



News & Notes

Labor & Industry Celebrates 100 Years of Workers' Compensation

In conjunction with this year's Annual Workers' Compensation Conference at the Hershey Lodge and Convention Center on June 1-2, the Department of Labor & Industry celebrated the 100th anniversary of Pennsylvania's Workers' Compensation Act (act). As part of the festivities, the Pennsylvania Bar Association held a Centennial Gala Reception & Dinner at the conference, and Labor & Industry buried a time capsule at the department's building, to be opened in 50 years.

creation of the Department of Labor & Industry – the Workers' Compensation Act established a no-fault system of providing monetary compensation and medical treatment to workers injured on the job. One hundred years later, our commitment to protecting and serving Pennsylvania's workforce remains as strong as ever, and as we carry out our mission in the coming years, we will continue seeking new ways to improve the workers' compensation system for all Pennsylvanians.

Approved on June 2, 1915 – only two years after the

A Message from the Directors

News & Notes is a quarterly publication issued to the Pennsylvania workers' compensation community by the Bureau of Workers' Compensation (BWC) and the Workers' Compensation Office of Adjudication (WCOA). The publication includes articles about the status of affairs in the workers' compensation community as well as legal updates on significant cases from the Commonwealth Court.

Among the articles featured in this edition are notices from the bureau and WCOA regarding upgrades to WCAIS, important claims-filing reminders from our Claims Management Division and an article advertising a new program by Kids' Chance of PA called Kids' Chance Cares. Kids' Chance is a charitable organization providing scholarships for children impacted by a parent's workers' compensation injury

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Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of July 23, 2015:

**11,052 committees covering
1,446,162 employees**

Cumulative grand total of employer savings:
\$582,738,891

Employer Information Services
717-772-3702

Claims Information Services
toll free inside PA: 800-482-2383
local & outside PA: 717-772-4447

Only People with Hearing Loss
toll free inside PA TTY: 800-362-4228
local & outside PA TTY: 717-772-4991

Email
ra-li-bwc-helpline@state.pa.gov

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

A Message from the Directors

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or fatality. Also included are articles celebrating the 100th anniversary of the enactment of the Pennsylvania Workers' Compensation Act. Additionally, we continue to feature the outstanding article entitled "A View from the Bench," in which judges from the Pennsylvania Workers' Compensation Judges Professional Association summarize recent key decisions from the Commonwealth Court that are of interest to all workers' compensation attorneys.

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

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

BWC Announces New Director

The Bureau of Workers' Compensation (BWC) recently announced the appointment of Scott Weiant as the new bureau director.

Prior to his July 2015 appointment as BWC director, Weiant occupied numerous leadership positions within the bureau. In 2002 he brought 22 years of private industry experience to the commonwealth when he joined the bureau's Health & Safety Division as an accident and illness prevention analyst. Weiant went on to become manager of the Certification and Education Section and eventually chief of the Health & Safety Division.

During his tenure as division chief, Weiant provided strong leadership throughout the development of WCAIS and the launch of the Health & Safety Division's outreach and training resource, PATHS. In August 2014 he was appointed to the newly-created position of assistant director, directly overseeing the operations of the Claims Management Division, the Health & Safety Division, the Compliance Section, and the Uninsured Employers Guaranty Fund.

Join us in welcoming Scott Weiant as the new BWC director.



2014 Medical Accessibility Study Available

The Department of Labor & Industry is required by the Workers' Compensation Act to commission an annual study to determine whether the fee schedule for health care services is adequate to ensure that injured workers have sufficient access to quality health care. The study also considers the impact of using panel providers on access to quality care and on number of days lost per injury.

The 2014 study reports the highest levels of patient satisfaction with care in the study's 18-year history. According to the study, the great majority of injured workers, approximately 90 percent, continue to receive timely and appropriate care for work-related injuries with which they are satisfied or very satisfied.

The 2014 study Results from can be found on the bureau's [Publications page](#).

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2014 WC Annual Report & Medical Access Studies

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2014 PA Workers' Compensation and Workplace Safety Annual Report Available

The 2014 Pennsylvania Workers' Compensation and Workplace Safety report is now available online. The report illustrates the Workers' Compensation Program's achievements in 2014 and provides statistics on work injuries and illness that occurred during the year

to workers employed by businesses covered by the Pennsylvania Workers' Compensation Act.

The 2014 report can be found at the bureau's [Publications page](#).

14th Annual Workers' Compensation Conference

This year, more than 1,450 members of the workers' compensation community participated in the 2015 Workers' Compensation Conference on June 1 - 2.

The Workers' Compensation Act also celebrated its 100th anniversary on June 2, 2015. To celebrate this historic event, the Pennsylvania Bar Association Workers' Compensation Section Centennial Celebration Committee held a Gala Reception & Dinner on June 1, 2015.

Attendees at both the conference and the gala/reception represented various sectors of the community, including labor, employers, insurers, attorneys, health care professionals, and others with an interest in Pennsylvania's workers' compensation law, practices and procedures.

Working together with workers' compensation professionals on the conference planning committee,



the Department of Labor & Industry offered sessions ranging from the tried and true "As the Claim Turns" and "Legal Updates" to topics that incorporated the 100 years of workers' compensation history and more. Attendee evaluations were filled with positive feedback such as "The best! Energizing!" "Excellent conference and well planned" and "Had a great experience at this conference. All of the speakers did an awesome job presenting." Attendees also enjoyed visiting with vendors who offered products and services related to rehabilitation, investigation, insurance, case management and legal representation.

The 2016 conference will be held at the Hershey Lodge and Convention Center on May 16 - 17, 2016, and efforts are underway to prepare the 2016 agenda. Please watch the department website for more information about next year's event. Visit www.dli.state.pa.us and click on "Workers' Compensation," "Conference, Seminars, Training" then "Annual Conference."



WCOA WCAIS Enhancement News

In the June release, WCOA made the changes below in WCAIS to enhance external stakeholders' experience.

1. **Petition Assignment Date** – We will be adding a column for Petition Assignment Date to the Petitions & Answers and General Information tabs in the Dispute Summary.
2. **Brief Extension Request History** – The Brief Extension Request History grid on the Briefs tab of the Dispute Summary will keep the original brief due date as well as any extended due date.

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WCOA WCAIS Enhancement News

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3. **Instructions from the Judge** – An “Instructions from the Judge” text box will be added to the General Information tab of the Dispute Summary. This will allow the judge to communicate important information to external stakeholders.
4. **Field Office Contact Information** – WCOA correspondence will now have the contact information of the appropriate WCOA field office in the footer.
5. **Continuance Request Information** – The reason for the continuance request and the date that the need for the continuance arose are now required fields for the external stakeholder when submitting a continuance request. Continuance request history details will now be displayed in a grid on the Hearing Information tab of the Dispute Summary.
6. **Entry of Appearance Service Document** – Upon entry of appearance, the external stakeholder will receive a document on the dashboard in the correspondence grid that they can print and use to notify other parties of their entry of appearance.
7. **Canceled Events** – Canceled events will now be removed from the Upcoming Events grid on the dashboard.
8. **Assignment County** – In some instances the assignment county listed on the assignment notice was incorrect. This defect has been resolved.
9. **Law Firm Admin Role Updates** – Law Firm Admins will have the ability to enter an attorney’s appearance on multiple matters simultaneously.
10. **Law Firm User Role Updates** – Attorneys will now be able to designate a Law Firm User to work on their behalf in WCAIS. Law Firm Users can work on behalf of multiple attorneys within the system.

