was performed on claimant showing less than 50% impairment. Claimant argued that the IRE was invalid because he had not reached maximum medical improvement. The workers' compensation judge granted the Modification Petition and rejected claimant's argument that an IRE physician has to determine that a claimant is at maximum medical improvement prior to calculating the impairment rating. The claimant appealed. The Court agreed with the claimant's argument and held that the examining IRE physician must determine whether the claimant has reached maximum medical improvement in order for the IRE to be valid. Combine v. WCAB (National Fuel Gas Distribution Co.), No. 539 C.D.2008. Filed August 14, 2008.

JOINDER PETITIONS

An employer for a first injury named in a Claim Petition has no obligation to join another employer for a second subsequent injury, but has the burden that the current disability is not the result of the first injury. Pope & Talbot v. WCAB (Pawlowski), 1193 C.D. 2007. Filed May 21, 2008.

JURISDICTION

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.

Commissioner Hoffman decided that a claimant, who was a resident of Virginia, but was hired by telephone for defendant, a Pennsylvania Company, that the claimant was not principally localized in any state. Claimant testified that he was injured in Washington, D.C. but understood that he was not principally localized in any state. The WCJ found that claimant had entered a contract in Pennsylvania with the telephone company and that claimant's employment was not localized in any state. Lanier v. Arc Tech, 22 PAWCLR 60, decided on April 3, 2007. The Board affirmed based upon Sec. 305(a)(2) of the Act.

LACK OF JURISDICTION BY THE WORKERS' COMPENSATION JUDGE IN A UTILIZATION REVIEW

The Court was asked to determine whether a Workers' Compensation Judge had jurisdiction to review reasonableness and necessity of claimant's medical treatment where the claimant's provider failed to provide medical records to the UR but the the peer review physician issues a written report. In Geisler, supra. the Court found no jurisdiction of the WCJ when the provider failed to send records, but no report was provided by the peer reviewing physician. Claimant had fallen from a scaffold on June 12, 2001. He suffered multiple injuries. A Notice of Compensation Payable was issued. A Petition for Review amending the injuries noted on the NCP was allowed by the WCJ. The employer then filed a UR for treatment of Dr. Paul Heberle. Although URO received no records from Dr. Haberle, the peer reviewing physician prepared a report which essentially found that without records, no effective way existed to evaluate the treatment and determined that care was unreasonable. Claimant filed a petition to appeal the UR. Under the regulation at 34 Pa. Code Sec 127.464, the URO did not have the authority to send records to the peer review physician. The Commonwealth Court believed that Geisler was applicable to these facts and the WCJ had no jurisdiction over the matter. Judge Smith-Ribner voiced a strong dissent that the claimant, because of the result, has not gotten reimbursed for prescription costs for which he hd paid out of pocket. Stafford v. WCAB(Advanced Placement Services), No. 542 C.D. 2007 decided September 21, 2007 by Judge Mary Hannah Leavitt.

MASSAGE THERAPISTS

The employer is not liable for a massage therapist who is not a licensed healthcare provider, even if prescribed by a medical doctor. Pennsylvania does not have a program for the licensing of massage therapists, although the massage therapist in this case was a nationally certified massage therapist. Boleratz v. WCAB (Air Gas, Inc.), 147 C.D. 2007. Filed August 24, 2007.

NOTE: The dissenting opinion arguing that massage therapy is compensable if prescribed by a physician.

MEDICAL HOME MODIFICATIONS

Where a carrier has paid in good faith for home modifications, notwithstanding the contractor sending the carrier a substantially larger bill once the work was completed, it was the contractor that had to file a fee review and that the carrier would not penalized for failure to pay for the modifications. The WCJ was without authority to order payment of the additional expenses. Enterprise Rent-A-Car v. WCAB (Claubaugh), 863 C.D. 2007.

MEDICAL TESTIMONY

When a claimant seeks benefits for a psychological injury/depression, he/she is required to show a causal relation between the mental injury and the physical stimulus by way of unequivocal medical evidence. A judge is free to accept or reject, in whole, or in part, the testimony of any witness. Medical testimony is equivocal if it is found to be based on possibilities and it is incompetent if it is equivocal. Even if a medical expert's opinion is unequivocal, the judge must still accept his/her opinion to support an award. In this instant case, the Court decided that whether testimony of an expert is equivocal is a matter of law. The Court found the claimant expert unequivocal BUT did not assign credibility to his analysis of the facts. The medical expert did not testify to any other causing factors that could have accounted for the psychological injury the claimant was asserting. The judge believed the claimant suffers from a condition, but he didn't find his facts on causation. Campbell v. WCAB(Post-Gazette), No. 38 C.D. 2008. Filed July 29, 2008.

MENTAL CLAIMS

The Commonwealth Court held that a bus driver for SEPTA who was accosted by hooded men with a gun is not entitled to disability benefits for post-traumatic disorder, anxiety, chest pains and impotence because this circumstance is not an abnormal work condition for the particular bus route through a high crime area. McLaurin v Workers' Compensation Appeal Board (SEPTA), No 40 C.D. 2009. August 26, 2009.

NOTICE OF ABILITY TO RETURN TO WORK

The Commonwealth Court affirms its decision in Melwark Home v Workers' Compensation Appeal Board(Rosenberg), 946 A.2d159 (Pa Cmwlth 2008) requiring an employer to promptly issue a Notice of Ability to Return to Work as required by Section 306 (b)(3) of the Act. The Act does not specify what is considered to be prompt. The Court clearly states that the timing of the Notice must not prejudice the claimant in any way. Bentley v. WCAB (Pittsburgh Board of Education, No. 1560 C.D. 2008. Decided July 29, 2009.

