Tom Wolf | Governor

W. Gerard Oleksiak | Secretary

News & Notes

Vol. 23 | No. 2

"Serving all Pennsylvanians"

Spring 2018

2018 Workers' Compensation Conference

The 17th Annual Pennsylvania Workers' Compensation Conference will be held on June 7-8, 2018, at the Hershey Lodge and Convention Center, Hershey, Pennsylvania.

This year's event will feature a keynote address on medical marijuana. Come to this exceptional and popular conference for updates on significant and timely topics such as:

- **60 tips in 60 Minutes**
- **Opioid Use: Where are we Now?**
- **Workers' Compensation Medical Marijuana – Medical**
- **The Gig Economy: Workers' Compensation and Liability Consideration**
- **Workers' Compensation Medical Marijuana – Legal/HR**
- **Opioid Use: The Road to Recovery**
- **Workers' Compensation Jeopardy**

Nearly 1,400 people registered to attend the 2017 conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor and others. Attendance at this event promises a sharing of practical, useful and timely information and provides attendees with the unique opportunity to network with other workers' compensation professionals while renewing valuable contacts. Attendees will also have the opportunity to visit with 125 vendors and learn about their workers' compensation-related goods and services.

View Complete Details

Register Online Now

Questions:
800-482-2383 (Toll Free Inside PA)
717-772-4447 (Local and Outside PA)
Email: RA-LI-BWC-Helpline@pa.gov

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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 the workers' compensation community.

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

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

Employer Information Services	*Claims Information Services*	*Hearing Impaired*	*Email*
717-772-3702	toll free inside PA: 800-482-2383 local & outside PA: 717-772-4447	PA Relay 7-1-1	ra-li-bwc-helpline @pa.gov

Auxiliary aids and services are available upon request to individuals with disabilities.
Equal Opportunity Employer/Program

A Message from Scott G. Weiant
Director – Bureau of Workers' Compensation

The workers' compensation system in Pennsylvania has experienced much change over the last several years, including business process automation, manual process changes, and personnel changes within the bureau that has amounted to many years worth of institutional knowledge gone. There has been a flurry of activity on the legislative front and much attention focused on the opioid crisis and where the workers' compensation system touches this issue.

Throughout all this change, bureau staff have remained resilient, accepting challenge after challenge to move the bureau forward to better serve all our stakeholders, both internal and external. None of this change could have been accomplished successfully without the participation and input from bureau staff, and you, our stakeholders. I want to thank each of you for your great ideas, suggestions, and at some intervals, your patience! Looking forward, I want to encourage each of you to become an active partner, participating in focus groups, suggesting process enhancements, and simply letting us know what is on your mind. Together, we can continue to make the workers' compensation system better for all.

BWC Appoints New Division Chiefs

BWC is pleased to announce the recent appointments of two new division chiefs; Leandra Kilgore has been appointed chief of the Claims Division, following the retirement of Gina Signore. Charece Collins has been appointed chief of the Self-Insurance Division.

One new division chief is a long-time member of the BWC family, and the other is returning to the bureau for this appointment.

Claims Chief Leandra Kilgore's commonwealth employment began at the Bureau of Workers' Compensation in 2003 as a clerk. Throughout her years with the commonwealth, she has worked at the bureau as well as other agencies expanding her knowledge and growing her career. She most recently held a position with the bureau as a program analyst.

In her new duties as chief of the Claims Division, Leandra manages the bureau's data quality, the authorized release of bureau records, and the processing of documents and Electronic Data Interchange (EDI) transactions received on workers' compensation claims. This division has been responsible for the commonwealth's EDI formatting for over a decade. However, in 2016, the division moved forward with a new responsibility when it created Forms Solution, which enables adjusters to generate forms directly from the Workers' Compensation Automation & Integration System (WCAIS).

In addition to its repository responsibilities, her division also provides information to the workers' compensation community through their helpline and outreach efforts.

Self-Insurance Chief Charece Collins returns to the bureau with extensive experience. After graduating from Dickinson School of Law in 2007, Charece began her career at the Bureau of Workers' Compensation as a law clerk.

In 2011, Charece enhanced her law experience by working with several regional law firms where she represented insurance carriers, self-insured employers and third-party administrators in workers' compensation matters.

In her new duties as chief of the Self-Insurance Division, Charece manages the processing and decision of individual employers for self-insurance status under Section 305 of the Workers' Compensation Act and Section 305 of the Pennsylvania Occupational Disease Act, sets conditions for self-insurance and monitors self-insured employers' compliance with these conditions.

Her division also processes and decides applications of groups of employers to operate as group self-insurance funds under Article VIII of the act and regulates and monitors the financial conditions of the group funds, including the setting of rates, the maintenance of surplus and the distribution of dividends to members. The division is responsible for collecting and tabulating information needed to issue assessments against insurers and self-insurers to maintain special funds established under the act.

Among its other duties, her division administers the Self-Insurance Guaranty Fund and the use of financial security to remedy defaults of self-insurers.

Please join BWC in congratulating Leandra and Charece and wishing them success in their new positions.

It’s Time to Apply!
2018 Governor’s Award for Safety Excellence

If you’re proud of your safety and prevention program for its impact on reducing employee injuries, financial and other achievements, why not apply for the Governor’s Award for Safety Excellence? The purpose of the award is to recognize outstanding prevention programs and the superior efforts that make these programs so successful. Companies can nominate themselves or be nominated by a third party.

If you would like to nominate your committee you can download the nomination form or get more information.

All applications must be submitted by June 1, 2018, to:

Barbara White
Program Coordinator
Bureau of Workers’ Compensation
Health & Safety Division
1171 South Cameron Street
Harrisburg, PA 17104

For additional information or assistance, call 717-772-1917 or email barbawhite@pa.gov.

PATHS
Your No-Fee Safety Training Resource

PATHS (PA Training for Health and Safety) is a no-fee, statewide service that provides employers and employees with easy access to cost-effective health and safety resources. PATHS provides a single, comprehensive website where you can register for webinars on over 208 safety-related topics, including the annually required training for both initial and renewal certification of a workplace safety committee. PATHS offers numerous PowerPoint presentations, videos, safety posters, toolbox talks, and safety forms that cover a wide variety of health and safety topics. These resources are all available for use by employers to maximize their employee safety training efforts.

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers’ compensation premium discounts as of March 20, 2018:

11,953 committees
covering
1,529,520 employees

Cumulative grand total of employer savings:
$692,660,174

Visit PATHS at www.dli.pa.gov/paths. You can contact the Health & Safety Division by phone at 717-772-1635 or by email at ra-li-bwc-paths@pa.gov.