BWC WCAIS Enhancement News

The following important enhancements to functionality were incorporated into the Workers’ Compensation Automation and Integration System (WCAIS) on June 18, 2015:

- Health Care Services Review Update
- Claims Updates

For enhancements for WCOA stakeholders, please see the article titled “WCOA WCAIS Enhancement News” on page 3.

Health Care Services Review Update:

1. For Health Care Professionals and Providers: As of the June release, the following statement has been added to the administrative decision: **Online fee review billed charges were reviewed as submitted by the provider/ professional.**
2. For UROs: As of the June release, all UR requests that are waiting for determinations are now displayed on the UR Request Information / Conflict of Interest tab.

Claims Management Updates:

1. SROI RB Edit: Due to input from adjusters, we have identified an update to the SROI RB that addresses some of the recent sequencing concerns, and in June we made the Agreement to Compensate code mandatory on all SROI RBs. This prevents an RB from being accepted without re-opening the claim, which had been the problem. Now that the Agreement to Compensate code is required, all RBs re-open the claim, which makes it easier for the next transaction in the sequence to accept. The updated Element Table was posted shortly before the June enhancement push. Please make certain to discuss the new edit with your EDI team and/or Transaction Partner so you have your code updated.
2. Employer FEIN Edit: Since June, WCAIS now edits FROI 00s and FROI 04s on the Employer FEIN to increase acceptances where multiple injuries occur on the same day with different employers. This reduces the amount of Data Quality corrections to interested parties, reduces extra steps by adjusters and eliminated the cost of an extra transaction that the previous work around required.
Please note: No system or coding updates are needed by the Trading Partners.

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BWC WCAIS Enhancement News

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Reminder to Update Claim with EDI Transaction

Some insurers and TPAs are still not being consistent in the use of EDI transactions to update claims in WCAIS. Since we have implemented the above and move toward additional enhancements to the filing process in WCAIS, it will become even more evident that an EDI transaction must be completed to establish a claim in WCAIS and that the proper EDI transactions be completed to update the claim status at pertinent junctures of the administration of the claim. Another enhancement made available in June is a new feature where WCAIS prompts a user when a form is uploaded to a claim (or when a form is generated from the claim summary for external users) to remind the user of the importance of matching the form submission with the equivalent EDI transaction, since that is the only way to update the claim in WCAIS (simply uploading and attaching a form does not update the claim status). This is another tool to help claims representatives better manage their claims in WCAIS. Refer to the PA Implementation Guide and Event Table to identify the proper transaction(s) for reporting claim activity.

Bureau Offering Customized Claims Management Training

The Claims Management Division is currently offering customized training meetings with insurers and TPAs. Based on a company's chosen filing method, their relationship with their transmission staff or vendor and a system review of their company's most difficult filing issues, we are anxious to help companies to settle into good filing practices, now that we have been live with WCAIS for more than a year. To set up a one-on-one training meeting with Claims Management staff, email the EDI resource account at RA-CMDEDI@pa.gov.

Using the Correct FEIN - Why is it so Important?

In February 2014, BWC created a new section to address data quality issues. The new unit, the Data Quality Section, researches and updates profile discrepancies for claimants, employers, insurers, and TPAs in WCAIS, along with other data matching elements that are used to identify a claim. The Data Quality Section, along with the EDI resource account, is seeing an increased number of incorrect employer FEINs being reported in the system. When the FEIN is entered incorrectly, the wrong party gets attached to the claim on the Interested Parties tab. WCAIS uses the information on the Interested Parties tab to generate correspondence and hearing notices and in the interactive Forms Generation and Forms Preparation features on the Actions tab of the claim. The use of an incorrect FEIN may result in unintended litigation expenses when the wrong party is named in a workers' compensation proceeding before a WCJ.

Please make certain to verify the employer FEIN before submitting an EDI transaction to BWC. If you are uncertain of the FEIN for the company, or if the company is out of business and you don't have the FEIN, please contact the EDI resource account at RA-CMDEDI@pa.gov with the employer's name and address. The EDI section will research the employer and provide you with either the correct FEIN or a placeholder FEIN to use in future EDI transactions. To prevent confusion and inaccurate data in WCAIS, do not make up your own placeholder ID. If there is an existing claim in WCAIS with an incorrect employer listed, please email the EDI resource account with the JCN and the name of the correct employer (and its address) and we will research this as well. If WCAIS has incorrect information, we will correct it; however, if WCAIS is accurate, we will provide you with the correct FEIN to use for that employer.

CLAIMS MANAGEMENT DIVISION

WCJ Procedural Requirements

The Office of Adjudication recently made significant changes to its website to provide guidance to attorneys as to each specific judge's procedural requirements for both litigation and mediation. Previously referred to as the "Judge Book," the Judges' Procedural Questionnaires

provide guidance in the form of a standard questionnaire completed by each judge. Each questionnaire contains 24 questions and answers and, in some instances, attached forms. The questionnaire provides information to parties as to a judge's expectations for hearings, submissions,

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WCJ Procedural Requirements

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etc. and addresses procedures that parties frequently encounter when litigating or mediating workers' compensation cases before a judge. The questionnaires may be searched alphabetically by judge's name or by field office and district.

The procedural requirements provided are for informational purposes only, intended solely as

general guidelines for litigating or mediating cases before workers' compensation judges. The Q&A's range in topic from what parties can expect at a first meeting with the judge, to a particular judge's rules for taking testimony, to procedures for superseding hearings, to whether the judge will close a case by mail, and more.

WCOA Resource Center...Here to Help You

Email: WCOAResourceCenter@pa.gov

Phone: 844-237-6316

The Workers' Compensation Office of Adjudication established a resource center to respond to inquiries from internal staff and external stakeholders regarding WCOA-related WCAIS problems, questions, and suggestions. Inquiries address issues such as data quality, defects, enhancements, general questions, profile updates, and how-to questions. Resource Center staff are tracking questions in number and type and using the information to identify training needs and other outreach efforts for users. Identifying and addressing issues at this level helps to keep problems from becoming larger issues. And, as a reminder, *WCOA staff members must escalate all WCAIS issues through their regular chain of command prior to contacting the Resource Center. This helps eliminate training issues incorrectly reported to the Resource Center and ensures that supervisors and administrative officers are aware of issues in their offices.*

When initially launched in November 2014, stakeholders were limited to submitting queries

and concerns to the Resource Center via email. In March 2015, a phone line was added, giving Resource Center staff the ability to speak directly to users. This is especially helpful when addressing more complicated issues and makes the process more efficient overall. The phone number is listed above, along with the email address.

Training and communications to internal staff and external stakeholders are also provided after each quarterly change to WCAIS, and Resource Center staff aid in testing all new WCAIS enhancements before they are released into production. This effort gives the staff timely and specific technical insight into WCAIS and WCOA processes and procedures, affording them a knowledge base essential in providing the best customer service possible.