NOTICE OF ABILITY TO RETURN TO WORK-PROMPT NOTICE

Once an employer receives medical evidence that a claimant is able to return to work it must promptly issue a Notice of Ability to Return to Work as required by Sec. 306(b)(3) of the Act. The Commonwealth Court was asked whether a Notice of Ability to Return to Work must be issued within thirty days. The Court answered that prompt notice could be given after thirty days depending upon the facts in a given case. Melmark had filed a petition for modification which was dismissed at a supersedeas hearing because the above Notice had not been issued within 30 days. The Employer had issued an Notice of Compensation Payable for low back strain. The statute uses language requiring "prompt written notice" which had been interpreted as within 30 days. The appeal board supported its opinion that the notice here was tardy based on Sec. 311.1 requiring claimant to respond to employment verification within 30 days. The Commonwealth Court found that prompt notice requires an employer to give claimant notice of medical evidence after its receipt by the employer and before the employer acts upon the information by petition. Melmark Home v. WCAB (Rosenberg), No. 899 C.D. 2007.

NOTICE OF COMPENSATION PAYABLE

A Workers' Compensation Judge may expand a description of an injury in a Notice of Compensation Payable without a claimant filing a Review Petition if the claimant establishes that the Notice of Compensation Payable erroneously described the injury. Sears Logistic Services v. WCAB (Preston), 634 C.D. 2007. Filed December 5, 2007.

NOTE: The preferred practice is for a claimant to file a Review Petition.

NOTICE OF OCCUPATIONAL DISEASE TO THE EMPLOYER

The Claimant worked mixing solvents in open tanks. He was not provided with breathing protection by the employer. Sometimes the solvents he mixed would spill on his skin. Claimant came down with a kidney condition. He notified the employer of his condition which was believed to be work related and he filed a Claim Petition claiming an occupational disease. The workers' compensation judge decided that the amount of health information available supported the belief that the Claimant's exposure to toxic chemicals caused his kidney condition and he granted the Claim Petition. The employer argued that the notice that the Claimant gave to his employer was untimely. The Claimant had suspected that he had a work related illness, but was not definitely told by a doctor until sometime later. The Act allows for the time period for notice to an employer to begin running only once the employee knows or should reasonably know of a work related illness. This fact meant that the Claimant had timely filed his petition within the 120 days he had to notify his employer of the illness. The employer also argued that there was not a sufficient link between the Claimant's illness and his exposure at work. The Court decided that the judge's decision was supported by substantial evidence. The judge had heard all testimony and he was able to choose which testimony he found to be the most credible. The Bullen Companies v WCAB (Hausmann), 409 C.D. 2008. Filed on October 23, 2008.

NOTICE OF TEMPORARY COMPENSATION -WHEN DO THE 90 DAYS BEGIN TO RUN?

Judge McGinley addressed the issue of when the NTCP's "clock" begins to run. Claimant was injured on November 30, 2002. He continued working until January 6, 2003. The employer issed an NTCP on February 6, 2003 with benefits beginning on January 31, 2003. On April 28, 2003, a Notice Stopping Temporary Compensation was issued. On June 11, 2003, the claimant filed for penalties for the unilateral suspending of benfits with a request for reinstatement as of April 28, 2003. Claimant took the position that the 90 day period began on the date of disability (January 6, 2003. The defendant took the position that it began when the NTCP was issued or on February 6, 2003. Initially, the Commonwealth Court had remanded the case to the WCJ to determine whether the trigger date was January 6, 2003 or January 31, 2003 when defendant made its first payment. The WCJ found the NTCP filed in a timely fashion. Defendant had argued that a scenario was possible where a claimant could present evidence of a disability more than 90 days before the issuance of the NTCP. Claimant contended that under such circumstance, the statute is clear that claimant is entitled to compensation from the date of disability. The Commonwealth Court agreed with claimant and found that the Notice Stopping Temporary Compensation was filed more than 90 days after the triggering date of disability of January 6, 2003. The important lesson is to understand is that the 90 days is triggered by the first date of disability. Interestingly the Court found that a reasonable contest existed but remanded the issue to the WCJ to decide the issue of penalties, if any. The Courts are cracking down on the use of the penalty provisions. Galizia v. WCAB (Woodloch Pines, Inc), No. 96 C.D. 2007. Filed September 24, 2007.

OFFSET PROVISIONS NOT APPLICABLE TO FATAL BENEFITS OF A WIDOW

The offset provisions of Section 204(aa) with regard to Social Security Old Age Benefits does not apply to Section 307 fatal benefits. Frank Bryan, Inc. v. WCAB (Bryan), 984 C.D. 2006. Filed on April 5, 2007.

OLD AGE SOCIAL SECURITY OFFSET

An employer is not entitled to Section 204 credit for old age social security offset until the employer notifies the claimant with a Bureau form LIBC 756 pursuant the rules and regulations Section 125.50. Maxim Crane Works v. WCAB (Solano), 2224 C.D. 2006. Filed August 14, 2007.

NOTE: We cannot overemphasize the obligations of employers and insurance companies to file timely Bureau forms with a claimant and with the Bureau.

ONE SENTENCE ORDERS

Claimant had been ordered to attend a vocational interview based upon a petition by the employer. The claimant failed to appear for the interview. The WCJ entered an Order simply forfeiting benefits to claimant based upon his failure to attend the interview. The Commonwealth Court has held that under the circumstances of this petition and acknowledgment that claimant failed to appear, the Order was sufficient and a remand would be a wasteful exercise. Joan Bradley v. WCAB (County of Allegheny), 343 C.D. 2006 filed February 23, 2007.

ORTHOPAEDIC APPLIANCES

The Pennsylvania Supreme Court, by Chief Justice Castille, found that an individual suffering from paraplegia and requiring modifications of a van is entitled not just to the modifications but to a van since the appliances or modifications are substantial and require a special van. The case also found that the 80% Medicare adjustment for orthopedic appliances is not applicable when the contested medical expenses are not from a health provider. Griffiths, Aplt v. WCAB (Seven Stars Farms, Inc.), 148 MAP 2005 (2008).