Kids’ Chance of Pennsylvania
Hope, Opportunity and Scholarships for Kids of Injured Workers

Paying for college is hard. Paying for college when one or both of your parents have been seriously or fatally injured in a workplace accident seems nearly impossible. For more than 20 years, Kids’ Chance of Pennsylvania, Inc. (Kids’ Chance of PA) has helped to lessen the impact of these high costs by providing scholarships to the children of these families.

Since its inception in 1997 Kids’ Chance of PA has awarded scholarships amounting to over $1.7 million, and that number continues to grow. During the 2017-2018 academic year, 53 scholarships were awarded to students, totaling $175,000. These scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors.

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 of PA, please contact us at 215-302-3598 or visit www.kidschanceofpa.org.

13th Annual Kids’ Chance of Pennsylvania
Golf Outing
Tee off for the Kids

Wednesday, June 6, 2018
Golfer Registration Opens: 11:00am
Recognition Luncheon: 12:00pm
Tee-Off: 1:30pm

Hershey Country Club
1000 E. Derry Rd
Hershey, PA 17033

Download Registration Form

Or visit www.kidschanceofpa.org for more information

Save the Date!!
Pennsylvania Governor's Occupational Safety and Health Conference

Hershey Lodge and Convention Center
October 29-30, 2018

This annual conference promotes and encourages the idea that workplace safety benefits everyone. Reducing workplace accidents and injuries through the creation and maintenance of safe, accident-free workplaces benefits employees, employers and local communities.

The Pennsylvania Governor's Occupational Safety and Health Conference (GOSH) provides invaluable resources to cultivate safe workplaces and encourage the use of best safety practices to prevent workplace injury and death.

This year's conference features exhibits and multiple workshops that provide timely information to promote the safety of workers in the commonwealth.

More information is available online at http://pasafetyconference.com.

2018 Medical Fee Schedule

The **2018 Medical Fee Schedule** is now available online.

Impairment Rating Evaluations

Protz Decision - On June 20, 2017, the Pennsylvania Supreme Court issued its decision in Protz v. WCAB (Derry Area School District), Nos 6 WAP 2016, 7 WAP 2017, holding that Section 306(a.2) of the Workers' Compensation Act (77 P.S. § 511.2) is an unconstitutional delegation of legislative authority.

The court's opinion makes clear that the entirety of Section 306(a.2) is unconstitutional. The Bureau of Workers' Compensation will no longer designate physicians to perform Impairment Rating Evaluations.

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.

First-time offenders may be eligible to enter 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:

Fayette County On Feb. 21, 2018, Senior Judge Gerald R. Solomon entered Kirk Young into the Accelerated Rehabilitative Disposition Program for a period of six months; ordered him to perform fifty hours of community service; be evaluated by Fayette County Adult Probation and Parole for participation in the automated reporting system; pay $1,235.75 in costs and fees; and to pay restitution of $23,442.42 to the Uninsured Employers' Guaranty Fund.

Columbia County On Feb. 27, 2018, Got Trash, Inc., Jeremy Evans and Carrie Ralston agreed to and paid a negotiated restitution in lieu of prosecution to the Uninsured Guaranty Fund in the amount of $12,500.00.

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

Notice to All Pennsylvania Workers' Compensation Self-Insurers

The Department of Labor & Industry, Bureau of Workers' Compensation (Bureau) would like to provide this important reminder concerning the required timeframes related to the submission of renewal applications for self-insurance in Pennsylvania. The bureau is providing this reminder to encourage ongoing compliance and facilitate the timely submission and processing of renewal applications prior to the expiration of a current self-insurance permit.

Section 305 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 501(a)(3), provides for the issuance of a self-insurance permit for a period of twelve (12) calendar months; all permits issued under this section expire and terminate on the last day of the 12-month period for which they are issued. Section 125.3(b) of the Workers' Compensation Self-Insurance Regulations, 34 Pa. Code § 125.3(b), provides that renewal applications shall be filed with the bureau no later than three months prior to the expiration of the current permit.

Compliance with the three-month requirement is necessary to ensure that all required information and documentation can be submitted and reviewed prior to the expiration date of the current permit. The bureau will not issue a decision on an application until the application, including any and all additional items that may be requested by the bureau pursuant to Section 125.3, have been submitted. 34 Pa. Code § 125.3(e).

Where the bureau requests additional information or documentation from a renewal applicant, the applicant is generally required to submit those items within 21 days; if the renewal applicant does not provide the additional information within the prescribed time period, the application will be deemed withdrawn. 34 Pa. Code § 125.3(d). Further, even where the renewal applicant has or is in the process of submitting the required additional items, if the renewal applicant failed to timely file a renewal application under Section 125.3(b) they will not be entitled to an automatic extension of their current permit beyond its expiration date. 34 Pa. Code § 125.7(b).

Whether the renewal application is deemed withdrawn due to the applicant's failure to provide additional items under Section 125.3(d), or the bureau is simply unable to issue a decision on the renewal application before the expiration of the current permit following a late filing of that application, the self-insurer would be required to obtain workers' compensation insurance coverage effective as of the permit expiration date, and provide evidence of that coverage to the bureau, to avoid a lapse in coverage for its employees.

Notice to all Pennsylvania Workers' Compensation Group Fund Self-Insurers

The Department of Labor & Industry, Bureau of Workers' Compensation (Bureau) would like to provide this important reminder concerning the required timeframe related to the submission of applications for membership in a group self-insurance fund in Pennsylvania. The bureau is providing this reminder to encourage ongoing compliance and facilitate the timely filing and processing of membership applications pursuant to the bureau regulations.

Section 802 of the Pennsylvania Workers' Compensation Act (Act), 77 P.S. § 1036.2, allows homogeneous employers to pool their liability under the Act through participation in a group fund approved by the department. Section 807 of the Act further provides that applications for prospective new members to join an existing group fund must be approved by the fund and filed with the department. 77 P.S. § 1036.7. Section 125.136(b) of the Workers' Compensation Self-Insurance Regulations, 34 Pa. Code § 125.136(b), provides that approved applications to add a new member to a fund shall be filed with the bureau no later than 15 days after the effective date of the employer's membership in the fund.

Compliance with the 15-day requirement is necessary to ensure that all required information and documentation can be submitted and reviewed in a timely manner for the bureau to determine whether the addition of the new member will affect the fund's continuing ability to satisfy its obligations, or will disturb the homogeneity of the fund. 34 Pa. Code § 125.136 (d), (e). If the new member disturbs the fund's homogeneity, the bureau is required to notify the fund and the new member's participation in the fund terminates 15 days after the issuance of the notice. 34 Pa. Code § 125.136(e).