So, remember to contact the WCOA Resource Center for your adjudication-related WCAIS concerns. Staff are standing by, ready to help you.

PA Training for Health and Safety

"PATHS" Your No-Fee Safety Training Resource

The Pennsylvania Bureau of Workers' Compensation, Health & Safety Division's PATHS (PA Training for Health and Safety) training is enjoying an ever-expanding impact on providing safety information with 134 topics, including the timely "Heat Related Injuries and Illnesses," now offered free of charge. The popularity numbers of this extraordinary FREE resource initiative continue to increase, with 18,772 individuals trained as of June 1, 2015, compared to 7,045 as of June 1, 2014. Employers and employees from **41 states** and **four countries** have taken

advantage of this program! You, too, may take advantage of this outstanding free resource by going to PATHS at www.dli.state.pa.us/PATHS or by contacting the Health & Safety Division by phone at 717-772-1635. You may also reach us via email at RA-LI-BWC-PATHS@pa.gov.

We have even more good news to report – you can now catch us on Facebook! Go to <https://www.facebook.com/BWCPATHS> and meet the trainers, read all about us, get good safety tips and ENJOY!

2015 Governor's Award for Safety Excellence

This year, BWC's Health & Safety Division has received 69 applications for the Governor's Award for Safety Excellence. We have received many exceptional applications from companies throughout the Commonwealth of Pennsylvania that strive every day to achieve a higher level of safety. Award winners this year will be

presented with the option of receiving the award at the Governor's Occupational Safety & Health Conference, October 26 - 27 at the Hershey Lodge & Convention Center, or receiving the award at both the conference and their workplace, to include all employees in the celebration.

Kids' Chance Golf Outing



10 Years of Support and Success with Kids' Chance of PA

Sunday, May 31, 2015 was a great day for the Kids' Chance of Pennsylvania 10th Annual Golf Outing. Beautiful weather greeted over 120 golfers who arrived to "Tee Off for the Kids" in support of our mission to provide scholarships to children who suffer from lack of financial support due to a parent's workers' compensation injury or fatality.

In celebration of our 10th anniversary of golf and camaraderie, the schedule was expanded in order to highlight the important recognition of our Partners and Scholar Sponsors, as well as 10-Year Golf Outing participants, and provide a beef-and-beer after golfing for additional socializing and relaxing among friends and colleagues.

Kids' Chance of PA President John McTiernan welcomed golfers to the recognition luncheon and

provided the latest and greatest news from Kids' Chance of PA. Following special acknowledgments of our Partners and Scholar Sponsors, Kids' Chance of Pennsylvania scholarship recipients Monirh Larkpor and John Kulick took their place at the podium to introduce themselves and inspire the group with their stories and the benefits our scholarships have provided.

Specifically, John shared that "I believe I speak for all of us, both students and families that have benefited from this organization, that we are forever grateful to this organization and for the support you have given all of us."

Thank you to everyone who attended! This was our most memorable golf outing yet, and we look forward to seeing you all again in 2016.

[Check out the photos and feel free to share!](#)

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Kids' Chance Golf Outing

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Two Cities, Two Dates, Too Much Fun to Miss!

It's time for the 2015 Kids' Chance of Pennsylvania 5/10K Walk/Runs. These are fun, family-friendly opportunities to support the Kids' Chance mission. [Register today](#) to join us at one or both locations:

Harrisburg: Sunday, Oct. 4, 2015, 11:00 AM - 4:00 PM

Pittsburgh: Saturday, Oct. 10, 2015, 7:30 AM - 2:00 PM

Not a runner, but still want to support the event? You can become a sponsor or participate as a volunteer. To become a sponsor or volunteer, please contact us at info@kidschanceofpa.org.

Announcing Kids' Chance Cares Program



Kids' Chance is pleased to announce its brand new program, Kids' Chance Cares: Student Care Packages! This program provides our scholarship recipients with a care package, which will be stuffed at a packing party on Oct. 22, 2015. This program is a great way to be involved with the Kids' Chance mission in a personal way, either as a care package item donor or volunteer.

The hardships created by the death or serious disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams. In addition to providing scholarship assistance, we want to do all we can to help our scholarship students make that next step in the furtherance of their education. Help us make sure that each care package recipient knows that "Kids' Chance Cares" about their education and we are here to support them.

Interested in getting involved? Please contact the Kids' Chance office directly at info@kidschanceofpa.org.

About Kids' Chance of Pennsylvania

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

The hardships created by the death or serious disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams.

Visit our website at www.kidschanceofpa.org to learn more.

Arts Council Unveils Sixth Portrait of Famous Philadelphia Industry

By the Arts Council, Workers' Compensation Section
Philadelphia Bar Association

On April 24, 2015, the Arts Council of the Workers' Compensation Section of the Philadelphia Bar Association unveiled its sixth painting in a series of iconic portraits depicting Philadelphia industries from by-gone eras that had a national and international impact. At a ceremony at the Ritz Carlton Hotel attended by 150 workers' compensation attorneys and judges, a portrait of "Lubin Films" was unveiled. Six years ago, the Arts Council (consisting of Philadelphia workers' compensation judges and attorneys) partnered with Shaina Anderson, a young student from the University of the Arts, for the purpose of creating paintings that capture the strong work ethic, dedication, and creativity of Philadelphia workers and the finely-crafted and high-quality goods they created. The walls of the hearing office of the Workers' Compensation Office of Adjudication at 8th and Arch Streets are presently adorned with the following portraits, which bring to life the glorious past of well-known Philadelphia industries. Each portrait has a narrative explaining how the industry has positively impacted our nation:

The Budd Company	"Philadelphia Moves the Nation" through the manufacture of high-quality railcars.
The Navy Yard	"Philadelphia Defends the Nation" through the building of the USS New Jersey (BB-62), the most decorated battleship in our nation's history.
John B. Stetson Company	"Philadelphia Adorns the Nation" through the production of world-famous hats.
Philadelphia Toboggan Company	"Philadelphia Amuses the Nation" through the crafting of high-quality carousels that whirled in amusement parks throughout the country.
Bassetts Ice Cream Company	"Philadelphia Treats the Nation" as the oldest ice cream manufacturer in the nation. Bassetts' secret of success is that it "has served a world-class product for a world-class city."

The sixth portrait is of "Lubin Films," a world-famous film company started by Siegmund Lubin in the last decade of the 19th century. At that time, the Lubin studio at 20th and Indiana Streets, Philadelphia, rivaled any film studio in the world. His studio films covered a wide variety of subjects, including westerns, the Civil War and modern life.



The art project is particularly important this year, since it serves as a tribute to the Pennsylvania worker as the commonwealth celebrates 100 years of the Workers' Compensation Act.

The public is invited to visit the Philadelphia Workers' Compensation Office of Adjudication, view the artwork and read the explanatory panels, which discuss the paintings and their significance to the nation and the world.

Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to insure its workers' compensation liability is a criminal offense and classifies each day's violation as a separate offense, either a third-degree misdemeanor or, if intentional, a third-degree felony.

