



# News & Notes

## Enhanced Customer Service Ticket System

A new Customer Service Helpline Business Process was launched in December that offers external stakeholders the ability to initiate customer assistance tickets 24/7 in WCAIS. This self-service feature provides an alternative to calling the Bureau of Workers' Compensation, the Workers' Compensation Office of Adjudication, and the Workers' Compensation Appeal Board during regular business hours. Registered users now have the ability to track their tickets, view the status of tickets, and receive responses right from their WCAIS dashboards. Unregistered users will receive responses via email and be given the opportunity to receive Helpline assistance in becoming registered users.

As part of this enhanced functionality, a searchable

### Visiting the Bureau?

Visitors are now required to check in with our security guard in the 1st floor lobby.

knowledge base is now being compiled with material from resolved tickets, and external stakeholders are able to search through a catalogue of entries and perform text-based searches to find resolutions previously offered for questions and issues similar to their query.

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## A Message from the Directors

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

We also 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.

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### Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of June 23, 2016:

**11,369 committees covering  
1,479,362 employees**

Cumulative grand total of employer savings:

**\$588,062,445**

*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*

## Enhanced Customer Service Ticket System

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As use of the WCAIS Customer Service Center broadens, the three offices will be looking to disable some e-mail resource accounts so that most stakeholder inquiry traffic can be directed through WCAIS, ensuring that the customer reaches the proper person or work area for the most expeditious assistance on a specific topic.

Additional tools and functionality for the Customer Service Center are being planned, which will offer fingertip access to our vast library of How-To Guides and previously recorded web trainings and simulations.

A chat function will also be incorporated into WCAIS to further streamline your access to assistance with Workers' Compensation matters.

To access the Customer Service Help Center in WCAIS, click on the Help link in the upper right hand corner of your WCAIS dashboard. When the additional customer service features are added, the link will be renamed, "Customer Service Center."

## A Message from the Directors

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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](mailto:RA-LIBWC-NEWS@pa.gov).

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

## Recent WCAIS Updates

In the spring release, the following enhancements were added to the Workers' Compensation Automation and Integration System (WCAIS):

### BWC Updates

- **Med Fee Reviews.** WCAIS now displays the most recent 250 med fee reviews on the external user dashboard, with the latest on top.
- When a med fee has been filed, WCAIS now generates an email request for information to the parent insurer or self-insured employer, in addition to the party billed.

### WCOA Updates

- **Conference Call Request Type.** A new request type has been added for conference call requests. This request may be submitted from the Requests tab of the Dispute Summary by clicking "Submit Request" from the "Select Request Type" dropdown.
- **Request Status.** The status of requests will be

displayed on the Requests tab of the Dispute Summary as well as the Dispute Business Events Log. The statuses include approved, denied, and pending.

- **Judge Communication Grid.** The Judge Communication grid on the WCOA Dashboard has been modified to include the following columns:
  - o The "Mark as Read" column allows the user to mark which items have already been reviewed.
  - o The "Date" column displays the date that the communication was generated to assist the user in identifying communications.
  - o "Claimant Name" column displays the claimant's name on the dispute to assist the user in identifying communications.

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## Recent WCAIS Updates

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- o "Action" column allows the user to delete the Judge Communication from the WCOA Dashboard. The Judge Communication will remain in the Documents & Correspondence tab of the Dispute Summary.
- **Viewing Exhibits.** The "View" link on the Exhibits tab of the Dispute Summary has been removed. In order to view the exhibit, the user is now able to click the link on the exhibit name.

### WC Appeal Board Update

**Brief Tracking:** One of the major features in the winter WCAIS release was the newly-created WCAB brief submission tracking system, specifying actual appellant / appellee "brief due dates," allowing for the online filing of brief extension requests, and providing attorneys with a new "WCAB dashboard" similar to the one used by WCJ's.

The Appeal Board is increasingly more current with its appellate caseload. Providing parties with specific "brief due dates" directly on the hearing notice, as well as automatically updating the "brief due date" on the new WCAB Dashboard for attorneys, will lead to fewer extension requests and will place appeals in line for decision much sooner.

## Upcoming WCAIS Features

Following a software release scheduled for Sept. 16, 2016, the following features will be available in WCAIS:

- Training One-Stop Shop
- Enhanced Search Phase 4
- EDI Forms Solution - See the **Form Revisions** and **Forms Solution** articles below for more information.

Watch for more information about these features and training opportunities closer to the September release date!

### Form Revisions

The Notice of Compensation Payable (LIBC-495), Notice of Compensation Denial (LIBC-496), Notice of Temporary Compensation Payable (LIBC-501), and the Notice Stopping Temporary Compensation (LIBC-502) are being revised to accommodate the industry's movement toward Forms Solution, the WCAIS functionality that will create forms from accepted EDI transactions.

Along with providing checkboxes that will populate for reporting details that had previously been captured as "Remarks," the Employee Address Block has been condensed and repositioned to fit perfectly in a standard business size window envelope, saving time and extra expense from printing labels and cover letters.

After the Forms Solution go-live on Sept. 16, 2016, the bureau will no longer accept paper versions of these four forms, and when they are created by Forms Solution, each form will have a unique, system-assigned number that will authenticate the form.

Look for sample versions of these forms on the bureau website in the coming weeks!

### Forms Solution – You asked, we answered!

Shortly after the WCAIS/EDI go-live in September 2013, stakeholders had asked us to find a way to eliminate the duplicate input associated with having to enter both EDI transactions and prepare forms. We met with three focus groups: insurers/employers and TPAs, attorneys from defense and claimant sides, and transaction partner companies, in order to build a product that will both complete your bureau filing requirement and return to you a completed form to serve on the claimant for the four most heavily used bureau forms. The NCP, NCD, NTCP, and stopping notices comprise a full 69 percent of forms filed with the bureau. More significantly, these four forms have statutory filing deadlines that can benefit from the immediate credit given for accepted transactions.

The four LIBC forms are being revised as explained in the previous article, and information about training webinars for this and other WCAIS improvements will be distributed as we get closer to the Sept. 16 release.

## WCAIS EDI Implementation Guide Available for Review

**Reminder:** The updated version of the [PA EDI Claims Implementation Guide](#) has been published at the link below. Please review the changes that will be implemented as part of the EDI Forms Solution in the WCAIS system on Sept. 16, 2016. These changes may require updates to your system. Failure to implement these changes may result in significant increases in the number

of EDI Claims transactions that are rejected by the Bureau of Workers' Compensation.

Please note that testing with transaction partners and direct filers resumed on July 5, 2016.

[WCAIS Claims EDI Implementation Guide](#)

## Revised Utilization Review Request, LIBC-601

For clarification of treatment dates to be reviewed, the LIBC-601 (Utilization Review Request) has been revised. The start and end dates have been separated to better identify the dates of treatment to be reviewed. If the end date is indeterminate, please enter "ongoing." If requesting a prospective review, simply state "prospective." If one date of

service is requested, enter that date for both the start and end date. Instructions for completing a Utilization Request can be found on the DLI website in the forms spreadsheet. The revised LIBC-601 (Rev. 03-16) must be used by April 1, 2016. If you have questions or concerns, please contact the Medical Treatment Review Section at 717-772-1914.

## Updated UEGF Forms & Processes

Copies of LIBC-550 and LIBC-551 should no longer be sent to the P.O. Box

Previously, the Notice of Claim Against Uninsured Employer (LIBC-551) contained language indicating that if the notice was being submitted by mail, then an additional copy must be sent to the Pennsylvania Uninsured Employers Guaranty Fund (UEGF) at a P.O. Box.

Similarly, the Claim Petition from the Uninsured Employer and Against the Uninsured Employers Guaranty Fund (LIBC-550) stated that a copy of any petition filed must be sent to the UEGF P.O. Box.

