pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

NEWS & NOTES

"Serving All Pennsylvanians"

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Josh Shapiro, Governor
Nancy Walker, Secretary

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WCAB Hires Two New Commissioners

The Workers' Compensation Appeal Board (WCAB) welcomed two new commissioners: the Honorable Maura Mundy, Esq., and the Honorable Gina Cerilli Thrasher, Esq. Both Commissioners have already made a great impact on WCAB.

Commissioner Mundy joined WCAB with more than 25 years of workers' compensation litigation experience, representing both claimants and defendants. She began her career with a clerkship for Workers' Compensation Judge Paul E. Baker. Thereafter, she defended a large insurance company in her capacity as staff counsel. In 2013, she and her partner opened a practice devoted exclusively to the representation of injured workers. Most recently, her focus had been on defending the interests of clients such as SWIF, the Commonwealth, and the Turnpike Commission.

Commissioner Mundy graduated from Kings College and the Widener University of Law. She resides in Palmyra with her daughter Ryann, and her Shih-Tzu, Dan. In her spare time, she enjoys running and a good cabernet.

Prior to joining WCAB, Commissioner Cerilli Thrasher was twice elected as a County Commissioner for Westmoreland County. She was the youngest female elected county commissioner in the Commonwealth. Commissioner Cerilli Thrasher received her undergraduate degree and her MBA from Philadelphia University, and her law degree from Duquesne University. She lives in Latrobe with her husband Ernie and their one-year-old son Leo Maximus. She enjoys traveling, trying new restaurants and wine with her husband, Sunday dinners with her extended family, and family evening walks around the neighborhood with her husband and son and their eight-pound Yorkie, Zoe Meatball.

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23rd Annual WC Conference

Join us for the 23rd Annual Pennsylvania Workers' Compensation Conference, May 30-31, 2024, at the Hershey Lodge & Convention Center, Hershey, Pennsylvania.

Come to this exceptional and popular conference for updates on significant and timely topics such as:

Avoiding Litigation

Home Is Where the Risk Is

Improving Outcomes Post-Concussion

Don't Fear the Fee Review

The New Face of Mental Health

AI Role in Workers' Comp: Processing Claims

Out of the Weeds: Medical Marijuana in Workers' Comp

Attendance at this event promises a sharing of practical, useful, and timely information. Take advantage of this 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.

Reservations for overnight accommodations at the Hershey Lodge must be made by contacting the lodge on or before May 1, 2024, at (855) 729-3108 or click here.

When making your reservations, advise the lodge that you are attending the "Bureau of Workers' Compensation Conference 2024" to get the conference room rate of $182, plus 11 percent tax per room, per night.

It's a conference you don't want to miss!

Click here for more information.

Click here to register.

Questions?

800-482-2383 (Toll-Free Inside PA)

717-772-4447 (Local and Outside PA)

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

TEE OFF FOR THE KIDS'

Join us for the 19th Annual Kids' Chance of PA Golf Outing

Wednesday, May 29, 2024
Hershey Country Club
100 East Derry Road
Hershey, PA 17033

Click here for more information.

Click here to register.

Kids' Chance of PA

Hope, opportunity, and scholarships for kids of injured workers.

At Kids' Chance of Pennsylvania, we're dedicated to helping our kids who need it most – those who need assistance for college or vocational education because a parent was killed or seriously injured in a work-related accident. The hardships created by the death or disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams.

Since its inception in 1997, Kids' Chance of PA has awarded over 1,000 scholarship grants to eligible students of more than $2.6 million in tuition assistance. During the 2023-2024 academic year, we awarded $188,000 in scholarships to 40 students. Through our involvement with the PHEAA/PATH program, two thirds of our recipients are eligible and received additional funds to relieve their financial burden!

Kids' Chance of Pennsylvania scholarships are made possible by the generous contributions of our scholar sponsors, corporate and community partners, and donors. Donations can be made online, and by check, or through corporate donation programs like United Way or SECA. We are proud to announce the establishment of endowment funds to support our scholarship program now and well into the future! Information on how to send direct donations to the long-term endowment fund will be available on our website, www.kidschanceofpa.org, by contacting us via email at info@kidschanceofpa.org, or by telephone at (215) 302-3598.

In addition to the donation sources listed above, Kids' Chance of Pennsylvania holds several fundraising events throughout the year, such as our annual golf outings in Hershey and Plymouth Meeting and our 5K Run/1-Mile Fun Walk in Pittsburgh. We held a Silent Auction and a Classic and Exotic Car Show last fall.

New for 2024, we are developing a Student Engagement Committee to explore additional ways that we can support our recipients with their future career aspirations after they graduate.

We need your help in spreading the message of Kids' Chance of Pennsylvania! If the family has young children, we have a Planning for the Future database where we store this information and reach out to the family when the children are old enough. Our mission is about supporting as many students as possible, and we need you to do that. Please reach out and we will send you information to pass on, or you can direct the family to our website – https://kidschanceofpa.org. Thank you for doing your part to help us give #moremoneyformorekids!

BWC Blood Drive a Success

On Jan. 17, 2024, the Bureau of Workers' Compensation and the American Red Cross sponsored a blood drive. The event was held in the cafeteria of the Labor & Industry building and was staffed by volunteers from the bureau's Self-Insurance Division.

As a result of the combined efforts of the bureau's staff and the blood donors from L& I, we were able to collect 26 pints of blood. In fact, 77 percent of the blood donors were first-time donors.

The willingness of Labor & Industry staff to commit their time to make this event successful shows their generosity, selflessness, and dedication to helping others. Of course, the real winners are the patients in need of blood. As you may know, the American Red Cross has recently declared an emergency blood shortage, and each blood donation can help save up to three lives.

You asked. We listened.

WCAIS Release 4.2 will arrive on Friday, March 29.

We are pleased to announce a new column (Claimant/ Employee Name) will be visible in the Correspondence Grid of your WCAIS Dashboard.

WCAIS Workers' Compensation Automation and Integration System

FIRST LAST

All Matters | Search...

Dashboard

Personalize Your Dashboard

My Claims

Add Item

Alerts

- BWC (0)
- WCOA (0)
- WCAB (1)
- General (0)

Quick Links

WCOA Dashboard | New WCAB Briefs and Requests Dashboard | Records Request Dashboard | File a WCOA Petition | Judges' Procedures and Policies

Correspondence (494)

Search Correspondences

Correspondence Status

Unread Read

View Status	Document Type ↕	Case #	Claimant/Employee Name	Date Sent ↕
	Notice of Continuance Venue Change Request Granted	MISC-1111	LAST, FIRST	02/23/2024
	Continuance Venue Change Request and Proof of Service	MISC-2222	LAST, FIRST	02/23/2024
	Continuance Venue Change Request and Proof of Service	MISC-3333	LAST, FIRST	02/23/2024
	Continuance Venue Change Request and Proof of Service	A23-1111	LAST, FIRST	02/23/2024
	Supersedeas or WCAB Central Office Order	REH-1111	LAST, FIRST	02/23/2024

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« ‹ 1 2 3 4 ... › »

WCAIS Virtual Training with Teams

Have you joined our bi-monthly WCAIS trainings via Teams?

If not, watch for more to come in 2024!

March 28	**2:00-2:30 p.m. EST**	**Filing an Appeal**	**Hosted by WCAB**
May 23	**2:00-2:30 p.m. EST**	**Entry of Appearance**	**Hosted by WCOA**

Please watch for additional email communications and share this training information with all WCAIS users in your office.

Training is provided by a partnership of the Bureau of Workers' Compensation (BWC), Workers' Compensation Office of Adjudication (WCOA), and Workers' Compensation Appeal Board (WCAB).

Claims Corner

WCAIS Bi-Weekly Teams Training – Records Request Dashboard

In January, the bureau conducted training open to all stakeholders for the ins and outs of the Records Request Dashboard. We want to thank the many who attended, and if you missed it, the recorded session can be found by clicking here.

If you're looking for more information or have questions about requesting bureau records, please submit any questions to us via a customer service ticket using the category of WCAIS and the sub-category of Request Bureau Records or call 717-787-3361.

As a reminder, you may quickly obtain bureau records online when you are a party to the claim, have a signed, in-date authorization, or have a subpoena.

Claims Corner (Cont'd.)

EDI Virtual Training Modules

Thank you to those who have joined us for the bureau's four easy-to-advanced EDI training modules. If you couldn't attend the training or want to review it again, click here to view the recordings.

If you were able to attend the sessions, we would love your feedback to help us move forward. If you haven't already submitted your feedback on the EDI 4-Part Learning Series Levels 100-400, click here to take this survey and let us know how you feel about the information we provided.

If you're interested in additional information on EDI, we offer individualized one-on-one trainings to insurers and TPAs. These trainings address adjusters' concerns and filing questions. If you're interested, please email RA-CMDEDI@pa.gov for questions, or to get something scheduled.