First-time offenders may be eligible to enter into the Accelerated Rehabilitative Disposition (ARD) program. Defendants who enter the ARD program waive their right to a speedy trial and statute of limitations challenges during the period of enrollment; they further agree to abide by the terms imposed by the presiding judge. Upon completion of the program, defendants may petition the court for the charges to

be dismissed. Although acceptance into the program does not constitute a conviction, it may be construed as a conviction for purposes of computing sentences on subsequent convictions.

The violators and locations are as follows:

Allegheny County

Jomarie Fennell, agent for Golden Years Home Health, Inc., was sentenced on April 27, 2015, by Judge Philip A. Ignelzi in the Allegheny County Court of Common Pleas. Fennell pled guilty to 12 third-degree felony counts, was sentenced to five years probation and was ordered to pay restitution to the Uninsured Employers Guaranty Fund in the amount of \$30,369.60.

A View from the Bench

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

Commonwealth Court Affirms Common Law Marriage Finding

In *Elk Mountain Ski Resort, Inc. v. WCAB (Tietz, deceased, and Tietz-Morrison)*, No. 1017 C.D. 2014 (Pa. Cmwlth. April 7, 2015), 114 A.3rd 27, Commonwealth Court has upheld a workers' compensation judge's (WCJ) decision which found that a valid common law marriage existed, and awarded §307 widow's benefits in addition to dependent minor child benefits. Decedent died in an October 2011 work-related vehicle accident. Widow filed a fatal claim petition seeking benefits for herself, two minor children, born in 2005 and 2011 respectively (whose rights to benefits the employer conceded), and one adult child from a previous marriage (later withdrawn). Decedent and widow were both Native Americans. Widow, corroborated by her mother, testified that she and decedent were married in a traditional Native American marriage ceremony, which she described at length. She offered several pieces of documentary evidence that purported to recognize their husband and wife status, including a Court of Common Pleas Orphans' Court Division decree that found her to be a surviving spouse entitled to an intestate share of decedent's estate and appointed her as the estate administratrix. The WCJ found all of claimant's evidence credible and awarded widow's benefits. The Workers' Compensation Appeal Board affirmed, as did Commonwealth Court, addressing several evidentiary issues. First, it held that the claimant's burden of proof to establish a common law marriage is "clear and convincing" evidence, not "substantial" evidence, and it explained the differences in those concepts. Next, where one of the proponents of the marriage is unavailable to testify, as here, there is a rebuttable presumption of a valid marriage if there is evidence of constant cohabitation and a reputation

of marriage. Third, The Dead Man's Act, 42 Pa.C.S. §5930, affecting the legal competency of witnesses concerning a dead person, did not apply here because the witnesses' (widow and her mother) interest was not adverse to the estate. In addition, its terms may be waived by the estate representative, which widow was, by virtue of the Orphans' Court decree. Finally, the employer had not raised that defense before the WCJ, so that it was waived. In conclusion, the court noted that the parties' common law marriage took place on June 12, 2004, before the Jan. 1, 2005, statute that abolished such marriages prospectively only. (It also discussed the relevant decisions on that issue.)

Fee Allocation between Former and Current Counsel Upheld

In *Bierman v. WCAB (Philadelphia National Bank)*, No. 1336 C.D. 2014 (Pa. Cmwlth. April 1, 2015), 113 A.3rd 38, the claimant suffered an October 1983 injury. Former counsel began to represent her in 1987 after the employer filed a termination petition, and counsel had received a fee deducted from the claimant's benefits for the next 26 years, despite having performed no services after the 1989 decision that denied termination. Former counsel and the employer began settlement negotiations in early 2012. When negotiations broke down without an agreement, the claimant sought new counsel and executed a contingent fee agreement with current counsel in April 2012. Current counsel filed a review petition seeking allocation of the ongoing fee, and the claimant's son testified to the reasons for dissatisfaction with former counsel and hiring of new counsel. During that litigation, current counsel effected a compromise and release (C&R) settlement. Claimant received her proceeds, and the fee was escrowed pending decision on the fee allocation review petition. Carefully outlining the analysis of the balancing of counsels' respective interests, in accordance with *Hendricks v. WCAB (Phoenix Pipe & Tube)*, 909 A.2d 445 (Pa.

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A View from the Bench

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Cmwlth. 2006), the workers' compensation judge (WCJ) then awarded former counsel the fee through the C&R hearing, already paid, and awarded current counsel the entire escrowed fee from the settlement. Former counsel appealed. The Workers' Compensation Appeal Board affirmed. Using an abuse of discretion standard, Commonwealth Court found that the WCJ had fully explained the considerations in arriving at the allocation and had adequately balanced the rights of the claimant to have counsel of her choosing and the competing attorneys' expectations of reasonable fees for their services.

Section 319 Subrogation is Absolute and is Lost Only by Choice

In *Fortwangler v. WCAB (Quest Diagnostics, et al.)*, No. 1085 C.D. 2014 (Pa. Cmwlth. March 31, 2015), 113 A.3d 28, the court was faced with the interpretation of subrogation waiver language in a third-party settlement agreement. A December 2008 agreement provided that the employer waived its past and future subrogation rights in exchange for payment of its outstanding lien, plus a small additional sum, about \$500, from the proceeds of the third-party recovery. (The claimant offered as an exhibit only an unsigned copy of this document.) A corrected January 2009 settlement agreement slightly increased the amount of the accrued lien, as a few more weeks' benefits had been paid in the interim, and provided that the employer agreed to accept this payment in full satisfaction of the lien, but it was paid the exact amount of the accrued lien. Significantly, the new agreement also deleted the sentence that had waived future subrogation. When the employer deducted the credit for the future lien from ongoing payments, the claimant filed a petition to review and to reinstate the full benefit payment. The claimant testified that counsel told her that the new agreement, despite the removed language, also waived future subrogation. The workers' compensation judge agreed, held that the employer waived future subrogation, and reinstated the claimant's full benefits without deduction. The Workers' Compensation Appeal Board (WCAB) reversed and allowed the employer to take the credit, holding that the claimant's understanding was not sufficient evidence upon which to support a finding of waiver. Commonwealth Court affirmed the WCAB. It addressed the differences in the agreements, which created ambiguity, requiring interpretation. It noted that the first agreement provided for payment of more than the accrued lien, while the second paid the exact lien, so that there was legal consideration for the waiver in the first but not in the second. Further, the express waiver language in the first was removed from the second. Because of the employer's absolute right of §319 subrogation, the claimant bore the burden of proving its voluntary waiver of future subrogation rights; her understanding was insufficient to meet

that burden. Because she was not present during the negotiations that led to the changed language and she offered no firsthand evidence (such as counsel's testimony), she had not met her evidentiary burden. Future subrogation was enforceable.

Disclosure of Third-Party Settlement

In *Reed v. WCAB (Allied Signal, Inc. and its successor in interest Honeywell, Inc. and Travelers Insurance Co.)*, No. 879 C.D. 2014, Pa. Cmwlth., 114 A 3d 464, the WCJ dismissed the review, modification, and reinstatement petitions filed by the claimant, who in this case is the daughter of Joseph Reed, because the claimant failed to disclose to the defendants the monetary amount received in a third-party settlement. The WCAB and Commonwealth Court affirmed.