Effective immediately, neither form requires that a copy be mailed to the UEGF P.O. Box. WCAIS has eliminated this need, and both forms have been updated to reflect this change. The updated forms can be found on our website at the following link:

[LIBC Forms Spreadsheet](#)

As a reminder, either form can conveniently be filed electronically in WCAIS. However, mailed copies of both forms continue to be accepted. Thank you for your patience as we continued to improve our processes.

## What's New Online

### Annual WC Conference Handouts

You may have missed the 15th Annual Workers' Compensation Conference, but you don't have to miss all the great information. Dozens of presentation handouts are available at the link below. Happy reading!

[Annual WC Conference Handouts](#)

Handouts have been posted where given permission from presenters. Unless indicated otherwise, the views and opinions expressed by the speakers in any presentation are solely those of the speaker and do

not necessarily represent the position or opinion of the Bureau of Workers' Compensation, the Workers' Compensation Office of Adjudication, the Workers' Compensation Appeal Board, or the Department of Labor & Industry.

### Workers' Compensation Act

An updated version of the Workers' Compensation Act is now available online at our Publications

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## What's New Online

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page. Hard copies are also available for purchase through the Pennsylvania Book Store's website.

[View the WC Act Online](#)

[Purchase a Hard Copy](#)

## 2015 WC Annual Report

The [Pennsylvania Workers' Compensation and Workplace Safety 2015 Annual Report](#) is available now at the link below. The report illustrates our program's achievements during 2015 and our commitment to carrying out the provisions of the Workers' Compensation Act with innovation and superior customer service.

[View the 2015 Annual Report](#)

## WC Chamber Guide, Eighth Edition

Completely revised with the most up-to-date information!

The ***Pennsylvania Workers' Compensation Guide, Eighth Edition*** is now available from the Pennsylvania Chamber of Business and Industry. One of the most all-encompassing and helpful resources available, the guide is a step-by-step, comprehensive working resource that answers nearly every question you might have about Pennsylvania's workers' compensation program.

The ***Pennsylvania Workers' Compensation Guide*** is written by the leading workers' compensation experts in Pennsylvania, including the Director of the Bureau of Workers' Compensation, the Director of the Office of Adjudication (WC Judges), other WC Bureau Chiefs, and top Pennsylvania attorneys and consultants. No other guide presents this detailed help from such a knowledgeable group of authors:

- **All aspects of workers' compensation:** who is entitled to receive workers' compensation, how to calculate your average weekly wage, WC insurance, managing in-house WC programs and controlling costs, what to do when faced with WC litigation, and more
- **Easy to understand descriptions** of major points, with plenty of examples
- The **newest, most up-to-date forms**, with a new chapter on filing electronically through the **Workers' Compensation Automation and Integration System (WCAIS)**

- Link to the **Judge's Rules**, which outline the practice and procedure before WC judges—section has been greatly updated, including a complete copy of the WC Final Law
- Employers' **most frequently asked questions** of the WC bureau – section totally revamped
- The **interrelationships between WC, FMLA, and the ADA** laws
- Updated tips on **managing your panel of physicians**
- More than 600 pages of helpful information!

Among the most highly regarded reference books on understanding workers' compensation law in the commonwealth, the Pennsylvania Chamber's ***Pennsylvania Workers' Compensation Guide, Eighth Edition*** is a complete overview of WC laws and regulations. With practical compliance strategies and easy to understand descriptions and examples, the guide is designed to reduce the amount of work and time needed to administer your company's workers' compensation program.

### To Order

Online: <https://www.pachamber.org/store/details.php?id=225>

Toll-free Publication Hotline: 877-866-8965

Mail: PA Chamber of Business and Industry

417 Walnut Street, Harrisburg, PA 17101

Secure Fax: 717-238-3316

# PA Training for Health and Safety

## “PATHS” Your No-Fee Safety Training Resource

The Pennsylvania Bureau of Workers’ Compensation, Health and Safety Division’s PATHS (PA Training for Health and Safety), is not just growing – it’s expanding at a fast and furious pace! The number of topics has now reached 151, one of the newest being the popular “Active Shooter.”

The popularity of this extraordinary FREE resource initiative continue to grow as well. More and more companies and individuals are realizing the superb value of utilizing PATHS. Employers and employees from **44 states** and **four countries** have taken advantage of this program.

You, too, can take advantage of this outstanding free resource by visiting PATHS at [www.dli.pa.gov/PATHS](http://www.dli.pa.gov/PATHS) or by contacting the Health & Safety Division by phone at 717-772-1635. You can also reach us via email at [RA-LI-BWC-PATHS@pa.gov](mailto:RA-LI-BWC-PATHS@pa.gov).

Keep up with all the latest safety news, tips, and ideas on our Facebook! Just go to [https://www.facebook.com/BWC\\_PATHS](https://www.facebook.com/BWC_PATHS) and meet our team. We have 235 likes so far, coming from as far away as Alaska – check us out!

## 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:

### Berks County

On Dec. 4, 2015, Manny Guitierrez, d/b/a Manny’s Tree Service, pled guilty before President Judge Paul Yatron in the Berks County Court of Common Pleas to nine misdemeanor counts of Failure to Procure Workers’

Compensation Insurance. Mr. Guitierrez was sentenced to nine years of probation and was ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of \$29,415.15.

### Cumberland County

On March 15, 2016, Sultan Bhatti, appearing on behalf of On The Run Mart, Inc., Mechanicsburg, PA, pled guilty before Judge M. L. Ebert, Jr, in the Cumberland County Court of Common Pleas to one misdemeanor count of Failure to Procure Workers’ Compensation Insurance. On The Run Mart, Inc. was ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of \$5,400.

### Bucks County

On April 11, 2016, Andrew Hummel, appearing on behalf of D & L Towing, located in Bensalem, PA, pled guilty before Judge Rea B. Boylan in the Bucks County Court of Common Pleas to five third-degree misdemeanor counts of Failure to Procure Workers’ Compensation Insurance. D & L Towing was sentenced to five years of probation and was ordered to pay restitution to the Uninsured Employers Guaranty Fund in the amount of \$26,640.18.



Every year, millions of teens work in part-time or summer jobs that provide great opportunities for learning important life skills and acquiring hands-on experience. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

## TIPS for Achieving and Maintaining Compliance with Youth Employment Laws\*

<b>T</b> rain Employees	<b>I</b> dentify Violations	<b>P</b> romote Compliance	<b>S</b> hare Accountability
<ul style="list-style-type: none"> <li>◆ Obtain compliance-assistance materials (posters, fact sheets, employer's guides and forklift stickers) from <a href="http://www.youthrules.dol.gov">www.youthrules.dol.gov</a> or request training from your local Wage and Hour Office.</li> <li>◆ Incorporate youth employment laws and company policies regarding the employment of youth into training and orientation seminars for managers and teens.</li> <li>◆ Provide a worksheet for youth to sign as part of initial training to test and verify their awareness of what equipment is off limits to them and what hours they can work.</li> <li>◆ Attach a monthly youth safety reminder to a paycheck or time card.</li> <li>◆ Conduct refresher training for all levels of management at regular staff meetings or special training sessions.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Designate a youth employment compliance director whose responsibility is to monitor compliance.</li> <li>◆ Conduct unannounced inspections of your establishment or branch location.</li> <li>◆ Make checking for compliance a regular part of any routine quality or store inspection.</li> <li>◆ Monitor the hours and times worked by youth under the age of 16 at the time payroll data is collected, and track and transcribe any violations.</li> <li>◆ Establish a hotline for employees/parents/the public to report potential problems or concerns.</li> <li>◆ Take time to interview youth at some regular interval to question them on the types of equipment they are operating.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Create a "buffer zone" to prevent employees from being scheduled up to the latest time or longest shift that could be worked.</li> <li>◆ Prepare two separate schedules: one for employees under age 16 and one for employees aged 16 and over. Only permit shift swapping among employees on the same schedule.</li> <li>◆ Require a manager's signature on the schedule for all shift swaps.</li> <li>◆ Verify the ages of all youth by requiring legally-acceptable proof of age at the time of hiring.</li> <li>◆ Post the hours that youth can work next to the time clock.</li> <li>◆ Color-code time cards, badges and/or uniforms so that youth can be easily identified.</li> <li>◆ Post a warning sticker or a stop sign on hazardous equipment.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Encourage youth to say "no" to a manager who is asking them to work too late or to operate hazardous equipment.</li> <li>◆ Add "monitoring to maintain compliance" to job descriptions of managers.</li> <li>◆ Include "compliance with youth employment laws" as a performance factor in managers' reviews and recognize those who successfully maintain compliance on their shifts, in their departments or at their branch locations.</li> <li>◆ Test youth about their understanding of policies and safety procedures before they start work.</li> <li>◆ Send a letter to the parents of newly-hired teens informing them of the youth employment laws and who to contact to report any concerns.</li> </ul>