Following such notice, the employer would be required to obtain workers' compensation insurance coverage effective as of termination, to avoid a lapse in coverage for its employees.

Meet the OLCAM Building Safety Committee

The OLCAM Building Workplace Safety Committee is committed to maintaining a safe work environment which actively involves all employees in identifying, preventing, and correcting workplace safety issues to reduce accidents and injuries. They are committed to the safety and welfare of all employees through prevention, education and awareness with the ultimate goal of reducing or eliminating workplace accidents.

The safety committee is responsible to:

- Assist in the agency's safety and health efforts by identifying and recommending solutions for workplace safety and health issues.
- Hold regular meetings to ensure safety and health issues are reviewed and ideas for improvement are regularly considered and communicated to management.
- Assist in the identification and correction of workplace hazards.
- Bring workers and management together in a cooperative effort to promote safety and health in the workplace.
- Set committee goals and objectives and monitor progress and achievements.
- Review or investigate injuries and provide recommendations to prevent recurrences.
- Assist in the communication of safety and health information to employees.
- Develop safe work practices.

Agency managers and supervisors are responsible to:

- Ensure all applicable health and safety rules, procedures, and work practices are adhered to or enforced in the workplace.
- Provide or disseminate safety information to employees as appropriate.
- Assist in identifying and reporting hazards within the workplace.
- Provide job specific safety orientation to all new employees and upon assignment of a new task or operation that has exposure to hazards.
- Ensure employees receive or participate in the necessary safety training.
- Take or coordinate the corrective actions necessary to address any unsafe work conditions or acts with the guidance or support of the agency safety coordinator.
- Report and investigate all incidents and injuries by completing the appropriate workers' compensation and safety report forms.
- Provide or make available the necessary safety or personal protective equipment required for the work environment or task.

Employees are responsible to:

- Know and adhere to established safety procedures, rules, and work practices.
- Properly utilize and maintain all agency provided safety or personal protective equipment and controls.
- Immediately or as soon as practicable report all workplace injuries or incidents to their supervisor.
- Report all workplace hazards or safety concerns through the safety suggestion process, supervisory chain of command, or agency safety coordinator.
- Participate in all required agency safety training and education.
- Upon request for volunteers to assist the agency with the Workplace Safety and Health Program, consider volunteering to participate in safety committees, emergency evacuation teams, first responder training, and any other safety or health group established by the agency.

If you notice a safety concern please feel free to bring it to the attention of one of the committee members, or your manager/supervisor, so the issue can be addressed at their next safety meeting.

WCAIS Enhancements

The following enhancements were incorporated into the Workers' Compensation Automation and Integration System (WCAIS) on April 6, 2018:

EDI Community

Change Transactions submitted with blank fields, where previous transactions populated that field, will return a TA ACK (Transaction Accepted Acknowledgement) with a message stating: Blank Field(s) = No Change. Trading Partners do not need to update their claims processing systems.

As a reminder, filers seeking to change data in a field must replace the previously submitted data with new data rather than leaving the field blank. Leaving a field blank will NOT remove the previously submitted information.

A View from the Bench

Commonwealth Court Rejects Retroactive Application of Construction Workplace Misclassification Act

In D & R Construction v. WCAB (Suarez), 167 A.3d 837 (Pa. Cmwlth. 2017), the Commonwealth Court held that the Construction Workplace Misclassification Act (CWMA) did not apply retroactively, and cannot be used as guidance in applying the traditional common law test to determine the existence of an employment relationship.

The claimant alleged he sustained a compensable injury six months before the CWMA's effective date. Claimant filed claim petitions against the alleged employer, D&R Construction, and the Uninsured Employers Guaranty Fund (UEGF). The WCJ applied the traditional common law criteria and found that the claimant was an independent contractor and dismissed the petitions. On appeal, the board reversed and remanded, finding that the claimant was an employee, citing the CWMA as "instructive" in making that finding.

On appeal, the court agreed with the defendants. At the outset, the court found that the CWMA is substantive, not procedural, and therefore could not be applied retroactively. The court further rejected the board's reasoning that the CWMA clarifies the common law's traditional factors, and could therefore be relied upon as guidance. In so finding, the court noted that the CWMA's provisions were substantially different from the traditional common law factors. Moreover, the CWMA dictates strict application of each criterion, and the absence of one criterion will negate the independent contractor status. This is in contrast with the Workers' Compensation Act and the resulting case law, where there are no mandatory factors; rather, there is a weighing of factors, with control being a primary factor.

Two Recent Federal Court Decisions Impact Workers' Compensation Practice:

(1) Workers' Compensation Judge Has Exclusive Jurisdiction to Decide Rescission of a Workers' Compensation Insurance Policy

American Builders Insurance Company v. Custom Installations Contracting Services, Civil Action No. 3:15-295 (Western District of PA, Aug. 18, 2017), 217 WL 5501357

This decision from the Western Federal District Court is significant because the trial judge deferred the issue of rescission of a WC insurance policy allegedly obtained by fraud to exclusive workers' compensation (WC) jurisdiction.

Custom Installation Contracting Services (Custom), a Pennsylvania company, obtained a WC policy from out-of-state insurer American Builders Insurance (American). American allegedly limited its policy coverage and did not insure either roofing work or any work to be performed more than 15 feet above ground. Custom verified that it did not do either type of work. American issued a WC policy. Two months later, a Custom employee was working on a roof, fell 25 feet to the ground, and was rendered a quadriplegic. Pursuant to American's WC policy in effect, claimant received wage and medical benefits exceeding $1 million.

American then filed suit against Custom in federal court, requesting rescission of the policy and monetary damages for fraud. It did not give notice of the suit to claimant and did not advise the trial judge that it was already paying claimant. After completing pre-trial discovery, American filed a motion for summary judgment on the rescission issue only, which Custom, by then insolvent, did not oppose.

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The trial judge granted the motion, rescinding the policy.

American promptly filed a termination petition in claimant's WC case, asserting the federal court's rescission order. When claimant learned of the potential uninsured status of Custom, he filed a UEGF claim petition. After the WCJ denied supersedeas, American filed an injunction request in the federal suit, seeking an order that it did not have to pay claimant or his medical providers. Claimant and UEGF petitioned to intervene in the federal action and argued that the federal court did not have jurisdiction over the WC insurance policy rescission issue, and that this issue had to be decided in the WC forum.

The trial judge's August 18 memorandum decision provided a lengthy discussion of the facts and case law before vacating the rescission order and dismissing American's injunction request, finding that the rescission of the WC policy between American and Custom was exclusively a workers' compensation issue to be decided initially by a WCJ.

