



# News & Notes

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"Serving all Pennsylvanians"

Spring 2017

## PA Training for Health and Safety

### "PATHS" Your No-Fee Safety Training Resource New Safety Training: Opioid Addiction and Medical Marijuana

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

Have you seen our Facebook? Meet our team and follow us at <https://www.facebook.com/BWCPATHS> to keep up with all the latest safety news, tips and ideas! We have 310 likes so far, coming from as far away as Alaska – check us out!

PATHS now offers 192 topics, including the ever-popular "Active Shooter" and recent, timely additions such as "Opioid Addiction" and "Medical Marijuana." Employers and employees from **46 states** and **five countries** have taken advantage of this program so far, and we train tens of thousands of workers in Pennsylvania every year. Last year, our staff held 414 training sessions on 140 different topics and trained over **33,600 Pennsylvania workers**.

You, too, can take advantage of this outstanding free resource by visiting PATHS at [www.dli.pa.gov/PATHS](http://www.dli.pa.gov/PATHS) or by contacting the Health & Safety Division by phone at 717-772-1635. You can also reach us via email at [RA-LI-BWC-PATHS@pa.gov](mailto:RA-LI-BWC-PATHS@pa.gov).

**Safety Committee Box Score**

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of March 23, 2017:

**11,640 committees covering 1,502,032 employees**

Cumulative grand total of employer savings:  
**\$651,850,829**

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### A Message from the Directors

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

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

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

<p><i>Employer Information Services</i> 717-772-3702</p>	<p><i>Claims Information Services</i> toll free inside PA: 800-482-2383 local &amp; outside PA: 717-772-4447</p>	<p><i>Only People with Hearing Loss</i> toll free inside PA TTY: 800-362-4228 local &amp; outside PA TTY: 717-772-4991</p>	<p><i>Email</i> ra-li-bwc-helpline@pa.gov</p>
<p><i>Auxiliary aids and services are available upon request to individuals with disabilities. Equal Opportunity Employer/Program</i></p>			

## Recently in WCAIS

### EDI Forms Solution Training Webinar

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

The Forms Solution training sessions which took place on

April 12, 2017 and April 20, 2017 are available for viewing in WCAIS. Watch these webinars to learn some tips to enhance your usage of the system and enjoy the highest level of benefit.

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

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

### References for Using Forms Solution

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

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

Both of these handouts can be downloaded from the EDI webpage at: [www.dli.pa.gov/edi](http://www.dli.pa.gov/edi).

### Upcoming Change in the Filing of UR and IRE Requests

As of July 1, 2017, **ALL** Utilization Review and Impairment Rating Evaluation Requests must be filed electronically in the Workers' Compensation Automation and Integration System (WCAIS). Requests submitted on paper will be accepted up to and including June 30, 2017; however, beginning April 10, 2017, a letter will be sent to the submitter reminding them of the transition to the electronic form available in WCAIS. Paper applications received after July 1, 2017, will be returned without file preservation with a letter explaining the submitter should make their request using the electronic form available in WCAIS.

To electronically file Utilization Review, Impairment Rating Evaluation, or Medical Fee Review requests, you must be registered in WCAIS. If you have not already registered in WCAIS, you are encouraged to do so. As a registered user, you will have ready access to WCAIS's extensive self-help library, automated search functionality, Helpline chat feature, as well as requests and corresponding decisions you are a party to. If you have questions regarding the registration process, or how to file a Health Care Services Review related request, please contact our Helpline at 717.772.4447 or 1.800.482.2383.

For more information, please visit [www.wcais.pa.gov](http://www.wcais.pa.gov), and click on the "Help" link. You also have the option to "Submit a Question" by selecting the appropriate link in the Help menu,

or you may email questions to the Health Care Services Review Division resource account: [RA-LI-BWC-HCSR@pa.gov](mailto:RA-LI-BWC-HCSR@pa.gov).

For stakeholders desiring to learn more about the Utilization Review and Impairment Rating Evaluation Request online filing initiative, the Bureau will host one hour long training sessions. One of the Bureau's online filing specialists will be available to answer questions at the end of the presentation. Interested parties may sign up to attend in person or request information on how to attend the webinars remotely by emailing Darrel Evans, Clerical Supervisor, at [darevans@pa.gov](mailto:darevans@pa.gov). Requests should be received one week before the desired date of training.

#### Filing a Utilization Review Request Online

May 9, 2017 at 10 am and 2 pm  
June 1, 2017 at 10 am and 2 pm

#### Filing an Impairment Rating Evaluation Request Online

May 10, 2017 at 10 am and 2 pm  
June 5, 2017 at 10 am and 2 pm

Sessions will be recorded and made available online for stakeholders who cannot attend any of the scheduled sessions. All training will take place at Room 326, OLCAM Building, 1171 South Cameron Street, Harrisburg, PA 17104.

### Kids' Chance of Pennsylvania

#### Hope, Opportunity and Scholarships for Kids of Injured Workers

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

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

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## Kids' Chance of Pennsylvania

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

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

application. In 2015, the inaugural year of the program, there were 105 submissions. This past year, the program received 313 submissions. We want to see more of these submissions come from Pennsylvania this year!

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

For more information about how you can help support Kids' Chance, please contact us at 610-850-0150 or [info@kidschanceofpa.org](mailto:info@kidschanceofpa.org), and visit [www.kidschanceofpa.org](http://www.kidschanceofpa.org).

## Hit 'Em Straight for the 12th Annual Kids' Chance of PA Golf Outing!

Register for the 12th Annual Kids' Chance of Pennsylvania Golf Outing and Recognition Luncheon, scheduled for Sunday, June 11, 2017, at the Hershey Country Club.