Information about YouthRules! can be found at [www.youthrules.dol.gov](http://www.youthrules.dol.gov). For information about the laws administered by the Wage and Hour Division, log on to [www.wagehour.dol.gov](http://www.wagehour.dol.gov), or call the Department of Labor's toll-free helpline at 866-4USWAGE.

\* Different rules apply to farms, and state laws may have stricter rules.

## A View from the Bench

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

### Commonwealth Court Winter Decisions

Recent decisions from the Commonwealth Court, as well as updates regarding the *Protz* and *Winchilla* cases noted below, can be found in the Spring Decisions section on page 12.

#### Section 306(a.2) regarding IREs Is Declared Unconstitutional

In *Protz v. WCAB (Derry Area School District)*, No. 1024 C.D. 2014, 2015 WL 5474071, 124 A3d 406, Pa. Cmwlth., filed Sept. 18, 2015) the Commonwealth Court found unconstitutional the provision of §306(a.2) which authorizes the physician to use "the most recent edition of the AMA Guides" when conducting an IRE.

Claimant suffered an April 2007 injury. A December 2009 IRE found that she was not at MMI. After an October 2011 IRE, conducted under the 6th Edition of the *AMA Guides*, found that she was less than 50 percent impaired, the employer took an automatic change of status, which a WCJ vacated after the claimant's review petition, as the IRE was conducted more than 60 days after the claimant had received 104 weeks of total disability benefits. Employer then filed a modification petition, which the WCJ granted. Claimant appealed, asserting that the statutory section under which the evaluation was performed was unconstitutional. The WCAB affirmed, citing prior Commonwealth Court decisions regarding the constitutionality of the provision.

Claimant appealed, challenging "...the constitutionality of Section 306(a.2) of the Act...as an unconstitutional delegation of legislative authority pursuant to Article II, Section 1 of the Pennsylvania Constitution." Article II, Section 1 provides: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Although the claimant incorrectly cited "Article III, Section 1" in the appeal to the WCAB and in her petition for review, the court found that the proper issue and argument concerning unconstitutional delegation of legislative authority were preserved and were not waived. It then held that only the legislature has the power to make law, and that, by providing for the automatic update of the *AMA Guides* to the most recent one without further review by it, the legislature improperly delegated its sole legislative authority under the Pennsylvania Constitution to the American Medical Association, a non-governmental body. It distinguished governmental agency regulations, which are promulgated to carry out the provisions of a statute, which are permissible. It held that, because

the 4th Edition of the guides was the one in existence when the statutory provision was enacted in 1996, only that edition could be used to perform IREs. It vacated the modification from total to partial disability status and remanded for consideration/evaluation under the 4th Edition. Three judges dissented, and two dissenting opinions were written. Both the claimant and the employer have filed petitions for allowance of appeal to the Supreme Court.

#### The Constitutional Argument Regarding Section 306(a.2) May be Waived

In an unreported but nevertheless potentially significant decision, orally argued serially with *Protz*, the same Commonwealth Court panel, on the same date and by the same author, affirmed a 6th Edition of the *AMA Guides* IRE modification. *Winchilla v. WCAB (Nexstar Broadcasting)*, No. 213 C.D. 2014 (Pa. Cmwlth. Sept. 18, 2015). Although §306(a.2) was just declared unconstitutional in *Protz*, the court found that the claimant in *Winchilla* waived the constitutional argument and was bound by the IRE's less-than-50 percent impairment rating. Claimant suffered an August 2002 injury, was evaluated under the 6th Edition, and was found less than 50 percent impaired. Claimant's answer to the modification petition raised a "general" constitutional argument, and he offered no evidence on the constitutional issue and no medical evidence except his (irrelevant, according to the decision) social security disability award. The WCJ modified the claimant's disability status. The WCAB found that it had no jurisdiction over the alleged constitutional issue, affirmed the WCJs modification, and dismissed the claimant's appeal. Claimant's petition for review to Commonwealth Court did not specify a particular constitutional violation. He first raised the specific "unlawful delegation of legislative authority" issue in his brief. The court found that the constitutional argument had been waived and permitted the status change pursuant to the 6th Edition to stand.

#### Pa. Supreme Court Grants Appeal in *O'Rourke*, 2014 WI 3672881

The opinion of the Pa. Commonwealth Court in *Laura O'Rourke vs. WCAB (Garland)*, 83 A3rd 1125, filed June 8, 2014, was noted beginning on page 12 of the Spring 2014 issue of *News & Notes*. On July 23, 2014, the Pennsylvania Supreme Court issued the following order:

"PER CURIAM AND NOW, this 23rd day of July, 2014, the Petition for Allowance of Appeal is GRANTED. The issue, rephrased for clarity, is:  
(1) Is Claimant's injury compensable pursuant to Sec. 301 (c) of the Pennsylvania Workers' Compensation Act and in terms of the decisions

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## A View from the Bench

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in *Malky v. Kiskiminetas Valley Coal Co. et al.*, 123 A. 505 (Pa. 1924) and *Workmen's Compensation Appeal Board (Slaughenhaupt) v. U. S. Steel Corp.*, 376 A.2d 271 (Pa. Cmwlth. 1977)."

### **Petition for Allowance of Appeal Denied in Zwick**

In the Spring 2015 edition of *News & Notes*, pages 12-13, we reported on the Commonwealth Court's opinion in *Zwick v. WCAB (Popchocoj)*, 106 A.3d 251. In that case, Mr. Zwick, a licensed realtor and investor who rehabilitated residential properties, was found to be a statutory employer under Section 302(a) of the act, pursuant to the opinion of the Pennsylvania Supreme Court in *Six L's Packing Co. v. WCAB (Williamson)*, 44 A.3d 1148 (Pa. 2012). On July 29, 2015, the Pa. Supreme Court denied the petitions for allowance of appeal that had been filed by Mr. Zwick. See *Mark Zwick v. Workers' Compensation Appeal Board (Popchocoj), Uninsured Employers Guaranty Fund* (two cases), Nos. 90 EAL 2015 and 91 EAL 2015, 119 A3d 352(Table).

### **Petition for Appeal Granted Regarding Credibility of IRE Physician**

In the Summer 2015 *News & Notes*, pages 16-17, we reported on the Commonwealth Court decision in *IA Construction Corporation v. WCAB (Rhodes)*, 110 A.3d 1096 (Pa. Cmwlth. 2015), which reversed a WCJ's denial of benefit modification based upon an impairment rating evaluation (IRE). The WCJ found the IRE physician not credible, but the court held that the WCJ had no evidence in the record to support the reason for so finding. The Supreme Court has granted the claimant's petition for allowance of appeal on the issue of whether Commonwealth Court improperly invaded the WCJ's credibility determination responsibility. *IA Construction Corporation v. WCAB (Rhodes)*, No. 112 WAL 2015 (Pa., Aug. 26, 2015).