American's fraud claim against Custom remains open, and American can seek reimbursement from Custom for all payments it has to make to, or on behalf of, claimant due to Custom's alleged fraud. American has filed an appeal to the 3rd Circuit.

(2) A Compromise and Release Agreement and Decision Do Not Preclude Actions That are Not Premised on the Workers' Compensation Act

Zuber v Boscov's, No. 16-3217 (Third Circuit Court of Appeals, Sept. 11, 2017), 871 F.3d 255

In this matter, the claimant had settled his Aug. 12, 2014, workers' compensation claim against the employer by compromise and release (C&R) agreement in an April 8, 2015, decision. Three months later, on July 9, 2015, he filed a federal civil suit against his former employer alleging that: (1) it violated his Family Medical Leave Act (FMLA) rights; (2) it retaliated against him for exercising his FMLA rights; and (3) it fired him in retaliation for pursuing a workers' compensation claim. The district court's April 8, 2016, opinion dismissed the complaint on the employer's motion, finding that the C&R agreement was a general release of all claims, including the three claims asserted in this action. On the plaintiff's (claimant) appeal, the Third Circuit found that the C&R resolution did not contemplate the claims made in this suit but only resolved the work injury claim, *i.e.* wage loss, medical expenses, and other benefits enumerated in the Workers' Compensation Act. It did not resolve FMLA or retaliatory termination of employment claims. The appeals court reversed the trial court's dismissal order and remanded the case for further proceedings.

The recently revised C&R agreement form, LIBC-755, added language to clarify that it resolved matters "… under the Workers' Compensation Act only."

Hawbaker vs. WCAB (Kriner's Quality Roofing Services and Uninsured Employer Guaranty Fund)

The opinion of the Pa. Commonwealth Court in Hawbaker v. WCAB (Kriner's Quality Roofing Services and Uninsured Employer Guaranty Fund), 159 A.3d 61, filed Feb. 13, 2017, was the subject of the following Per Curiam Order of the Pa. Supreme Court:

"And now, this 12th day of October 2017, the Petition for Allowance of appeal is DENIED." No. 300 MAL 2017, 2017WL 4552432 (Table)

The Commonwealth Court opinion was discussed on Pages 10 and 11 of the Fall 2017 issue of *News & Notes*.

Significance of the Description of the Injury in an Indemnity Only C & R Agreement: Subsequent Utilization Review

In Thomas Haslam v. WCAB (London Grove Communication), 169 A.3d 704 (Pa. Cmwlth. 2017), the claimant suffered a 1998 injury when he fell off a roof. The opinion indicates he suffered fractures to his right ankle, tibia, and fibula, and left calcaneus and injuries to his neck and low back. The court notes that the original Notice of Compensation Payable was not made part of the record in this litigation so the exact injuries accepted by the employer were unknown. A 2001 supplemental agreement described the work injury as "right and left foot fractures." The parties entered into an indemnity only Compromise & Release Agreement which described the work injury as, "various injuries and bodily parts, including but not necessarily limited to, fractured right and left feet."

In 2014, employer filed a Utilization Review Request regarding compound medication allegedly prescribed for Reflex Sympathetic Dystrophy or Complex Regional Pain Syndrome (RSD/CRPS). Employer lost the Utilization Review Determination and filed a Review Petition asserting that the diagnosis of RSD/CRPS was not expressly accepted in the Compromise and Release Agreement. Claimant then filed a Review Petition seeking to expand the description of injury to include the CRPS.

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A View from the Bench

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The workers' compensation judge denied employer's Utilization Review Petition and granted claimant's Review Petition, finding that the CRPS and the compound medications to treat the CRPS were within the description of injury contained in the Compromise and Release Agreement. Defendant promptly appealed to the Workers' Compensation Appeal Board.

The Workers' Compensation Appeal Board reversed both of the WCJ's holdings, stating that the injuries as described in the Compromise and Release Agreement could not be expanded after the fact, and that CRPS was not within the "various injuries" language. The board noted claimant was treating for CRPS more than five years before the C&R, so it should have been specifically included, if acknowledged. The board asserted that by interpreting the language in the Compromise and Release Agreement regarding "various injuries" to be entirely open ended would defeat the purpose of encouraging settlements and providing finality. Claimant appealed the board's opinion to the Commonwealth Court.

The Commonwealth Court reversed the board's opinion and reinstated the underlying workers' compensation judge's decision. The court first discussed the defendant's Petition to Review the UR Determination. The court noted that the employer conceded the medications were reasonable to treat CRPS, but argued that as it had only accepted bilateral foot fractures the treatment was not reasonable and necessary. The court construed this as a causation argument, not cognizable in a UR, which accepts relatedness. The court indicated that employer should have filed a Petition to Review Medical Treatment or Billing but did not, and ruled that employer's Petition to Review UR had to be denied. See, Bloom v. WCAB (Keystone Pretzel Bakery), 677 A.2d 1314 (Pa. Cmwlth. 1996).

Concerning claimant's Review Petition, the court cited DePue v. WCAB (N. Paone Construction, Inc.), 61 A.3d 1062 (Pa. Cmwlth 2013), finding that the injury description could not be expanded once set forth in the Compromise and Release Agreement. However, the court considered the language of the C&R, and found that employer agreed to pay medical bills not only for the foot fractures but for treatment "all reasonable and necessary medical expenses that are related to the aforesaid acknowledged work-related injury (ies) pursuant to the terms and conditions of the Pennsylvania Workers' Compensation Act, as amended." As there was an obvious connection between the fractures and resultant foot pain, the court placed the burden of proof of non-relatedness on employer (and not relatedness on claimant). Employer did not meet its burden to offer medical evidence that CRPS was a separate and distinct injury. On Jan. 31, 2017, the Supreme Court denied employer's petition for allowance of appeal. No. 662 MAL 2017.