This case actually began with a claim petition filed by Joseph Reed in 1985 due to an occupational disease. The WCJ awarded benefits from 1985 to 1990, at which time benefits were suspended because the claimant did not follow through on available work within his restrictions. However, since there was a third-party recovery, the defendants did not pay the benefits awarded from 1985 to 1990. The earlier decision was appealed to the WCAB and Commonwealth Court and was affirmed. A Petition for Allowance of Appeal to the Supreme Court followed and was denied. *Reed v. WCAB (Allied Corporation and Travelers Insurance Co.)*, 944 A.2d 759 (Pa. 2007), (order denying petition for allowance of appeal). Shortly after those appeals were exhausted, the current petitions were filed and dismissed leading to this appeal.

On appeal, the claimant argued that the WCJ erred by placing the burden on the claimant to establish the amount of the third-party recovery. The claimant argued that, under Section 319 of the act, the employer has the burden to establish that the automatic subrogation provision has been triggered. However, the Commonwealth Court determined that the claimant misconstrued the WCJ's initial ruling. The WCJ actually concluded that the employer satisfied its burden under Section 319, thereby triggering the automatic subrogation provision. The only question remaining is the amount of the recovery.

Section 319 of the act provides, in pertinent part:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer ... 77 P.S. § 671.

The Commonwealth Court noted that the text of the

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statute clearly and unequivocally establishes the employer's burden. An employer must demonstrate that it is compelled to make payments for a claimant's work-related injury by reason of the negligence of a third-party and that the funds the employer is seeking to recover were paid to the claimant for the same compensable injury for which the employer is liable under the act. *Kennedy v. WCAB (Henry Modell & Co., Inc.)*, 74 A.3d 343, 348 (Pa. Cmwlth. 2013). Once an employer's burden has been satisfied, subrogation is automatic. The statute does not make subrogation contingent upon an employer demonstrating the amount of recovery.

With respect to the amount of the recovery, the court wrote: "WCJ Seelig placed the burden on claimant to establish the amount of the recovery...We discern no error." Following its discussion of the evidence produced by claimant regarding the recovery, the court concluded, "Claimant has failed to produce evidence to substantiate the claim that the third party recovery (in connection with litigation involving an asbestos claim) was \$1.00."

Social Security Offset

Pocono Mountain School Dist. v. W.C.A.B. (Easterling), 113 A.3d 909, (Pa.Cmwlth., No. 548 C.D. 2014, 663 C.D. 2014), involved cross-appeals, with the defendants asking the Commonwealth Court to determine whether the Appeal Board erred by affirming the WCJ's determination that the claimant sustained a specific loss of his left hand, while the claimant requested a determination as to whether the board erred by reversing the WCJ's conclusion that the defendant is not entitled to a Social Security benefit offset. The Commonwealth Court affirmed the granting of the specific loss benefits, finding that the WCJ's credibility determinations were clearly supported by substantial competent evidence in the record; therefore, the WCJ did not err in granting the claimant's review petition and amending claimant's work injuries to include specific loss of his left hand. Thus, the WCAB properly affirmed the WCJ's decision on this issue.

The Commonwealth Court reversed the granting of the Social Security offset. Claimant argued on appeal that the board erred by reversing the WCJ's conclusion that employer is not entitled to a credit and/or offset for claimant's Social Security benefits because, although the benefits were received after his work injury, they were approved before his injury date. Employer contended that its offset entitlement stems from the fact that no benefit was due and no payment was made prior to claimant's work injury.

Claimant's date of injury was Jan. 20, 2010. He was age 62 on the date of injury. He began receiving Social

Security retirement benefits in February 2010. In this case, the record reflects that the claimant applied for Social Security retirement benefits in 2009, before he turned 62-years-old. By a Nov. 29, 2009 notice of award, the Social Security Administration (SSA) approved claimant's application, stating, "Your entitlement date is January 2010," and his payments would be based upon his current monthly benefit rate of \$1,135.70. The notice of award explained that because the claimant estimated that he would earn \$15,000 in 2010, Social Security was withholding \$1,135 of his benefits for January 2010 because of his work and earnings. It was possible that he would be entitled to benefits even before January 2010, but Social Security needed to know the claimant's actual earnings for 2010 before they could determine if January 2010 is the earliest possible month for which benefits would be payable. The claimant testified that he submitted his 2010 earnings to SSA as instructed. SSA did not thereafter contact him or send him a re-evaluation letter. Rather, on Feb. 10, 2010, SSA issued his first monthly payment in the amount of \$1,135. According to SSA's benefit payment history, claimant was not paid for January 2010. Claimant's 2010 benefit total was \$12,485, which represents a \$1,135 payment for each month of 2010, except January 2010.

The Commonwealth Court then discussed their analysis of entitlement versus actual receipt of Social Security retirement benefits provided in *Pittsburgh Board of Education v. Workers' Compensation Appeal Board (Davis)*, 878 A.2d 173 (Pa. Cmwlth. 2005), which held that pursuant to Section 402(a) of the Social Security Act, [42 U.S.C. § 402(a)], it is clear that one becomes entitled to Social Security old age benefits upon application for those benefits after attaining retirement age. The court noted that according to SSA's regulations, "[a]pply means to sign a form or statement that [SSA] accepts as an application for benefits" 20 C.F.R. § 404.303. SSA publicizes that application can be made "when you are at least 61 years and 9 months of age" and encourages applicants to "apply three months before [they] want [their] benefits to start." However, in order to be "entitled" to benefits, an individual must have "applied and ... proven his or her right to benefits..." 20 C.F.R. § 404.303. The entitlement requirements are: "(a) You are at least 62 years old; (b) You have enough social security earnings to be fully insured ...; and (c) You apply;...." 20 C.F.R. § 404.310.

The claimant in this case applied for benefits in advance of his eligibility and had been approved. He was entitled to Social Security retirement benefits when he turned 62 on Jan. 2, 2010, which was 18 days before his work injury occurred. That claimant's payments did not commence until Feb. 10, 2010, which was 21 days after his work injury is irrelevant. The

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undisputed notice of award states that claimant was entitled to benefits in January 2010. Moreover, SSA did not modify claimant's January 2010 entitlement date after receiving his earnings report. Based upon the *Pittsburgh Board of Education* court's holding, the Commonwealth Court ruled that because claimant was entitled to his Social Security retirement benefits prior to his work-related injury, the defendant is not entitled to a credit and/or offset. Therefore, the WCAB erred by reversing the WCJ decision on this issue.