### **Addressing of Issues at WCJ Level and Cost Reimbursement**

In *Boddie v. WCAB (Crown Distribution Center)*, No. 1866 C.D. 2014, 2015 WL 5827585, 125 A.3d 84 2015, filed July 28, 2015, the Commonwealth Court concluded that the WCJ decision failed to address a necessary issue and erred in denying reimbursement for the cost of the claimant's medical deposition.

Claimant appealed when the WCJ failed to address his thoracic injury in the final decision and disallowed costs for the deposition of his medical expert. The facts are simple. A claim petition was filed for the claimant's back injury. On the very day of the claimant's medical deposition, the defendant accepted the injury with an NCP accepting liability for a lumbar spine injury

described as "L-2-3-4 transverse process fracture" and paying total disability benefits as of Feb. 28, 2012. The claimant still moved forward with the deposition. It is unknown whether the claimant even knew that the injury had been accepted when the deposition was secured. At the final hearing, the parties informed the WCJ that, although employer had accepted liability for a work injury by issuing an NCP, there remained a dispute about the average weekly wage and whether the employer should have recognized a thoracic injury in addition to the lumbosacral injury. In the final decision, the WCJ stated that since the employer had already accepted the work-related injury to this claimant, consisting of the L2-3-4 transverse process fractures, the only issue is whether there is a lumbar injury at L5-S1, in addition to the fractures accepted by the employer. (Note: There was also an issue as to the correct average weekly wage, but that issue was not appealed.)

The WCJ did not discuss the claimant's alleged thoracic injury, but concluded that the claimant failed to prove he sustained any work injuries besides those listed on the NCP, and the WCJ denied the claimant's petition. Because the WCJ denied the petition, litigation costs for the deposition of the claimant's medical expert were not awarded. The WCAB affirmed finding that because the WCJ accepted the defendant's medical expert over the claimant's, it did not matter that the thoracic injury was not discussed. The WCAB also agreed that the claimant did not prevail on the litigated medical issue, so disallowing costs for the claimant's medical deposition was appropriate. The Commonwealth Court, however, reversed the decision as to costs, finding that, at the time the deposition of the claimant's medical expert was taken, there was a dispute as to the entire claim, and since the claimant did prevail in part, the costs should be reimbursed. They also determined that the WCAB erred in affirming the WCJ's decision as it related to the thoracic injury, when the thoracic injury was not even considered in the WCJ's decision. The Commonwealth Court noted that even though the WCJ found the defendant's medical expert opinions credible as it related to the claimant's low back, this was not dispositive as to what the WCJ would find with regard to the claimant's alleged thoracic spine injuries. The WCAB decision was vacated and remanded for the WCJ to render specific findings of fact and conclusions of law with regard to this issue.

### **Three Year SOL Under Sec. 413(a) and Sec. 315; Effect of Counsel's Stipulation**

In the case of *Sloane v. WCAB (Children's Hospital of Philadelphia)*, No. 1213 C.D. 2014, 2015 WL 5727683, 124 A.3d 778 2015, the Commonwealth Court concluded that the reinstatement petition was barred by three-year statute of limitations contained in Section 413. The court also found that a stipulation regarding what injury was at issue, made by the

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## A View from the Bench

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claimant's counsel during a medical deposition, was binding.

On appeal to the court, the claimant sought review of the portion of the Appeal Board's order that reversed the WCJ's reinstatement of total disability benefits arising from work injuries sustained in 2004 and 2006. In its appeal, the employer sought review of the board's order to the extent that it upheld the WCJ's determination that the claimant's 2007 right-knee replacement surgery and related treatment were compensable medical expenses related to the 2006 work injury.

On April 20, 2004, the claimant injured her right elbow during the course and scope of her employment as a nurse. The notice of compensation payable described the injury as lateral epicondylitis of the right elbow. The claimant suffered a second work-related injury to her right elbow and right knee on Dec. 3, 2006, while attempting to restrain a patient. This 2006 injury was accepted through a medical-only notice of compensation payable, and the injury was described as exacerbation of right elbow epicondylitis and flare up of preexisting degenerative joint disease in the right knee. The claimant continued working and continued to receive partial disability benefits for the 2004 work injury. Subsequently, the claimant was taken off work for a knee replacement surgery and filed a reinstatement petition for the Dec. 3, 2006, work injury. In the final decision, the WCJ awarded both wage loss and medical expenses after concluding that the claimant was totally disabled as of Nov. 17, 2007, based upon both her 2004 and 2006 work injuries. The WCJ further concluded that the employer was liable for payment of medical expenses for the December 2007 total knee replacement surgery and follow-up treatment.

The Commonwealth Court affirmed the WCAB's reversal of the portion of the WCJ's order that granted total disability benefits based on the 2006 work injury, concluding that the claimant was required to comply with the three-year limitations period of Section 413(a) of the Workers' Compensation Act for modification of an NCP, rather than the 500-week period for reinstatement of suspended partial disability benefits. The claimant argued that this situation is similar to when a WCJ would grant a claim petition and immediately suspend benefits. The court explained, however, that the medical-only NCP was created for the specific purpose of not accepting any compensable disability. Since no disability has ever been acknowledged, disability was not suspended when the 2006 medical-only NCP was issued. Since there was some ambiguity as to the proper petition that should have been filed, the court also analyzed whether the petition might be timely under Section 315 of the act. Section 315 also imposes a three-year limitations period, measured from the date of injury. 77 P.S. § 602. Unlike Section 413(a), payments of medical expenses may toll the Section 315 limitations

period where those payments were made "in lieu of" workers' compensation benefits. The court noted that the controlling question in this analysis is the intent of the employer, i.e. whether the employer intended the payments for medical services to replace disability benefits. Here, by issuing the medical-only NCP, the employer made its intent expressly clear that it would pay the claimant's medical expenses but accepted no liability for wage-loss benefits. Thus, the petition would also be untimely under Section 315.

The WCAB concluded that the reinstatement petition, filed in 2011, was timely filed with respect to the 2004 work injury because the claimant continued receiving partial disability payments through the date of filing of the petition. However, the WCJ's award of wage loss benefits for the 2004 injury was reversed by the WCAB, after concluding that the credible medical evidence of the claimant's own medical expert demonstrated that she was totally disabled as a result of the 2006, not the 2004, injury. The Commonwealth Court affirmed because disability for the 2004 injury date was not properly before the WCJ, as no petition had been filed regarding the 2004 date of injury, and the parties stipulated during one of the medical depositions that the 2004 right elbow injury was not at issue in the current litigation.

The WCJ's order was also affirmed regarding the employer's liability for medical expenses for the claimant's 2007 right-knee replacement surgery, finding that the claimant's medical expert provided substantial evidence for this determination and that the WCJ did not err in crediting him, though he did not begin treating the claimant until July 2011. He testified that he was only monitoring the claimant's condition, because his opinions contradicted the notes of some of the claimant's other treating physicians. They noted that the employer's arguments must be rejected because they go to the weight and credibility of the evidence rather than the expert's competency. The WCJ has exclusive province over questions of credibility and evidentiary weight, including whether to accept or reject the testimony of any witness, including a medical witness, in whole or in part. *University of Pennsylvania v. WCAB (Hicks)*, 16 A.3d 1225, 1229 n.8 (Pa. Cmwlth. 2011); *Anderson v. Workers' Compensation Appeal Board (Penn Center for Rehab)*, 15 A.3d 944, 949 (Pa. Cmwlth. 2010).