C & R: Failure of TPA to Comply With a Non-Disbursement Order

In Coffman v. Kline, 167 A.3d 772, Pa. Super., filed July 24, 2017, the Pennsylvania Superior Court determined that a TPA was required to comply with a non-disbursement order, even though the settlement amount was less than the $5,000 statutory threshold for liens against a workers' compensation award. The court held that since the TPA willfully violated the non-disbursement order with wrongful intent, it could be held in contempt. The facts are simple. The claimant was settling his workers' compensation case. He had child support arrearages in excess of $13,000.00. Domestic Relations learned of the settlement plans and issued a Non-Disbursement Order directed to the TPA, Sedgwick. When the C&R was scheduled, the claimant's share was less than $5,000. Relying on Act 109, 23 Pa. C.S.A. 4308.1(i), the WCJ did not order payment of the known arrearages. It appears from the opinion that the WCJ was not made aware of the Non-Disbursement Order. Based on the WCJ's decision, and despite its knowledge of the Non-Disbursement Order, Sedgwick paid claimant's entire share to him. When Domestic Relations found out, it filed a Civil Contempt petition for mother's benefit against Sedgwick in the Court of Common Pleas. The trial court dismissed the petition, finding that the specific language in 4308.1(i) was inconsistent with, and took priority over 23 Pa. C.S.A. 4305(b) (10) (i) and (ii), which gave Domestic Relations general seizure power. However, the Superior Court in the 2009 decision of Campbell v Walker, 982 A.2d 1013 (Pa. Super. 2009), already held that the sections were complementary, not inconsistent, and that a wage attachment or non-disbursement order for arrearages was enforceable against the entire award, not just the amount over $5,000. The Superior Court then essentially found that Sedgwick was in contempt, reversed the dismissal, and remanded for a hearing. The court also discussed its 2008 *Faust v Walker* decision that explained that, when only Act 109 applies, a claimant gets to keep the first $5,000.

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A View from the Bench

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Specific Loss: Need for Competent Medical Evidence that Loss of Use is Permanent

In Morocho v. Workers' Comp. Appeal Bd. (Home Equity Renovations, Inc.), 167 A.3d 855, Pa..Cmwlth., filed Aug. 3, 2017, claimant filed a petition against Home Equity and the UEGF which included a request for an award for loss of use of his right index finger for all practical intents and purposes. The claimant's medical expert only provided that there was a loss of use for all practical intents and purposes "at this time." Employer's medical expert said the finger was functional, although limited. The WCJ believed claimant's doctor and awarded permanent injury benefits for the finger. The WCAB reversed, finding that the evidentiary burden of permanence was not met. The Commonwealth Court affirmed the WCAB. A claimant has the affirmative burden to prove "permanence" by competent medical evidence. The WCJ cannot infer that a loss of use injury is permanent by a simple factual description.

The doctor's report, which did not specifically state that the loss of use was permanent and why, was not sufficient; his language did not imply permanence. Further, the court said that a remand to take additional evidence on the permanence issue, as requested by claimant's counsel, was not required. They believed the claimant, by the exercise of due diligence, could have raised this question before the WCJ. A remand is not appropriate since the claimant had sufficient opportunity to present evidence.

The Department of Labor and Industry, Uninsured Employers Guaranty Fund v. WCAB (Lin and Eastern Taste)

The opinion of the Pennsylvania Commonwealth Court in the Department of Labor & Industry, Uninsured Employers Guaranty Fund v. WCAB (Lin and Eastern Taste), 155 A.3d 103, filed Feb. 17, 2017, was the subject of the following Per Curiam Order of the Pa. Supreme Court:

"**AND NOW**, this 23rd day of August 2017, the Petition for Allowance of Appeal is **GRANTED**. The issue, as stated by petitioner, is:

(1) Whether the Commonwealth Court's decision interpreting the language of the Construction Workplace Misclassification Act (CWMA) to mean that the CWMA only applies to circumstances where the putative employer's industry or business is construction was in error?

No. 124 EAL 2017, 170 A.3d 1006 (Table). The Commonwealth Court opinion in this matter was discussed on Pages 9 and 10 of the Fall 2017 issue of *News & Notes*.

The Hartford Insurance Group on Behalf of Chunli Chen v Kafumba Kamara, Thrifty Car Rental and Rental Car Finance Group

The opinion of the Pennsylvania Superior Court in the Hartford Insurance Group on behalf of Chunli Chen v. Kafumba Kamara, Thrifty Car Rental and Rental Car Finance Group, 155 A.3d 1108, filed Feb. 10, 2017, was the subject of the following Per Curiam Order of the Pennsylvania Supreme Court:

"**AND NOW**, this 9th day of August 2017, the Petition for Allowance of Appeal is **GRANTED**. The issues, as stated by petitioner, are:

a. Can a workers' compensation lienholder bring a third-party action on behalf of the injured worker to recoup amounts paid to the injured worker from the alleged tortfeasor contrary to the standard set in *Liberty Mutual Insurance Company v. Domtar Paper Co.*, 631 Pa. 463, 113 A.3d 1230 (Pa. 2015)?

b. Did the Superior Court fail to see that the failure to attach the verification of Chunli Chen to plaintiff's complaint and decision to attach the verification of the insurance adjuster with knowledge of the lien, supports the argument of [petitioners] that this lawsuit was brought without the cooperation of Chunli Chen and solely on behalf of the insurance company in an attempt to subrogate its lien in direct contradiction of the standard set in *Liberty Mutual Insurance Company v. Domtar Paper Co.*, 631 Pa. 463, 113 A.3d 1230 (Pa. 2015)?

c. Is the caption, and effect of the caption, "The Hartford Insurance Group On behalf of Chunli Chen" synonymous with "Liberty Mutual Insurance Company, as subrogee of George Lawrence" as it appears in *Liberty Mutual Insurance Company v. Domtar Paper Co.*, 631 Pa. 463, 113 A.3d 1230 (Pa. 2015)?

No. 205 EAL 2017, 170 A.3d 982 (Table). The Superior Court opinion in this matter was discussed on Page 5 of the Fall 2017 issue of *News & Notes*.

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A View from the Bench

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Volpe Tile and Marble, Inc v. WCAB (Redelheim) Supersedeas Fund Reimbursement

In Volpe Tile and Marble, Inc. v. WCAB (Redelheim), 170 A.3d 1275, (Pa. Cmwlth. 2017), the application of Nationwide Insurance for Supersedeas Fund Reimbursement was denied because the compensation for which reimbursement was sought was "in fact payable" per the terms of §443(a) of the Act, 77P.S. §999(a).

In October 2010, the WCJ granted a Reinstatement Petition effective Dec. 20, 2007 regarding a 2006 injury sustained by the claimant. During the litigation of the Reinstatement Petition, Nationwide had joined Liberty Mutual, contending that the Dec. 20, 2007 incident, (which gave rise to the Reinstatement Petition) was a new injury. As of Dec. 20, 2007, Liberty Mutual was the insurer for the employer. In the October 2010 decision, the joinder had been denied. Nationwide appealed the decision granting the reinstatement and the denial of the joinder and requested supersedeas. That request for supersedeas was denied by the WCAB in November 2010.