Multiple NTCPs

In *Aldridge v. WCAB (Kmart Corporation)*, 113 A.3d 861, Pa. Cmwlth., No. 494 C.D. 2014, the Commonwealth Court affirmed the WCAB, which denied and dismissed the claimant's claim and penalty petitions and granted the defendant's termination petition. The main issue on appeal was the defendant's use of multiple notices of temporary compensation payable (NTCP). The first NTCP was issued just after the work injury and accepted only payment of medical expenses for left knee, left shoulder, and left hand "contusions." This NTCP converted by operation of law to a medical-only notice of compensation payable (NCP) when the defendant did not stop the NTCP by June 5, 2011. However, a second NTCP was issued on Aug. 4, 2011, for the same date of injury for wage and medical benefits for a "left labrum and bicep tear." The 90-day period for this NTCP began July 20, 2011, and ended on Oct. 17, 2011. Before the ending date, however, the defendant issued a notice stopping the NTCP and denial, checking the box on the denial that indicated they were declining to pay wage loss benefits based upon a determination that the claimant had "not suffered a loss of wages as a result of an already accepted injury." The injuries identified on the notice of denial, however, included the already accepted left knee, left shoulder, and left hand "contusions," the injuries that had been listed on the first (medical-only) NTCP, rather than the "left labrum and bicep tear" injuries, as listed on the second NTCP.

The claimant filed a claim petition, alleging left rotator cuff tear and left knee and left hip injuries and a penalty petition alleging that the defendant violated the Workers' Compensation Act by filing the second NTCP, that the second NTCP has the same force and effect of an NCP, and therefore that the defendant unilaterally stopped paying benefits on an open NCP. The defendant filed a termination petition, alleging that the claimant fully recovered from the accepted left knee, left shoulder, and left hand "contusions." After finding the claimant and her expert not credible and finding the defendant's expert credible, the WCJ denied the claim petition, granted the termination petition and denied the penalty petition, finding that,

while the defendant violated the act by issuing the second NTCP, no penalties were payable, since the defendant did not owe any benefits to the claimant. This decision was affirmed by the WCAB and the Commonwealth Court.

The Commonwealth Court agreed with the WCAB that the Workers' Compensation Act does not specifically allow or disallow the filing of a subsequent NTCP and that employer neither violated the act nor is estopped from denying liability for claimant's left labrum and bicep tear conditions. The defendant only accepted liability for left knee, left shoulder, and left hand "contusions." The defendant filed the second NTCP in August 2011, in apparent response to new information it received regarding disability as a result of alleged additional work injuries. Contrary to the claimant's argument, the defendant's issuance of the second NTCP did not bar the defendant from denying liability for the injuries described therein. The fact that the subsequent notice of denial listed the denied injuries as left knee, left shoulder, and left hand contusions rather than the left labrum and bicep tear injuries is of no consequence. The Commonwealth Court reasoned that because the defendant never started paying wage loss benefits for the contusion injuries, it is perfectly clear that the notice stopping temporary compensation (NSTC) and denial, despite language to the contrary, related to the defendant's second NTCP for labrum and bicep tear injuries, citing "common sense" as support for their conclusion.

Mental/Mental Injury

In *Pamela Murphy v. WCAB (Ace Check Cashing, Inc.)*, No. 1604 C.D. 2013, Pa. Cmwlth., filed Feb. 20, 2015, 110 A.3d 227, the Commonwealth Court is again addressing the burden of proof in mental/mental cases. Claimant, the general manager of a check-cashing business, arrived at work early one morning in the company of her husband, only to be met with an armed gunman who handcuffed the husband and threw him into the backseat of claimant's car. As the gunman forced claimant to disarm the security system and open the door to the check-cashing business, he informed claimant that he had an accomplice and that if she did not cooperate, the accomplice would kill her husband. After emptying several safes, the gunman hog-tied the claimant and departed. Sometime later, claimant was able to free one hand and was able to use her cell phone to call the police. The dispatcher instructed the claimant to open the door for the police, but by the time she was sufficiently free of her bonds to stand, the police had arrived and entered the business with guns drawn. Claimant attempted to run outside to check on her husband only to be stopped by the police. Claimant became hysterical, believing her husband dead. Finally, the husband got

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out of the car and the police allowed the couple to reunite. Claimant called the company president and informed him of the robbery. Claimant then began experiencing chest pains and difficulty breathing. She was taken to the hospital for treatment.

Claimant treated with her family physician, complaining of pain in her neck, shoulders, and upper back. She attributed these injuries to being hog tied during the robbery. Claimant also began treating with both a psychologist and psychiatrist for post-traumatic stress disorder (PTSD), anxiety, and depression. Claimant filed a claim petition as well as a penalty petition, alleging injuries to her neck, shoulders, thoracic spine, wrist, and ankles as well as PTSD, anxiety, and depression.

The workers' compensation judge credited claimant's testimony that the incident caused anxiety and PTSD but discredited her complaints of physical injuries based on the photographs and treatment records obtained at the time of the initial incident. The judge credited the testimony that the PTSD was caused by the work incident and that the PTSD was disabling but discredited the doctor's testimony with regard to any physical complaints stemming from the incident. Finally, the judge credited the employer witnesses that all employees were trained in how to deal with robberies but discredited their testimony that every employee was provided with an "ambush code" to alert the police of a robbery in progress.

Based on these credibility determinations, the judge found that an armed robbery was not an abnormal working condition for claimant, as the manager of a check-cashing business, and as a result, claimant could not be compensated for any mental disability or treatment for a physical injury. The judge also denied the penalty petition, finding no violation of the act. A timely appeal was filed, and the Workers' Compensation Appeal Board affirmed, noting that an armed robbery at the check-cashing business was foreseeable, could have been anticipated, and thus was not an abnormal working condition. Claimant promptly appealed to the Commonwealth Court. The court vacated the board's opinion and remanded, in order to allow the court to consider the reasoning in the recent cases of *Payes II* and *Kochanowicz II*.

In her appeal, claimant alleged that her claim should have been considered under the physical/mental standard and that, even if the claim were considered under the mental/mental standard, the armed robbery did not constitute a normal working condition.

Claimant argued that under *Donovan v. WCAB (Academy Medical Realty)*, 739 A.2d 1156 (Pa. Cmwlth. 1999), she only had to prove that a "physical stimulus" resulted in the mental injury and that it was

unnecessary to prove that the "physical stimulus" resulted in any physical disability. In disposing of the first allegation, the court noted that for a physical/mental case, the burden is to establish a physical stimulus (which it clarified to mean a physical injury that requires medical treatment, even if the injury itself is not disabling) and a mental injury, which must be related to the physical stimulus. See, *Gulick v. WCAB (Pepsi Cola Operating Co.)*, 711 A.2d 585, 588 (Pa. Cmwlth. 1998). The court provided a detailed review of the leading cases in this area, including *Bartholetti v. WCAB (School District of Philadelphia)*, 927 A.2d 743, 746 (Pa. Cmwlth. 2007), *Ryan v. WCAB (Community Health Services)*, 707 A.2d 1130 (Pa. 1998), *Pittsburgh Board of Education v. WCAB (Schultz)*, 840 A.2d 1078-1081 (Pa. Cmwlth. 2004), *Cantarella v. Department of Corrections/SCI at Waymart*, 835 A.2d 870 (Pa. Cmwlth. 2003) and *Anderson v. WCAB (Washington Greene Alternative)*, 862 A.2d 678, 685 (Pa. Cmwlth. 2004). The court concluded that the "physical stimulus" was insufficient in this case to apply the physical/mental standard. Specifically, as the judge rejected the claimant's assertions that the work injury resulted in any physical injury beyond bruising to the ankles and wrists, which resolved within a day or two of the incident and was not itself disabling, this physical stimulus was insufficient to support a physical/mental claim.