### Sections 305.2(a)(1) and 305.2(d)(4) of the Act

In *Watt v. WCAB (Boyd Brothers Transportation)*, No. 53 C.D. 2015, 2015 WL 5331723, 123 A. 3d 1155, filed Sept. 15, 2015, the primary issue was whether the claimant's work duties as a truck driver were "principally localized" in Pennsylvania so as to entitle him to Pennsylvania workers' compensation benefits pursuant to Section 305.2(a)(1) of the act, 77 P.S. § 411.2(a)(1) with respect to a work injury sustained in the state of New Jersey.

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The claimant was a Pennsylvania resident when, using his personal computer, he applied online with Boyd Brothers Transportation (employer), a trucking firm whose principle place of business was in Clayton, Alabama. He remained a resident of Pennsylvania at all times relevant to this litigation. He was interviewed and underwent orientation training for four days in Ohio, and his hire date was at the conclusion of the orientation on Nov. 24, 2010. During the orientation in Ohio, the claimant received a packet of documents, and on or about Nov. 24, 2010, signed a document titled "Workers' Compensation Agreement" (WC Agreement) that provided for Alabama jurisdiction over workers' compensation injuries. On Nov. 29, 2010, the claimant began driving for the employer. He sustained a right shoulder injury on April 12, 2011, while removing a tarp from a cargo load in New Jersey. Pursuant to the terms of WC Agreement, he received WC benefits under Alabama law. He then filed a claim petition in Pennsylvania.

Before the WCJ, the claimant offered a breakdown, trying to show that most of his worktime was spent in Pennsylvania. The employer offered several witnesses and documents to assert that Pennsylvania did not have jurisdiction. The WCJ found the Alabama employment agreement enforceable and dismissed the claim. The WCAB affirmed.

On appeal to the Pennsylvania Commonwealth Court, the claimant argued first that his work was principally localized in Pennsylvania. The court disagreed. Although the WCJ found that the claimant drove more miles and spent more time working in Pennsylvania than he did in any other "single" state, in the aggregate, his work in Pennsylvania was not a "substantial" part of his entire multi-state employment history. The claimant next argued that the employment agreement's choice of law provision was unenforceable because it purported to supersede the Pennsylvania WC statute. Citing Section 305.2(d)(5), concerning out-of-state travel and several decisions, the court disagreed and found it enforceable. The decisions that had not enforced choice of law agreements were not apposite. The claimant then argued that Section 305.2(d)(5) was unconstitutional, both facially and as applied. The court found waiver of the first contention because the claimant failed to notify the Pennsylvania Attorney General as required, and it disagreed with the latter contention because of the full faith and credit clause. Significantly, the claimant was not injured in Pennsylvania (implying that, had he been, the result might have been different). Further, the employer here had sufficient contacts with Alabama for its jurisdiction to be reasonable. The court affirmed the WCJ's decision that Pennsylvania jurisdiction did not attach.

### **UEGF Claims and Sections 305(c) and 1603(b) of the Act**

*In Lozado v. WCAB (Dependable Concrete Work and Uninsured Employers Guaranty Fund, 21 C.D. 2014,*

*2015 WL 4634965, 123 A.3d 365, filed Aug. 5, 2015, the Commonwealth Court held: (1) the claimant's filing of a tort claim, as permitted by Section 305(d) of the act, did not preclude a claim against the Uninsured Employers Guarantee Fund (fund); (2) the claimant's failure to give notice of claim to the fund within 45 days pursuant to Section 1603(b) is not a complete bar to receiving benefits. The court begins its discussion with what it terms a "brief description of the fund and the governing provisions..." The discussion includes five footnotes and is a very concise summary of the primary statutory provisions governing the fund.*

The procedural facts are critical to understanding the issues. Claimant was injured on or about May 11, 2007, when he was employed by Dependable Concrete Work. On April 15, 2009, a claim petition and a penalty petition were filed against the employer. Thereafter the Bureau of Workers' Compensation informed the claimant's counsel that "research indicated that Employer did not have ..." workers' compensation insurance on May 11, 2007. On May 11, 2009, the last day for filing per the two-year statute of limitations (SOL), the claimant filed a praecipe for a writ of summons in the Philadelphia Court of Common Pleas. Per the local rules, the matter was referred to compulsory arbitration. On Jan. 5, 2010, while the tort action was pending, the claimant filed a claim petition against the fund and a "Notice of Claim Against Uninsured Employer." While the claim petition against the employer and claim petition against the fund were pending before the WCJ, on May 28, 2010, the arbitrator in the tort action awarded the claimant a \$50,000 default judgement. Shortly thereafter, the claimant appealed the arbitrator's award for a *de novo* trial in the trial court in Philadelphia.

The WCJ dismissed both petitions against the employer, concluding that the claimant had chosen a tort remedy pursuant to Section 305(d) of the act, 77 P.S. § 501(d). The WCJ also dismissed the claim petition against the fund for two reasons: (1) the claimant did not file the notice of claim within 45 days of learning that employer was uninsured, as required by Section 1603(b) of the act, 77 P.S. § 2703(b); (2) the claimant filed the claim petition against the fund concurrently with the filing of the notice of claim instead of waiting 21 days, as required by Section 1603(d) of the act, 77 P.S. § 2703(d). The claimant appealed both decisions, and the WCAB affirmed both decisions. The board's dismissal of the claim against the fund was based upon Section 305(d), and it concluded that Section 1603(b) "...does not act as a complete bar to compensation, but instead bars the claimant from receiving compensation until such time as he has provided [the fund] with notice."

The claimant did not appeal the WCAB opinion affirming the WCJ's decision that he could not pursue a workers' compensation claim against the uninsured employer because, by pursuing the third party suit, he had made his choice to pursue that action, and it was therefore his exclusive remedy against that entity. He only appealed the WCJ's decision dismissing his claim

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against the fund. He contended that he only filed the civil suit within the two-year SOL in civil actions because he might not have a decision in the compensation matter before the civil SOL would expire. The fund argued that the claimant had made an irrevocable election. The court noted that the claimant learned of the possibility of no workers' compensation insurance from the bureau only two weeks before the second anniversary of his injury, so he promptly had to file a praecipe for a writ of summons to toll the civil SOL. Because the writ held the civil action open only for a reasonable time, he was able to wait 11 months to file the complaint. He obtained an undefended arbitration award, but he took an appeal and then filed a motion to stay the trial proceedings until the workers' compensation matters were concluded. The court found that the claimant had not truly chosen the tort remedy in lieu of the compensation remedy. Using liberal construction, it found that the claimant's UEGF claim was not barred by Section 305(d), reversing both the WCJ and WCAB on that issue.

The court then addressed the Section 1603(b) late notice issue. The WCJ had found the UEGF claim totally barred by the alleged late notice. The WCAB said that was an incorrect interpretation, that the claim was barred only until notice was given. The court noted that the section said "until" notice is given, not "unless" notice is given. It contrasted that with the 21-day and 120-notice provisions contained in Section 311 of the act. With regard to the 21-day notice, the act uses the word "until," allowing for benefits once notice was given. With respect to the 120-day notice requirement, the act uses the word "unless," thereby completely barring benefits where notice is given after the expiration of 120 days. The WCAB and the court found the word differences to be significant and intentional by the legislature. Thus, the court held that benefits against the UEGF would not be payable until notice was given, even if that was more than 45 days after the claimant knew of the employer's uninsured status. Untimely notice is not a complete bar to benefits. It did not accept the claimant's argument that the fund should have to show "prejudice" to avoid liability until notice is given, and it distinguished cases involving notice related to insurance contracts. The court reversed the WCAB as to Section 305(d), affirmed it as to Section 1603(b), and remanded for further proceedings.

### Commonwealth Court Spring Decisions

Earlier decisions in the *Protz* and *Winchilla* cases, updated below, can be found in the *Winter Decisions* section on page 8.