**Golfer Registration Opens:** 11:00 a.m.

**Recognition Luncheon:** Noon

**Tee-Off:** 1:30 p.m.

The day will begin with remarks from Kids' Chance of PA President Chris Davis and a luncheon recognizing our generous supporters. Kids' Chance scholarship recipients will also be in attendance to share their stories.

Golf will tee off at 1:30 p.m., so gather your foursome and plan to head out to the greens for a round of golf. Continue networking and socializing during a beef-and-beer gathering afterward, where we will announce the winners of both the tournament and raffle.

The mission of Kids' Chance of PA is to provide scholarship grants for college and vocational education to children of Pennsylvania workers who have been killed or seriously injured in a work-related accident resulting in financial need.

There's something for everyone at the 12th Annual Golf Outing and we are looking forward to another great day of Kids' Chance celebration and support. We hope to see you there!

To register for the golf outing, [please visit our website](#).



## Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to insure its workers' compensation liability is a criminal offense and classifies each day's violation as a separate offense, either a third-degree misdemeanor or, if intentional, a third-degree felony. In lieu of prosecution, defendants may pay restitution of monies owed to the Uninsured Employers Guaranty Fund.

First-time offenders may be eligible to enter into the Accelerated Rehabilitative Disposition (ARD) program. Defendants who enter the ARD program waive their right to a speedy trial and statute of limitations challenges during the period of enrollment; they further agree to abide by the terms imposed by the presiding judge. Upon completion of the program, defendants may petition the court for the charges to be dismissed. Although acceptance into the program does not constitute a conviction, it may be construed as a conviction for purposes of computing sentences on subsequent convictions.

The violators and locations are as follows:

**Chester County** In December 2016, William Linaberry, d/b/a West Chester Glass Company LLC, entered into an agreement with the Department of Labor & Industry to reimburse the Uninsured Employer Guaranty Fund in the amount of \$45,000 as restitution in lieu of prosecution on 78 felony counts of Failure to Insure its Worker's Compensation Liability.

**Berks County** On February 15, 2017, George Limberiou, d/b/a Riveredge Inc., pleaded guilty to one felony count of Failure to Procure Workers' Compensation insurance before Judge M. Theresa Johnson in the Berks County Court of Common Pleas. George Limberiou was sentenced to seven years of probation and ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of \$111,369.52.

**Bucks County** On March 13, 2017, Cory B. Sanders, d/b/a Sandman Express LLC, entered into an agreement with the Department of Labor & Industry to reimburse the Uninsured Employer Guaranty Fund in the amount of \$10,892.44 as restitution in lieu of prosecution on 515 misdemeanor counts of Failure to Insure its Worker's Compensation Liability.



Every year, millions of teens work in part-time or summer jobs that provide great opportunities for learning important life skills and acquiring hands-on experience. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

**TIPS for Achieving and Maintaining Compliance with Youth Employment Laws\***

<b>Train Employees</b>	<b>Identify Violations</b>	<b>Promote Compliance</b>	<b>Share Accountability</b>
<ul style="list-style-type: none"> <li>◆ Obtain compliance-assistance materials (posters, fact sheets, employer’s guides and forklift stickers) from <a href="http://www.youthrules.dol.gov">www.youthrules.dol.gov</a> or request training from your local Wage and Hour Office.</li> <li>◆ Incorporate youth employment laws and company policies regarding the employment of youth into training and orientation seminars for managers and teens.</li> <li>◆ Provide a worksheet for youth to sign as part of initial training to test and verify their awareness of what equipment is off limits to them and what hours they can work.</li> <li>◆ Attach a monthly youth safety reminder to a paycheck or time card.</li> <li>◆ Conduct refresher training for all levels of management at regular staff meetings or special training sessions.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Designate a youth employment compliance director whose responsibility is to monitor compliance.</li> <li>◆ Conduct unannounced inspections of your establishment or branch location.</li> <li>◆ Make checking for compliance a regular part of any routine quality or store inspection.</li> <li>◆ Monitor the hours and times worked by youth under the age of 16 at the time payroll data is collected, and track and transcribe any violations.</li> <li>◆ Establish a hotline for employees/parents/ the public to report potential problems or concerns.</li> <li>◆ Take time to interview youth at some regular interval to question them on the types of equipment they are operating.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Create a “buffer zone” to prevent employees from being scheduled up to the latest time or longest shift that could be worked.</li> <li>◆ Prepare two separate schedules: one for employees under age 16 and one for employees aged 16 and over. Only permit shift swapping among employees on the same schedule.</li> <li>◆ Require a manager’s signature on the schedule for all shift swaps.</li> <li>◆ Verify the ages of all youth by requiring legally-acceptable proof of age at the time of hiring.</li> <li>◆ Post the hours that youth can work next to the time clock.</li> <li>◆ Color-code time cards, badges and/or uniforms so that youth can be easily identified.</li> <li>◆ Post a warning sticker or a stop sign on hazardous equipment.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Encourage youth to say “no” to a manager who is asking them to work too late or to operate hazardous equipment.</li> <li>◆ Add “monitoring to maintain compliance” to job descriptions of managers.</li> <li>◆ Include “compliance with youth employment laws” as a performance factor in managers’ reviews and recognize those who successfully maintain compliance on their shifts, in their departments or at their branch locations.</li> <li>◆ Test youth about their understanding of policies and safety procedures before they start work.</li> <li>◆ Send a letter to the parents of newly-hired teens informing them of the youth employment laws and who to contact to report any concerns.</li> </ul>

Information about YouthRules! can be found at [www.youthrules.dol.gov](http://www.youthrules.dol.gov). For information about the laws administered by the Wage and Hour Division, log on to [www.wagehour.dol.gov](http://www.wagehour.dol.gov), or call the Department of Labor’s toll-free helpline at 866-4USWAGE.

