

News & Notes

VOLUME 28 ISSUE 2

"Serving all Pennsylvanians"

SPRING 2023

Gerald Mullery named Deputy Secretary of Compensation and Insurance



Former State Representative Gerald Mullery (also known as Jerry) was named the Deputy Secretary of Compensation and Insurance. Jerry was a member of the Pennsylvania House of Representatives, representing District 119 from 2010 to 2022.

He earned his bachelor's degree from King's College and his J.D. from Duquesne University School of Law. His professional experience includes working as an attorney for Michael J. O'Connor & Associates before becoming in-house counsel for the Lackawanna Insurance Group. In 2006, he opened his own private practice, Kasper & Mullery LLC.

"I'm very excited to accept this new role," Mullery said. "I have two and a half decades of experience in workers' compensation as a practitioner. I've represented injured workers, employers, and insurance companies and I have served as house counsel for a workers' compensation insurance company."

News & Notes is a quarterly publication issued to the workers' compensation community by the Bureau of Workers' Compensation (BWC), the Workers' Compensation Office of Adjudication (WCOA), and Workers' Compensation Appeal Board (WCAB). 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.

- Marianne Saylor, Director - Bureau of Workers' Compensation
- Joseph DeRita, Director - Workers' Compensation Office of Adjudication
- Alfonso Frioni Jr., Chairman - Workers' Compensation Appeal Board

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STILL TIME TO REGISTER!
22nd Annual Pennsylvania Workers' Compensation Conference
June 1-2, 2023



It's a conference you don't want to miss! Nearly 900 people registered to attend the 2023 conference, representing employers, case manager, third-party administrators, defense and claimant counsel, laborers, and others. Attendance at this event promises a sharing of practical, useful, and timely information to members of the workers' compensation community. Attendees will also have the opportunity to visit with 125 vendors and learn about their workers' compensation-related goods and services.

Questions?

(800) 482-2383

Email: RA-LI-BWC-Helpline@pa.gov

[REGISTER ONLINE!](#)

18th Annual Kids' Chance of PA Golf Outing

Still Time to Register!



Celebrate the Kids' Chance of Pennsylvania Golf Outing
Wednesday, May 31, 2023
Hershey Country Club | 1000 East Derry Road | Hershey, PA 17033

[Registration Form](#)

[Visit Kids' Chance of PA](#)

Email: info@kidschanceofpa.org

Deadline to Apply for the 2023 Governor's Award for Safety Excellence



On April 6, 2023 Acting Secretary Nancy Walker, through a press release, encouraged Pennsylvania employers to submit nominations for the annual Governor's Award for Safety Excellence (GASE).

This annual recognition highlights exceptional safety strategies and injury-prevention programs that protect Pennsylvania workers on the job and serve as a model for valuable best practices within a given industry.

[View the Press Release.](#)

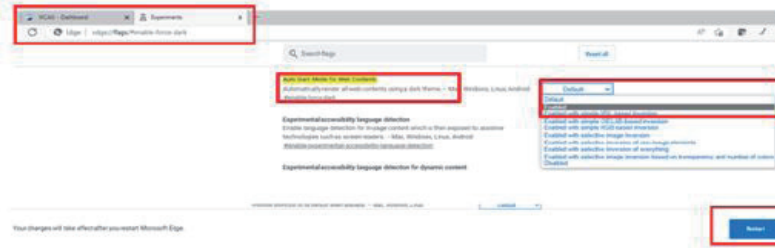
Companies can nominate themselves or be nominated by a third-party. All nominations must be submitted by June 1 to be considered for the current calendar year.

For more information and to download the nomination form visit the [GASE webpage](#). Email nomination forms to ra-li-bwc-safety@pa.gov and include 'GASE Nomination Form' in the subject line.



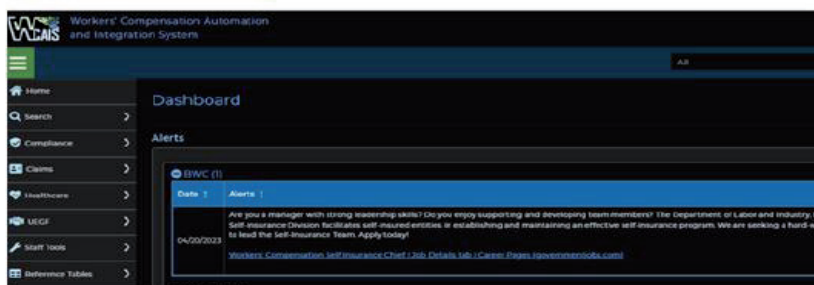
SPRINGTIME TIPS

Is WCAIS bright for your eyes? Want a darker background?
From Edge, new tab, type: `edge://flags/#enable-force-dark`



Auto Dark Mode for Web Content will pop up, please select Enable from drop down.

