pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

JOSH SHAPIRO, GOVERNOR
NANCY A. WALKER, SECRETARY

News & Notes

VOLUME 28 ISSUE 3 "Serving all Pennsylvanians" SUMMER 2023

Matthew W. Slater, Esquire joins the Bureau of Workers' Compensation as the Chief of Self-Insurance

Matthew W. Slater, Esquire has joined the bureau as the Chief of the Self-Insurance Division. Matt is responsible for overseeing the Self-Insurance program for Pennsylvania. Matt practiced workers' compensation law for more than 14 years throughout Pennsylvania. He represented claimants, many of whom worked for self-insured employers. Matt is a 2003 graduate of Widener University School of Law. He lives in Montgomery County with his wife, two daughters, and two German Shorthaired Pointers. Matt can be reached at mslater@pa.gov or (717) 886-9120.

Brandi Coleman joins the Bureau of Workers' Compensation as the Manager of the Uninsured Employers Guaranty Fund (UEGF)

Brandi Coleman has joined the bureau as Manager of the UEGF. Brandi is responsible for leading the UEGF team in analyzing claims information, evaluating potential and existing UEGF liabilities and recovery actions, and monitoring financial data to ensure stability in the UEGF. With over a decade of experience in the insurance industry, she began her career 20 years ago with state government as Press Secretary. Brandi is a 2001 graduate of the University of Pittsburgh. Brandi can be reached at bracoleman@pa.gov or (717) 886-9105.

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

In This Issue

22nd Annual Workers' Compensation Conference a Success!

The 22nd Annual Workers' Compensation Conference was held June 1-2, 2023 in Hershey, PA. This conference, is recognized as one of the top five worker's compensation conferences in the nation. More than 1,300 people attended this year's conference.

Work has already began to prepare for the 2024 conference which is scheduled for May 30 – 31, 2024.

Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to insure its Workers' Compensation liability is a criminal offense. 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 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 six months are as follows:

Allegheny County

Judge Kelly Bigley entered Joshua Bines, owner of A Clearvue LLC, into the Accelerated Rehabilitative Disposition Program on June 16, 2023 in Allegheny County Court of Common Pleas. Joshua Bines was placed on probation for a period of two years , complete 250 hours community service, was ordered to pay the costs of prosecution, and paid restitution to the Uninsured Employers' Guaranty Fund in the amount of $13,312.00. The bureau's Compliance Unit reports A Clearvue LLC is no longer in operation.

WCAIS TRAINING COMES TO TEAMS!

The Bureau of Workers' Compensation, Workers' Compensation Office of Adjudication, and Workers' Compensation Appeal Board will begin bi-monthly WCAIS Teams trainings for all stakeholders starting in September.

Watch for email communications, training topics, dates, and times.

Claims Corner

EDI Trading Partner Application Data - Call Underway

The bureau's annual data call for Trading Partner Application (TPI) data began July 15 and will run through October 15.

All Trading Partners companies (including Web Portal filers, Direct-File flat filers, and companies using a Transaction Partner) must submit a new Trading Partner Application annually.

To submit a new application, log into WCAIS, select the Trading Partner Application option from the EDI Drop-down menu, and begin! The data from your prior application will pre-populate to save you time, so all you need to do is review, update any fields that have changed, and submit.

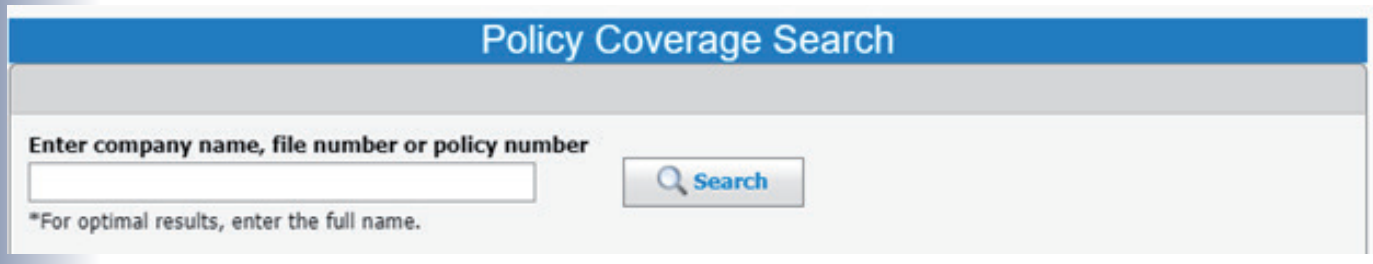
Questions regarding TPIs may be submitted using the WCAIS 'Submit a Question' option from the Customer Service drop-down menu. The category should be 'EDI,' and the sub-category should be 'Trading Partner Agreements .' You can find the virtual training on TPIs at the Bureau's EDI page, www.dli.pa.gov/EDI, by going to the Trading Partners, Transaction Partners, and Direct Filer Information block.