### Supreme Court Grants the Cross-Appeals in *Protz*

The preceding *Winter Decisions* section included a note regarding the significant Commonwealth Court

*Protz* decision, which declared the use of the 6th Edition of the *AMA Guides* to determine impairment unconstitutional and remanded the matter for consideration under the 4th Edition. Both parties appealed. We wondered whether the Supreme Court would agree to take either appeal or would find them premature and not consider the issue until the remand was decided. The wait is over. The Supreme Court had granted both appeals as of March 22. *Protz v. WCAB (Derry Area School District)*, Nos. 412 and 416 WAL 2015 (Pa. March 22, 2016). Number 412 granted the employer's appeal, framing the issue as whether the act unconstitutionally delegated lawmaking authority to an entity other than the legislature when it authorized the use of the "most recent" edition of the *AMA Guides*. The issue as stated in Number 416 is based on the claimant's argument that the entire scheme of using the *AMA Guides*, regardless of edition, is unconstitutional due to improper delegation, such that remand was unnecessary and inappropriate, essentially seeking to strike impairment ratings from the act.

### Claimant's Waiver of Sixth Edition IRE Constitutional Argument Is Precedential

*Winchilla v. WCAB (Nexstar Broadcasting)*, No. 213 C.D. 2014, 126 A.3d 364, Pa. Cmwlth., filed Sept. 18, 2015, (originally unreported), and ordered reported on Dec. 1, 2015, *appeal denied*, No. 420 WAL 2015 (Pa. Dec. 29, 2015).

The preceding *Winter Decisions* section included a discussion of the then-unreported companion case to *Protz*, in which Commonwealth Court held that the constitutional argument against use of the 6th Edition of the *AMA Guides* to determine an impairment rating was waivable. The court indicated that a modification of the claimant's disability status from total to partial, pursuant to a finding of less-than-50 percent-impairment under the 6th Edition criteria, was permitted when the claimant had not properly preserved the constitutional issue. Now, not only has the Commonwealth Court decision been reported, the Supreme Court has denied the claimant's petition for appeal.

### Supreme Court to Review an IRE That Did Not Consider Injuries Added After It Was Conducted

A Commonwealth Court decision discussed on page 12 in the Fall 2015 *News & Notes*, Vol. 20, No. 3, was appealed, and the Supreme Court will hear it. In *Duffie v. WCAB (Trola-Dyne, Inc.)*, No. 1840 C.D. 2014, 119 A.3d 445, Pa. Cmwlth., filed June 26, 2015, after the claimant underwent an IRE for the acknowledged physical injuries, he filed a timely appeal and also filed a petition to add mental injuries. The WCJ added the mental injuries and then denied the IRE modification

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because the impairment rating percentage had not included them. The WCAB and Commonwealth Court both reversed and upheld the automatic change of status, holding that the IRE only has to consider injuries acknowledged as of the examination date, since the claimant is able to later petition to review the status change if the newly added injuries cause the rating to exceed the 50 percent threshold. On Feb. 3, 2016, the Supreme Court, 568 MAL 2015, 2016 WL 544918, granted the claimant's petition for allowance of appeal.

### Subrogation Allowed under MCARE Act

In a subsequent *Protz* case involving subrogation, [*Protz v. WCAB (Derry Area School District)* No. 402 C.D. 2015, 2016 WL 56261 (Pa. Cmwlth. Ct. Jan. 6, 2016)], the claimant suffered a work-related knee injury for which she had been receiving workers' compensation benefits. Surgery for her right knee resulted in a medical malpractice claim and an award for future medical expenses and lost wages, with none of the funds being set aside for the payment of past medical bills or past lost wages. In December 2012, the employer and insurer filed a petition to review compensation benefits, indicating that the claimant received a third-party recovery in the medical malpractice action and seeking to subrogate that recovery under Section 319 of the Workers' Compensation Act. Claimant filed an answer denying that the injuries resulting from the medical malpractice increased the employer's and insurer's liability under the act and asserting that they were not entitled to any recovery under the Medicare Care Availability and Reduction of Error Act (MCARE). The WCJ awarded subrogation, and the WCAB affirmed.

The Commonwealth Court has now also affirmed, stating: "Our interpretation of Section 508 of the MCARE Act also aligns with the presumption that "the legislature did not intend to change existing law by omission or implication" but only "by an express provision." *Fletcher v. Pennsylvania Property and Casualty Insurance Guaranty Association*, 914 A.2d 477, 483 (Pa. Cmwlth. 2007), *aff'd*, 603 Pa. 452, 985 A.2d 678 (Pa. 2009). Indeed, prior to the enactment of the MCARE Act, employers and workers' compensation carriers were entitled to subrogation with respect to both past and future benefits. See *Helms Express v. Workmen's Compensation Appeal Board (Lemons)*, 106 Pa. Cmwlth. 287, 525 A.2d 1269, 1272 (Pa. Cmwlth. 1987), *appeal dismissed*, 519 Pa. 319, 548 A.2d 252 (Pa. 1988). Although Section 508(c) of the MCARE Act disallows subrogation with respect to benefits paid up until the time of trial, it does nothing to alter the pre-existing law with regard to future benefits. It is also noteworthy that claimant's own medical expert opined that her disability resulted solely at the present time from her complications of chronic regional pain syndrome, which are directly attributable to the vascular injury

(medical malpractice claim). Were it only for her knee itself, she would be back to work at her usual and customary employment.

### "Collective Communications" Meet the Section 311 Notice Requirement

In *Gahring v. WCAB (R&R Builders and Stoudt's Brewing Company)*, No. 534 C.D. 2015, 128 A.3d 375 (Pa. Cmwlth. Nov. 23, 2015), the issues involved two employers and two injury dates for the same body part. Its importance is that it builds on earlier decisions concerning what constitutes sufficient notice of an alleged injury by a claimant to an employer. Claimant suffered a 1997 compensable back injury while working for R&R Builders (Employer I), underwent L3-4 and L4-5 surgery, and, in 2002, resolved only his wage indemnity benefits by compromise and release, leaving future medical expenses for his ongoing chronic low back pain open for payment by Employer I. He then began working for Stoudt's Brewing Company (Employer II) in 2010. His low back pain increased by 2011, resulting in a second surgery in late 2012. He stopped working for Employer II when it could not accommodate his post-surgical restrictions. He filed a penalty petition against Employer I for its failure to pay for his 2012 surgery, and it joined Employer II, asserting that claimant's disability and surgery were due to his work for Employer II. (Claimant also filed a claim petition against Employer II for an unrelated elbow-burn injury.)

The WCJ found that the claimant's 2012 surgery was not related to the 1997 injury and dismissed the penalty petition against Employer I. The WCJ also considered the joinder as a "claim" against Employer II. Using a claim petition burden of proof analysis, the WCJ found that the claimant's repetitive work activities for Employer II did cause a material aggravation of his earlier injury, necessitating the 2012 surgery. However, the WCJ then dismissed the "claim" against Employer II under the §311 120-day notice rule, finding that claimant did not give timely notice to Employer II that he thought his injury was due to his work there, even applying the repetitive work standard, i.e. treating the last day worked as the injury date. Claimant's last workday for Employer II was Nov. 10, 2012, and, according to the WCJ's findings, he gave notice to Employer II on April 8, 2013, the date of the first hearing on his other (burn) claim, which was too late. The WCAB affirmed the denial of benefits, finding that the claimant's complaints to his supervisor while he worked at Employer II were not sufficiently specific to put it on notice of a claimed work-related injury.