The guides discussed in the modules can be found by clicking here.

Are you looking for information on the Pre-ACSR list?

The Annual Claim Status Report, or ACSR, is currently on hold, but keeping your claims in WCAIS current shouldn't be.

To assist filers with maintaining their claims, we have periodically sent out lists of open claims that still need filings. Although there isn't a due date for completing your pre-ACSR list, it is vital to work on updating the claims to align the data in WCAIS with the data in your system. The bonus is that updating the claims will make your future ACSR lists smaller and more manageable!

- You don't have to dig through your paper files or create new forms for these old claims. Group together claims where these are unavailable and get us a list with the suspension or closure date, and we'll take it from there! If you can't easily locate the date, note that these claims will get marked suspended as of the beginning of this year.

- Any old form, even if the form type is on the Actions tab dropdown, may be added to the Documents & Correspondence tab as a miscellaneous document. We don't want to cause confusion by having old forms reviewed by staff, especially since the regulations say the Suspend/Mod must be filed within seven days of the suspension or modification date.

- Your review is an excellent opportunity to review your processes so that you can correct any coding or staff training issues where gaps may exist. Ensuring you don't miss EDI filings will help you keep claims off your future ACSR lists!

It really is as simple as aligning your information in WCAIS with your system's records. For more assistance, a complete list of tips to help your claim review can be found by clicking here.

One-on-One Personal Training

The Healthcare Services Review Division is pleased to announce that we are offering one-on-one personal training for healthcare professionals, healthcare providers, and their attorneys or billers. We are currently providing training for filing medical fee reviews online in WCAIS. In this training, you will be provided with step-by-step instructions on the following:

- How to file a new application for fee review
- How to resume a draft application for fee review that has already been started
- Completing all sections of the fee review
- What happens after the fee review has been submitted

If interested, please contact us at RA-LI-BWC-HCSRD@pa.gov. We look forward to hearing from you!

New WCAIS feature coming soon!

File an online Medical Fee Review application and let us do the entry for you!

As of March 29, 2024, you will have an option to choose for BWC staff to enter all service lines from a bill.

The option to enter your own service lines remains.

If you would like us to show you how to use this exciting new feature, please contact the resource account at RA-LI-BWC-HCSRD@pa.gov,

We are seeking your participation in the annual Medical Accessibility Study!

This study gives healthcare providers and insurance carriers a voice to share important opinions on the workers' compensation efforts in Pennsylvania.

The bureau has contracted with FieldGoals.US, a Harrisburg-based healthcare research firm, to conduct this study. Each year, injured workers, providers, and carriers are surveyed to determine whether injured workers have access to quality medical treatment for their injuries. The survey is brief and should take about five minutes to complete.

If you would be interested in completing the survey to provide your feedback regarding adequate access to quality healthcare, insurance coverage, and products for injured workers, or if you would like more information, please contact the bureau at RA-LI-BWC-HCSRD@pa.gov.

The 2024 Part B Fee Schedule tables are available now by clicking here!

Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to ensure its Workers' Compensation liability is a criminal offense. The bureau's Compliance Section is responsible for investigating potential 305 violations and referring cases for potential prosecution. Violations may be classified as either a third-degree misdemeanor or, if intentional, a third-degree felony. Each day, the employer is in violation of Section 305 and is charged as a separate offense.

Defendants who are first-time offenders may be eligible to enter the Accelerated Rehabilitative Disposition (ARD) program. Those who enter the ARD program waive their right to a speedy trial and statute of limitations challenges during the period of their 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 for the past 3 months are as follows:

Delaware County

Hector N. Mayorga Cordon was sentenced on Sept. 25, 2023, by Judge George A. Pagano in Delaware County Court of Common Pleas. The defendant was charged with Improper Classification of Employees for purposes of the Workers Compensation Act. Mr. Mayorga Cordon ultimately pled guilty to three misdemeanor counts of the third degree, was sentenced to 3 years' probation, and agreed to pay restitution to the Uninsured Employer Guaranty Fund in the amount of $189,483.

ADELPHIA GATEWAY, LLC

Adelphia Gateway, LLC is an 84-mile interstate pipeline in eastern Pennsylvania that extends from Lower Mount Bethel Township in North Hampton County to Marcus Hook in Delaware County and provides up to 850,000 dekatherms of domestically produced natural gas to constrained energy markets in the greater Philadelphia region.   OSHA VPP Star Certification continuously since 2000.

Excellent Safety Practices:

- 811 Safety Days provide monitoring & surveillance training
- Work with local schools on pipeline and gas safety protocols
- The VelocityEHS® system allows all employees to report incidents, good catches (near misses), and hazard conditions, and includes the ability to assign responsible personnel to correct safety issues as they are identified.

APPLIED GEOLOGY & ENVIRONMENTAL SCIENCE, INC. (AGES)

Applied Geology & Environmental Science, Inc. (AGES) provides environmental consulting services and solutions to clients with known or suspected environmental issues, including major gas and electrical utility companies.

Excellent Safety Practices:

- Applied root cause analyses to all their safety program elements in response to one lone worker vehicle incident
- Provided employees with GPS satellite phones, personal vehicles maintained by the employer, and required Smith driver training for all employees
- Logged more than 600,000 hours without a recordable claim to date, with 1.5 million miles of accident-free driving

DVL GROUP, INC

DVL Group, Inc. is an employee-owned company offering sales & solutions expertise for critical environments.

Excellent Safety Practices:

- Good Catch program proactively identifies hazards and documents near misses
- Extensive personalized safety training using Vector Solutions where employees can complete quizzes for comprehension and upload a copy of the company's policy for review.
    - Recipient of the Great Place to Work award six times. Employees are vested shareholders with very low turnover.

2023 Governor's Award for Safety Excellence (GASE) Winners (cont.d)

INDEPENDENCE EXCAVATING

Independence Excavating are site preparation contractors including heavy civil construction, demolition, heavy industrial applications, environmental remediation, concrete paving, aggregate crushing, and recycling.

Excellent Safety Practices:

- 'Indy-Vation' in-house incentive program encourages employees to bring forward designs or alternate methods for reducing or eliminating risks and hazards; Designed and fabricated a 'Pipe Cutting Station' that minimizes kickback and ensures a level cutting grade
- Union employer with rates well below the industry average
- Extensive Return to Work/Light Duty program that includes full pay for all injured workers before they return and during light duty

RIGHT OF WAY CLEARING & MAINTENANCE, INC.

Right of Way Clearing & Maintenance, Inc. is a land clearing company that clears the right of way for natural gas pipelines. Primary operations include tree, brush, and stump removal, and they specialize in steep slope terrain.

Excellent Safety Practices:

- No lost time cases in 5 years
- Implemented the Fatigue Risk Management Program in response to regulatory changes mandating winter work; the program applies to all employees in any capacity
- Soren Eriksson's Game of Logging augments Chainsaw Safety Training

TENASKA OPERATIONS, INC.

The Tenaska Westmoreland Generating Station (TWGS) is an immaculate, state-of-the-art fossil fuel power generation facility with dozens of upgraded safety features. It was clear during the walk-through that cleanliness and safety are the primary focuses.

Excellent Safety Practices:

- Dedicated on-site sub-contractor job station with electrical hook-ups so that the sub trailers can remain on-site
- Modified original plant design to incorporate safety enhancements, including an elevator reaching the top of the stacks for maintenance purposes
- OSHA VPP Star worksite seven times in the past 20 years
- No lost time accidents or recordable injuries since 2017

2023 Governor's Award for Safety Excellence (GASE) Winners (cont.d)

TYBER MEDICAL

Tyber Medical is an orthopedic device manufacturer including trauma/extremity systems.

Excellent Safety Practices:

- Comprehensive safety policy and procedures that can be accessed by QR code
- Virtual reality training and exclusive videos on YouTube accessible by QR code
- Excellent rates with 280,000 hours worked in 2021 and 330,000 hours worked in 2022 without an incident.

Now Accepting GASE Nominations

The purpose of this award is to recognize outstanding workplace health and safety programs and the superior efforts that make these programs so successful. Pennsylvania employers may nominate themselves or may be nominated by a third-party. **Nominations are due May 1st.**

- Use the Request for GASE Nomination Form to receive the link to the GASE Nomination Form and the GASE Nomination Worksheet.
- Use the worksheet to gather your information and prepare your responses.
- Copy and paste many of your collected responses from the worksheet directly into the nomination form.

The GASE Review Committee looks forward to learning about your exemplary safety program and the unique efforts used to keep your employees healthy and safe.

Questions?

Contact the GASE Program Coordinator at RA-LIBWC-GASE@pa.gov or (717) 772-1917.

Bennett v. Jeld Wen, Inc., ___ A.3d ____, No. 1454 C.D. 2022, 2023 WL 8720653 (Pa. Cmwlth. 2023) (Publication Ordered Dec. 15, 2023).