PENALTIES

Penalties were awarded to a claimant in a case filed by Judge Dan Pelligrini where the carrier in a quadriplegic injury failed to pay bills because the proper forms had not accompanied the bills or reports were not filed when the employer had previously paid medical bills not accompanied by these forms or reports. Thus, where the Court determines that the carrier has enough information to pay the medical bills and doesn't, it is no excuse for the carrier to require filing for payment of the bills with the HCFA forms. Seven Stars Farms, Inc. v. WCAB (Griffiths), No. 990 C.D.2007. Filed on November 8, 2007.

In another case, a claimant had sustained a work injury on September 10, 1997. A Claim Petition was filed on March 25, 1998. The employer failed to answer the petition or appear at the hearing before the Judge. The Judge ordered payment of benefits and the employer did not pay. The claimant then filed a Penalty Petition alleging the employer violated the statute by not paying benefits. The employer argued that it had constructively complied with the order because the claimant had been paid by Injured On Duty benefits agreed upon in a separate civil service action. Judge Hagan agreed that under this circumstance no penalties were in order. Claimant appealed arguing that the civil service resolution was irrelevant to the workers compensation proceedings. The Court remanded to the Board and Judge for further findings and learned that claimant had received more in benefits on the Injured On Duty than if he had received workers compensation benefits. Judge Hagan, however, found the employer had violated the Act and assessed a 50% penalty against the employer. The Board affirmed. The employer appealed this decision to the Commonwealth Court. Judge Friedman did not believe the employer was entitled to "self help" and should not disregard the statute. The award to claimant of penalties and the award of ongoing penalties was affirmed by the Commonwealth Court as being within the discretion of the Judge. City of Philadelphia v. WCAB(Sherlock), 881 C.D. 2007. Filed on October 10, 2007.

PENALTIES/ISSUANCE OF INITIAL IMPROPER DOCUMENT

Penalties and attorneys fees were not awarded although a Notice of Compensation Payable was not properly issued at the outset. Claimant sustained an ankle injury on February 3, 2003. A panel physician diagnosed a right ankle sprain. The employer issued a Notice of Temporary Compensation Payable. On April 15, 2003, Dr. Jeff Kahn for the employer examined the claimant. He believed that claimant had suffered a temporary aggravated preexisting condition. The employer thereafter issued a Notice Stopping Temporary Compensation and Notice of Workers' Compensation Denial. On the Denial employer had stated that claimant was not disabled from his injury and that claimant had been released to full duty work, but due to downsizing a job was not available for the claimant. Based on

the full duty release, compensation payments were stopped. The claimant testified, as did his medical expert, that the work injury had aggravated his preexisting condition causing his symptoms. The defendant introduced the testimony of two medical experts, Dr. Jon Tucker and Dr. Jeffrey Kahn. Both of defendant's medical experts testified that claimant could perform his full duty work. The WCJ awarded claimant benefits as well as attorney fees of $14,740 and a 50% penalty.

The Workers' Compensation Appeal Board reversed the decision on the award of penalties andattorney fees. The Commonwealth Court found that the WCJ had issued a reasoned decision where the medical experts had contradicted each other's testimony. Employer felt that a reasoned decision required the WCJ to explain why he accepted one doctor over another. The Commonwealth Court believed the WCJ had issued a reasoned decision by explaining his acceptance of the more severe description by the claimant's medical expert. There is good language in the opinion regarding the WCJ as final finder of facts. The Court then went on to hold that where a genuine issue exists such as here, the employer does not engage in an unreasonable contest relying upon prior authority of Brutico v. WCAB(US Airways), 866 A.2d 1152 (2004). The Court on the penalty issues found that penalties were not appropriate under this case. Since the employer issued a Notice of Temporary Compensation Payable, and claimant received benefits, the prompt investigation requirement had been met. The Court distinguished Spangler v. WCAB (Ford), 602 A.2d 446 (Pa. Cmwlth. 1992) and Geiger v. WCAB (Circle Fine Art Corp.), 654 A.2d 19 (Pa. Cmwlth. 1994), holding them inapplicable to the facts in the present case. Here because a proper Denial was issued, no penalties were in order. The Court distinguished Jordan v. WCAB (Luczki), 921 A2d. 27 (2007) where the Court found for claimant on penalties. In Jordan, the claimant was paid on a salary continuation program which did not justify the denial of compensation. The Court has followed the decision of Gereyes v. WCAB (New Knight, Inc.) , 793 A2d. 1017 (2002). In that case claimant had a wrist injury and returned to work with a wage loss. On the Notice of Workers' Compensation Denial form the employer had placed an "x" by claimant not being disabled. Because the grounds were specified for the denial, the Court held penalties were not properly awardable. Also, where medical benefits are paid on an ongoing basis the defendant is less likely to be penalized. Gumm v. WCAB(Old Republic Insurance Services), 599 C.D. 2007 AND 703 C.D. 2007. Filed January 28, 2008.

PENSION OFFSET

The employer was not entitled to a pension offset to a sum of $4500, which the claimant had rolled over into an IRA. Gadonas v. WCAB (Boling Defense and Space Group), 1943 C.D. 2006. Filed August 1, 2007.

Under §204(a) (relating to employer sponsored offsets), the employer has the burden to establish the extent to which the employer funded the offset. Moreover, the employer must submit a Report of Benefits For Offsets (LIBC 756B). City of Philadelphia v. WCAB (Andrews), 1915 C.D. 2007. Filed May 12, 2008.