At bottom of tab, a Restart button will appear. Please click and wait ...



After a few seconds, return to WCAIS ... Your Dashboard will appear with a black background!

Claims Corner

Online Trading Partner Agreement Applications are here!

The bureau implemented our new Online Trading Partner Agreement Application (TPI) process on March 31. All new or amended TPIs may be submitted quickly and easily using the new screens.

Were you unable to attend the training? Don't worry, we've got you covered! [Access the training](#) and the new [Trading Partner Agreement Guide](#) online.

Remember, you can simply amend your existing TPI if you need to add or inactivate a Claim Administrator or add, delete, or edit a contact for your company. To file your annually required TPI or change your submission method, a new TPI is needed.

TIP: Please ensure all registered users maintain their WCAIS login details, such as emails, direct phone numbers with ext., and names so you won't miss any key notifications.

SROI FN and SROI PD Filing Made Even Easier!

Beginning June 30, we will reduce some EDI edits to assist filers in increasing their acceptance rates. The bureau will allow SROI FN transactions on claims where a closing transaction has already been accepted. Additionally, SROI PD transactions will be accepted on claims already in Medical Only status. *Please know that these EDI submissions will not trigger new Forms Solution forms.*

By no longer issuing a Transaction Rejected (TR) for the duplicative filings on these two transaction types, we hope to help reduce the filer's costs associated with their rejections.

And the best news is that EDI filers don't need to change their coding!

Records Request Dashboard

Need workers' compensation records from the bureau? Just submit your request online using the one-stop shop Records Request Dashboard, accessible from your WCAIS Dashboard's Quick Links. If you are not a WCAIS user, [get registered today!](#)

Utilizing the online process offers postage savings, a timely response, access to the request's response for 90 days, eco-friendliness, and allows the bureau to continue processing requests at no charge.

Except for non-WCJ-issued subpoenas, all requests may be submitted online.

Spring into Action with Cleanup Safety Tips

Blue skies, chirping birds, and warming temperatures — April and May are prime time for getting home exteriors, yards, and gardens back into shape. Before you get started on your outdoor to-do list, consider these safety precautions.

Dress for yard cleaning

- Wear protective footwear. Wear shoes or boots, not sandals, to protect your toes.
- Apply bug spray to keep pests away. Shower after use to remove the chemicals from your skin. And while you're at it, take a minute to look for ticks. If you find one, gently pull it out with tweezers.
- Apply sunscreen or skin products with SPF 30 to any exposed skin to help prevent sunburn. Don't be fooled by cloudy days; you can still get a sun burn.

Work smart

- Stretch your body. Take time to stretch and warm up before the work begins. Weeding, trimming, and raking are repetitive motions so change your posture or stance every few minutes and switch activities every 30 minutes.
- Lift things carefully and safely. Lift properly by bending at the knees and hips and using leg power rather than bending at the waist and putting the strain on your back. Instead of carrying heavy or unwieldy loads, use a cart or wheelbarrow.
- Drink water and take breaks in the shade. Even if it's not hot or humid, yard work is exercise, and staying hydrated is important to avoid heat-related illness.

Protect loved ones

- Watch out for children and pets. See that children and pets are inside, or well supervised if out, while you work.
- Securely store tools and equipment. Store sharp tools, weed killer, fertilizer, and other dangerous items in a locked cabinet out of reach of curious hands and mouths.
- Educate and supervise kids with tools and equipment. Before allowing any child to operate a mower, sound judgment, strength, coordination, and maturity are necessary.

A View from the Bench

[Teresa L. Fegley, as Ex'x of the Est. of Paul Sheetz, Petitioner v. Firestone Tire & Rubber \(Workers' Comp. Appeal Bd.\)](#), No. 680 C.D. 2021, 2023 WL 2543474 (Pa. Cmwlth. Ct. Mar. 17, 2023).

This matter involved a Penalty Petition and a Petition to Review the Utilization Review Determination. The primary issue was whether the employer and its insurance carrier was obligated to reimburse the claimant for out-of-pocket expenses for medical marijuana.