Commonwealth Court has reversed and remanded for the calculation of benefits from Employer II. Claimant and his Employer II supervisor both testified that the claimant complained that his recently extended work hours there were making his pain worse, but both of them (mistakenly) thought the symptoms were due to his earlier injury. Relying upon the Supreme Court's

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decision in *Gentex Corporation v. WCAB (Morack)*, 23 A.3d 528 (Pa. 2011) and its own unreported decision in *Morris v. WCAB (Ball Corporation)*, No. 1172 C.D. 2014 (Pa. Cmwlth. Jan. 16, 2015), the court noted that, many times, cumulative trauma injuries are not obviously connected to work activities. In such cases, the adjudicator must look at the totality of the circumstances and consider the “collective communications” between the worker and the supervisory personnel. Here, claimant’s several statements made to his Employer II supervisor while he was still working, that his extended work hours and duties were making his back pain worse, were enough to inform Employer II of the “possibility” that his increased symptoms were related to his cumulative work activities there. His mistaken belief that his symptoms were due to his earlier injury was not important; his surgeon was the first to advise him otherwise. Thus, his notice was timely, and benefits were to be awarded based upon the WCJ’s finding that the 2012 surgery was due to a material aggravation of the 1997 injury from his 2010-2012 work activities at Employer II.

**To Be Effective Under §313,  
a Claimant’s Notice of Injury Must Be Given  
to a Supervisor.  
Further, Temporal Proximity Alone Will Not  
Support a Causation Opinion.**

In *Penske Logistics and Gallagher Bassett Services, Inc. v. WCAB (Troxel)*, No. 713 C.D. 2014, 2015 WL 5446498, Pa. Cmwlth., filed June 17, 2015, and ordered reported on Feb. 23, 2016, the Commonwealth Court discussed the §§311, 312, and 313 notice of injury requirements. In February 2011, the claimant, Edwin Troxel, slipped on ice and fell, hurting his back and right arm and shoulder. He told a co-worker, Brian Yoder, who was not his supervisor, about the incident. Yoder gave him an injury report form, which the claimant completed and simply pushed under the office door because it was locked and the staff was not in. There was a family connection with his actual supervisor, Julie Troxel, so he had always reported work injuries to her supervisor (the office manager), not to her. He kept working and sought no treatment. He missed time from June to August 2011 for a work-related ankle injury. After he returned to work in late August, he decided to seek treatment for his arm. He told the manager, John Cusatis, who had not been the manager in February, about the slip-and-fall, and asked to see a panel physician; Cusatis responded that there was no record of the incident. Claimant then informed the employer’s workers’ compensation representative, Lisa Epler, about the fall. She told him that he needed to file a formal report because there was none in his file. On Nov. 30, 2011, he finally handed to Cusatis a copy of his February 3 report, which did not contain the signature of a supervisor; the claimant had completed the entire document on his own. Cusatis told him the notice was too late but instructed Epler and Troxel to input it into their

system.

In the meantime, the claimant had seen his family doctor in August and then saw a neurosurgeon in October, who, after review of an August MRI and November EMG, diagnosed cervical spine issues and performed cervical spine surgery in January 2012. The surgeon testified that, since the claimant did not have symptoms before the February fall, the fall must have aggravated a pre-existing herniation, related to an earlier 2001 cervical spine fusion surgery.

The WCJ awarded benefits, finding that his February notice to Yoder was sufficient, despite Yoder’s testimony that he was not the claimant’s, nor anyone’s, supervisor and did not recall any conversation with the claimant. Cusatis testified that the claimant did not tell him about the incident until November (rather than August). Epler testified that she found out about the fall from Cusatis in November. Troxel testified that claimant did not tell her about this incident, although he occasionally mentioned his aches and pains, and that she learned of it when Cusatis gave her the claimant’s report to enter into the system on December 1. Sonny Lall testified that he was the claimant’s supervisor in February, that the claimant did not orally report the incident to him, that he was the only one who used the office where the claimant said he slid the report, and that he never saw the document. Other employees with access to that office testified that they never saw the report lying on the floor or anywhere else. Several witnesses testified about proper procedure for reporting work injuries and said that the claimant had followed that procedure several times, including submitting written reports directly to his supervisor, both before and after this incident, such as with the June ankle injury. The court stated: “The WCJ discredited Employer’s fact witnesses for several reasons...” and discussed the reasoning of the WCJ with respect to the various fact witnesses. The WCJ found claimant’s physician more credible on causation. The WCAB affirmed, and employer appealed.

The Commonwealth Court reversed on two grounds, untimely notice and incompetent medical opinion. (It also discussed the disfigurement award, not noteworthy except for its questioning of how the WCAB arrived at its conclusion that it was within the reasonable “range” of awards.) The court gave a fairly lengthy analysis of §311, §312, and §313 in particular. Telling a co-worker is not enough. The notice must be given to someone in a supervisory capacity or to an appropriate agent. Claimant’s own testimony showed that he did not timely report the incident to a supervisor or agent but only to a co-worker, Yoder, whom he knew not to be a supervisor. Furthermore, he did not tell him what his injuries were, as required by §312, only that he had fallen. Slipping the note under a door was not notice without some indication that it was actually received. The court also noted that the claimant had followed company procedure in other instances, so he knew how to report an injury, but he did not follow that procedure in this case. Claimant’s notice to Cusatis for a February injury, whether given in August or in November, was untimely.

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Observing that it did not have to discuss the medical evidence because of the reversal on the notice issue, the court did so anyway. Temporal proximity is not enough to support an opinion of causation. Claimant had much earlier surgery, developed subsequent degenerative disease, fell in February, did not miss time from work or seek treatment until August, and then for his arm, and he did not see the testifying surgeon until October. The doctor's causation opinion that some injury to claimant's nerve roots must have occurred during the slip-and-fall, because he was reportedly asymptomatic before then, was legally incompetent.

### **Fatal Heart Attack Is Compensable Without Direct Evidence of the Inciting Work Activities**

In *Robert Dietz (Dec'd.) by Judith Dietz v. WCAB (Lower Bucks County Joint Municipal Authority)*, No. 2051 C.D. 2014, 126 A 3d 1025, Pa. Cmwlth. filed on Aug. 14, 2015, originally unreported, and ordered reported on Dec. 3, 2015, the claim involved a fatal claim for a fatal heart attack sustained by a public employee. Decedent was employed as a field maintenance worker for 20 years for a municipal authority, doing heavy physical labor, including jackhammering, roadwork, and cutting tree roots out of the sewer system, etc. He worked long hours in all weather. On Nov. 7, 2007, he began his workday at 7 a.m. At 9:35 p.m., 14 hours later, he called his wife to tell her that he had been jackhammering and doing roadwork all day but that he would be done soon. At 10:45 p.m., a co-worker arrived at their home to inform his wife that her husband had collapsed at the jobsite. She went to the hospital where she was informed that he had died from a heart attack. He had a minor coronary history, but nothing substantial, and he had not suffered any recent symptoms.

In the fatal claim proceedings, the widow did not offer co-worker testimony of the decedent's specific duties that day or just prior to his fatal attack. Her independent (non-treating) medical expert testified, based upon records review, that there was no cause for the decedent's myocardial infarction other than his long workday. The WCJ initially denied benefits, finding that the widow had not proven that the decedent's work on that particular day was any more physically stressful than his usual work activities. Upon appeal, the WCAB vacated and remanded the decision, stating that the WCJ had not applied the correct causation test. On remand, the WCJ then granted benefits, finding the widow's medical expert credible that the decedent's work on that day was a substantial contributing factor leading to his infarction and death. The WCAB then reversed the grant of benefits, holding that there was no direct evidence of the specific tasks that decedent was doing at the time of his collapse.