PERSONAL ANIMUS

A claimant suffered a psychological injury when a guest at a hotel grabbed claimant by her buttocks, lifted her shirt, and touched her abdomen. The injury occurred on March 5, 2003. Five days later she

was prescribed a sedative and referred to a licensed psychologist. Her physicians removed her from work. As a consequence of this event she had nightmares, fatigue and insomnia, lost forty pounds of weight, no longer had a relationship with her fiancé, feared strangers, and was not working. Her doctor diagnosed Post Traumatic Stress Disorder. The defendant's expert agreed that such an incident could cause the injuries, but she did not believe this incident produced the symptoms. The employer argued that under Sec. 301(c)(1) that work injuries caused by personal animus would not be within the Act. The specific language argued by the employer was under Section 301: "the term injury shall not include an injury caused by the act of a third person intended to injure the employee because of reason personal to him". The Commonwealth Court found that for personal animus to apply some part of the infliction of injury must be personal and intended. The Commonwealth Court found neither in concluding that the claimant was entitled to benefits. M&B Inn Partners v. WCAB (Petriga), 1201 C.D. Filed January 18, 2008.

REBUTTABLE PRESUMPTION

The Claimant was a widow of the decedent who had worked as a welder. The employer issued a Notice of Compensation Payable (NCP) citing metal fume fever. The decedent then passed away and the widow filed a Fatal Claim Petition saying he died of late stage COPD. The decedent's doctors testified that a combination of welding fumes and cigarette smoking contributed to his death. The employer's reviewing doctor concluded that the decedent's tobacco smoking was what caused his death. The workers' compensation judge denied and dismissed the Claimant's petitions. The Claimant appealed to the Commonwealth Court under the argument that the death certificate was not given proper weight and the decedent was not given the presumption that he had suffered from a work related occupational disease. The Claimant also argued that the Fatal Claim Petition was timely filed and should not have been dismissed. Upon remand, it was decided that there was no presumption that the decedent had suffered from an occupational disease. There were two doctors that had offered testimony that the decedent did not suffer from an occupational disease, therefore the Claimant did not meet her burden of proving that he did, so she was not entitled to the rebuttable presumption. A workers' compensation judge has the ability to make the decisions as to credibility of witnesses and use their testimony to accept or reject the rebuttable presumption, as well as the cause of death on a death certificate. The judge had not erred in denying rebuttable presumption, not using the cause of death on the death certificate or in dismissing the Claimant's Fatal Claim Petition. The Claim Petition was not timely because the Claimant had not succeeded in amending the NCP. Patton v. WCAB (Lane Enterprises Inc), No. 2363 C.D. 2007. Filed October 22, 2008.

REESTABLISHING WORK AVAILABILITY

Does the employer need to establish work availability when claimant was determined by a Workers' Compensation Judge to have failed in prior litigation to accept work offered to her and then is incarcerated? Claimant injured her left foot on Sept. 23, 1994. Her injuries accepted were neck, left shoulder, left knee and left elbow. She stopped working on Nov. 16, 1994, apparently due to her injuries. She underwent an IME on November 27, 1996 with the doctor returning claimant to sedentary duty. Subsequently she was charged with DUI and aggravated assault for which she served time in prison. Without knowing claimant was incarcerated, employer made a job offer of sedentary work on January 21, 1997. The employer filed a Suspension Petition on May 30, 1997alleging the

refused offer of work on January 21, 1997. The WCJ issued a Decision on March 31, 1998 finding that the employer was entitled to a suspension as of January 21, 2007, or the date of the offer of work, and further held that claimant would not be entitled to reinstatement of total disability because she had been offered the sedentary job. Claimant was incarcerated until March 28, 2000. Thereafter, she filed a Reinstatement Petition alleging her condition had gotten worse to the point where she could no longer work. The WCJ denied her petition on May 9, 2002, which was NOT appealed. The instant petition for reinstatement on April 26, 2004 again alleged a decrease of earning capacity but the WCJ granted benefits from May 12, 2003 until September 8, 2004 due to surgery. The Appeal Board held that the employer did not have to reestablish job availability. Claimant filed this appeal arguing that the WCJ never found her refusal to accept employment was in bad faith Her reason for not being able to accept the position was incarceration.

The prior holding of Mitchell v. WCAB (Steve's Prince of Steaks) 815 A.2d 620 (2003), had held that once incarceration had been completed the claimant was entitled to benefits. The Court herein found that the Judge went through a Kachinski analysis and determined claimant's benefits should be suspended based on the decision by the WCJ of March 31, 1998. Further, the Court held that once an employee has acted in bad faith, the employer need not keep an available job open indefinitely. Claimant must demonstrate her worsening condition and that she could not perform the work offered. An employer need not reestablish job availability following a period of total disability when the claimant originally refused a job offer in bad faith. The bottom line is that if an employer makes a good faith offer and claimant refuses the offer in bad faith, the employer does not later, after a surgery and total disability, need to reestablish work availability just that her condition has returned to base line. Muretic v. WCAB (Department of Labor and Industry), No. 787 C.D. 2007.

REINSTATING BENEFITS/PENALTIES

A claimant seeking reinstatement after he/she has been deemed to be fully recovered and benefits have been terminated has a heavy burden to prove that the injury has increased or recurred since the decision on the Termination Petition. The claimant must show that his/her physical condition has changed in some way by way of credible medical evidence. A claimant can show a change in physical condition by showing the return of symptoms that were once resolved.

The Court ruled that penalties must be paid immediately otherwise it would make it difficult to enforce penalties. In this case, the penalty on the late payment did not exceed the maximum 50% penalty authorized by the Act as the employer had argued. The Court stated that any employer that does not timely comply with an order to pay benefits, compensation or penalties, may be ordered to pay an additional 50% penalty. National Fiberstock Corp. v. WCAB (Grahl), 1456 C.D. Filed on August 29, 2008.

RE-LITIGATION

Where claimant has filed a second review petition to decide the correct AWW based upon a recent decision changing the law, claimant was barred where the issue had been previously litigated or could have been litigated. The Commonwealth Court held that changes in decisional law do not permit such refilings based on the doctrine of "law of the case". Jeffrey Merkel v. WCAB (Hofmann

Industries), No. 1586 C.D. 2006. March 6, 2007.