Following the denial of supersedeas, Nationwide paid the past due benefits and resumed payment of weekly benefits. During the pendency of the appeal, (in July 2012) Compromise and Release Agreements between the claimant and Nationwide and between the claimant and Liberty Mutual were approved. Per the C&R Agreement with Nationwide, the parties agreed to resolve all claims for future indemnity, future medical and specific loss benefits starting on June 25, 2012, in exchange for the payment of $50,000.00. The agreement provided that the appeal would proceed so that the board would eventually enter a decision on the merits of that appeal and determine claimant's entitlement to the payment of indemnity and medical benefits for the period of July 5, 2006 to June 24, 2012. The Compromise and Release Agreement with Liberty Mutual provided in relevant part as follows: "The sum of $50,000.00 represents payment of all future indemnity claims for the work-related injuries of Dec. 20, 2007."

In December 2012, the board reversed the December 2010 decision which had granted reinstatement against Nationwide, concluding that the December 2007 incident was an aggravation or new injury.

The board remanded the matter for the WCJ to determine the average weekly wage and compensation rate for the December 2007 new injury. Upon remand the WCJ dismissed the Reinstatement Petition as moot due to the approval of the C&R with Nationwide. The WCJ likewise dismissed the Joinder Petition against Liberty Mutual as moot due to the C&R between the claimant and Liberty Mutual.

Nationwide then filed an application for reimbursement from the Supersedeas Fund which the WCJ denied in March 2015. Nationwide appealed, and the WCAB affirmed concluding that all the requirements of §443(a) had not been met by Nationwide because in the board's words: "It was determined here that Nationwide should not have paid compensation to claimant, not that [he] should have never received compensation."

On appeal to the Commonwealth Court, Nationwide argued that the benefits which it paid following the November 2010 denial of its supersedeas request were "not payable" as contemplated by §443(a). The Commonwealth Court discussion begins by stating that: "In establishing the (supersedeas) fund in the Commonwealth's Treasury, the General Assembly legislated reimbursement, under specified circumstances…(for) workers' compensation benefits that were subsequently determined not to be owed." The court's opinion refers to a number of previously reported commonwealth opinions involving supersedeas fund reimbursement. The court summarizes the factual circumstances as discussed above, which resulted in the pending supersedeas reimbursement request. The final paragraph of the court's opinion succinctly sets forth the court's analysis and reason for its denial of reimbursement, and affirmance of the WCAB.

The court wrote: "What can be garnered from these cases is that, even though the fund was developed to protect employers or insurers that make compensation payments that are later, by virtue of administrative or judicial action, determined not to be required or owed, reimbursement is warranted only under prescribed circumstances. *Sweigart*, 84 A.3d at 366. The present appeal pertained to whether the applicant for supersedeas fund reimbursement met the criterion that compensation was not payable to claimant. Resolution of this issue did not hinge upon which carrier was responsible for the payment of compensation or whether the liable carrier had entered into a C&R.

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We will not bypass the plain language of Section 443(a) of the Act and rule contrary to the law providing for reimbursement only if specific criteria are satisfied. In summary, employer cannot circumvent a final determination concluding that compensation is payable to claimant."

Commonwealth Court, in First Reported Decision to Apply Protz, Holds that Supreme Court Disapproval of *AMA Guides* Applies in Case Where Permanent Impairment was Being Litigated but Where Constitutionality had Never Been Raised

Thompson v. WCAB (Exelon Corp.), 168 A.3d 408 (Pa. Commw. 2017), 2017 WL 3495982

I. Summary

In the first case to apply *Protz*,* the claimant, whose challenge to her Oct. 13, 2005 IRE of 23 percent under 5th Edition of *Guides* was pending in Commonwealth Court at the time of the final *Protz* ruling, was held entitled to an order of reinstated total disability. According to the court, "under *Protz* … Section 306(a.2) is stricken and no other provision of the Act allows for modification of benefits based on an IRE." The court so held notwithstanding the fact that claimant had not filed an appeal of the 2005 IRE within 60 days. In this regard, the court by an earlier decision in the case (January 2016) had excused her late challenge because of a defect in the original 2005 Notice of Change filing.

The court, notably, did not engage in an extensive discussion of retroactivity, but rejected the employer's waiver argument based on claimant's failure to raise the constitutionality issue.   The court stated, "Because this matter began before *Protz I* and *Protz II* were decided and this appeal implicates the validity of Section 306(a.2) (1) of the Act, claimant raised this issue at the first opportunity [she had] to do so."

A procedural anomaly of case was that, although employer already held a "statutory change" to partial, it nevertheless filed, in December 2010, a *Gardner*-style modification petition when claimant had approximately 100 weeks of partial disability benefits left, thus prompting claimant to file *her own* challenge some five years after IRE. Employer apparently filed the petition to clarify, with finality, the ending date of the 500 weeks.

* Protz v. W.C.A.B. (Derry Area School Dist.), 161 A.3d 827, 2017 WL 2644474 (Pa. 2017).

This clarification was apparently desired as the claimant, after the injury, had received certain periods of severance pay and unemployment, during which she did not receive total disability.

II. Facts of the Case

Claimant, Thompson, was employed by Exelon Corporation. She sustained an injury arising in the course of employment on Oct. 16, 1998. She was paid benefits voluntarily under a NCP. In the 60-day period following her 104 weeks of TTD receipt (interrupted by periods of unemployment), employer failed to request an IRE. However, after another year or so, employer requested, on Sept. 19, 2005, that claimant attend an IRE. The IRE was convened with Dr. Bonner on Oct. 13, 2005. Dr. Bonner accorded claimant a 23 percent impairment rating. Claimant thereupon received the Notice of Change (a bureau form). Notably, the form at that time admonished the recipient that if he or she wished to appeal within 60 days, he or she may do so, but a *requirement* of the same was claimant's possession of medical evidence of an impairment of 50 percent or more. Claimant, in the face of this IRE and this admonition, filed no appeal.

Five years passed.

III. Initial Litigation

Then, on Dec. 29, 2010, employer filed to modify/suspend, alleging that claimant's 500 weeks would end effective Oct. 8, 2012. As noted in the summary, employer was apparently seeking a declaration or advisement from the judge that the partial disability, which had already seemingly been established, would end its run on a date certain. Claimant, for her part, cross-petitioned. She alleged that she was not at MMI in 2005 and hence the IRE opinion was defective. The WCJ in material aspect granted employer relief, and claimant appealed. The board affirmed, ruling that claimant was barred from relief because she had not appealed within the 60 days.

Commonwealth Court vacated and remanded. It held that the then-extant version of the Notice of Change was inadequate and thus deprived claimant of her due process rights.

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On remand on the merits, the board concluded that the employer's calculation of the 104 weeks was correct, and that the evidence supported Dr. Bonner's 23 percent rating.