The court then went on to address the claimant's claim of an abnormal working condition under the mental/mental analysis. The court noted that the WCJ had not had available to him, and thus could not have applied, the recent reasoning in *Kochanowicz II*, Pa. *Liquor Control Board v. WCAB (Kochanowicz)*, 108 A.3d 922 (Pa. Cmwlth., No. 760 C.D. 2010, filed Dec. 30, 2014) and *Payes II*, *Payes v. WVAB (PA State Police)*, 79 A.3d 543 (Pa. 2013). Specifically, that the facts in this case could represent a "singular extraordinary event occurring during [Claimant's] work shift" that caused Claimant's PTSD. As a result, the court vacated the order of the Workers' Compensation Appeal Board and remanded the matter to the WCJ to allow the judge to apply the reasoning in *Kochanowicz II* and *Payes II*. Concurring opinions were entered, which note that mental/mental cases will continue to be assessed on a case by case basis and that there is no bright line test or standard that is generally applicable.

Dismissal of a Claim Petition Filed by a Pro Se Claimant

In *Deborah Roundtree v. WCAB (City of Philadelphia)*, No. 1182 C.D. 2014, Pa. Cmwlth., filed May 8, 2015, 2015 WL 2137634, the opinion primarily deals with the workers' compensation judge's discretion to set the trial schedule and to, in fact, dismiss a petition, even in a case where a pro se claimant fails to present

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any medical evidence despite being given almost an entire year to do so and multiple reminders as to the type of evidence which needed to be presented. In addition, the case makes mention of the fact that, in a claim where there is not a singular discrete incident but rather is a mental/mental claim alleging long-term harassment, hostile work environment, race, age, and gender discrimination, expert testimony establishing the causal connection will be required. See, *General Electric Co. v. WCAB (Valsamaki)*, 593 A.2d 921, 924 (Pa. Cmwlth.), *appeal denied*, 600 A.2d 541 (Pa. 1991).

Allergic Asthma

In *Nancy Little v. WCAB (Select Specialty Hospital)*, No. 1401 C.D. 2014, Pa. Cmwlth., filed March 28, 2015, 2015 WL 1313554, 113 A.3d 1, claimant developed an allergic asthma to Di-Isocyanate, a chemical in the floor wax used at Select Specialty Hospital, the defendant. During the initial round of litigation, the workers' compensation judge awarded claimant several short, closed periods of total disability, then partial disability resulting from her employment at a second facility that was willing to use a different type of floor wax. Claimant was unable to locate a full-time position, however, and continued to experience a wage loss. Finally, the judge terminated claimant's benefits as of the date of defendant's independent medical examination, as the effects of the exposure had resolved, and all treatment for those symptoms had ceased. Claimant appealed the termination of her benefits, arguing that she could not return to her pre-injury position due to her ongoing sensitivity to the Di-Isocyanate, and thus her ongoing wage loss was attributable to the work injury.

The Workers' Compensation Appeal Board denied the appeal, citing *Harle v. WCAB (Telegraph Press, Inc.)*, 658 A.2d 766 (Pa. 1995). In *Harle*, the Supreme Court held that an employee whose earning power is no longer affected by a work-related injury is no longer entitled to partial disability benefits, even though his present wages do not equal his pre-injury wages. (In *Harle*, the wage loss was due to a plant shut down, which ended the pre-injury position.) Claimant appealed, alleging that as her allergic sensitivity to the floor wax prevents her from returning to the pre-injury position with the defendant, the sensitivity is causing an ongoing loss of wages; thus her benefits should not have been terminated, and her partial disability benefits should continue to be paid. See, *Davis v. WCAB (H.M. Stauffer & Sons, Inc.)*, 760 A.2d 899 (Pa. Cmwlth. 2000) and *Collins v. WCAB (Brown)*, 672 A.2d 1319 (Pa. Cmwlth. 1996).

In reversing the board, the court performed a thorough review of *Bethlehem Steel Corporation v. WCAB (Baxter)*, 708 A.2d 801 (Pa. 1998). In *Baxter*, claimant suffered from childhood asthma that was aggravated

by his exposure to paint fumes on the job. Once away from the paint fumes, claimant's lung function returned to normal, and his work-related injuries completely resolved. In addition, the aggravation was temporary and did not result in permanent injury. After distinguishing *Farquhar v. WCAB (Corning Glass Works)*, 528 A.2d 580 (Pa. 1987) and *Lash v. WCAB (General Battery Corp.)*, 420 A.2d 1325 (Pa. 1980), both cases where the work injury resulted in a permanent alteration of the claimants' physiology, the *Baxter* court denied claimant ongoing benefits, as claimant's work-related aggravation had returned to baseline, and his inability to work stemmed from his pre-existing, non-work-related asthma, not the temporary work-related aggravation.

In the present case, the court found claimant's allergy-induced asthma to be more akin to the conditions in *Farquhar* and *Lash*: in short, permanent changes to physiology that would not return to a pre-injury baseline; thus, the court reversed the board and the judge and instructed the judge to consider an award on additional benefits based on the current record.

Despite the remand the court also noted that both parties had relied solely on reports in support of their respective claims, and defendant had objected to the use of claimant's reports in support of any ongoing claim. This objection was not resolved prior to the issuance of the decision and order. The court directed the judge to determine the admissibility of the claimant's reports for the purposes of any award of further benefits.

AWW Calculation for Short-Term Employee

In *Benjamin Anderson v. WCAB (F.O. Transport and Uninsured Employer Guarantee Fund)*, No. 181 C.D. 2014, Pa. Cmwlth., filed March 10, 2015, 111 A. 3d 238, the court discusses the proper way to determine the average weekly wage (AWW) for this short-term employee, who had no fixed hourly rate or number of hours to be worked. Claimant worked for only two weeks and only had earnings during one of the two weeks. He was paid a percentage of the overall profit of the delivery run, and the court concluded that, due to the lack of a fixed hourly wage or number of hours to be worked, the AWW could not be calculated under Section 309 (d.2).

In arriving at an AWW, the court noted that the method used should "advance the overall humanitarian purpose of the Act." *Hannaberry HVAC v. WCAB (Snyder)*, 834 A.2d 524, 533 (Pa. 2003). Furthermore, the AWW should reasonably reflect the economic reality of the claimant's recent pre-injury earnings with some benefit of the doubt to the claimant. *Triangle Bldg Ctr. V. WCAB (Linch)*, 746 A.2d 1108, 1112 (Pa. 2000). The court applied a process very similar to that found in *Burkhart*

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Refractory Installation v. WCAB (Christ), 896 A.2d 9 (Pa. Cmwlth. 2006). The claimant in *Burkhart* worked only twelve weeks during the sixteen weeks of his employment. The court in *Burkhart* threw out the four weeks where claimant had no earnings and averaged claimant's total gross earnings over the remaining twelve weeks to reach his AWW. In the current case, the court threw out the first week of employment, where claimant had no earnings, and concluded that the \$810 claimant earned during his second week represented his true AWW.