In Bennett v. Jeld Wen, Inc., the Commonwealth Court held that the employer was entitled to a de novo hearing under Section 425 of the Act. In so holding, the Commonwealth Court affirmed the board's exercise of its discretion to grant an employer a de novo hearing to address after-discovered evidence relevant to penalty proceedings and found that the board did not err in relying on the after-discovered evidence to deny the penalty petition and claimant's request for attorney fees.

By way of background, claimant was injured in 2010. She settled the wage loss portion of her claim in 2017, while the medical portion remained open. Claimant treated with Dr. Corba (Corba) for her work-related injuries and was prescribed a compound cream. Omni Pharmacy (pharmacy) mailed the cream to claimant and submitted bills to the carrier seeking payment. Pharmacy filed fee review applications when payment was not received. Administrative determinations were issued ordering payment of the bills with interest. Employer did not appeal but did not issue payment. Thereafter, claimant's counsel sent a letter to employer's counsel with copies of the administrative determinations and requested payment. Employer continued to deny payment. Pharmacy stopped supplying the compound cream due to the unpaid bills.

In September 2018, claimant filed a Penalty Petition. Employer argued it wasn't liable for penalties or the underlying bills because it believed that Corba had a financial interest in pharmacy, making the bills the product of a prohibited self-referral. Employer offered evidence of prior unsuccessful attempts to obtain information from pharmacy about Corba's relationship with pharmacy. Claimant offered the unappealed administrative determinations from the fee review process and letters requesting payment of the bills. Claimant argued if self-referral was an issue employer should have indicated as such on the denials and in the prior fee review proceedings. Employer sought to depose Corba and received subpoenas to investigate Corba's relationship to pharmacy. The subpoenas were never answered, enforcement was ultimately denied by the Common Pleas Court based on pharmacy's representation that a stipulation in separate fee review proceedings "overlapped" with the penalty proceeding.

In the penalty proceeding, employer offered the stipulation that pharmacy had entered in the separate fee review proceeding into evidence. The stipulation provided that for the purposes of the fee review proceeding, and specific dates of service at issue, Corba had an ownership interest in pharmacy. Employer argued that the stipulation was relevant to the penalty proceedings, particularly given the "evidentiary stonewalling" of Corba and pharmacy. The workers' compensation judge sustained claimant's objection that the stipulation was not relevant to the penalty proceeding since dates of service were different. The record on the penalty closed in March 2020. Employer sought to re-open the record to offer the hearing officer's decision from the fee review proceeding. The request was denied. Thereafter, the workers' compensation judge granted the penalty petition and awarded penalties of 15 percent, counsel fees of $4,000, and ordered the employer to pay the Pharmacy with statutory interest.

Employer appealed to the board and filed a petition for a de novo hearing pursuant to Section 425 of the Act "based on after-discovered evidence and alleged improper conduct by a party in interest."

This provision of the act provides:

> If on appeal it appears that the referee's award or disallowance of compensation was capricious or caused by fraud, coercion, or other improper conduct by any party in interest, the board may, grant a hearing de novo before the board, or one or more of its members or remand the case for rehearing to any referee. 77 P.S. §856.

The board concluded that this was a rare case that meets the criteria set forth in Section 425. The workers' compensation judge's decision was vacated in the "interest of justice," and the case was remanded to a different workers' compensation judge for a de novo proceeding to address the issue of a prohibited self-referral and to allow for submission of the fee review hearing officer's decision into evidence. The board noted that employer had consistently argued that the bills were not payable due to the relationship between Corba and pharmacy and its attempts to obtain further information in this regard were consistently rebuffed by those interested parties. Additionally, pharmacy's representation to the Court of Common Pleas of there being "overlap" between the fee review and the penalty proceedings was incorrect, and stymied employer's efforts to gather information about a prohibited self-referral.

During the remand proceedings, the employer offered a statement of financial interest signed by pharmacy's counsel that acknowledged Corba had a financial interest in pharmacy on the dates of service at issue. The workers' compensation judge found, among other things, that Corba had a financial interest in pharmacy during the period covered by claimant's penalty petition. The board adopted the WCJ's findings as its own and incorporated those into a final opinion on the penalty petition. The board concluded that there were unpaid medical bills, so the burden shifted to the employer to show no violation of the act occurred. Based on the evidence from the de novo hearing, the board found that Corba had a financial interest in pharmacy during the relevant time period, so the bills were not payable as a result of a prohibited self-referral. Consequently, there was no violation of the act, so the board denied and dismissed the penalty petition. Employer was not required to pay pharmacy's bills nor the penalty, and no counsel fees were awarded since employer's contest was reasonable.

Claimant appealed to the Commonwealth Court arguing that the board exceeded their jurisdiction in allowing the employer to revisit liability for bills that were the subject of unappealed fee review determinations. Claimant argued that employer should have raised the self-referral issue in the fee review proceedings, not in the context of the later filed penalty petition. Claimant also argued that the board erred in reversing the original workers' compensation judge's grant of penalties and attorney fees as a result of the additional evidence taken during the de novo proceedings.

The Commonwealth Court noted that the case presented a unique factual scenario that represented the convergence of multiple provisions of the act, including involving the "rarely used" Section 425 of the Act which authorizes the board to take the "extraordinary step" of holding a de novo hearing and rendering a decision on a petition as fact finder. The court then explained that the burden in a penalty petition is on the claimant to prove a violation of the act, and even if a violation is found, a penalty is not mandatory. In this case, the claimant met the initial burden showing a violation, so the burden then shifted to employer to demonstrate it did not violate the act. Employer attempted to do

so by arguing the bills were a result of a prohibited self-referral and sought evidence to support that position. The court then recited the efforts employer undertook to obtain supporting information, which were thwarted by Corba and pharmacy.

The court's standard of review was limited to determining whether the board abused its discretion to grant the de novo hearing pursuant to Section 425 of the Act. The court discussed that a proper ground for rehearing is to afford a party the opportunity to adduce evidence not offered at the original hearing because it was not available. The court agreed with the board that the record on this matter demonstrated improper conduct by a party in interest—namely "evidentiary stonewalling" in multiple forums that stymied employer's efforts to gather information about the existence of an improper self-referral. The court found that the original workers' compensation judge was not provided with complete information in order to render judgement with "full knowledge of" the relevant facts. However, the board had such knowledge when denying the penalty petition and found that there was a prohibited self-referral such that the bills were not payable. Accordingly, the board did not exceed its authority or abuse its discretion in granting the de novo hearing, nor by rendering a decision based on the evidence that was presented and denying the penalty petition.

Finally, the court addressed claimant's argument that employer raised the self-referral too late and in the wrong forum as the fee review determinations were not appealed. The court did not find these issues to be fatal under the circumstances of the case. While employer bears the burden of proving a self-referral, Corba and pharmacy thwarted employer's attempts to adduct the evidence needed to meet its burden of proof for "years." Consequently, the court, citing the board, declined "to penalize [employer] for possible procedural mistakes and … reward Dr. Corba and [] pharmacy for their own improper conduct." No penalties or attorney fees were awarded since claimant did not prevail in whole or in part on the penalty petition.

Boulin v. Brandywine Senior Care, Inc. (WCAB), No. 1273 C.D. 2022, 2024 WL 15949 (Pa. Cmwlth. Ct. Jan. 2, 2024)

The Commonwealth Court held that multiple petitions filed by a pro se litigant were barred by the doctrine of res judicata.

The case is procedurally complicated due to the length of litigation and the various appeals.

The claimant's work-related injury was accepted through the filing of an notice of compensation payable. The notice of compensation payable outlined the injury to be: a fractured right ankle, strained right ankle, strain right shoulder, and strain mid/lower back. In subsequent litigation, the workers' compensation judge granted claimant's review petition to expand the work-related injury to include: a right avulsion fracture of the calcaneus (heel bone), cervical contusion-strain-sprain, thoracic contusion-strain-sprain, lumbosacral contusion-strain-sprain, left elbow contusion, and right shoulder strain-sprain. The workers' compensation judge found that claimant recovered from all the work-related diagnoses with the exception of her right calcaneal fracture. Claimant appealed the workers' compensation judge's opinions, to the extent that she was found to be recovered from the injuries. All appeals, including an appeal to the Supreme Court, were denied.

A subsequent termination petition was filed by the employer. The workers' compensation judge granted the termination petition finding claimant recovered from the work injury. Claimant, again, appealed to the Supreme Court. All appeals were denied.

Claimant then filed a claim petition, modification petition, reinstatement petition, review petition, a petition to review compensation benefits offset, and a petition to review medical treatment and/or billing. The petitions all presented similar claims, the gist being that claimant disagreed with the prior workers' compensation judge's description of injury and termination of her benefits. Claimant also sought to include additional injuries: right thumb issues; bilateral carpal tunnel syndrome; sciatica; tendinitis, tendinosis, and tendinopathy in both arms; and injuries to her scapula and buttocks. The workers' compensation judge denied the petitions on the basis of res judicata. The WCAB affirmed and so did the Commonwealth Court.