REMANDS

Claimant had been a firefighter for 39 years. He began having chest pains and underwent an angioplasty. Claimant filed a Claim Petition alleging his heart disease occurred during the course of his employment. He has not returned to work as a firefighter, but has taken a light-duty capacity job. In the workers' compensation judge's initial decision, the judge stated that the claimant did not present unequivocal evidence to establish that his heart disease was causally related to his work, and therefore, he denied the Claim Petition. The Board remanded the case back to the judge to decide whether the claimant was entitled to benefits under the occupational disease portion of the law, section 108(o) of the Occupational Disease Act. Upon remand the judge believed that claimant was entitled to benefits under the occupational disease provisions. The employer appealed on the basis that the judge had not been requested to revisit credibility issues on remand. Although remands are required to be narrow in their focus on the particular issue remanded, the Judge had the authority to reconsider the evidence including credibility. Robert Repash v. WCAB (City of Philadelphia), No. 114 C.D. 2008. Filed
November 10, 2008.

REMOVAL FROM WORK FORCE

The Commonwealth Court has published this previously unreported opinion holding that a claimant who has moved to Portugal has voluntarily removed himself from the work force and, thus, the employer is entitled to a suspension of compensation benefits. This decision is consistent with Blong v Workers' Compensation Appeal Board (Fluid Containment), 890 A.2d 1150 (Pa. Cmwlth 2006) where the claimant moved to New Zealand and Smith v Workers' Compensation Appeal Board (Dunhill Temporary Systems), 723 A.2d 1285 (Pa. Cmwlth 1999) where the claimant joined the Peace Corps and moved to Africa. Mendes v Workers' Compensation Appeal Board (Libson Contractors Inc) No 154 CD 2009. August 26, 2009.

RES JUDICATA/COLLATERAL ESTOPPEL

Claimant filed a Second Petition to Review Compensation Benefits. The workers' compensation judge granted this petition. The case was appealed to the Board who reversed the judge's decision. In the second review petition, the Claimant wanted to add addition injuries to his Notice of Compensation Payable after the parties had already addressed any additional injuries in a Stipulation. The main issue of this matter became whether the additional injuries were barred by technical *res judicata* or collateral estoppel. The Commonwealth Court decided the Claimant's petition was barred by the doctrine of technical *res judicata*. The subject matter of both review petitions was the same (the nature and extent of the work related injuries) and the issue in both petitions was whether the Notice of Compensation Payable reflected the true nature and extent of all of the Claimant's injuries. The doctrine of res judicata and collateral estoppel both fall under the doctrine of res judicata which does not allow for the relitigation of claims or issues in future proceedings. Weney v. WCAB (Mac Sprinklers Systems Inc), No. 678 C.D. 2008 Filed on November 26, 2008.

RETIREMENT

"A claimant who accepts a pension is presumed to have left the work force, entitling an employer to a suspension of benefits unless he establishes that (1) he is seeking employment or (2) the work-related injury forced him to retire". The Pennsylvania State Universtiy v. WCAB (Hensal), 1942 C.D. 2007. Filed May 19, 2008.

SEXUAL HARASSMENT

The Supreme Court reversed the Commonwealth Court and reinstated benefits to a coal miner who was victimized sexually by a supervisor. The Commonwealth Court had determined that the claimant had not been exposed to abnormal working conditions. The Supreme Court disagreed. The importance of the case is that sexual harassment is cognizable as a work injury under Pennsylvania law. The claimant in the present case had had preexisting emotional problems from a commanding officer in Vietnam. Claimant has flashbacks. In 1994 while working for the defendant, claimant had three incidents in which sexual harassment occurred. Claimant began missing work and claimed total disability. The first incident described the supervisor say "You have a nice looking butt, come up here and sit down next to me". The second incident involved the supervisor stating that he would like to have intercourse with him. The third event was the supervisor telling claimant that he had " a nice pair of legs". The Judge granted benefits. In part the benefits were granted because they were considered abnormal as the supervisor had been disciplined. I t was not normal joking but intended to cause emotional harm. The Board affirmed. The Commonwealth Court on the other hand believed that although the incidents were crude and unacceptable they were actionable in the rough business of mining. The Supreme Court disagreed strongly with the Commonwealth Court and found a course of conduct which constituted an injury for which disability had resulted and thus was compensable.

SCARRING

The WCAB has reversed a WCJ decision granting 17 weeks of compensation to a firefighter who had two marks on the left side of his neck - one was 1 ½ inches long by 1/4 inch wide and a second 1 inch long by ½ inch wide. There were two additional spots of 1/4 inch and 1/16 inch. The WCAB believed that "most" Judges would have awarded between 50-65 weeks modifying the award to 60 weeks.

SECTION 204 OFFSETS

An offset is permitted when a claimant receives social security disability payments which are then converted to old age benefits when he reached 65 years of age. The Court determined that where old age benefits are received, a strict interpretation of the Act requires applying the offset whether or not claimant had received social security disability payments or not. The Court spoke about claimant's intention of continuing to work. Here claimant did not testify. Francis Ropoch v. WCAB(Commonwealth of PA/DPW), 1638 C.D. 2007.

SLEEP DISORDER IS NOT AN INJURY

The Board has held that failure by an employee to adapt to shift changes is not an injury within the meaning of the Act. An injury is a lesion or change in body part which produces pain or harm or lesser use. Patrick Maguire v. FedEx Freight 21 WCLR 266 (PA. W.C.A.B. 2007).

SPECIAL RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE-AMENDMENTS

Update on amendments to the Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board (34 Pa. Code Ch. 111) and the Workers' Compensation Judges (34 Pa. Code Ch. 131).

On August 20, 2009, the Independent Regulatory Review Commission (IRRC) approved the Bureau of Workers' Compensation final form amendments of Chapters 111 and 131 regarding administrative procedures in Pennsylvania workers' compensation matters, which will take effect upon publication in the Pennsylvania Bulletin anticipated to take place shortly. While the amendments to the procedures before the Workers' Compensation Appeal Board and the Workers' Compensation Judges have, for the most part, no earth shattering ramifications, the amendments to the following sections are important to note:

Section 111.11 and Section 131.11 - Provides for the eventual ability to file all petitions, answers and appeals electronically.