While we're on the subject of TPIs…

We are adding an additional Contact Type to the TPI screen on October 13. Trading Partners should use this new Contact Type to identify the individual, or Resource Account, who should receive emails about claim-specific issues, such as social security number changes or names, during the validation process. Whoever you identify will need to be someone within your company who can update the information in your system to ensure you don't receive any subsequent issues with EDI transactions later for the claim in question.

Are you looking for insurance coverage?

You can easily find this information on our website under the resource link "WC Insurance Search"; Workers' Compensation Insurance Search Form (pa.gov).



To run the search, enter the company name, file number, or policy number in the Policy Coverage Search box. All relevant results will display, and then you just need to select the right company from the list by clicking its link. Your results, which include the policy number, insurance carrier, NAIC code, and effective dates, will display in seconds.

Summer Safety Tips

Regardless of work, age, and location, there are general summer safety tips doctors promote to prevent or lessen the chances of heat illnesses and heat stress. Some of the most recommended tips are:

- Use broad-spectrum sunscreens to avoid sunburns, rashes, blisters, and redness
- Drink water or drinks with electrolytes regularly to avoid dehydration and heat strokes
- Wear light-colored and lightweight clothing to spot ticks and other insects on the skin and avoid trapping heat
- Avoid letting food sit out under the sun for long periods uncovered to ensure no insects can come in contact with it.

For Kids and Teens

In many places around the world, summer is a time for kids and teens to play outdoors in the sun, either on the beach or elsewhere. While they are expected to follow the same safety tips adults do, there are some summer safety tips for kids specifically for guardians to know, such as:

- Apply only small amounts of sunscreen on children less than six months old
- Avoid bringing kids under one year old into direct sunlight
- Cover children's heads under direct sunlight
- Supervise children playing in bodies of water, regardless of whether they have a floating device or not
- Ensure child seats are not too hot to the touch before seating a child
- Discourage children from playing in playgrounds when the sun is at its highest

For Workers

Certain workplace hazards only manifest in the summer due to the hot weather. This is especially true for those who work in direct sunlight and in such conditions for a prolonged period of time, leading to heat stress or heat stroke.

However, working for long periods during the summer or in extreme heat conditions is discouraged by the U.S. Centers for Disease Control and Prevention (CDC)'s National Institute for Occupational Safety and Health (NIOSH). As a summer safety tip, the CDC calls for employers to lessen or limit their employees' time in hot places. Instead, it encourages them to work more in cooler environments or air-conditioned areas or take more breaks. All workplaces should also have the proper ventilation system and potable water sources to help mitigate heat stress, heat cramps, heat exhaustion, fatigue, and dehydration.

Workers should also continuously wear sunscreen and other protective gear, even if some of them do not work in direct sunlight. Ultraviolet (UV) rays are found to be more intense during the summer; since sunlight and UV rays can still penetrate through windows or come from blue-light devices, wearing sunscreen indoors is essential.

A View from the Bench

***Elite Care, Rx, LLC v. Premier Comp. Solutions, LLC , et. al*, No. 1144 WDA 2020, 2023 WL 3591990 (Pa. Super. Ct. May 23, 2023).**

In *Elite Care, RX, LLC v. Premier Comp. Solutions, LLC*, the Superior Court affirmed the trial court's rejection of the insurer's challenge to subject matter jurisdiction and remanded the case back to the trial court of Allegheny County for further proceedings. In doing so, the court declined to follow the Commonwealth Court's holding in *Armour Pharmacy* and held that the Workers' Compensation Act does not provide for an administrative proceeding by or against putative providers or their billing agents in the bureau and found that such entities have no standing there.

By way of background, Elite Care, RX, LLC ("Elite Care"), is a third-party billing agent for healthcare providers. In this case 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.

In the instant case, 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 nothing 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 Courts 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.

Judge McLaughlin authored a concurring opinion, joined by Judge Murray, arguing that there was no need to consider whether the Commonwealth Court's decision in *Armour Pharmacy* was correct. She argued that the appeal could be resolved based on the Supreme Court's recent decision in *Franczyk v. The Home Depot*, ---A.3d ---, 2023 WL 2992700 (Pa. 2023), because the "injuries" alleged in the Elite Care's lawsuit were separable in that the lawsuit is between strangers to the employment relationship, it is for allegedly fraudulent conduct to evade payment of the bills—not for the unpaid bills themselves.