\* Different rules apply to farms, and state laws may have stricter rules.

## A View from the Bench

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

### **Gregorski v. WCAB (Self-Insurance Guaranty Fund as Successor to The Great Atlantic and Pacific Tea Company)**

In *Gregorski v. WCAB (Self-Insurance Guaranty Fund as Successor to The Great Atlantic and Pacific Tea Company)*, No. 370 C.D. 2016 (Pa. Cmwlth., filed January 5, 2017), the Commonwealth Court held in an unreported decision that the parties, including the Employer, are legally bound by the description of injury set forth in paragraph 4 of a C&R Agreement. On November 11, 1985, Claimant sustained an injury that was acknowledged by the Employer as a "pulled neck." In 2001, the Employer litigated a Modification Petition alleging that light duty employment had been offered to the Claimant that he failed to accept. In a Decision circulated in 2003, the WCJ denied the Modification Petition, relying on the medical opinion of the neurosurgeon who performed cervical fusion surgeries to the Claimant's neck in 1999 and 2002 to find that the Claimant was not capable of performing the jobs offered to him. In 2012, the Claimant filed a Penalty Petition against the Employer, which was assigned to a different WCJ. During the proceedings on the Penalty Petition, the parties requested that it be amended to a Petition to Seek Approval of a Compromise and Release Agreement. On December 23, 2013, the WCJ issued a decision approving the C&R Agreement. Pursuant to the C&R Agreement, the parties agreed to settle the wage-loss portion of the Claimant's case and Employer would continue to pay for medical expenses that were reasonable, necessary and causally related to the work injury. In paragraph 4 of the C&R Agreement, the injury is described as a neck injury, but also states: "Claimant's injury includes a back injury."

In November of 2013, the Employer filed a Termination Petition based on an opinion of full recovery from the neck injury. The Claimant sought an award of unreasonable contest, because the doctor did not opine that there had been a full recovery from a back injury. In a May 7, 2015 decision, the WCJ granted the Termination Petition. The WCJ also denied the request for an unreasonable contest. In declining to award unreasonable contest attorney's fees, the WCJ entered a Finding of Fact stating that there was no specific finding of fact by the WCJ who decided the Modification Petition in 2003 to amend the description of injury, either explicitly or impliedly, to include the low back. The WCJ further stated that the Compromise and Release Agreement is not an adjudication of whether the Claimant sustained a back injury and does not *sua sponte* amend the description of injury. Claimant appealed to the Board, which affirmed the WCJ in an opinion of February 23, 2016, finding no error in the WCJ's finding that the only accepted injury as a neck injury and the conclusion that there was a reasonable contest in the Termination Petition.

Claimant petitioned the Court for a review of the Board's decision. After the filing of the appeal, counsel for the Employer withdrew his appearance and the Self-Insurance Guaranty Fund filed an application averring that Employer had ceased operating its business. In 2016, an order was entered substituting the Fund for the Employer. On appeal, the Claimant argued that it was an error for the WCJ to confine the work injury to the description contained in the original NCP, and not find that it had been amended to include a back injury. The Claimant argued both that the first WCJ had implicitly expanded the description of injury in the 2003 adjudication, because the Claimant's doctor was found to be credible, and that the injury description had been amended by the C&R Agreement.

The Commonwealth Court found that the second WCJ did not err in declining to find that the first WCJ had implicitly amended the description of injury when there were no specific findings by the first WCJ stating as such. The Commonwealth Court agreed with the Claimant's argument that the injury description contained in the Compromise and Release Agreement, agreed to by the parties, is final, conclusive and binding on the parties once it is approved. The Court stated that the WCJ's finding that the C&R Agreement was not an adjudication and therefore could not be used to amend the description of injury to be contrary to the Court's decision in *DePue v. WCAB (N. Paone Construction, Inc.)*, 61 A.3d 1062 (Pa.Cmwlth. 2013), where it held that a Claimant was precluded from later adding a new injury to the description of injury contained in a C&R Agreement when that right was not expressly reserved, holding that once approved, a C&R Agreement is final and binding on the parties. In *DePue*, the parties similarly agreed to settle wage loss benefits, with the Employer retaining responsibility for medical expenses for the injury described in the C&R Agreement. In *DePue*, the Claimant was bound by the description of injury in the C&R Agreement and precluded from filing a petition to expand the description of injury. Therefore, in *Gregorski*, the Court found no reason for the description of injury to not also be binding on an Employer. On the issue of the unreasonable contest, the Court found that although the WCJ erred in finding that the injury was not amended by the C&R Agreement, this error did not constitute grounds for reversal of the denial of an unreasonable contest, because, since the Fund had taken over, it could not be ordered to pay Claimant's attorney's fees.

### **Firefighter Cases**

In *Capaldi v. WCAB (City of Philadelphia)*, No. 787 C.D. 2016, 2017 WL 74399 (Pa. Cmwlth. Ct. filed Jan. 9, 2017), the facts of this case are simple. Claimant began employment as a firefighter for the City of Philadelphia in 1969. He retired in October 2003 after 34 years of service. In May 2005, approximately 18 months after retirement, Claimant was diagnosed with squamous cell carcinoma of the right vocal cord, which was successfully treated with

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## A View from the Bench

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surgery. Seven years later, in December 2012, Claimant filed a claim petition alleging that his cancer was caused by his workplace exposure to carcinogens. Claimant sought payment of his medical bills. The WCJ reached several legal conclusions. First, Claimant did not prove that he was unable to work as a result of his cancer; therefore, he was not entitled to use the presumption of causation set forth in Section 301(e) of the Act, 77 P.S. §413. Second, Claimant did not file his claim petition within 300 weeks of his last date of employment, which precluded his use of the presumption set forth in Section 301(f) of the Act, 77 P.S. §414. Third, Claimant, who had to prove that his squamous cell carcinoma was an occupational disease without the assistance of a presumption, did not meet his necessary burden. The WCJ denied the claim petition. The WCAB agreed with the WCJ.