IV. Second Appeal to Commonwealth Court

Claimant, appealing once again, argued that the employer and board had (1) miscalculated the 104-week period, (2) that claimant was not at MMI, and (3) that the IRE was defective as the doctor had used the 5th Edition of the *Guides*, "the use of which, at the time of the filing of the petition for review, had been declared unconstitutional [in 2015] by this court in *Protz I* …."

Employer, in response, argued:

> "…that claimant failed to timely raise the issue of Dr. Bonner's use of the Fifth Edition of the *AMA Guides* and that claimant should be barred from raising the constitutionality of Section 306(a.2)(1) of the Act because claimant failed to notify the attorney general of a constitutional challenge."

The court, however, rejected any waiver argument:

> "Because this matter began before *Protz I* and *Protz II* were decided and this appeal implicates the validity of Section 306(a.2)(1) of the Act, claimant raised this issue at the first opportunity to do so. *See* Pa. R.A.P. 1551(a).
>
> "…[T]hus, claimant is not precluded from raising the issue of the improper use of the Fifth Edition of the *AMA Guides* on appeal. *See Mazuruk v. Workers' Comp. Appeal Bd. (Gillin & Sons Contracting, Inc.)*, 2016 Pa. Commw. Unpub. LEXIS 720 (Pa. Cmwlth., No. 1216 C.D. 2015, filed Oct. 14, 2016) (applying *Protz I* even though case was decided after board's decision and claimant's petition for review).
>
> "…[F]urthermore, claimant was not required to notify the attorney general of a constitutional challenge, because she is arguing that this court should remand for the WCJ to apply our precedent in *Protz I*, which concluded that Section 306(a.2)(1) of the Act is unconstitutional as to the Fifth Edition of the AMA Guides.
>
> Claimant, herself, is not litigating the constitutionality of Section 306(a.2)(1) of the Act, which has just recently been decided by our Supreme Court."

V. Final Ruling

The court, having rejected any waiver argument, proceeded immediately to the current law, that is, *Protz* as considered on appeal by the Supreme Court. The court declared:

> "Our Supreme Court, in *Protz II*, agreed that Section 306(a.2) constituted an unconstitutional delegation of legislative authority, but it disagreed with the remedy provided by this court. The Supreme Court concluded that as a result of the unconstitutional delegation, the entirety of Section 306(a.2) of the Act must be stricken as unconstitutional…. In so doing, the Supreme Court essentially struck the entire IRE process from the Act…. Thus, we are compelled to reverse the board's affirmance of the WCJ's modification of claimant's benefits, because under the Supreme Court's recent decision in *Protz II*, Section 306(a.2) is stricken and no other provision of the Act allows for modification of benefits based on an IRE."

The court concluded, "the board's opinion is reversed to the extent that it modified claimant's workers' compensation benefits from full [*sic*, should be "total"] to partial."

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Suspension Allowed When Claimant Quits a Light Duty Job Which Was Paying Pre-Injury Wages

In Torijano v. WCAB (In a Flash Plumbing), 168 A.3d 424 (Pa.Cmwlth. 2017), 2017 WL 3722013, the claimant sought review of the Sept. 21, 2016 order of the WCAB that affirmed the WCJ's decision to grant a suspension petition. By way of history, the claimant was employed by employer as a plumber's helper. On May 30, 2014, he sustained an injury which was accepted via a Notice of Compensation Payable as a low back strain. Subsequently, employer filed a petition to suspend benefits alleging a specific job was offered to the claimant, which he refused.

The claimant returned to work for the employer with restrictions in June of 2014. He was asked by his employer to call in before jobs and when he left, so that he could be directed to light duty jobs, and to report his hours. Claimant repeatedly did not call in as requested, which led to a reprimand. Claimant was asked to sign a paper acknowledging that the reprimand was discussed with him, causing him to become upset. Claimant did not show up for work again. Employer sent a letter advising him that light duty work continued to be available. Claimant was later released by his doctor to return to full duty. He never showed up for work again, even after receiving the full duty release.

Employer and claimant each presented fact and medical witnesses. Employer's evidence included testimony from the claimant's treating physician that claimant was restricted to light duty work for a period of time, and then fully recovered as of Aug. 19, 2014. Employer also offered four fact witnesses, who testified that claimant worked light duty without complaint and was not asked to perform work that would exceed his restrictions. Testimony also established that light duty work remained available to the claimant if he would show up for work. Claimant offered medical expert testimony that he was capable of light duty work, but not yet fully recovered. Claimant testified that he did not quit his job, but also admitted that he told the adjuster that the only reason he was not working was because of the reprimand he received.

The WCJ found all four fact witnesses to be credible and claimant's medical expert to be credible. The WCJ concluded that employer met its burden of establishing that work was available to the claimant, and that claimant quit of his own volition. The WCJ granted the suspension petition, but found that the claimant was not fully recovered. Claimant appealed to the board, which affirmed. Claimant then sought review of the board's order, arguing that the board erred in suspending his benefits when employer offered no medical evidence to establish that on the date claimant allegedly quit, he was capable of returning to his pre-injury job or that light duty was available.

The Commonwealth Court noted that, to suspend benefits, the employer must establish either that work within the claimant's restrictions was available **or** that claimant's loss of earnings was caused by something other than the work-related injury. It cited prior case law establishing that when a loss of earnings is no longer the result of a work-related disability, the employer is not required to establish job availability within a claimant's medical restrictions. Further, an employer does not need to demonstrate through medical evidence that a claimant is physically able to work or that available work has been offered when a claimant has voluntarily withdrawn from the workforce. In this case, the Commonwealth Court found there was substantial evidence to support that the claimant's loss in earnings was the result of his own actions in voluntarily quitting his job, and not the result of his work injury. The court found it significant that the claimant admitted to telling the adjuster the only reason he was not working was because of the reprimand. The court further noted that there was substantial evidence that claimant was working within his restrictions at the time he stopped working, and never complained that he was asked to do work that exceeded his restrictions.

The court concluded that because the claimant's loss in earnings was due to a factor other than his work injury, i.e. his voluntary quit, employer was not required to provide additional medical evidence regarding the claimant's physical limitations or to establish availability of a job within those restrictions. The court affirmed the order of the board.

Reinstatement Not Required Where the Renewed Disability is Cause by a Non-Work Related Condition

In McNeil v. WCAB (Department of Corrections, SCI-Graterford), 2022 C.D. 2016, (filed Sept. 1, 2017), the claimant sought review of a Nov. 17, 2016 order of the WCAB, which affirmed the decision of a WCJ dismissing claimant's reinstatement petition.