This case is a straight-forward application of the concept of res judicata finding that the thing sued upon, the causes of action, the parties, and the parties' capacity were all identical to the previous litigation. Claimant was not making any new arguments but was attempting to re-litigate the prior review petitions and termination petitions. The court provided a clear discussion of the burden to show that the doctrine of res judicata applies and the burden on a post-termination reinstatement petition to show that claimant's disability has increased or recurred or that the condition has changed.

Dennis v. Inglis House (WCAB), 303 A.3d 559 (Pa. Cmwlth. 2023)

In Dennis v. Inglis House (WCAB), the Commonwealth Court held that claimant's appeal to the WCAB following a remanded workers' compensation judge decision, sufficiently preserved appealable issues by referencing the initial appeal to the WCAB, but lacked specificity to preserve a wage loss argument. As to the merits of the preserved issue, the Commonwealth Court held that the decision of the workers' compensation judge was supported by substantial competent evidence, thereby affirming the WCAB.

Claimant was employed as a CNA and alleged injuries to her neck, right arm, right shoulder, and right wrist on Jan. 14, 2020 when moving a patient. After the incident, the claimant continued working in a light-duty capacity. On March 25, 2020, claimant attended an appointment with Francis Burke, III, M.D., who released claimant to full-duty work. Claimant did not return to work as she did not believe that she was capable of performing her pre-injury job. Claimant returned to modified work on May 20, 2020, but at her prior wages. Claimant was then taken off work as of August 13, 2020, and on Sept. 17, 2020, she underwent rotator cuff surgery and did not return to work.

During the claim petition proceedings, claimant testified on her own behalf and presented the testimony of Kevin O'Donnell, M.D. Employer presented the testimony of Dr. Burke and Dennis McHugh, D.O. The workers' compensation judge found that claimant met her burden of proving that she sustained a work injury on Jan. 14, 2020 and suspended benefits for the period from Jan. 14, 2020 to July 17, 2020. The workers' compensation judge further found that claimant was fully recovered from the work-related cervical sprain, and right hand and wrist pain as of July 6, 2020, and from her right trapezial and shoulder sprain as of July 17, 2020, at which time, the workers' compensation judge terminated claimant's benefits. Finally, the workers' compensation judge awarded counsel fees against employer for an unreasonable contest.

In reaching this determination, the workers' compensation judge accepted claimant's testimony in part, but rejected claimant's testimony that she was unable to perform light duty work on or after March 24, 2020 or any work after Aug. 13, 2020. The workers' compensation judge found Dr. Burke credible as to the diagnoses of cervical, trapezius and right shoulder strains, but rejected his opinion that claimant was fully recovered as of March 25, 2020. The workers' compensation judge further credited Dr. Burke's diagnoses as to the claimant's right-hand condition but rejected his opinion that there was no relationship between the claimant's right-hand condition and the work injury. Instead, the workers' compensation judge credited Dr. O'Donnell's testimony that claimant's right hand and wrist pain was work-related. The workers' compensation judge also credited Dr. O'Donnell's opinion that claimant was capable of performing modified work as of April 13, 2020. Dr. O'Donnell's testimony was further credited that claimant's cervical spine issue had resolved as of July 6, 2020. Finally, the workers' compensation judge credited the testimony of Dr. McHugh that claimant was fully recovered from any hand and wrist pain as of July 6, 2020, and from a cervical, right trapezial and right shoulder sprain as of July 17, 2020. Finally, the workers' compensation judge further credited the opinion of Dr. McHugh that there was no relationship between claimant's work injury and her shoulder surgery due to the location of the tear.

Claimant appealed to the WCAB on the grounds that the workers' compensation judge erred in not recognizing a rotator cuff injury. Employer appealed the assessment of counsel fees for unreasonable contest. The WCAB affirmed the workers' compensation judge's findings regarding the description of injury. The WCAB reversed the determination that employer engaged in an unreasonable contest and remanded the matter solely for the application of Lorino v. WCAB (Commonwealth of PA), 266 A.3d 487 (2021). Following remand, the workers' compensation judge granted the request for attorney's fees, and granted the claim petition, as previously set forth in the original decision. Claimant appealed to the WCAB. In her appeal, claimant stated that she was reasserting her previous grounds of appeal to the WCAB. The WCAB affirmed.

On appeal to the Commonwealth Court, claimant first argued that the workers' compensation judge erred in limiting the description of injuries and in finding that she had fully recovered. Employer argued that claimant waived both issues as her appeal to the WCAB after the workers' compensation judge's remanded decision, simply stated that claimant was reasserting the issues contained in her prior appeal. Employer argued that as there was no provision in the WCAB's rules allowing for the preservation of issues by mere reference, the issues were not set forth in the appeal. The court rejected this argument. It reasoned that while there was no provision in the WCAB's rules to allow preservation by reference, there was also nothing prohibiting it. The court acknowledged that "general allegations which do not specifically bring to the attention of the board the issues decided are insufficient." 34 Pa. Code § 111.11(a)(2). However, by incorporating the prior appeal, the court held that claimant had sufficiently apprised the WCAB of the issues being raised.

As for the merits of claimant's argument, the court summarily rejected the alleged errors as to the description of injury and full recovery, citing to the substantial evidence of record to support the workers' compensation judge's findings.

Claimant next argued that the workers' compensation judge erred in denying wage loss benefits arising from claimant's work-related injuries. Again, employer argued that claimant waived this

argument as the original appeal to the WCAB following the workers' compensation judge's initial decision failed to raise any error regarding wage loss. The Commonwealth Court agreed with employer, holding that as claimant did not raise this issue in the initial appeal to the WCAB, the issue had been waived. Because the initial appeal to the WCAB, only referenced that the conclusions of law were not supported by substantial competent evidence and contained legal errors, there was insufficient specificity to raise claimant's wage loss argument. Therefore, the alleged error had been waived. Further, the court concluded that a remand does not give a litigant a second opportunity to raise novel issues that could have been raised earlier. Accordingly, the Court affirmed the WCAB.

Howard Dunetz v. Charles H. Sacks D.M.D., P.C. (Workers' Comp. Appeal Bd.), No. 302 C.D. 2022, 2023 WL 7028363 (Pa. Cmwlth. Ct. Oct. 26, 2023)

In a case of first impression, the Commonwealth Court en banc held in Howard Dunetz v. Charles H. Sacks, DMD, P.C., 304 A.3d 134 (2023), that claimant, who did not have a direct appeal pending when the Supreme Court issued its 2017 decision in Protz, did not show that his was an extraordinary case justifying Protz to be applied retroactively to the date his benefits were originally modified pursuant to an 2010 impairment rating evaluation.

The underlying litigation commenced on June 12, 2020, when claimant filed a reinstatement petition alleging the 2010 modification of his benefits from total to partial was unconstitutional pursuant to Protz and that his benefits should be reinstated back to total as of the date of the original impairment rating evaluation modification. In the meantime, employer had paid claimant 500 weeks of partial disability benefits through July 2, 2020, at which time the indemnity benefits were stopped. On Jan. 22, 2021, the employer filed a modification petition seeking the modification of the claimant's benefits from total to partial based upon a Dec. 15, 2020, impairment rating evaluation, resulting in a 17 percent whole-body impairment rating. The workers' compensation judge granted claimant's reinstatement petition in part and employer's modification petition in its entirety – restoring total disability benefits only from June 12, 2020, when the reinstatement petition was filed, to Dec. 15, 2020, the date of the most recent impairment rating evaluation. In so doing, the workers' compensation judge held that pursuant to Act 111 employer was entitled to a credit for the 500 weeks of partial disability benefits already paid claimant, so that by Dec. 15, 2020, his benefits were exhausted. The WCAB affirmed the workers' compensation judge's decision.

In its appeal to the Commonwealth Court, claimant argued that in Dana Holding Corp. v. WCAB (Smuck), 232 A.2d 3d 629 (2020), the Supreme Court approved the use of an equitable balancing test allowing Protz to be applied retroactively back to the date of the original modification of benefits in extraordinary circumstances such as his. The court, however, rejected claimant's argument and affirmed the WCAB's decision, noting first that there is no indication that the court in Dana Holding meant to apply an equitable balancing test to cases such as claimant's, which was not pending appeal when Protz was decided. The court also noted that in applying any balancing test, it must consider both claimant's and employer's interests. Ultimately, the court held that claimant did not show that his case was extraordinary justifying a departure from the default approach of non-retroactivity except with respect to cases pending at the time of the decision. In so doing, the court observed that claimant benefited from Protz in its immediate aftermath in that he was able to

seek a reinstatement of his total disability benefits due to the unconstitutionality of the impairment rating evaluation scheme and that the harm claimant alleges is really the result of the legislature's enactment of Act 111, which allows employers credit for the partial disability benefits previously paid. Finally, the court noted that there are numerous ways a claimant may exhaust their 500 weeks of partial disability benefits and that "agreeing with claimant that his is an extraordinary case to which equitable balancing applies because he remains disabled and has a financial need for his indemnity benefits would mean all claimants who face this situation present extraordinary cases [, which] cannot be the intent or purpose of the equitable balancing test described in Dana Holding."