On appeal to the Commonwealth Court, Claimant raised two arguments. First, Claimant contends that the WCAB erred in construing the Act to require a firefighter seeking compensation for cancer pursuant to Section 108(r) of the Act to file his claim petition within 300 weeks of his last day of work. Second, Claimant argues that if Section 301(f) of the Act imposes a deadline for filing a claim petition for occupational disease, then the discovery rule should apply.

After a thorough review of the statutory provisions relevant to occupational disease as well as relevant case law, the Commonwealth Court found Claimant's medical evidence did not establish that squamous cell carcinoma is a type of cancer caused by Group 1 IARC carcinogens, and this was necessary in order to establish that his cancer is an occupational disease under Section 108(r) of the Act. As a result, the presumption of compensability in Section 301(f) of the Act was unavailable to Claimant. Claimant also had the opportunity to prove that his cancer was compensable pursuant to Section 108(n) of the Act, which is the predicate to taking advantage of the presumption set forth in section 301(e) of the Act. However, Claimant's medical evidence was rejected. Therefore, Claimant did not meet his burden of proving that his cancer was a compensable occupational disease either under Section 108(n) or Section 108(r) of the Act.

In *City of Williamsport v. WCAB (Cole (Deceased))*, 145 A.3d 806, (Pa. Commw. Ct. 2016), the Supreme Court denied the Petition for Allowance for Appeal on December 21, 2016. In this case, the WCJ granted benefits and the WCAB affirmed. The Commonwealth Court reversed, citing *Gibson v. WCAB (Armco Stainless & Alloy Products)*, 861 A.2d 938 (Pa. 2004) and provided that for an expert's testimony to be competent, it must be based on facts warranted by the record or reasonable inferences drawn therefrom. The Commonwealth Court found the widow's lay testimony and the claimant's medical opinion based on assumptions incompetent.

In *Demchenko v. WCAB (City of Philadelphia)*, 149 A.3d 406 (Pa. Cmwlth. Ct. filed October 26, 2016), the City of Philadelphia hired Claimant as a firefighter in 1974;

but shortly thereafter, he worked as both a firefighter and a paramedic. By January of 1980, he was working exclusively as a paramedic. In May of 2006, Claimant retired. One month later, Claimant was diagnosed with prostate cancer, which was successfully treated with surgery. In June of 2012, Claimant filed a claim petition alleging that his prostate cancer was caused by exposure to IARC Group 1 carcinogens while working as a firefighter. Claimant sought payment of disability compensation from November 27, 2006 to January 15, 2007, and payment of medical bills. The WCJ credited the testimony of Claimant on his work history and the testimony of Claimant's medical experts that Claimant had been exposed to Group 1 carcinogens during his career as a firefighter and paramedic. However, the WCJ rejected Claimant's medical expert opinion as to causation. The WCJ credited the Defendant's medical expert testimony that Claimant's medical expert did not use accepted epidemiologic standards for a general causation opinion and that any elevated risks for prostate cancer among firefighters might also be explained by other factors. Based upon these findings, the WCJ denied the claim petition. The WCJ also reached several legal conclusions. First, because Claimant retired prior to his cancer diagnosis, his cancer did not cause a post-retirement compensable disability and, thus, he was not entitled to use the statutory presumptions available to claimants seeking compensation for an occupational disease. Second, Claimant did not prove that prostate cancer is an occupational disease under Section 108(r) of the Act because his evidence did not show that exposure to Group 1 carcinogens has been linked to prostate cancer. Third, because Claimant did not demonstrate that prostate cancer is an occupational disease for firefighters, he had to prove that his prostate cancer was caused by his workplace exposures, such as Class 2A carcinogens, as allowed under Section 108(n) of the Act; however, his medical evidence was not credited. Finally, the WCJ concluded that even if one assumed that Claimant was entitled to a presumption that his prostate cancer was caused by firefighting, the Employer's evidence rebutted it.

Claimant appealed to the WCAB and it affirmed. It upheld the WCJ's factual findings and agreed with the WCJ that Claimant did not prove that prostate cancer is an occupational disease under Section 108(r) of the Act. The WCAB also agreed that Claimant was not entitled to use the statutory presumption to prove his claim, but said this was because to use the statutory presumption in Section 301(f) of the Act, a claimant must file his claim petition within 300 weeks of the last day of occupational exposure to the carcinogen. Claimant retired in May 2006, and he did not file his claim petition until June 13, 2012, which was 315 weeks after his last day of employment as a firefighter. Therefore, Claimant did not satisfy the deadline for being able to use the presumption in Section 301(f) of the Act.

After reviewing the relevant case law and statutory provisions, the Commonwealth Court held that claimant was required to file a claim petition within 300 weeks of his

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## A View from the Bench

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last day of employment as a firefighter to take advantage of the statutory presumption that his prostate cancer was work related; the discovery rule did not apply as to allow claimant to take advantage of the presumption that his cancer was work related; and claimant failed to prove that his cancer was caused by his employment as a firefighter.

### Justus v. WCAB (Bay Valley Foods)

In *Justus v. WCAB (Bay Valley Foods)*, No. 1556 C.D. 2015, 147 A.3d 1237 (Pa. Cmwlth. Nov. 22, 2016) the issue was whether the WCJ had erred when he granted the Employer's Motion to Dismiss a fatal claim petition for claimant's failure to provide *prima facie* evidence that the death was work related.