Claimant had a 1977 work injury to his back, which included two surgeries. He had taken opiates and narcotics for 30 years. He had been able to wean from the narcotics and opiates through the use of medical marijuana. A UR Determination found the use of medical marijuana reasonable and necessary. Claimant filed a Penalty Petition when the carrier failed to pay for the treatment. The WCJ denied the Penalty Petition finding that there was no obligation to reimburse medical marijuana. The WCAB affirmed. The Commonwealth Court held that employer's failure to reimburse claimant's out of pocket medical expenses constituted a violation of the act. The matter has been remanded to determine whether a penalty should be imposed.

At issue was Section 2102 of the MMA which provides, in pertinent part, "Nothing in [the MMA] shall be construed to require an insurer or a health plan, whether paid for by Commonwealth funds or private funds, to provide **coverage** for medical marijuana." 35 P.S. § 10231.2102. The court held that the plain language of Section 2102 of the MMA provides for *coverage* obligations for medical marijuana. Coverage is distinct from *reimbursement*. There is no language in the statute which prohibits insurers from reimbursing a claimant who lawfully used medical marijuana to treat a work injury.

Also in the discussion from the court was the fact that the MMA's policy declaration provides for medical marijuana as a therapy to mitigate suffering and enhance the quality of life of those suffering with

chronic pain. The intention of the MMA was to provide access to such medical treatment and to hold that injured workers are excluded from this potential treatment would be an absurd result denying injured workers the statutory right of receiving medical treatment for the work injury.

After finding that the MMA provided for reimbursement of medical marijuana under PA law, they addressed the argument by the carrier that ordering reimbursement would violate federal law. Section 841(a) of the Federal Controlled Substances Act (Federal Drug Act) provides, in relevant part, that "it shall be unlawful for any person knowingly or intentionally -- [] to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]" 21 U.S.C. § 841(a). Again, because the issue is reimbursement, there is no violation of this law on its face.

There was a lengthy dissent issued in this matter. We are still within the appeal period on this holding from the Commonwealth Court.

[Edward Appel, Petitioner v. GWC Warranty Corp. \(Workers' Comp. Appeal Bd.\)](#), No. 824 C.D. 2021, 2023 WL 2543141 (Pa. Cmwlth. Ct. Mar. 17, 2023).

This matter involved claimant's Petition to Review Medical Treatment and/or billing seeking an order from the WCJ compelling the insurance carrier to reimburse out of pocket expenses for medical marijuana.

Claimant had a 2006 work injury to his spine, which resulted in chronic pain. He was able to wean off opiates with the use of medical marijuana. The WCJ found the medical marijuana related to the work injury but found that the MMA prohibited reimbursement by the carrier. The WCAB affirmed. The Commonwealth Court held, like they did in [Fegley](#), that the medical treatment was reimbursable. The same statutory pro-

A View From the Bench (cont'd.)

visions were at issue and therefore the discussion was essentially the same.

There was a lengthy dissent issued in this matter. We are still within the appeal period on this holding from the Commonwealth Court.

Herold v. University of Pittsburgh, ___A.3d.___, (Pa. Cmwlth. 2023), WL 2028206, 2-16-2023 The Commonwealth Court applied the principles of *Tooev*, to the Occupational Disease Act (ODA). Herold was an employee of the university from 1976-2016 as a stationary engineer. Herold was exposed to asbestos until 2004.

In April of 2019, 15 years after the last workplace exposure, Herold was diagnosed with mesothelioma. An expert opinion linked the disease to the asbestos exposure. In October 2019, Herold filed a civil action in trial court in Allegheny County. The trial court denied the summary judgement motion of the university alleging the court had no subject matter jurisdiction because the action falls within the purview of the ODA and Workers Compensation Board (board) hence Herold must file a claim with the board. The Commonwealth Court agreed with the trial court, giving the trial court subject matter jurisdiction.

Applying the principles of *Tooev*, the Commonwealth Court concluded that an occupational disease that manifests more than four years after the employee's last exposure to the hazard causing the disease is not subject to the exclusivity mandate of the ODA. The exclusivity mandate only applies to a disease that causes death or disability within four years of the last workplace exposure.

The university's argument that primary jurisdiction requires Herold to seek relief from the board in the first instance was also rejected by the Commonwealth Court. "We discern no appreciable benefits in requiring the trial court to stay proceedings and transfer the matter for initial review by the board, which would then be required to transfer the matter back to the trial court..."

The Commonwealth decision is detailed with a rendition of the history of exclusivity of the WCA and ODA, the distinguishing arguments between coverage and compensation, *Tooev*, and the flaws in the WC system in the context of latent occupational disease, and statutory language interpretations of sections 301(c) and 303 of the ODA.