Elite Care, Rx, LLC v. Premier Comp. Solutions, LLC , et. al, No. 156 WAL 2023, 2023 WL 6985825 (Pa. Oct. 24, 2023)

The Pennsylvania Supreme Court has granted the petition for allowance of appeal in the case of Elite Care, Rx, LLC v. Premier Comp. Solutions, LLC, et. al, No. 156 WAL 2023.

By way of background, Elite Care, RX, LLC ("Elite Care"), is a third-party billing agent for healthcare providers. A home-delivery pharmacy, Patient Direct Rx., filled injured workers' prescriptions and sold the right to bill and collect on those prescriptions to licensed healthcare providers. The providers contracted with Elite Care to serve as a third-party billing agent to ensure that the bills were paid.

Several insurers and their agents ("insurers") objected to this practice and refused to pay Elite Care $548,035.28 in prescription bills for 110 injured workers. Insurers initially argued that Elite Care's exclusive remedy was through the fee review process. Elite Care filed applications for fee review. However, once the Medical Fee Review Section found in Elite Care's favor, insurers appealed to a fee review hearing officer alleging that the Fee Review Section lacked jurisdiction to determine whether Elite Care was an agent of the providers. The hearing officer found that the Fee Review Section lacked jurisdiction and advised that Elite Care may wish to pursue other remedies available outside the fee review process.

Elite Care filed a civil complaint including counts for declaratory judgement, fraud, civil conspiracy, and unjust enrichment. Insurers filed preliminary objections, one of which alleged that the trial court lacked subject matter jurisdiction because the prescriptions at issue were to treat work-related injuries so the bureau had exclusive jurisdiction. The trial court overruled the objection, determining that the case was not a workers' compensation matter, but rather a claim for damages based on allegations of conspiracy and fraud. Insurer thereafter filed a petition for permission to appeal which the Superior Court granted as to the following issue: "Because the issues raised by the complaint […] have, as their ultimate basis, injuries compensable under the act, must they be decided by a workers' compensation judge or fee-review hearing officer and not by the Court of Common Pleas?" A three-judge panel of the court affirmed the trial court. Insurer then petitioned for a review en banc.

The Superior Court en banc concluded that the Workers' Compensation Act does not divest trial courts of jurisdiction over causes of actions where the parties to a lawsuit are an employer's insurers and a provider's billing agent. The court first noted that Elite Care asserted three common-law causes of action, which predated the establishment in 1915, and that there was not anything in the current act granting the bureau jurisdiction over the specific common-law causes of action asserted. The court then discussed the Commonwealth Court's holding in Armour Pharmacy v.

Bureau of Workers' Compensation Fee Rev. Hearing Office, 86 A.3d 300 (Pa. Cmwlth. 2014), where the Commonwealth Court held that due process requires a fee review hearing officer to determine whether an entity is a "provider" within the meaning of the act before a claim can go through the fee review process. The Superior Court declined to follow Armour Pharmacy because in their view the Commonwealth Court "manufactured" an administrative proceeding for a putative provider to seek redress within the bureau even though the legislature had not provided jurisdiction. The Superior Court held that the act does not provide for an administrative proceeding in the bureau by or against putative providers or their billing agents and that such entities have no standing there, because the act does not confer it upon them. Ultimately, the court found that the act does not divest the original jurisdiction of the Court of Common Pleas over common law causes of action where the parties to the lawsuit are an employer's insurer and a provider's billing agent. The case was remanded back to the trial court of Allegheny County for further proceedings.

Insurers filed a petition for allowance of appeal. The issue to be considered by the Supreme Court, as stated by the petitioner is:

> Can a purported medical provider seeking payment for prescription medication in accordance with the provision of the Pennsylvania Workers' Compensation Act (hereinafter "WCA"), specifically 77 P.S. §501(a)(1), and corresponding Medical Cost Containment Regulations (hereinafter "MCCR"), 34 Pa. Code §§ 127.1-127.755, circumvent the exclusivity provisions of the WCA by initiating litigation outside the forums established by and under the WCA and MCCR for adjudicating such issues? Alternatively phrased, is the liability of the employer and its Insurer or carrier exclusive in place of any and all other liability, given the WCA provides for an exclusive remedy barring any tort action flowing from a work-related injury?

Federated Insurance Co. v. Summit Pharmacy (Bureau of Workers' Comp. Fee Rev. Hearing Off.), No. 115 C.D. 2023, 2024 WL 15752 (Pa. Cmwlth. Ct. Jan. 2, 2024)

In an en banc decision with considerable ramifications, the Commonwealth Court held in Federated Insurance Company v. Summit Pharmacy (Bureau of Workers' Compensation Fee Review Hearing Office), 2024 WL 15752 (No. 115 C.D. 2023) that the Red Book values used by the bureau in determining the average wholesale price ("AWP") when resolving fee disputes for pharmaceutical drugs is inconsistent with section 306(f.1)(3)(vi)(A) of the Workers' Compensation Act ("Act"). That section limits the reimbursement of pharmaceuticals to 110 percent of the AWP of the product. The court further directed the bureau to "promptly" identify and publish in the Pennsylvania Bulletin a new nationally recognized schedule to determine the AWP of prescription drugs to be used in fee review disputes. Respondent pharmacy has filed a petition for allowance of appeal of the court's decision.

This case originated when respondent submitted bills for drugs dispensed to a workers' compensation claimant totaling about $74,000. Petitioner determined that respondent's billed pricing was far above the actual AWP of the drugs as reported by the National Drug Acquisition Cost ("NADAC") index. Petitioner thereafter adjusted its payments to be 110 percent of the AWP using the NADAC index or $1,511.93. Respondent filed applications for fee review for the approximate $72,500 difference. The bureau's Fee Review Section issued determinations applying the Red Book and ordered the petitioner to pay the disputed $72,500. The hearing officer affirmed the bureau's fee

review determinations, finding that petitioner failed to meet its burden of proving that its payment of 110 percent of the NADAC price had properly reimbursed respondent under the act. In so doing, he found petitioner's expert not credible.

The publisher of the Red Book at issue in the case is IBM Health Watson ("IBM"). According to the court, IBM indicates in its statement of policy that the AWP it publishes "'is, in most cases, the manufacturer's suggested AWP and does not reflect the actual AWP charged by a wholesaler,'" that the values used in the Red Book are reported to it by manufacturers, and that IBM does not independently analyze the data to ascertain the amounts paid by providers, such as pharmacies, to wholesalers. Neither the act nor the regulations define the term AWP.

Before the Commonwealth Court, petitioner argued that the Red Book values do not and cannot, reflect the AWP, as defined in the term's plain meaning, because of how those values are determined. Petitioner maintained that AWP means "actual" AWP or an average of the AWPs pharmacies throughout the country pay for the prescription drugs, they then resell to their customers, as reflected in the NADAC index. Respondent on the other hand argued that AWP is a term of art and the Red Book an accepted source of AWP within the pharmaceutical industry. Its expert, whose testimony was found credible by the hearing officer, opined that AWP is not a mathematical average of actual prices paid but rather a manufacturer's suggested price that is used as a reference point in benefit negotiations among pharmacies, prescription benefit managers, and third parties.

In concluding that the Red Book is inconsistent with the act, the court leaned heavily on its previous decision in Indemnity Insurance Company of North America v. Bureau of Workers' Compensation Fee Review Hearing Office (Insight Pharmacy), 245 A.3d 1158 (Pa. Cmwlth. 2021). In Indemnity Insurance, the court rejected Insurer's assertion that the best proxy for actual AWP, which insurer maintained was not reported in the Red Book or any readily available source, was the average retail price. However, the plain meaning of AWP according to the court in Indemnity Insurance is a price that is an industry average not one charged by a single manufacturer and is a number derived by averaging the wholesale prices of all manufacturers or wholesalers. Pursuant to Indemnity Insurance, insurers are free to produce evidence challenging the accuracy of the Red Book's pricing for a drug's AWP as used in section 306(f.1)(3)(vi)(A).

In sum, the court held that the evidence found credible by the hearing officer, including the excerpts from IBM's statement of policy, do not "in any way reflect that the 'AWP' found in the Red Book meet the standards set forth in Indemnity Insurance for an 'accurate' AWP." Additionally, the NADAC index proffered by insurer's expert also cannot be used to ascertain AWP due to the hearing officer's finding him not credible. Thus, the court determined that a remand is required for further proceedings to determine the appropriate reimbursement due respondent. The hearing officer is to stay the remand proceedings until the bureau publishes a new schedule to determine the AWP for the drugs at issue.