A number of witnesses testified before the WCJ regarding the tragic events which preceded Decedent's death. The witnesses included Claimant (Decedent's widow), who is a registered nurse, management personnel of the Employer, a HazMat team emergency management coordinator, and a criminal investigator for the Pennsylvania State Police (PSP). The Decedent was a mechanic for the Employer and his duties required him to periodically enter a water-cooling treatment shed, which was approximately fifty to one hundred feet from the main plant. The Decedent's duties included the maintenance of the water quality in the cooling system (used to cool a cooking process inside the plant). It involved the Decedent entering the shed and testing for PH level and adding an anti-microbial additive if necessary. Various anti-microbial chemicals were stored inside the shed including a pool chlorinator and an acidic baseline solution for calibrating the PH meter, and there was an exhaust fan that ran continuously on a thermostat. The shed was kept locked and the Decedent had one of the keys. At approximately 1:40 p.m. on July 18, 2012, the Employer's maintenance supervisor was informed that the Decedent was missing. The shed door was locked, and after getting a key, the Decedent was found in the shed at approximately 1:50 p.m. He had not previously been seen since approximately 11:30 a.m. The Decedent was found lying face down, still breathing, and the person who assisted in pulling the Claimant out of the shed noticed vomit on the floor near where the Decedent had been found. A HazMat team was called due to the vomit and the presence of chemicals inside the shed.

The Decedent was transported to UPMC Hamot and later the same day was transported by helicopter to UPMC Mercy in Pittsburgh. Claimant went to UPMC Hamot, spoke to the ER physician, and Claimant then drove to UPMC in Pittsburgh. Claimant testified before the WCJ concerning her understanding of the Decedent's treatment and diagnosis between July 18 and July 20, 2012, when the Decedent died. The record indicates that there was no dispute that the Decedent's death was the result of a subarachnoid hemorrhage (SAH) that was not causally related to his employment. The basis of the claim was summarized by the Court as follows: "Claimant argues... that Decedent sustained, in essence, an aggravation of his SAH, as a result of the Employer's premises or the

condition of his employment, which resulted in a delay in treatment and a misdiagnosis of his condition, which substantially contributed to his death". The Claimant's medical evidence consisted of a report from Dr. Eric Lee Vey, M. D., a forensic pathologist. The Employer submitted no medical evidence and following the testimony of the various fact witnesses and the submission of the report of Dr. Vey, made a motion to dismiss, which was granted by the WCJ. The Court stated: "In dismissing the Fatal Claim Petition, the WCJ concluded that the delay in Decedent being found inside the locked cooling shed and the erroneous diagnosis due to the presence of chemicals therein, did not cause an aggravation of Decedent's non-work-related condition, the SAH, which caused his death. (WCJ Decision and Order, Conclusion of Law Paragraph 4)..."

In its opinion, the Court quoted Section 301 (c) of the Act, 77 P. S. § 411 (1), which addresses the term "injury" and "personal injury". The Court then wrote:

"In *Pawlosky v. Workers' Compensation Appeal Board (Latrobe Brewing Company)*, 525 A.2d 1204, 1209 (Pa. 1987), our Supreme Court held that a job-related aggravation of a pre-existing disease constitutes an "injury" within the meaning of Section 301(c)(1) of the Act. Under Section 301(c)(1), a claimant has the burden of proving by unequivocal evidence that the injury arose in the course of the employment and that the injury was related to that employment. *Krawchuck v. Philadelphia Electric Company*, 439 A.2d 627 (Pa. 1981). Accordingly, it is a well-established rule that unless there is an obvious causal connection between a worker's death and the work injury, the claimant must present unequivocal medical evidence establishing the connection. *Dobash v. Workers' Compensation Appeal Board (PG Energy)*, 836 A.2d 1085 (Pa. Cmwlth. 2003)."

The Court states that the report of Dr. Vey "summarized the salient features of the case opined as follows". The Court then quotes from all or parts of five paragraphs from Dr. Vey's report. Following this quotation, the Court discusses other portions of his report. In this regard, the Court wrote: "Dr. Vey concluded that in Petitioner's case, 'the proper diagnosis and institution of appropriate treatment for his SAH was hampered by two temporal delays, both stemming from his workplace circumstances. First, because the confined and isolated workplace area in which Mr. Justus was initially stricken was in a location apart from others, there was a delay of several hours in finding him. Second, the presence of chemicals where he was found and the absence of witnesses associated with his workplace environment, led healthcare providers to initially diagnose him as a victim of chemical or toxic exposure.'"

The Court concluded its analysis of Dr. Vey's report in relevant part as follows: "In his report, Dr. Vey opined, within a reasonable degree of medical certainty that workplace-related delays encountered in [Decedent's case] substantially contributed to his poor outcome, lessened his likelihood of achieving a more improved

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## A View from the Bench

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result and reduced his chances of survival.” With regard to that opinion, the Court stated: “This testimony did not establish within a reasonable degree of medical certainty that the delay in treatment was a substantial cause of death. Dr. Vey reported that the medical condition that caused Decedent’s death was SAH, which was not related to his employment with Employer..Claimant failed to establish *prima facie* evidence of a compensable fatal claim; therefore, the Board did not err in its decision to grant Employer’s motion to dismiss and to dismiss the fatal claim petition. We affirm.”

### **Saladworks LLC and Wesco Insurance Company v. WCAB (Gaudio and UEGF)**

The opinion of the Pa. Commonwealth Court in *Saladworks, LLC and Wesco Insurance Company v. WCAB (Gaudio and UEGF)*, 124 A.3d 790, decided October 6, 2015, was the subject of the following order issued on April 3, 2017: “The appeal (of the UEGF) is DISMISSED as having been improvidently granted.”