The claimant sustained an injury on Jan. 26, 2011, when she slipped and fell while trying to enter a truck while working as a gate sergeant. She sustained injuries to her left ankle and left shoulder. She filed a claim petition, and employer issued a Notice of Compensation Payable on March 7, 2011, accepting a left ankle sprain and left shoulder sprain. Employer subsequently issued an amended/corrected NCP which added the additional injury of a low back strain.

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The WCJ granted the claim petition, and acknowledged injuries including: left ankle sprain, acute cervical strain, acute back pain, musculoskeletal injury of the left shoulder, mild edema of the left ankle, left shoulder sprain, and tenderness of the left shoulder and upper and lower back.

On Aug. 15, 2013, employer filed a termination petition, which was premised upon a decision of an arbitrator under the Heart and Lung Act, in which the claimant was found to be fully recovered, as well as an IME opinion of full recovery. While the termination petition was pending, claimant filed a review petition, alleging an incorrect description of the work injury, and a penalty petition. These petitions were consolidated with the termination petition. Prior to the close of the record on the termination, review and penalty petitions, claimant was examined by Dr. Andrew Kuntz, and underwent an MRI of her left shoulder which revealed a partial tendon tear and degenerative changes. Claimant did not offer any evidence regarding Dr. Kuntz's exam or the MRI in the pending litigation. On Dec. 30, 2014, Dr. Kuntz performed surgery to the claimant's left shoulder, and provided additional diagnoses regarding the left shoulder, including left rotator cuff tear. The record was closed at the time of the surgery, but the WCJ had not issued a decision, and claimant did not ask for the record to be reopened.

The WCJ issued a decision on Feb. 2, 2015 granting the termination petition, granting the review petition to add thoracic and lumbar strains to the work injury, but denying that the left rotator cuff was work-related. Both parties appealed and the board issued a decision affirming the WCJ. Neither party appealed the board decision.

The claimant continued to follow-up with Dr. Kuntz who provided a report on Sept. 3, 2015 stating that it was his opinion that claimant's shoulder condition resulted from the work injury. Based on this report, claimant filed a reinstatement petition on Nov. 18, 2015, seeking a reinstatement of benefits as of Dec. 30, 2014, the date of her shoulder surgery.

One hearing was held on the reinstatement petition. No testimony was taken. The only evidence offered was the decision of the WCJ in the prior proceeding. There was dialogue between counsel confirming that the worsening of condition was the surgery performed to the rotator cuff in December of 2014. Employer made a motion to dismiss. The WCJ dismissed the reinstatement petition in an order circulated on Feb. 29, 2016. Claimant appealed to the board, which affirmed the WCJ. The board held that the attempt to add the rotator cuff tear was barred by the doctrine of collateral estoppel, and noted that even if a worsening of condition had occurred in December 2014, claimant did not establish that her condition changed since the prior termination proceeding, and was thus not entitled to a reinstatement of benefits.

Claimant appealed to the Commonwealth Court arguing that the board erred in (1) failing to consider the report of Dr. Kuntz, (2) holding that claimant did not meet her burden of establishing a causal connection between her condition and the work injury, and (3) holding that the worsening of her condition occurred prior to the termination of benefits.

The court affirmed the board's dismissal of the reinstatement petition, holding that the burden of proof on a reinstatement after a termination requires a causal connection between the work-related injury and the recurrence of disability through an actual change in physical condition. The court found that the claimant was barred by the doctrine of collateral estoppel as the WCJ granted the termination petition and excluded the rotator cuff from the work injury in the prior litigation. The court further noted that even if not collaterally estopped, claimant's counsel admitted at the first hearing on the reinstatement petition that the petition was premised on the surgery done in December of 2014, prior to the decision on the termination petition, so the claimant did not show any worsening of her condition following the termination of her benefits.

The court noted that claimant was bound by the statements of her counsel made on the record at a hearing, even though she was not present of the hearing, as her attorney was acting on her behalf and within the scope of his authority. The court also discussed claimant's argument that the WCJ erred in failing to consider Dr. Kuntz's report as part of the record. Claimant's counsel had attached the report to the brief, but did not offer it into evidence. The court reviewed the Special Rules 131.52 and 131.61 in holding that the report was not properly admitted and could not be considered as evidence.

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Claimant argued that the board erred in holding that the worsening of condition occurred prior to the previous termination of benefits. The court held that although the December 2014 surgery occurred after the May 2014 termination date, the subsequent WCJ decision found the injury not related, so any change in condition after May 2014 was irrelevant.

Motor Vehicle Accident: Course of Employment, Traveling Employee, Special Mission

In Rana v. WCAB (Asha Corp.), 173 A.3d 1279, Pa. Commw. 2017, filed Sept. 29, 2017, the Commonwealth Court has held that a fatally injured management worker of a restaurant chain, who was travelling due to an emergency situation at one of his employer's units, sustained such injury in an accident arising in the course of his employment.

The worker, Rana, was employed as a manager-trainee for a franchisee of Dunkin Donuts. The franchise had three units in Southeastern Pennsylvania, specifically in Wyncote, Horsham, and Hatfield. Rana was assigned primarily to the Wyncote location. Yet, one of his job duties was to respond to operational issues at other locations as well. On the day in question, Rana was traveling to a sick employee situation at the Hatfield unit when he was involved in a fatal automobile accident. The WCJ awarded benefits, finding that the deceased, a college student whose parents stilled lived in India, was in the midst of a special mission.

The appeal board reversed, ruling that Rana was merely commuting at the time. Commonwealth Court in turn reversed, ruling that the facts showed that claimant was in fact a travelling employee at the time of his death. In this regard, he had a permanent station at the Wyncote location, but otherwise he had no fixed site of work. The court also agreed with the WCJ that Rana was, in any event, in the midst of a special mission. The court, finding that claimant had a cognizable claim, then remanded. In this regard, another issue to be decided by the board was whether the parents, who were still resident in India, were entitled to Pennsylvania fatal claim benefits.

Workers' Compensation Word Scramble

RUINUDSEN	_ _ _ _ _ _ _ _ _
TOACEIICTFNRI	_ _ _ _ _ _ _ _ _ _ _ _ _
EMETNDJGU	_ _ _ _ _ _ _ _ _
JDNTOIACUADI	_ _ _ _ _ _ _ _ _ _ _ _
NEDMEMTNA	_ _ _ _ _ _ _ _ _
PLAPEA	_ _ _ _ _ _
ESITOPTNI	_ _ _ _ _ _ _ _ _
CAOLITUANCOP	_ _ _ _ _ _ _ _ _ _ _ _
OLTEUGARRY	_ _ _ _ _ _ _ _ _ _
ESERUSDSEAP	_ _ _ _ _ _ _ _ _ _ _

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