Also at issue was a labor market survey that had been performed in this matter. The results of the labor market survey were not disturbed. Due, however, to the recalculation of the AWW, the positions identified now resulted in a modification rather than a suspension. The matter was remanded to determine the correct ongoing partial disability benefit to be paid.

Vexatious Litigation

In the case of *Steven Smith vs. WCAB (Consolidated Freightways, Inc.)* filed March 9, 2015, at No. 606 C.D. 2014, 111 A.3d 235, the Commonwealth Court was faced with a situation where the claimant had filed multiple petitions over the years, attempting to re-litigate issues that had previously been adjudicated, as had appeals of the adverse decisions that derived from those petitions. The court wrote: "Like the petitions at issue in our 2011 decision, the two petitions now before us are barred by the doctrines of collateral estoppel and res judicata. Over a period of almost twenty years, Claimant has filed approximately seventeen petitions, all based on the same 1996 incident, which, back in 1997, WCJ Valley determined did not cause any injury or disability to Claimant."

The court had held in its December 2011 opinion that the behavior of the claimant and his counsel was precisely the type of "obdurate and vexatious conduct which [Pennsylvania Rule of Appellate Procedure 2744] was designed to prevent," but in 2011 the court had concluded that they were bound by the Pennsylvania Supreme Court decision in *Phillips vs. WCAB (Century Steel)*, 721 A.2d 1091 (Pa. 1999) that awarding counsel fees to employers would violate the intent of the attorney fee provision in the act, which is to give claimants the opportunity to receive attorneys' fees in the event of an unreasonable contest by the opposing party. The court also referred to *Battell vs. WCAB (Saqoit Fibers Company)*, 520 A.2d 525 (Pa. Cmwlth. 1987), where the employer was awarded costs for the claimant's repeated filing of an action that was clearly prohibited by the doctrines of collateral estoppel and res judicata, and the opinion writer had noted that an award of counsel fees would have further been appropriate "had such

a petition been filed." At the end of its decision, the court concludes in this new case, "We believe, therefore, that our Supreme Court left open the ability of the Appellate Courts to impose sanctions under Pa. R.A.P. 2744 in cases such as the one at bar. Otherwise, there is no way for our courts to curb the sort of flagrant abuse of the system engaged in here. Accordingly, we affirm the Board's order and dismiss Claimant's October 27, 2014, 'Reply to Defendant's Motion to Quash the Motion to Compel Service.' We further award costs and counsel fees incurred by Respondent to defend this appeal, jointly and separately, against Smith and his appellate counsel for obdurate and vexatious prosecution of a frivolous appeal." The court went on to order the respondent to file a detailed statement of those costs and fees with the court within 30 days. *Note:* The authors believe that this is the first reported appellate opinion in Pennsylvania in which counsel fees were actually awarded against the claimant and claimant's counsel with respect to an appeal to the Commonwealth Court of a workers' compensation matter.

Enforcing Subrogation Rights

In the case of *Patrick Washington vs. WCAB (National Freight Industries, Inc.)*, filed March 4, 2015, at No. 1070 C.D. 2014, 111 A.3d 214, the Commonwealth Court dealt with a situation where the defendants' answer to a claim petition was not filed within 20 days after the claim petition was mailed, but the address used for the defendants on the face of the claim petition was incorrect. The court noted that, under both the common law mailbox rule and the Workers' Compensation Act, there is only a presumption that a mailed item was received if it is shown that the item was mailed to the party's correct address. Consequently, the defendants were not precluded from presenting a defense.

Impairment Rating Evaluations

In the case of *IA Construction Corporation vs. WCAB (Rhodes)*, filed Feb. 19, 2015, at No. 2151 C.D. 2013, 110 A.3d 1096, the Commonwealth Court dealt with a situation where the IRE physician, who is certified to perform impairment rating evaluations, arguably did not possess the requisite specialties to fully assess and evaluate all of the aspects of a claimant's injuries. The WCJ had denied the employer's modification petition, finding that the physiatrist could not evaluate a traumatic brain injury with organic affective changes and persistent cognitive problems, including memory impairment, post-traumatic headaches, post-traumatic vertigo, and musculoskeletal or myofascial neck and back injuries. The IRE physician had lumped the claimant's diagnoses into three classifications: traumatic brain injury, cervical HNP status post-surgery, and gait dysfunction, and the physician had assigned a 34

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percent whole person impairment rating. The WCJ did not find that doctor's opinions credible and convincing for a variety of reasons, all related to the nature of the diagnoses and the doctor's particular specialties. The WCAB affirmed the WCJ's decision, and the employer appealed.

The Commonwealth Court held that once an impairment rating physician is certified to perform ratings, he/she is qualified to rate any impairment under the Workers' Compensation Act, there is no requirement that the doctor possess particular specialties, and the lack of those specialties is not a lawful basis for disregarding the IRE doctor's opinions. Furthermore, the court felt that the WCJ had erred when, in the absence of a contrary medical opinion, she had criticized the IRE physician's lumping of the claimant's diagnoses into categories. The court wrote:

(I)f a WCJ is to reject an IRE and the deposition testimony of the doctor who conducted the IRE as unpersuasive, there must be evidence of record to support the basis for that rejection. In other words, a WCJ's opinion as to the insufficiency of an IRE cannot stand without some record support. Here... (the WCJ) does not cite any provision of the AMA Guides or other evidence in support of her reasoning that... (the IRE physician) miscategorized or improperly grouped Claimant's injuries or that he improperly calculated Claimant's impairment rating. Moreover, Claimant did not elicit any evidence that would support (the WCJ's) reasoning. In the absence of any contradictory evidence, there was simply not substantial evidence of record to which... (the WCJ) could point in support of disregarding... (the IRE doctor's) testimony. In the absence of substantial evidence in the record to support a basis to disregard... (the IRE physician's) testimony, the WCJ and the Board erred in denying Employer's Modification Petition.

Enforcing Subrogation Rights

In *Liberty Mutual Insurance Company vs. Domtar Paper Company*, No. 19 WAP 2014, filed April 27, 2015, 113 A.3d 1230, the Pennsylvania Supreme Court reaffirmed the long-standing principle that workers' compensation insurance carriers and employers seeking to recover reimbursement (subrogation) from third-party tortfeasors who caused the claimant's injury lack standing to file a direct action against the tortfeasors and must instead file suit in the name of the claimant or obtain the claimant's cooperation and get them to join in the lawsuit against the tortfeasors. Liberty Mutual had attempted to file this lawsuit under the name "Liberty Mutual Insurance Company, as subrogee of L. George Lawrence," who was the claimant in the pending workers' compensation case. Prior precedents they cited holding the same way include: *Reliance Insurance vs. Richmond Machine Company*, 455 A.2d 686 (Pa. Super 1983); *Moltz vs Sherwood Brothers, et al*, 176 A. 842 (Pa. Super 1985); and *Scalise vs. FN Venzie and Co., et al*, 152 A. 90 (Pa. 1930). The court stated the applicable legal principle as follows: "Accordingly, we reaffirm that the right of action against a third-party tortfeasor under Section 319 of the WCA remains in the injured employee, and that the employer/insurer's right of subrogation under Section 319 must be achieved through a single action brought in the name of the injured employee or joined by the injured employee."

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