In the Saladworks case, the Claimant worked for a franchisee (G21 D/B/A Saladworks), and the franchisor was Saladworks. Claimant filed Claim, Penalty, and UEGF Claim Petitions against G21. UEGF filed a Joinder against Saladworks. Based upon the franchisee’s agreement, and finding no authority to hold the franchisor liable, the WCJ dismissed UEGF’s Joinder, and held G21 primarily liable and UEGF secondarily liable. The UEGF appealed, and the WCAB reversed the WCJ’s dismissal of Saladworks and found that it was a responsible statutory employer under Section 302(a) and the decision of the Pennsylvania Supreme Court in *Six L’s Packing Company v. WCAB(Williamson)*, 44 A.3d 1148 (2012). The Commonwealth Court reversed the WCAB, finding that Saladworks was in the franchising business, and not the restaurant business, and it was not a statutory employer and therefore it was not liable. Therefore, the UEGF was liable since the franchisee, G21 D/B/A Saladworks, did not have workers’ compensation insurance. The UEGF’s petition for allocator was granted on May 23, 2016, the Pennsylvania Supreme Court heard argument on December 7, 2016 and thereafter, issued the order dismissing the appeal.

### **Byfield v. WCAB (Philadelphia Housing Authority)**

The opinion of the Pa. Commonwealth Court in *Byfield v. WCAB (Philadelphia Housing Authority)*, 143 A.3d 1063, decided July 26, 2016 was the subject of the following Per Curiam order issued on January 4, 2017: “And Now, this 4th day of January, 2017, the Petition for Allowance of Appeal is DENIED.”

In *Byfield*, Employer filed a suspension petition based upon §306(f.1) (8) of the Act, alleging that Claimant refused reasonable treatment by not undergoing lumbar spine facet injections. The Workers’ Compensation Judge (WCJ) granted suspension, even though there was no evidence that the claimant had ever refused any

proposed facet injections and was apparently working without earnings loss. The claimant appealed and specifically requested interest (sic - litigation costs?) and unreasonable contest counsel fees. The Workers’ Compensation Appeal Board (WCAB) reversed the WCJ because there was no evidence of refusal sufficient to support the decision suspending benefits, but, although its opinion apparently acknowledged the counsel fee request, it did not award or deny counsel fees in its order. Neither party appealed.

Instead, 18 days after the WCAB decision, the claimant filed a review petition seeking fees and costs for the successful defense in the earlier petition. A different WCJ dismissed the petition, finding that the claimant should have either appealed to Commonwealth Court or requested a rehearing before the WCAB on the fees and costs issue. The claimant appealed the dismissal, arguing that he did not have standing to appeal the earlier decision because he had won and, as a result, was not an “aggrieved” party. Nevertheless, the WCAB affirmed the WCJ under the same reasoning, i.e. appeal or rehearing were the only available options, and it also held that collateral estoppel applied to bar relief here.

Upon the claimant’s appeal, Commonwealth Court discussed the concept of mechanical or mathematical error, such as an award of the wrong benefit rate, which goes to satisfaction of the award; in such case, a later review petition to amend/increase the amount of benefits awarded is allowable. Here, the failure to award fees and costs was not a mechanical error. Because whether to award fees is discretionary, that issue is part of the merits of the case and not part of the award satisfaction. Therefore, the claimant was adversely affected, and thus “aggrieved,” by the WCAB’s failure to award fees and costs. He should have appealed that decision, because he had standing to do so, or requested a rehearing before the WCAB, pursuant to §426 of the Act, to address the fees and costs issues. He could not collaterally attack the decision by a subsequent petition. The Court affirmed the WCJ and WCAB’s decisions to deny relief (noting that it did not need to decide whether collateral estoppel applied.)

### **County of Allegheny v. WCAB (Parker)**

In *County of Allegheny v. WCAB (Parker)*, No. 82 C.D. 2016, 151 A.3d 1210, (Pa. Crmwlth. Ct., filed December 20, 2016), the Commonwealth Court upheld an order directing Claimant’s counsel to refund unreasonable contest counsel fees that were determined to have been erroneously awarded.

By way of background, Employer had originally prevailed on a suspension petition. On appeal, the Board reversed and remanded the matter to the WCJ with instructions to award unreasonable contest counsel fees together with compensation that had been previously suspended. On remand, the WCJ ordered Employer to pay \$14,750.00 in unreasonable contest counsel fees. The Board affirmed and Employer appealed. The Commonwealth Court reversed, finding the Board had erred in reversing the

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## A View from the Bench

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WCJ's earlier suspension petition. The court vacated both the compensation award and the counsel fee award. Employer obtained reimbursement of the compensation payment from the Supersedeas Fund, but not the unreasonable contest counsel fees, because fees and costs are not reimbursable under Section 443. Employer then filed a review petition seeking repayment of the counsel fees by Claimant's counsel. The WCJ found that Claimant's counsel had no legal obligation to repay Employer, and the Board affirmed the WCJ. Employer appealed to Commonwealth Court.

Relying on *Barrett v. WCAB (Sunoco, Inc.)*, 987 A.2d 1280 (Pa. Cmwlth. 2010), a case that ordered repayment by a claimant's counsel of litigation costs that were not owed, the Commonwealth Court held that Claimant's counsel must repay the \$14,750.00 unreasonable contest counsel fee to Employer. The court distinguished repayment from counsel versus repayment from a claimant, which is not permitted. The court held that unreasonable contest counsel fees, awarded as a cost under Section 440, have no special protection and should not be treated differently than any other type of litigation costs. In so holding, the court rejected several public policy arguments raised by Claimant and Amicus, i.e., that reimbursement would have a chilling effect on the representation of claimants and the pursuit of unreasonable contest fees. The purpose of Section 440 is to discourage unreasonable contests and to ensure that successful claimants receive compensation benefits undiminished by the costs of litigation, not to reward counsel and claimants who have pursued unmeritorious claims and legal positions. As such, allowing retention of erroneously awarded unreasonable contest counsel fees does not advance the purposes of the Act. The decision was issued by a three-judge panel, with a dissent.