Section 131.41(b) - A judge may now reconsider a prior supersedeas decision on his or her own motion rather than requiring a request for reconsideration from one of the parties.

Section 131.50 - During a challenge hearing a judge is limited to determining whether the claimant has stopped working or is earning the wages stated in the Notice of Suspension or Modification.

It is important to note, however, that the rule continues to require that insurers shall reinstate compensation if the judge fails to hold a hearing within 21 days or fails to issue a written order approving the suspension or modification of benefits within 14 days of the hearing. This provision necessitates due diligence on behalf of carriers and their counsel because, in the present economic climate, claimant's counsel may show renewed interest in pursuing penalties if the carrier fails to reinstate benefits in a timely manner.

Section 131.59a - Permits the adjudicating judge to preside over a voluntary mediation upon the agreement of all parties and the judge.

Section 131.59b - No judge will be assigned to preside over a mandatory mediation of a case where they are the adjudicating judge; this prohibition cannot be waived or modified. Additionally, if the parties fail to comply with the mediation provisions, the adjudicating judge may issue sanctions, including penalties for carriers and forfeiture of interest for claimants.

Obviously, the main concern with this amendment is the fact that employers may be subject to penalties if the individual with authority to settle the workers' compensation claim fails to attend the mediation in person or by teleconference or fails to have the requisite authority to accept, modify or reject settlement proposals either offered at a mediation or within a

reasonable time period established by the mediating judge after the mediation. As such, agreeing to a mandatory mediation now involves some element of risk if authority is not in hand prior to the initial hearing. The employer is also at risk for penalties in those situations where the judge automatically schedules a mandatory mediation as authority must now be obtained prior to the mediation or the employer may face a penalty if the mandatory mediation must be canceled for lack of authority.

Section 131.60 - Establishes procedures for resolution hearings, including the requirement that requests for resolution hearings be in writing and the specific manner in which the request must be submitted depending upon the status of the case at the time of resolution. Hearings must be scheduled within 14 days of the request. The parties must introduce into evidence proof that a petition was filed as of the hearing date; no resolution hearing may proceed absent the submission of such proof. Decisions reached following resolution hearings must be rendered within 5 days of the hearing; this is in contrast to Section 131.57, where an adjudicating judge presiding over a hearing approving a Compromise and Release Agreement has 30 days to circulate a decision.

Section 131.111 - No decision may be circulated by a judge without the submission by claimant of a domestic relations statement and a printout from the child support website setting forth the status of any and all liens.

SPECIFIC LOSS BENEFITS

Payment of specific loss benefits did not toll the three year statute of limitations of Section 413 for reinstatement of benefits. Visteon Systems v. WCAB (Steglik), 1179 C.D. 2007. Filed December 14, 2007.

Specific loss benefits are payable without regard to whether the permanent injury has actually caused the claimant a wage loss, thus specific loss benefits are recognized by the Act as being compensated for the loss of use of a body party rather than for general loss of earning power. A claimant can still receive specific loss payments as well as partial disability, total disability benefits or even full wages. Notwithstanding his earnings, the claimant was entitled to be paid the schedule of specific loss benefits. Allegheny Power Service Corp. and Acordia Employer Service v. WCAB(Cockroft), No. 242 C.D. 2007. Filed July 22, 2008.

The Commonwealth Court recently published an unreported decision concerning concurrent payment of specific loss benefits and ongoing partial disability benefits holding that while a claimant is receiving partial disability benefits, specific loss benefits at not payable until payment of partial disability benefits has expired. Community Service Group v. WCAB (Peiffer), 90 C.D. 2009. Decided May 5, 2009. Published July 30, 2009.

STATUTE OF LIMITATIONS

Judge Bernard McGinley held that where the injured employee's benefits have been suspended the claimant must file a reinstatement petition within the 500 week period. Claimant had been injured

on December 11, 1992. He returned to work on March 28, 1994 on a suspension. His reinstatement petition was filed on April 25, 2005. The Commonwealth Court found that during the period of suspension, the statute was not tolled. Thus claimant had 500 weeks from the date of the suspension within which he needed to file his petition. This decision is to be distinguished from the Stanek v. WCAB (Greenwich Collieries), 756 A.2d 661 (2000) where the Supreme Court allowed claimant to pursue total disability benefits after payment of 500 weeks of payment of partial disability benefits. In Stanek, supra, the Court found claimant had petitioned for benefits within three years of his receipt of benefits. In Prosick, supra. the claimant had not petitioned within three years and had filed after the 500 week period had elapsed. A warning to claimants that they need to file their petitions within three years of the date of last receipt of any benefits or be barred. Prosick v. WCAB(Hershey Chocolates), No.1188 C.D. 2007. Filed on November 15, 2007.
The Court reaffirmed its decision in Prosick. Claimant was injured November 2, 1995 and received benefits through January 2, 1996. His benefits were suspended thereafter. A Petition to Reinstate Benefits was filed on September 16, 2005 alleging a decrease of earning power. Based upon Sec. 413(a) of the Act, which clearly states that no compensation will be paid unless a petition has been filed within three years of the most recently received payment of compensation. Stehr v. WCAB (Alcoa), No. 1187 C.D. 2007. Filed on November 29, 2007. Decided by Senior Judge James Flaherty.

A claimant must file for specific loss benefits after a suspension of benefits within 500 weeks. In Romanowski the 500 weeks expired on July 2, 2002 and the petition was filed October 4, 2004. The Court, after considering claimant's arguments that specific loss is different than disability benefits, refused to allow claimant to pursue his claim for specific loss benefits. Michael Romanowski v. WCAB (Precision Coil Processing), filed at 1174 C.D. 2007. Filed March 12, 2008.