Keffer v. Colfax Corporation (Workers' Compensation Appeal Board), 304 A.3d 422 (Pa. Cmwlth. 2023)

In Keffer v. Colfax Corporation (Workers' Compensation Appeal Board), the Commonwealth Court affirmed the dismissal of claimant's review and reinstatement petitions, filed more than three years

following the last payment of wage loss benefits, as untimely. In so holding, the court rejected claimant's arguments that employer's actions tolled the three-year statute of repose set forth in Section 413(a) of the Act. Section 413(a) provides that a workers' compensation judge may, at any time, modify or reinstate a notice of compensation payable or an agreement or award of workers' compensation benefits, provided that a petition is filed within three years after the most recent payment of compensation. In this case, claimant suffered a back injury on Dec. 18, 2014. Employer issued a notice of temporary compensation payable and claimant received wage loss benefits until he returned to work on March 9, 2015. On March 12, 2015, employer issued a notice stopping temporary compensation and a medical only notice of compensation payable accepting liability for medical expenses for a low back strain. Claimant's symptoms then recurred, and he underwent back surgery on April 11, 2018. Claimant and employer executed a supplemental agreement on April 23, 2018 acknowledging claimant's disability had recurred and that he would receive total disability benefits effective April 11, 2018. A second supplemental agreement was executed on June 29, 2018, after claimant returned to work with no further loss of wages.

Thereafter, on May 14, 2021, claimant filed review and reinstatement petitions seeking reinstatement of total disability benefits, review of medical treatment and medical bills, and an amendment of the description of injury to include L5-S1 disc herniation. The workers' compensation judge dismissed the petitions as time-barred, and the board affirmed. In affirming the board's order, the court agreed the April 23, 2018 supplemental agreement did not toll the three-year statute of repose in Section 413(a) because the three-year limitations period had already expired when the supplemental agreement had been executed. The court cited caselaw holding that payment of compensation does not operate to resurrect a claim once the three-year limitations period has expired. See Cozzone v. WCAB (Pa. Mun./E. Goshen Twp.), 73 A.3d 526 (Pa. 2013).

The court also rejected claimant's equitable estoppel argument, agreeing employer had no legal obligation to advise claimant of the date upon which the three-year limitations period would expire, and further rejecting claimant's assertion that employer's conduct lulled him into a false sense of security that it would pay his future wage loss and medical benefits. Here, the workers' compensation judge's specific finding that employer did not engage in concealment, misrepresentation, or other inequitable conduct was supported by substantial evidence. Accordingly, the workers' compensation judge did not err in concluding claimant failed to prove employer's conduct equitably estopped employer from raising the statute of repose as a defense to claimant's untimely filed petitions.

Robert Lewis v. Lehigh Asphalt Paving & Constr. Co. (WCAB), 303 A.3d 893 (Pa. Cmwlth. 2023)

In Robert Lewis v. Lehigh Asphalt Paving & Construction Company, the Commonwealth Court applied the Slaugenhaupt test, holding that as claimant was not injured while engaged in the furtherance of the employer's business and affairs, and his injury did not occur as a result of a condition of the premises, the injury was not within the course and scope of claimant's employment. In so holding, the Commonwealth Court affirmed the WCAB, who had upheld the workers' compensation judge's denial of benefits.

Claimant worked in the equipment yard of employer's facility. During his workday, he began to feel left calf and ankle pain and weakness. At the end of his shift, claimant clocked out at 4:30 p.m.

Fifteen minutes later, claimant returned to the employer's parking lot where the work truck that he was driving was located. When stepping into the cab of the truck, claimant felt a pop in his lower leg, tearing his Achilles tendon. Employer issued a timely denial of the claim, indicating that the injury did not occur in the course of employment.

Claimant filed a claim petition and penalty petition. Claimant testified that he did not trip over anything in the employer's parking lot, nor did he hit his leg against the vehicle. Moreover, he did not perform any work duties between the time that he punched out and when he arrived home. The workers' compensation judge granted the claim petition and denied the penalty petition. However, the WCAB remanded the matter back to the workers' compensation judge for a determination of whether claimant was in the course of his employment at the time of injury.

Following remand, the workers' compensation judge concluded that claimant's injury was not caused by a condition of the premises and claimant was not engaged in the business of the employer when injured. Consequently, the judge denied the claim petition because the injury was not within the course and scope of claimant's employment. The WCAB affirmed.

Claimant appealed to the Commonwealth Court which affirmed the denial of the claim petition. The court referenced Section 301(c)(1) of the Act noting there are two situations where an injury can be considered in the course of employment. The first is where an employee is actually engaged in the furtherance of the employer's business, whether on or off the premises. This analysis did not apply to claimant's situation, however, as he had already clocked out and was entering a vehicle to go home when the injury occurred.

In the second situation, the court noted that an employee who is engaged in work at the time of injury can nonetheless be entitled to compensation where the employee: (1) is on a premises under the control of the employer; (2) is required by the nature of their employment to be on such premises; and (3) sustains an injury or injuries due to a condition of the premises or operation of the business. Workmen's Comp. Appeal Bd. (Slaugenhaupt) v. United States Steel Corp., 376 A.2d 271, 273 (Pa. Cmwlth. 1977). The court recognized that the first two prongs of the test were satisfied, as claimant was on the employer's premises and was required to be there since only 15 minutes had passed since the end of his shift, citing Newhouse v. WCAB (Harris Cleaning Serv., Inc.), 530 A.2d 545 (Pa. Cmwlth. 1987). However, the court engaged in extensive review of case law as to the third prong, i.e., was the injury due to a condition of the premises.

First , the Commonwealth Court undertook a survey of the case law where the courts determined that an injury was caused by a condition of the premises. Slaugenhaupt involved a claimant who suffered an epileptic seizure and crashed his car into a concrete abutment on the employer's premises. There, while the seizure caused the accident, the claimant's fatal injuries resulted from the force of the car striking the abutment. In Newhouse, the claimant was riding on the hood of a car while traveling from a work site to a public road, when he was thrown to the ground as the car turned to follow a bend in the road as the exit gate was closed. The court considered the closed gate and the bend in the road to be a condition of the premises that caused the injuries. Finally, in Stewart v. WCAB (Bravo Grp. Servs., Inc.), 258 A.3d 584, 594 (Pa. Cmwlth. 2021), the claimant slipped and fell forward to the ground while getting off a shuttle van. The Stewart Court held that the ground that claimant landed upon was a condition of the premises that contributed to claimant's injury.

The Commonwealth Court then reviewed several cases where a condition of the employer's premises played no role in causing the claimant's injuries. For example, in Anzese v. WCAB, 385 A.2d 625, 626 (1978), a lightning strike was found to be unrelated to the condition of the premises or operation of the employer's business. Additionally, injuries sustained by a claimant while helping a coworker with a disabled car were non-compensable as the court held that it was the movement of the vehicle that resulted in the claimant's injuries and not a condition of the premises. See, Dana Corporation v. WCAB (Gearhart), 548 A.2d 669, 670 (Pa. Cmwlth. 1988). Further, a claimant injured when climbing over the center console of her car because she had to get in through her passenger side door when the snow was piled up by the driver side door was not injured by a condition of the premises. There, the court held that the injury was caused by a condition of the car, and not by the piled-up snow in the employer's parking lot. See, Markle v. WCAB (Bucknell Univ.), 785 A.2d 151, 156 (Pa. Cmwlth. 2001). Finally, a claimant who sustained a fractured kneecap while running to his car upon learning of a family emergency did not sustain a compensable injury, as there was no allegation that the employer parking lot caused the injury. See, Quality Bicycle Products, Inc. v. WCAB (Shaw),139 A.3d 266, 270 (Pa. Cmwlth. 2016).

In this case, the court stated that the facts were most like those in Shaw. The claimant had already punched out and felt a popping sensation while getting in his vehicle. It was not the ground that caused the injury, nor did the claimant trip or hit his leg. Instead, the act of stepping up into the truck caused the leg injury, which did not qualify as a condition of the employer's premises. Consequently, as claimant did not meet all of the Slaugenhaupt criteria, he was not in the course of employment when he was injured.

In addition to the course and scope of employment argument, claimant also argued that he was a "traveling employee" and therefore, exempt from the "coming and going" rule as his employer provided him with a company vehicle, phone, and paid for his gasoline. The court summarily dismissed claimant's argument, holding that the issue was waived as it was not raised before the workers' compensation judge or the WCAB in the original proceedings, and only raised the argument on remand. The court stated that when "a case is remanded for a specific and limited issue, those issues not encompassed within the remand order may not be decided on remand." Levy v. Senate of Pa., 94 A.3d 436, 442 (Pa. Cmwlth. 2014) (quoting in re Indep. Sch. Dist. consisting of the Borough of Wheatland, 912 A.2d 903, 908 (Pa. Cmwlth. 2006)). Moreover, even if the claimant was a traveling employee, and thus exempt from the "coming and going" rule, that rule was not implicated in this case, because claimant was on the employer's premises at the time of his injury. Accordingly, the court affirmed the adjudication of the WCAB, denying and dismissing claimant's claim.