### **Salvadori v. WCAB (UEGF & Farmers Propane Inc.)**

*Salvadori v. WCAB (Uninsured Employers Guar. Fund & Farmers Propane, Inc.)*, No. 2166 C.D. 2015, 2016 WL 7048049, 151 A.3d 278, (Pa. Cmwlth. Ct. filed Dec. 5, 2016) determined that because the Employer had insurance in Ohio that would cover the Claimant's work injury, the Employer was not uninsured and the UEGF was not secondarily liable.

Claimant was a truck driver for a trucking business in Ohio, however, Claimant's routes were primarily in PA and he was injured in PA. The employer did not have PA worker's compensation coverage. The Claimant filed petitions against the Employer and the UEGF. The UEGF submitted evidence, without objection by Claimant, in an attempt to rebut the presumption of insurance, including a section 305.2(c) certification form and a copy of correspondence from the Ohio Bureau of Workers' Compensation.

Ultimately, the WCJ granted Claimant's claim petitions against both Employer and the UEGF. The WCJ concluded that Claimant had successfully proven that he sustained

work-related injuries on February 4, 2013, which rendered him totally disabled as of that date. The WCJ also concluded that the UEGF was secondarily liable for payment of the award because the evidence of record established that Employer did not maintain insurance in Pennsylvania at the time of Claimant's work injury and there was no evidence that Employer or its Ohio insurance carrier complied with all of the requirements outlined in section 305.2 so as to be deemed to have secured the payment of compensation under the Pennsylvania Workers' Compensation Act. Employer and the UEGF thereafter filed appeals with the Board.

The Board affirmed the decision of the WCJ as to the grant of Claimant's claim petition against Employer, but reversed the decision of the WCJ as to the grant of Claimant's claim petition against the UEGF. In reversing the WCJ's grant of Claimant's claim petition against the UEGF, the Board held that the WCJ erred in finding that the UEGF was secondarily liable for payment of the award. More specifically, the Board concluded that the section 305.2 certification submitted into evidence established that Employer was not uninsured, that Employer had secured the payment of compensation under Ohio law and that Claimant was entitled to benefits under said law. The PA claim against the Employer was upheld, but the UEGF was not secondarily liable because the Employer was not uninsured.

The Commonwealth Court affirmed explaining that Section 305.2(c) of the Act simply permits an out-of-state employer to file a certification form with the Pennsylvania Bureau of Workers' Compensation in order to access its Ohio coverage for payments. The benefit of this legislative enactment is clear, that the responsible employer, and not the UEGF, is liable for the payment of compensation benefits. Because the certification form submitted into evidence by the UEGF conforms to the requirements of section 305.2(c) of the Act, the Board properly held that Employer was deemed to be insured as a matter of law. The Board did not improperly reject the supported findings of the WCJ, re-weigh evidence or interpret inferences in the manner least favorable to Claimant. Instead, the Board merely held that the WCJ's finding that Employer was uninsured was not supported by the record.

### **Whitmoyer v. WCAB (Mountain County Meats)**

In *Whitmoyer v. Workers' Compensation Appeal Board (Mountain County Meats)*, 150 A.3d 1003 (Pa. Cmwlth. Ct., filed Dec. 1, 2016), the Commonwealth Court held that the term "compensation" in Section 319 of the Workers' Compensation Act, relating to subrogation of employers to the rights of employees against third persons, encompasses medical expenses in addition to indemnity benefits.

By way of background, Claimant sustained a work-related amputation of his arm in 1993. In 1994, Claimant commuted his entitlement to indemnity and specific loss benefits in exchange for a lump sum. Employer remained responsible for Claimant's future medical expenses.

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Thereafter, in 1999, Claimant recovered \$300,000 in a third-party negligence claim. The parties entered into a third-party settlement agreement whereby employer was entitled to recovery of a net accrued (past) subrogation lien of \$81,627.87. The third-party settlement agreement further provided that the employer would be liable to Claimant for 37% of future medical expenses, up to the recovery balance of \$189,416.27. The 37% represented Employer's pro-rata share of the litigation expenses incurred by Claimant in the negligence action.

Notwithstanding the third-party settlement agreement, Employer paid all of Claimant's medical expenses for the next several years, without applying the credit. In 2012, Employer filed a petition to modify the third-party settlement agreement. The WCJ modified the percentage of Employer's reimbursement to Claimant from 37% to 26.09%. The Board affirmed. On appeal to the Commonwealth Court, as well as in the proceedings below, Claimant took the position that Section 319 does not allow a credit against medical expenses incurred after payment of a third-party subrogation lien. Claimant argued that such credit only applies to "future installments of compensation", and future medical expenses do not constitute installments of compensation.

The court examined the statutory language and reaffirmed prior decisions holding that medical expenses are included within the definition of "installments of compensation" under Section 319 and are subject to recovery. The court acknowledged prior case law holding that when the legislature uses the term "compensation" ambiguously in a provision of the Act, courts must engage in a case-by-case analysis in order to ascertain legislative intent. In the instant scenario, the court determined that the legislature's objective in enacting Section 319 was threefold: to prevent double recovery for the same injury by the claimant, to ensure that the employer is not compelled to pay compensation made necessary by the negligence of a third party and to prevent a third party from escaping liability for its negligence. Therefore, the rationale underscoring the legislature's objective in enacting Section 319 would be undermined if medical expenses were excluded from recovery.