SUBROGATION

Subrogation rights and the workers' compensation liabilities of an employer can be transferred to a third party. See Section 319 of the Act and 34 Pa. Code 125.15. Risius v. WCAB (Penn State University), 791 C.D. 2006. Filed April 18, 2007.

The Workers' Compensation Judge has sole jurisdiction for enforcement of a subrogation lien; subrogation rights of an employer is absolute unless the employer engages in "deliberate bad faith to subvert employee's third party action." Stout v. WCAB (Pennsbury Excavating, Inc.), 1969 C.D. 2007. Filed May 22, 2008.

After a Compromise and Release Agreement was approved by the Court (lien section was clearly marked as "no") the claimant filed a third party action. The employer sought a subrogation credit due to the claimant's third party recovery. The issue was whether employer was entitled to subrogation notwithstanding the waiver of same by the compromise and release. The Commonwealth Court held that because there had been no anticipation of the third party lawsuit, the parties were operating under a mutual mistake of fact. The Court allowed recovery of the lien. Gorman v. WCAB (Kirkwood Construction Co.), No. 1926 C.D. 2008. Filed on July 9, 2008.

In a case involving an employer's subrogation rights under Section 319 of the Act, the

Commonwealth Court held that an employer's workers compensation lien and the claimant's third party settlement must be charged the same percentage for attorney fees and costs in a third party liability action. The claimant received a settlement of $75,000 for a broken leg resulting from a work-related motor vehicle accident. Claimant's counsel had a fee agreement with the claimant for 40%. Claimant's counsel charged the 40% fee against the employer's lien of about $47,000 and paid the employer $28,200. With regard to the claimant, claimant's counsel reduced the claimant's 40% fee to 33% and refunded a portion of the fee arguing that it had become the property of his law firm. Had claimant's counsel charged a 33% fee against the lien the employer would have received $31,020. Good Tire Service v. WCAB (Wolf), 729 C.D. 2008. Decided July 15, 2009.

SUPERSEDEAS

When an employer appeals to the Workers' Compensation Appeal Board from a Decision of a Workers' Compensation Judge approving a Compromise and Release Agreement and obtains a supersedeas, but subsequently withdraws the appeal and pays the Compromise and Release amount, the employer cannot be subject to a Penalty Petition for frivolous appeal. Gregory v. WCAB (Narbon Builders), 2021 C.D. 2006. Filed June 8, 2007.

SUSPENSION OF BENEFITS UPON TAKING PENSION

The Commonwealth Court found that for a claimant to continue receiving workers compensation benefits after he has applied for and received his pension from his employer, claimant must prove that he is actively seeking employment after retirement or that he was forced to retire because of his work injury. There is a presumption created that the claimant, upon receipt of his pension, is leaving the workforce. If claimant has claimed that receipt of his pension and his retirement are due to the work injury, then claimant must prove that he is unable to work at any job. The onus is upon the employee to establish that he is incapable of working at any job. Barry Mason v. WCAB (Joy Mining Machinery and AIG Claims), 1906 C.D. 2007. Filed March 18, 2008.

TERMINATING BENEFITS

The claimant suffered an injury to her right knee and she received total disability benefits. The employer filed a Termination Petition alleging the claimant had fully recovered. The workers' compensation judge denied employer's Termination Petition. The judge determined the employer did not prove that the claimant was fully recovered. Claimant continued to receive benefits. Employer filed a second Termination Petition, which was granted. Claimant's argument was that the employer was trying to re-litigate the decision that she was not fully recovered. The Act provides that a claimant's benefits can be suspended, modified or terminated based on a change in a claimant's disability. The employer argued that an initial unsuccessful attempt to terminate does not bar them from filing subsequent Termination Petitions based on medical evidence that a claimant has recovered as of a date after the first Termination Petition was decided. A decision on the subsequent Termination Petition must be based on evidence of the claimant's condition having changed since the first Termination Petition decision. Prebish v. WCAB (DPW/Western Center), No. 319 C.D. 2008. Filed July 14, 2008.

The Claimant was hurt while unloading a truck and he received total disability benefits. The employer filed a termination petition alleging that the Claimant had fully recovered from that work related injury. The termination petition was denied and the judge allowed the Claimant to gather new medical evidence that he was still unable to work. The employer filed a second termination petition. The Claimant was examined by a neurologist who determined that the Claimant's examination was normal and that the Claimant was faking results of certain tests. The Claimant was fully recovered and could return to normal working habits. The judge granted the employer's termination petition and found the Claimant able to return to work without restrictions. Folmer v. WCAB (Swift Transportation), 596 C.D. 2007. Filed on October 11, 2008.

TERMINATION DENIED ALTHOUGH INJURIES IN NCP RESOLVED

Commissioner Santone found that despite claimant's leg fracture having resolved, which was the described injury in the NCP, claimant continued having pain due to a nerve injury which the Board felt was not a distinct injury different from the leg fracture which then placed the added burden on the employer to prove the nerve injuries' resolution also. Bonnoni v. WCAB (Akers), 22 PAWCLR 54.

TERMINATION OF BENEFITS DENIED

A recent case was published upon motion on November 7, 2007 from its original filing date of September 10, 2007, which simply reversed the grant of a termination by the WCJ where the medical testimony accepted by the Judge did not recognize the work injury - a herniated disc. In this case the defendant needed to show that the claimant had recovered from accepted herniated disc injury. Elberson v. WCAB (Elwyn, Inc) No. 2408 C.D. 2006.

TRAVELING EMPLOYEES

The claimant was injured in a motor vehicle accident on her way to work for involved employer. She filed a Claim Petition alleging she was in the course of her employment when she was in the accident. The workers' compensation judge disagreed with the claim that she was a traveling employee because on any given day she could be working for any one of, or all three of, her employers and her commute to her job for this employer was not in the course of her employment. A claimant has all the burden of proving that he/she should get compensation when filing a Claim Petition. The question of traveling employee criteria was the issue. Such an issue is a question of law and must be based on the findings of fact. The Court holds that a traveling employee is based on whether the job duties include travel, whether the claimant works on the employer's premises or whether the claimant has no fixed place of work. The Court held that because claimant traveled each day for this employer, irregardless of how many employers she worked for, she was entitled to the presumption of traveling employee and was entitled to benefits. Jameson v. WCAB (Gallagher Home Health Services), No. 399 C.D. 2008. Filed August 19, 2008.