McHenry v. Goodyear Tire & Rubber, Co. (WCAB), 305 A.3d 257 (Pa. Cmwlth. 2023)

Plaintiffs filed a lawsuit in the Court of Common Pleas for asbestos exposure. Employer filed a motion for summary judgement seeking the suit be dismissed for lack of subject matter jurisdiction. Employer alleged plaintiff should file an Occupational Disease Act (ODA) claim. The trial court judge denied the motion to dismiss. Employer was granted leave to file an appeal from the interlocutory order on the motion for summary judgement. Claimant opposed the motion and appeal noting claimant retired from employment about 15 years prior to being diagnosed with asbestosis, rendering any petition filed under the ODA useless as he does not meet the legal definition of disability under the ODA. The Commonwealth Court agreed with claimant. The court noted employer did not

challenge assertion claimant was not disabled under the ODA definition. The Commonwealth Court referenced the Tooey case in their decision. (Tooey v. AK Steel Corp.,81 A3d 851, (Pa. 2013)

Premium Transportation Staffing, Inc. v. Robert Welker (Workers' Comp. Appeal Bd.), No. 1329 C.D. 2022, 2023 WL 8264421 (Pa. Cmwlth. Ct. Nov. 30, 2023)

In Premium Transportation Staffing, Inc. v. Robert Welker (WCAB), No. 1329 C.D. 2022, 2023 WL 8264421 (Pa. Cmwlth. Ct. Nov. 30, 2023), the Commonwealth Court held that although the establishment of abnormal working conditions in a psychological injury claim requires a fact-specific analysis, it remains a question of law that is subject to appellate review.

The claimant, an over-the-road truck driver, filed a claim petition alleging that he suffered post-traumatic stress disorder (PTSD) from an incident when his truck caught fire while he was driving on the turnpike. The claimant escaped the truck physically unharmed, and the fire was extinguished when another truck driver saw the fire and used the fire extinguisher in his truck to put out the fire.

The claim petition was bifurcated for a preliminary determination on whether the truck fire constituted an abnormal working condition. The workers' compensation judge found that a truck fire "falls into the category of a highly unusual and singular event" and that the claimant had been exposed to an abnormal working condition to establish a mental/mental injury, citing Payes v. WCAB (Pennsylvania State Police), 79 A.3d 543 (Pa. 2013). The workers' compensation judge ultimately granted the claim petition for a closed period finding that the claimant suffered from compensable PTSD from which he later recovered.

Both parties appealed, and the WCAB affirmed the judge's decision in its entirety.

The parties appealed to the Commonwealth Court with the employer arguing that the workers' compensation judge erred in concluding that the truck fire constituted an abnormal working condition. The court examined the case law regarding "mental/mental" claims, particularly Payes and PLCB v. WCAB (Kochanowicz II), 108 A.3d 922 (Pa. Cmwlth. 2014). In Payes, a mentally ill person dressed entirely in black ran in front of the claimant's state trooper vehicle while on I-81, flying over the car and landing on the highway. The state trooper tried to revive the victim while on the busy highway by doing mouth-to-mouth resuscitation, but she could not be revived. The state trooper filed a claim petition for a psychological injury, and the workers' compensation judge awarded compensation. Ultimately, the Pennsylvania Supreme Court agreed with the judge, holding that the workers' compensation judge's findings established "the existence of an extraordinarily unusual and distressing single work-related event" that constituted an abnormal working condition, and the incident "was not an event normally experienced or anticipated by employees in the claimant's line of work." Kochanowicz involved a state liquor store manager who was robbed at gunpoint, with a gun pointed at his head during the robbery, and was later tied to a chair with duct tape. Notwithstanding the claimant receiving general training about armed robberies and knowledge of the risk of being robbed, the workers' compensation judge found that a "robbery by gunpoint to the back of the head" was an abnormal working condition, and the Commonwealth Court later agreed under the application of the Payes standard.

In this case, the Commonwealth Court noted that whether a serious or dangerous event constitutes an abnormal working condition is highly fact-sensitive but is still a mix of fact and law. The court noted that the more fact-sensitive the situation, the greater deference should be given to the workers' compensation judge findings of fact. However, ultimately, whether the claimant has established abnormal working conditions is a question of law subject to appellate review.

The court concluded that in this case, while the fire was not an everyday occurrence and was a singular event, "the truck fire [the claimant] experienced bears little resemblance to the 'extraordinarily unusual' events that occurred in the Payes or Kochanowicz cases." The court noted that the claimant's truck was equipped with a fire extinguisher, his pre-trip inspection ensured the presence of an extinguisher, and the record established that truck drivers experience or anticipate fires in their line of work. This was borne out by the fact that another passing truck driver was able to quickly extinguish the fire. The claimant was not trapped in the cab but instead retreated to safety, and the whole ordeal lasted two to three minutes. When obtaining his commercial driver's license, the claimant was trained on the possibility of a truck fire and how to respond if it occurred. The court noted that training for and anticipation of certain risks remains a relevant inquiry in determining the existence of an abnormal working condition.

In this case, the court held that the truck fire that caused claimant to exit his truck did not, in itself, constitute an abnormal working condition in a profession where drivers are trained to anticipate such an event and are equipped to respond. This does not mean that all truck fires constitute a normal working condition in the truck driving profession. However, there must be something "extraordinarily unusual" about a particular truck fire before it can be held to be an abnormal working condition.

The claimant also appealed the workers' compensation judge's determination that his PTSD had been fully resolved. In a separate opinion, the court dismissed this appeal, as the claimant was ineligible for benefits in the first place.

Resources for Human Development, Inc. v. Dixon (WCAB), ____ A.3d _______, No. 494 C.D. 2022, 2023 WL 8791811 (Pa. Cmwlth. Ct. Dec. 20, 2023).

In Resources for Human Development, Inc. v. Dixon (WCAB), the Commonwealth Court addressed whether claimant's concurrent employment was sufficiently intact for purposes of Section 309(e) for it to be considered in the calculation of her average weekly wage (AWW).

Claimant filed a review petition, which challenged employer's calculation of her AWW. Claimant sought to include wages from her concurrent employer, Public Partnerships. Claimant testified before the workers' compensation judge that she had worked for Public Partnerships for five years, but she was uncertain if she actually worked for them on the day she was injured with employer. Claimant also presented documentary evidence to support her earnings. The workers' compensation judge found that claimant's AWW was not accurately calculated, since it did not include wages from her concurrent employment. Employer appealed to the WCAB, which affirmed the workers' compensation judge.

On appeal to the Commonwealth Court, employer asserted that the evidence of record was devoid of any evidence that would support that claimant was concurrently employed at the time of her work

injury, as required by Freeman v. WCAB (C.J. Langenfelder & Son), 527 A.2d 1100 (Pa. Cmwlth. 1987). Employer asserted that no evidence supported that claimant was employed by Public Partnerships on the date of her work injury.

The Commonwealth Court rejected employer's argument that to qualify as concurrent employment, claimant had to work both positions on the day the injury occurred. The court cited to Triangle Bldg. Ctr. v. WCAB (Linch), 560 Pa. 540, 746 A.2d 1108 (Pa. 2000), in which the Pennsylvania Supreme Court held that "in order for an employment relationship to constitute concurrent employment for purposes of Section 309(e), the relationship must remain sufficiently intact such that the claimant's past earning experience remains a valid predictor of future earnings loss." Id. at 1112. In Linch, the court held that the claimant, who was temporarily laid off from his concurrent employment at the time of his work injury, was entitled to the inclusion of additional wages for concurrent employment.

In the case at hand, the Commonwealth Court concluded that even though claimant may not have worked a shift for Public Partnerships on the date of the work injury, claimant's employment with that entity was sufficiently intact when the work injury occurred. The credited evidence showed that this relationship existed prior to her work with employer, while she worked for employer, and after she stopped working for employer. Accordingly, the Commonwealth Court affirmed the WCAB.