The court also addressed and rejected several alternative arguments proffered by Claimant, including whether there was a binding agreement to not apply the credit to medical bills, whether Employer waived or released its Section 319 rights, and whether Employer should be estopped from asserting a claim for credit as to future medical expenses by paying medical expenses for a number of years without reduction.

### **Duffey v WCAB (Trola-Dyne Inc.)**

In *Duffey v. WCAB (Trola-Dyne, Inc.)*, 2017 WL 277462, (Pa. 2017), filed January 19, 2017, reversing, 119 A.3d 445 (Pa. Commw. 2015), the Pennsylvania Supreme Court has held that the Impairment Rating Evaluation (IRE) physician, when undertaking the evaluation, is not

only to assess the diagnoses or injured body parts that are on the Notice of Compensation Payable (NCP), or have been otherwise accepted by the employer. Instead, the IRE physician is to take into consideration further consequential injuries which have developed as of the date of the IRE. The court ruled that the NCP does not "circumscribe" the range of health-related conditions to be considered in the IRE process.

A worker, Duffey, was employed by Trola-Dyne. In March 2009, he injured both hands when he picked up "hot" electrical wires. His injuries, inscribed upon the NCP, were "bilateral hands, electrical burn [while] stripping some electric wire." The claimant was paid TTD voluntarily. Thus, in March 2011, he had received 104 weeks of such benefits. In the meantime, the claimant developed psychogenic issues and had received treatment. Yet, the NCP still simply recorded the upper extremity injuries.

The IRE physician thereafter accorded claimant a 6% permanent impairment. Within three weeks, claimant filed a review petition asserting that the IRE was invalid "because the description of the injury was incomplete." In the litigation which followed, claimant and two physicians testified. The WCJ credited claimant's physician, who testified that claimant had developed PTSD well before the IRE. The WCJ, in the wake of these facts, invalidated the IRE "Because claimant had established that he suffered additional work injuries, the WCJ concluded that [the IRE] was invalid because it did not address claimant's additional work related injuries." The WCJ also amended the NCP to include PTSD and an adjustment disorder. The Appeal Board, however, reversed, as claimant had never sought to amend the NCP before the IRE. Commonwealth Court affirmed.

The Supreme Court reversed and restored the WCJ ruling invalidating the IRE. The Court held that the law "explicitly invests in physician-evaluators the obligation 'to determine the degree of impairment due to the compensable injury.'" Thus, the IRE physician "must consider and determine causality in terms of whether any particular impairment is 'due to' the compensable injury." The Court pointed out, notably, that the *AMA Guides* assessment applies to the "whole body." In addressing this whole-body impairment evaluation, the IRE physician "must exercise professional judgment to render appropriate decisions concerning both causality and apportionment." Here, the IRE physician failed to do so, neither seeking to assess claimant's psychogenic condition or referring the claimant out to a specialist. The IRE physician misunderstood the "scope of his responsibilities," and thus the WCJ had properly invalidated the IRE.

### **Susan Riley v. WCAB (Commonwealth of Pennsylvania)**

In *Susan Riley v. WCAB (Commonwealth of Pennsylvania)*, No. 238 C.D. 2016, 2016 WL 7157234, (Pa. Cmwlth. Ct., filed Dec. 8, 2016) the Court reaffirmed its earlier holding in *Johnson v. WCAB (Sealy Components Group)*, 982 A.2d 1253 (Pa. Cmwlth. 2009) that because the claimant did

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not file her Petition to Review the IRE within the initial 60 day window following the IRE, she had waived her right to appeal pursuant to section 306(a.2) (2) of the Act.

In *Riley*, Claimant's IRE was performed under the Fifth Edition of the Guides to Impairment in 2003. Claimant did not challenge it within 60 days of Defendant filing the Notice of Change in Status. Claimant filed a 2012 Review Petition seeking to expand the description of injury and alleging that the IRE physician failed to consider the complete description of injury in providing the 21% whole person impairment rating. The WCJ denied the Review Petition and concluded that Claimant did not have an impairment rating of equal to or greater than 50%. Claimant appealed and while that Decision was on appeal to the WCAB, the Commonwealth Court decided *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406, 416 (Pa. Cmwlth. 2015), *appeal granted*, 133 A.3d 733 (Pa. 2016). Claimant then filed in 2015, more than 10 years after the completion of her IRE, a motion to vacate the IRE. The WCAB denied it based on *Johnson*, as it was filed more than 60 days after the determination and there was no evidence of more than 50% impairment. Claimant appealed the WCAB's opinion.

Claimant alleged that the WCJ erred in failing to expand the description of injury and that the WCAB erred in failing to apply *Protz*. The Commonwealth Court affirmed. The Court noted the WCJ's decision denying the Petition to Review the description of injury was supported by the objective evidence and the WCJ's credibility determination. The Court then addressed the *Protz* argument. Citing *Johnson*, the Court noted that the claimant in *Protz* had preserved the constitutional issue within the initial 60-day period whereas the Claimant in this case did not. The Court also discussed *Wingrove v. WCAB (Allegheny Energy)*, 83 A.3d 270, 276 (Pa. Cmwlth. 2014), noting that a claimant cannot use a subsequent edition of the Guides to challenge the IRE when he fails to do so within the initial 60-day period and fails to present evidence of greater than 50% impairment. The Court also discussed *Ruse v. WCAB (Valley Medical Facilities Sewickley)*, (Pa. Cmwlth. No 952 C.D. 2014), filed Jan. 13, 2016, a post-*Protz* decision which indicates that claimant can preserve the right to raise the constitutional argument if the challenge is raised during the 60-day period. The *Riley* opinion was initially an unreported decision, but was subsequently reported on January 24, 2017

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