Judge Olsen filed a dissenting opinion arguing that all of Elite Care's claims seek payment for treatment that was provided under the act or compensation for damages due to the insurer's intentional mishandling of the workers' compensation claims, both of which occurred while the insurers were acting within their roles as workers' compensation insurers under the act. She argues that the act establishes the exclusive forum for resolution of payment disputes and mishandling of workers' compensation claims, citing several sections of the Act and *Kuney v. PMA Ins. Co.*, 578 A.2d 1285 (Pa. 1990).

Lindsay Franczyk v. The HOME DEPOT, INC. d/b/a Home Depot, Philip Rogers, and Thomas Mason, 292 A.3d 852 (Pa. S.Ct. 2023)

In Lindsay Franczyk v. The HOME DEPOT, INC. d/b/a Home Depot, Philip Rogers, and Thomas Mason, the Pennsylvania Supreme Court held the exclusivity provision of the Workers' Compensation Act barred a dog bite victim's suit against her employer, Home Depot, for negligently allowing the dog owner and witnesses to leave the employer's store without obtaining identifying information necessary for the victim to bring suit against the dog owner. The court noted that the act provides a comprehensive statutory remedy for workplace injuries in the form of a mandatory no-fault insurance program. In exchange, the so-called exclusivity provision of the act precludes employees from bringing workplace injury claims against their employers, although employees are not precluded from bringing negligence claims against third parties responsible for their injuries. The courts have recognized narrow exceptions to the exclusivity provision but have consistently held that an employer's wrongful, intentional, or bad faith conduct are not exceptions. Here, the employee argued she was not seeking to recover from her employer for the dog bite itself, but rather for the economic harm she suffered as a result of having been denied the opportunity to file a third-party lawsuit against the dog owner. The trial court recognized this novel exception and permitted the employee to proceed with her negligence claim, and the Superior Court affirmed the trial court's ruling. On appeal, the Supreme Court reversed, finding that

the exception approved by the lower courts could not be reconciled with the act's design, purpose, or plain language. The court rejected the employee's argument that her suit against her employer presented a truly separate injury; rather, the asserted injury was intertwined inextricably with an injury compensable under the act. The act clearly precluded the employee's attempt to recover for her physical injuries from her employer beyond what is afforded under the act. This is precisely what the exclusivity provision of the act is intended to prevent. In a concurring opinion, Justice Todd agreed with the majority's holding to the extent the employee's claim was based upon a theory of mere negligence on the employer's behalf. She would decline, however, to extend the ruling to claims alleging an employer's intentional misconduct, such as intentional interference with an employee's right to sue a third-party tortfeasor.

Kristina Steets v. Celebration Fireworks, Inc. (Workers' Comp. Appeal Bd.), No. 512 C.D. 2022, 2023 WL 3294626, 295 A.3d 312 (Pa. Cmwlth. Ct. May 8, 2023)

This matter involved an estate of the deceased injured worker filing a penalty petition for failure to pay specific loss benefits. The primary issue is whether the employer is obligated to pay specific loss benefits when TTD payments have ended due to death and there are no dependents under the Workers' Compensation Act.

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 WCJ to add a specific loss award of 840 weeks to be paid once the claimant's total disability benefits ceased. On November 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 WCJ 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.

At issue was Section 306(g) of the Workers' Compensation Act. The court noted that "The survivability of specific loss benefits is treated separately in the act." Est. of Harris v. WCAB (Sunoco, Inc.), 845 A.2d 239, 243 (Pa. Cmwlth. 2004). There is also a distinction when the cause of the death is due to the work-related injury and when the death was from another cause.

On the specific facts presented here, Section 306(g) provides for the payment of specific loss benefits following a work-related death and states, "if there are no dependents eligible to receive payments under this section[,] then the payments shall be made to the estate of the deceased but in an amount not exceeding reasonable funeral expenses as provided in this [A]ct." 77 P.S. § 541. The court noted that nearly an identical fact pattern and argument was made in the matter of Est. of Harris v. WCAB (Sunoco, Inc.), 845 A.2d 239, 243 (Pa. Cmwlth. 2004). Such case law was binding precedent, not in error, and consistent with the statute and statutory interpretation.

Accordingly, the court held that when an employee, without qualifying dependents, dies due to a work injury while collecting total disability benefits and before specific loss benefits are payable, the only specific loss payments due are reasonable (up to $7,000.00) funeral expenses to be paid to the funeral home.

A View From the Bench (cont'd.)

There was a dissent issued by Judge Ceisler and joined by President Judge Cohn Jubelirer in this matter. The distinction was made from Harris as the claimant in that matter was not awarded specific loss benefits prior to his death. The dissent argued that Section 410 of the act was applicable and authorized payment of specific loss benefits following a death.

