RECENT DEVELOPMENTS IN PENNSYLVANIA WORKERS’ COMPENSATION
2007

FRED C. TRENOR AND JAMES S. EHRMAN

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

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

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

October/November 2007

MARGOLIS EDELSTEIN
Fred C. Trenor, Esquire
James S. Ehrman, Esquire
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256
412-642-2380 (fax)
ftrenor@margoliselstein.com
jehrman@margoliselstein.com

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

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

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

WILMINGTON OFFICE
750 South Madison Street
Suite 102
Wilmington, DE 19801
302-888-1112
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*NOTE*

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

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

II. APPELLATE DEVELOPMENTS

ABNORMAL WORKING CIRCUMSTANCES
The Commonwealth Court affirmed the Workers’ Compensation Appeal Board and Workers’ Compensation Judge on April 14, 2007 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.

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.

AVERAGE WEEKLY WAGE
The Commonwealth Court found that under Section 309(c), board and lodging are, by definition, part of wages. Claimant, a pilot, was required to stay overnight for work. The
decendent 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 on October 10, 2007.

BAD FAITH CONDUCT
Whether the termination of an employee was bad faith conduct on their 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).

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
The Commonwealth Court, on June 1, 2007, held that 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.

CLAIMANT’S BURDEN REGARDING NOTICE OF ABILITY TO RETURN TO WORK
The Commonwealth Court, on June 8, 2007, held that where an employer has not filed a Notice of Ability to Return to work with the Bureau and prosecuting a Suspension Petition, the Claimant waged the issue as to whether the employer can prosecute the suspension Petition if the Claimant does not raise the issues before the Workers’ Compensations Judge. Payne v. WCAB (Elwynly, Inc.), 216 C.D. 2007.

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

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

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

COURSE OF EMPLOYMENT
Judge Mary Leavitt wrote an Opinion on December 19, 2006 holding that an employee walking to work was a covered employee even though a third party tortfeasor 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.

DEPENDENCY OF A PARENT
The Commonwealth Court, on April 9, 2007, 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

EARNING POWER ASSESSMENT
Where 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
The Commonwealth Court held that 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
In the opinion order published by the Commonwealth Court on November 2, 2007, originally filed on August 2, 2007, 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.

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 record 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 particularly nasty decision held that 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, but the claimant returned to work for 2 1/2 hours on July 19, 2003, and a Notice of Denial 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) 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
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
The Commonwealth Court, on August 23, 2007, held that a provider must timely file a fee dispute application in accordance with Section 306(f.1)(5) and further holds that 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.

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.

IMPAIRMENT RATINGS EVALUATION
The Commonwealth court, on June 18, 2007, held that 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.

INDEPENDENT RATING EVALUATION
The Supreme Court, on April 17, 2007, 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.

JURISDICTION
An Opinion by President Judge James Collins found on November 22, 2006 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 had 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 Commonwealth Court, on August 24, 2007, held the employer is not liable for 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.

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

MEDICAL HOME MODIFICATIONS
The Commonwealth has held that 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.

NOTICE OF TEMPORARY COMPENSATION -WHEN DO THE 90 DAYS BEGIN TO RUN?
Judge McGinley, in an Opinion dated Sept. 24, 2007, 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 issued 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 benefits 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 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.

OFFSET PROVISIONS NOT APPLICABLE TO FATAL BENEFITS OF A WIDOW
The Commonwealth Court held on April 5, 2007 that 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.

OLD AGE SOCIAL SECURITY OFFSET
The Commonwealth held, on August 14, 2007, 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

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

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.

PENSION OFFSET
On August 1, 2007, the Commonwealth Court held the employer is 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.

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, 1997 alleging 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.

**RE-LITIGATION**
The Commonwealth Court held on March 6, 2007 that 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.

**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. It 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.
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).

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.

SUBROGATION
The Commonwealth Court held on April 18, 2007, that 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

SUPERSEDEAS
The Commonwealth Court, on June 8, 2007, held that 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.

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 of was ordered by the Commonwealth Court 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.

UNREASONABLE CONTESTS
Judge Bonnie Brigance Ledbetter wrote an Opinion on December 5, 2006 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.

UNTIMELY FILED SCARRING CLAIMS

UTILIZATION REVIEW DETERMINATION
The Commonwealth Court affirmed, on February 12, 2007, 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.

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 to determine 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.

**URO DETERMINATIONS**
The Commonwealth Court affirmed the Workers’ Compensation Appeal Board and Workers’ Compensation Judge on April 4, 2007 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.

**III. BUREAU DEVELOPMENTS**

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

2. A new WCJ has been appointed to the Erie District – Jean Best, formerly of Dallas Hartman’s office, will shortly be announced as Judge.

3. Please remember that the Bureau Conference is scheduled to be held from 05/30/07 and 06/01/07 with an agenda that will cover many significant Pa. developments and take the opportunity to meet the Judges along with physicians such as Steven Conti and others. If you wish to be registered, we would be delighted to assist you, just let us know.

4. The fall section meeting was held in Hershey on September 20 and 21, 2007. The most recent case law was presented which allows us to answer any questions regarding workers compensation issues.

**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.
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