Schmidt v. Schmidt, Kirifides & Rassias PC (WCAB), 305 A.3d. 1137 (Pa. Cmwlth. 2023)

Whether an employer can be required to reimburse a claimant for out-of-pocket expenses for CBD oil was the main issue before the Commonwealth Court. Claimant had been judicially determined to have a compensable low back injury. Claimant later filed a penalty petition alleging employer violated the act by failing to reimburse him for out-of-pocket expenses for CBD oil prescribed by his doctor. Many factual and legal issues were presented to the workers' compensation judge who found in favor of claimant, including finding claimant and his medical evidence to be credible, claimant was using the CBD oil as directed on the packaging. Claimant submitted the prescription and receipts to employer and was not reimbursed, and claimant purchases the CBD oil at a natural remedy store and not a pharmacy. The workers' compensation judge concluded claimant was not a medical provider. The workers' compensation judge concluded the Healthcare Financing Administration forms were not required for CBD oil, as it is not a drug and is a dietary supplement. Employer appealed the grant of the penalty petition. The WCAB reversed the decision of the workers' compensation judge for various reasons including the recent actions of the Federal Drug Administration admonishing some CBD suppliers for marketing violations, the potential effect on insurers by the ruling of the workers' compensation judge, and because of the billing forms required by the act. Claimant appealed the board's reversal to the Commonwealth Court. The Commonwealth Court reversed the board's decision. The court found the act requires payment of medicine and supplies with CBD oil fitting this definition. The court noted CBD oil does not contain the substance THC, which is found in medical marijuana. The court found the board disregarded the findings of the workers' compensation judge and did not give all reasonable inferences to the prevailing party. The court concluded federal law would not be violated by requiring reimbursement of CBD oil. Finally, the court did not find the billing forms required by the act for medical providers were required to obtain reimbursement.

Brenda Searfoss a/k/a Brenda Walton v. Commonwealth of Pennsylvania, No. 145 M.D. 2023, 2023 WL 8460390 (Pa. Cmwlth. Ct. Dec. 7, 2023)

The Commonwealth Court held that a claimant cannot force an employer to go through with a purportedly negotiated compromise and release agreement, either through the workers' compensation or civil forum.

The claimant was injured in 2016. Settlement discussions occurred in 2020 and 2021. The employer offered $125,000 to settle the indemnity portion of the claim. At an October 2021 mediation, the claimant was advised that she needed to apply for a disability pension prior to the hearing to approve the compromise and release agreement. The claimant said that she would accept the offer once the disability pension step was complete. The claimant sought an estimate of her disability pension payment in December 2021.

In October 2022, the claimant advised the employer that she was accepting the $125,000 settlement offer and applied for the disability pension the next day. However, the employer told her that the offer was no longer available and refused to settle at that amount.

The claimant filed a petition to seek approval of a compromise and release agreement, which was dismissed by the workers' compensation judge when no signed compromise and release agreement was provided by the parties at the hearing.

The claimant then filed a complaint with the Commonwealth Court in its original jurisdiction, under civil contract principles to enforce the settlement. The employer filed preliminary objections, raising a host of issues. The court agreed with the employer, citing McKenna v. WCAB (SSM Industries, Liberty Mutual Insurance Co.), 4 A.3d 211 (Pa. Cmwlth. 2010) and Falkinburg v. WCAB (Lowe's Home Centers, LLC) (Pa. Cmwlth., No. 1867 C.D. 2014, filed Aug. 14, 2015) (unreported).

In applying Section 449, the Commonwealth Court concluded that unless and until a hearing is held before a workers' compensation judge and an order is circulated approving the compromise and release agreement, there is no valid agreement to enforce. In this case, there was never even a signed compromise and release agreement, so there was nothing for the workers' compensation judge to approve.

The court dismissed the claimant's attempts to bypass the Workers' Compensation Act by bringing a civil action. The court stated that if the claimant believed herself aggrieved by the workers' compensation judge's dismissal of her petition for the approval of the alleged compromise and release agreement, she could have appealed the workers' compensation judge's decision to the board, which she did not do. The court dismissed her civil contract suit.

Wheatley v. Pyramid Hotel Grp. (WCAB), No. 1017 C.D. 2022, 2024 WL 118150 (Pa. Cmwlth. Ct. Jan. 11, 2024)

In Wheatley v. Pyramid Hotel Grp. (WCAB), No. 1017 C.D. 2022, 2024 WL 118150 (Pa. Cmwlth. Ct. Jan. 11, 2024), the claimant filed a claim petition alleging that he suffered a work-related aggravation

of an underlying respiratory condition on Oct. 8, 2018. On May 13, 2020, the workers' compensation judge granted the claim petition. Both the claimant and the employer appealed the judge's decision to the WCAB.

On March 25, 2021, the WCAB affirmed in part, reversed in part, and remanded the matter to the workers' compensation judge to address wage data from other employment between Oct. 28, 2018, and Oct. 8, 2019. The remand allowed the claimant to raise objections to the wage data, and the employer could defend against any claim for penalties.

On remand, the parties entered into a stipulation. On Aug. 31, 2021, the workers' compensation judge issued an amended decision and order granting the claim petition in accordance with the stipulation.

On Sept. 29, 2021, the claimant filed an appeal to the Commonwealth Court from the WCAB's March 25, 2021 order that remanded the matter back to the workers' compensation judge. On April 22, 2022, the court quashed the appeal on the basis that the claimant improperly appealed the judge's August 2021 order directly to the Commonwealth Court without first going back to the board, citing Dowhower v. WCAB (Capco Contracting), 934 A.2d 774 (Pa. Cmwlth. 2007), and Shuster v. WCAB (Pennsylvania Human Relations Commission), 745 A.2d 1282 (Pa. Cmwlth. 2000).

On May 13, 2022, the claimant filed a petition that the court deemed an application for reconsideration of its April 22, 2022 order. The court dismissed this petition as untimely on May 20, 2022, because reconsideration requests under Pa.R.A.P. 2542(a)(1) must be filed within 14 days of the entry of the order involved. The court commented that even if the petition was timely, it would still be quashed, explaining:

> [E]ven if [claimant's] [reconsideration application] had been timely filed, [this court] would still find that [claimant's] petition for review must be quashed. Here, the last order of the [board] is dated March 25, 2021, and the petition for review was filed on Sept. 29, 2021, which is more than 30 days after the board's decision and, therefore, untimely. See Pa.R.A.P. 1512(a)(1). In order to timely perfect an appeal to this court, [claimant] would have to ask the board to render a final order following the issuance of the Aug. 31, 2021 decision of [workers' compensation judge]. As noted in our prior [memorandum and] order, this court is unable to act on appeals that are taken directly from a workers' compensation judge's order.

On May 23, 2022, the claimant mailed a copy of his petition to the WCAB, requesting an order making all proceedings final, so an appeal can be filed with the Commonwealth Court. On Sept. 1, 2022, the board denied the petition on the basis as being untimely, noting that it should have been filed within 20 days of the workers' compensation judge's Aug. 31, 2021 order, per Section 423 of the Act. The claimant then appealed to the Commonwealth Court.

On appeal to the court, the claimant argued that the board erred by denying his appeal as untimely because he appealed to the court originally on Sept. 29, 2021, reasonably believing that the board's previous order became final with the workers' compensation judge's August 2021 order. However,

quoting Shuster and Dowhower, the court pointed out the law is well settled that "[a] board order remanding a case to the workers' compensation judge for further action is interlocutory and cannot be appealed until the workers' compensation judge has issued his[/her] subsequent order." Shuster, 745 A.2d at 1285. Once the workers' compensation judge has issued an order after remand, even if the workers' compensation judge's order is favorable to the parties, "[t]he board, not this court, must review [it] before this court can undertake its appellate review."

To perfect his appeal, the claimant should have appealed to the board within 20 days of the workers' compensation judge's August 2021 order, and request that the board make its March 25, 2021 decision final so an appeal could be taken to the Commonwealth Court. Having failed to do so, the board properly denied the claimant's petition.

The Pennsylvania Supreme Court has granted a petition for allowance of Appeal in the Steets v. Celebration Fireworks (WCAB) case, involving the obligation to pay specific loss benefits when TTD benefits have ended due to death, and there are no dependents under the Workers' Compensation Act.

By way of background, claimant had significant injuries on June 30, 2017 when a fireworks display exploded. Her claim was accepted. Petitions were filed and were granted by the workers' compensation judge to add a specific loss award of 840 weeks to be paid once the claimant's total disability benefits ceased. On Nov. 28, 2020, claimant passed away from complications of her work injury. She had no qualifying dependents under the Workers' Compensation Act. Her estate filed a claim, review, and penalty petition alleging a violation of the act for failing to pay specific loss benefits and seeking payment of funeral expenses. The workers' compensation judge granted the payment of funeral expenses but denied the review and penalty petitions finding that there was no violation of the act in failing to pay the specific loss benefits. The WCAB affirmed. The Commonwealth Court held that specific loss benefits are payable after death only if there is a qualifying dependent.

The Supreme Court granted the petition for allowance of appeal. The issue to be considered by the Supreme Court, as stated by the petitioner is:

> Because specific loss benefits are not payable until either disability ceases or the worker dies, did [the] Commonwealth Court err by limiting receipt of specific loss benefits posthumously to only claimants who die because of a cause unrelated to the work injury?

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

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