Alpini v. Workers' Comp. Appeal Bd. (Tinicum Township), No. 2 MAP 2022, 2023 WL 3470691 (Pa. May 16, 2023)

In Alpini v. Workers' Comp. Appeal Bd. (Tinicum Township), the Supreme Court held that a claim brought by a police officer under the Dram Shop Act for injuries sustained when an intoxicated driver struck his patrol car "arose out of the maintenance or use of a motor vehicle" under the Motor Vehicle Financial Responsibility Law (MVFRL). Consequently, the township did not have a right of subrogation from the third-party recovery for the Heart and Lung benefits it paid.

By way of background, the claimant was a police officer who suffered injuries when his vehicle was struck by an intoxicated driver. Employer accepted liability for the claim through a converted notice of temporary compensation payable. The claimant also received Heart and Lung Act benefits, so the workers' compensation wage loss checks were signed over to the employer.

The claimant then sued the intoxicated driver in negligence, and the taverns that served the driver for violations of the Dram Shop Act. In general, the MVFRL does not allow subrogation for recovery arising out of the use of a motor vehicle, but the Dram Shop Act has no such restrictions. The claimant eventually settled all claims for $1,325,000, with $25,000 from the impaired driver and the remainder from the two bars involved in the lawsuit.

The employer filed a modification petition seeking subrogation of the Heart and Lung payment from the part of the settlement attributable to the Dram Shop action. The workers' compensation judge granted the employer's petition. Both claimant and the employer appealed the decision to the Workers' Compensation Appeal Board, which affirmed the decision, and remanded the matter back to the workers' compensation judge to determine the method by which the employer could recoup its lien. On remand, the workers' compensation judge found that the employer had met its burden of establishing a subrogable interest in the $1.3 million portion of claimant's settlement with the bars, entitling the employer to a net recovery of approximately $340,000.

The claimant appealed to the Commonwealth Court arguing that the employer did not have a right to subrogation against his Heart and Lung benefits per Stermel and Bushta. In Stermel v. Workers' Compensation Appeal Board (City of Philadelphia), 103 A.2d 876 (Pa. Cmwlth. 2014), the Commonwealth Court held that the MVFRL did not allow an individual to recover wage loss benefits from the City of Philadelphia because the wage loss was covered by the Heart and Lung Act, thus his recovery was the net of the Heart and Lung benefits. In Pennsylvania State Police v. Workers' Compensation Appeal Board (Bushta), 184 A.3d 958 (Pa. 2018), the Supreme Court held that state police were not entitled to subrogation for benefits paid under the Heart and Lung Act. The Commonwealth Court held that the Appeal Board did not err as a matter of law in finding that the township could subrogate payments made under the Workers' Compensation Act and Heart and Lung Act from the settlement with the bars under the Dram Shop Act. The court reasoned that although the recovery involved the use of a motor vehicle,

the liability of the bars did not arise from the use of a motor vehicle, but rather from their negligence in serving alcohol to a visibly intoxicated person. The court explained that when a third-party recovery arises from the use of a motor vehicle, per the MVFRL, Stermel and Bushta, employer may not seek subrogation from workers' compensation benefits paid or Heart and Lung Act benefits, however, that restriction does not apply to a recovery stemming from a different cause of action not arising under the MVFRL. The court therefore held that because the claimant's settlement specifically delineated the portion of recovery that was from the bars under the Dram Shop Act that portion of the settlement was available to the township in their subrogation claim.

The Supreme Court, in a divided decision, disagreed, and reversed. It noted that the anti-subrogation provisions of the MVFRL apply to "actions arising out of the maintenance or use of a motor vehicle." 75 Pa.C.S. § 1720. While the theory of recovery against the bar owners was under the Dram Shop Act, the fact remained that the action arose out of the maintenance or use of a motor vehicle. The court noted that had the legislature intended to have the anti-subrogation provisions apply only to actions arising under the MVFRL, it would have indicated as such. Instead, it applied the language more broadly to include actions arising from a motor vehicle collision, regardless of the theory of liability. In this case, the origin of the claimant's lawsuit was the drunk driver's vehicle colliding with the claimant's patrol car. Consequently, the court held that Section 1720's anti-subrogation provisions apply, and the employer cannot subrogate its payment of Heart and Lung Act benefits from the claimant's third-party settlement.

Justice Dougherty, joined by Justice Donohue, wrote a concurring opinion, writing that because the claimant received Heart and Lung benefits, he could not claim or recover those benefits in the third-party action under Section 1722 of the MVFRL. Therefore, there was no source of recovery from which the employer could subrogate under Section 319 of the Workers' Compensation Act.

Justice Wecht, joined by Chief Justice Todd, dissented, writing that he would be inclined to allow the employer to subrogate up to the amount of the workers' compensation benefits paid.

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