UNEXECUTED COMPROMISE AND RELEASE AGREEMENT

Where a settlement has been agreed upon but never signed, the Court will not enforce the agreement. Interestingly the Court held that claimant could not enforce the agreement as this was up to the employer and the agreement had to be signed. The reason for failing to sign the agreement was the insistence by the employer of having a MSA trust approved. Since the terms had not been agreed

upon, the Compromise and Release Agreement could not be enforced. Bennet Miller v. WCAB (Electrolux), 552 C.D. 2007.

UNREASONABLE CONTESTS

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. Filed December 5, 2006.

UNTIMELY FILED SCARRING CLAIMS

Claimant suffered an injury in 1991, but had neck surgery giving rise to the scarring claim in 2004 Sec. 315 of the Act precludes claimant recovery for specific loss of scarring by the statute of limitations. Kelley v. WCAB (Standard Steel), No. 1434 C.D. 2006, 2007 Pa. Commonwealth LEXIS 99. Filed March 6, 2007.

UTILIZATION REVIEW DETERMINATION

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. 2006. Filed February 12, 2007.

The Commonwealth Court held that where medical records have been sent to the UR physician reviewer, although not all or the complete records, and the Judge finds the Doctor whose treatments are reasonable is credible, the Geisler decision does not apply and the WCJ has the authority todetermine whether the care is reasonable and necessary. Loc, Inc and Nationwide Insurance/Wasau Insurance Company v. WCAB (Graham), No.536 C.D.2007. Filed on November 8, 2007.

During a utilization review, the reviewing doctor did not receive the required Verification Form along with the treating doctor's medical records and therefore he ruled the treating doctor's treatment unreasonable and unnecessary. The claimant filed a petition to review this utilization review Determination. The workers' compensation judge determined that there should be an order for another utilization review of the treating doctors' treatment. A judge lacks jurisdiction to decide the merits of the utilization review petition (whether treatment is unreasonable and unnecessary based

on a doctor's failure to supply medical records with the required Verification Form). A judge, however, does have the ability to decide the issues of the sufficiency of the URO's tracking of the Verification Form and the URO's compliance with the Act. HCR-Manorcare v. WCAB (Bollman), No. 2320 C.D. 2007. Filed July 2, 2008.

UR- MEDICAL RECORDS MAILED WITHIN 30 DAYS

The Commonwealth Court determined that although medical records were postmarked by the physician's postagemeter on the 30th day, it was sufficient for meeting the requirements of jurisdiction of the issue before the WCJ. Here, the physician had purportedly mailed the records on the 30th day but those records were not received until after the 30 days. The parties' arguments focused on what the URO rules require of a medical provider. It did not seem of concern to the Court that the physician had mailed the records from his own office as the Court interpreted the URO rule as simply requiring that the records be mailed within the 30 days. Jean Sueta v. WCAB (City of Scranton and PMA Group), 1905 C.D. 2007. Filed on March 7, 2008.

URO DETERMINATIONS

The Commonwealth Court affirmed the Workers' Compensation Appeal Board and Workers' Compensation Judge with regard to findings that Maxidone was not reasonable or necessary for a low back injury, but reversed with regard to blood patches being unreasonable and unnecessary. Sweigart v. WCAB (Burnham Corporation), 1714 C.D. 2006. Filed April 4, 2007.

A favorable URO Determination to an employer that the medical treatments of Dr. A are not reasonable nor necessary does not apply to subsequent treatments by a Dr. B and subject the employer to penalties. Schemck v. WCAB (Ford Electronics), 1011 C.D. 2007. Filed December 5, 2007.

III. BUREAU DEVELOPMENTS

1. The proposed new WCJ Rules were published in the September 6, 2008 Pennsylvania Bulletin. To review the proposed Rules easily:

- Log on to www.dli.state.pa.us
- Click on the Wokers' Comp/SWIF Quick Link found at the right hand side of the screen
- Click on Office of Adjudication
- Language re: the proposed Rules, including a link to the Rules themselves, will be found within the first bullet under Announcements

2. On December 5, 2006, Judge Ledbetter was appointed President judge of the Commonwealth Court.

3. A new WCJ has been appointed to the Erie District – Jean Best, formerly of Dallas Hartman's office.

IV. LITIGATION DEVELOPMENTS AND RESULTS

Below is a report card of our results in Western Pennsylvania. A win is when our petition is granted or the claimant's petition is dismissed. A loss is when our petition is denied or the claimant's petition is granted. In 2005 we received a new account that wanted to settle as many claims as possible; hence, the increase in the median settlement amount. Our largest settlement has been $150,000 and our lowest $0. Since 2000 we have recovered $458,000 from the Supersedeas Fund.

We have three attorneys serving Western Pennsylvania...Stewart Karn, Jim Ehrman and Fred Trenor.

Together our workers' compensation litigation experience is almost 100 years.

We invite you to visit our web page where we have a number of articles and publications, particularly, The Pitfalls of Pennsylvania Workers' Compensation and Recent Developments in Pennsylvania Workers' Compensation.

Report Card

	Win	Lose	settle	Median settlement
1999	73.3%	6.7%	20.0%	$32,500.00
2000	75.9%	10.3%	13.8%	$35,000.00
2001	59.4%	9.4%	31.3%	$40,000.00
2002	33.3%	13.9%	52.8%	$12,500.00
2003	34.5%	6.9%	58.6%	$27,500.00
2004	41.7%	8.3%	50.0%	$23,750.00
2005	33.3%	7.9%	58.7%	$47,500.00
2006	25.7%	5.7%	68.6%	$55,000.00