In *Philadelphia Surgery Center v. Excalibur Insurance Management Services, LLC (Bureau of Workers' Compensation Fee Review Hearing Office)*, 289 A.3d 157 (Pa. Cmwlth. 2023), the Commonwealth Court reversed a fee review hearing officer's order directing Philadelphia Surgery Center ("the provider") to reimburse Excalibur Insurance \$39,838.05 – the amount he found Excalibur Insurance overpaid provider. In ordering reimbursement, the court held that the fee review hearing officer had overstepped his authority under the Workers' Compensation Act ("Act").

In the underlying case, provider performed a work-related spinal cord stimulator implant and billed Excalibur Insurance \$134,016.13. Excalibur Insurance issued an explanation of reimbursement pursuant to which it paid provider \$54,231.88 for the implant. Provider then filed an application for fee review disputing the amount but not the timeliness of Excalibur Insurance's reimbursement. Following an investigation, the Fee Review Section determined that Provider was due \$14,393.83 for the implant. In so concluding, the Fee Review Section did not acknowledge Excalibur Insurance's prior payment of \$54,231.88 for the implant, even though Excalibur Insurance had referenced the \$54,231.88 payment in its response to the Fee Review Section's Letter of Investigation. Both the provider and Excalibur Insurance appealed the Fee Review Section's determination.

In concluding that the fee review hearing officer improperly awarded Excalibur Insurance reimbursement, the court notes that the fee review process only

A View From the Bench (cont'd.)

permits *providers* to challenge underpayments or denials of payment, while *insurers* are limited to contesting the administrative determinations of the Fee Review Section. Here, the Fee Review Section did not opine whether the amount it determined to be due provider had already been paid by Excalibur Insurance. Consequently, any overpayment was due to Excalibur Insurance's error at the billing stage and not because of any administrative decision made by the Fee Review Section. Although seemingly inequitable, the court reiterated that the regulations undergirding the fee review process must be construed in accordance with the act, under which no authority exists permitting the Bureau of Workers' Compensation ("bureau") to direct a provider to reimburse an insurer for an overpayment of fees for medical services. A legislative change in the act is required for the bureau to have such authority.

Sicilia v. API Roofers (WCAB), No. 287 MAL 2022

The Pennsylvania Supreme Court has granted the Petition for Allowance of Appeal in the case of *Sicilia v. API Roofers (WCAB)*, No. 287 MAL 2022.

The claimant suffered a work injury in 1999, which was accepted as a lumbar strain and knee contusion as a result of a fall from a ladder. The injury was later expanded by a stipulation accepted by a workers' compensation judge (WCJ) to include chronic pain, anxiety, and depression. The claimant underwent surgeries to his back, which were found to be causally-related to the accepted injury by a different WCJ. Still, the description of injury remained unchanged. In 2019, the claimant underwent an IRE. Based on the accepted injuries, claimant was found to have a whole-body impairment of 23%. In an addendum sent to the employer, the IRE doctor stated that if she included radiculopathy (the condition for which the surgeries

were undertaken), claimant would have a 45% impairment.

In a *Gardner*-style IRE Modification Petition, the WCJ discredited the IRE doctor when she opined that the radiculopathy was work related as no WCJ had previously amended the description of injury to include radiculopathy. The WCJ credited the IRE doctor's opinion of a 25% impairment and granted the Modification Petition. On appeal, the board rejected claimant's argument that "the WCJ erred in failing to consider reasonably related conditions not formally added to the NCP for which he underwent back surgeries that were previously determined to be the employer's responsibility." The appeal board affirmed the WCJ.

The Commonwealth Court reversed and remanded for an award of reinstatement of TTD benefits. The court stated that it was following *Duffey v. WCAB (Trola-Dyne, Inc.)*, 152 A.3d 984 (Pa. 2017), in holding that an IRE physician legitimately considers not only the NCP and/or adjudicative descriptions of a claimant's injury, but subsequent conditions which, in the doctor's professional judgement, are the result of the work injury.

The issues to be considered by the Supreme Court are:

- (1) Did the Commonwealth Court impermissibly expand the holdings in *Duffey v. WCAB (Trola-Dyne, Inc.)*, 152 A.3d 984 (Pa. 2017) . . . as to usurp the authority of the workers' compensation judge to determine the nature and extent of the compensable injury?
- (2) Did the Commonwealth Court err in reversing the Workers' Compensation Appeal Board by substituting [its] assessment of the credible testimony for that of the fact finder?

This is a quarterly publication of the
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Chairman, Workers' Compensation Appeal Board Alfonso Frioni, Jr.

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