Commonwealth Court reversed the WCAB and reinstated the WCJ's award. It discussed proof of causation and the divergent medical opinions from the widow and the employer's experts. Citing several earlier decisions, the court held that a claimant does not have to prove what specific work activity caused the heart attack. If sufficient evidence, even circumstantial, of a worker's general work duties show that it is a physically stressful job, and there is competent medical evidence that such physical activity caused the infarction, the injury/death is compensable. Otherwise, no unwitnessed heart attack could be compensable. Moreover, recovery is not precluded even if the worker is otherwise predisposed to an infarction due to prior cardiac issues (the employer expert's opinion here), if the claimant's expert (as here) is found more credible.

In an order dated March 30, 2016, the Pennsylvania Supreme Court denied the employer's petition for allowance of appeal. See *Robert Dietz (Deceased) by Judith Dietz v. WCAB (Lower Bucks County Joint Municipal Authority)*, No. 777 MAL 2015.

### **Subrogation Granted Against Uninsured Motorist Benefits**

In *Davis v. W.C.A.B. (PA Soc. Servs. Union)*, No. 216 C.D. 2015, 2015 WL 9488229, Pa. Cmwlth, filed Dec. 30, 2015), the claimant was a passenger in a motor vehicle driven by a co-employee when she suffered her work injury. The claimant was paid wage and medical benefits through workers' compensation and filed an uninsured motorist claim through her co-employee's policy. After the claimant settled the uninsured claim, the employer asserted a subrogation lien against this settlement. The WCJ granted the employer's petition to review compensation benefits offset, because the insurance had been purchased by someone other than the claimant.

The WCAB and Commonwealth Court affirmed. The court reviewed several relevant cases, including *Standish v. American Manufacturers Mutual Insurance Company*, 698 A.2d 599, 601-02 (Pa. Super. 1997), where the superior court held that an employer's workers' compensation insurance carrier could not subrogate against the uninsured motorist benefits received by the claimant from the claimant's personal automobile policy. In *American Red Cross v. Workers' Compensation Appeal Board (Romano)*, 745 A.2d 78, 81 (Pa. Cmwlth. 2000), *aff'd*, 564 Pa. 192, 766 A.2d 328 (Pa. 2001), the Commonwealth Court, following *Standish*, also concluded that the employer could not subrogate against proceeds received by the claimant from an uninsured/underinsured motor vehicle policy paid for by the claimant. They found that Section 319 of the Workers' Compensation Act provides for subrogation rights only against sums received from suits against third-party tortfeasors. Thereafter, the Commonwealth Court allowed subrogation for uninsured benefits that the claimant received through the employer's policy in *City of Meadville v. Workers'*

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*Compensation Appeal Board (Kightlinger)*, 810 A.2d 703, 704 (Pa. Cmwlth. 2002). The court concluded that it would be illogical to allow a claimant who is injured by an uninsured third party and recovers uninsured benefits under the employer's motor vehicle policy to be in a better position than the claimant who recovers directly from the third-party tortfeasor. If the third party had been insured, and claimant had reached a settlement with the third party, there is no question that the carrier could assert its subrogation lien against those funds. The court distinguished *American Red Cross*, because proceeds obtained by a claimant through his own insurance policy, paid for by him, are not subject to subrogation. The court then reviewed *Hannigan v. Workers' Compensation Appeal Board (O'Brien Ultra Service Station)*, 860 A.2d 632, 633 (Pa. Cmwlth. 2004) (*en banc*), where the claimant was injured in a car accident with an uninsured motorist while driving a customer's car. The claimant received workers' compensation benefits and also received an uninsured settlement from the customer's motor vehicle insurance policy. Following *City of Meadville*, the Commonwealth Court concluded that the employer was entitled to subrogate against the uninsured motorist benefits that the claimant received under the customer's motor vehicle insurance policy. The *Hannigan* court distinguished *American Red Cross*, stating that the claimant in *American Red Cross* received benefits through his own policy, the premiums for which were exclusively paid by the claimant. In *Davis*, the court quoted from its prior statement in *Hannigan* as follows: "In other words, where a Claimant has purchased his own insurance which pays for his injuries because of the premiums he has paid, he is entitled to the double recovery ordinarily barred by... (Section 319 of the Workers' Compensation Act). *The same cannot be said, however, of a claimant who recovers under a policy of insurance purchased by some third-party, such as a co-worker or, as here, a customer.*" The court concluded its opinion in *Davis* by stating that they had already concluded that an employer has the right to subrogation not only where the employer paid for the policy, but also where a third party, such as a customer or a co-worker, paid for the policy. *Hannigan*, 860 A.2d at 640 n. 11. The court then stated: "Because Claimant's co-employee paid for the uninsured motorist insurance policy, Employer was entitled to subrogate against Claimant's settlement proceeds."

### Firefighter Presumption Not Absolute

In *Swigart v. W.C.A.B. (City of Williamsport)*, No. 493 C.D. 2015, 2015 WL 9311688, Pa. Cmwlth., filed Dec. 23, 2015, the claimant filed a claim petition, alleging that he developed chronic obstructive pulmonary disease (COPD) on Jan. 21, 2011, after more than 22 years of work as a firefighter for the employer, during which he was exposed to smoke, fumes, heat, and gases in times of stress and under all weather

conditions. The WCJ found that while claimant has asthmatic bronchitis, that condition does not disable him from working as a firefighter. Thus, the WCJ concluded that the claimant does not benefit from the presumption that his lung condition is a work-related occupational disease pursuant to Sections 301(c)(2), 301(e), and 108(o) of the Workers' Compensation Act. The WCJ also concluded that the claimant did not meet his burden of proving a work injury under Section 301(c)(1) of the act, 77 P.S. § 411(1), because his medical evidence regarding the causal relationship of his lung condition to his firefighting was equivocal.

The WCAB and Commonwealth Court affirmed. The Commonwealth Court disagreed with the claimant's first argument, that the employer's medical testimony was incompetent because its expert witness explicitly refused to acknowledge the occupational causal presumption given to firefighters with a disease of the heart and lungs. The court recognized that it had previously held that expert testimony that adamantly rejects any causal relationship between exposure to the hazards of firefighting and lung disease is incompetent, citing *Marcks v. Workmen's Comp. Appeal Bd. (City of Allentown, Dep't of Pub. Safety, Bureau of Fire)*, 119 Pa. Cmwlth. 214, 547 A.2d 460 (Pa. Cmwlth. 1988). In *Marcks*, the court had stated that:

"However, the determination as to whether the testimony of a medical witness is competent is a question of law and is fully reviewable by this Court. *Buchanan v. Workmen's Comp. Appeal Bd. (City of Phila.)*, 659 A.2d 54 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied ...* 542 Pa. 675, 668 A.2d 1137 (Pa. 1995). 'Our review must encompass the witness' *entire testimony*, and not merely isolated statements, in reaching our determination.' *Id.* at 56 (emphasis added); *see also Kelley v. Workers' Comp. Appeal Bd. (City of Wilkes-Barre)*, 725 A.2d 232, 235 (Pa. Cmwlth. 1999) (stating that 'in determining whether testimony of a medical witness is competent to rebut the presumption ..., review must encompass the witness' *testimony in toto*; not mere excerpts of the medical witness' *testimony*'; *City of Wilkes-Barre v. Workmen's Comp. Appeal Bd. (Zuczek)*, 541 Pa. 435, 664 A.2d 90, 93 (Pa. 1995)."

The Commonwealth Court also noted that in *Dillon v. Workers' Comp. Appeal Bd.*, 853 A.2d 413, 418-19 (Pa. Cmwlth. 2004), the court "...concluded that if a doctor 'indicates his acknowledgment that the *presumption* exists; [but] he believes its use as a risk factor for [lung] disease is not as medically compelling, this does not render his expert opinion incompetent. *Id.* at 419."

After reviewing the testimony of the defense medical expert in *Swigart*, the court concluded that the doctor did not testify that a causal relationship does not exist between exposure to the hazards of firefighting and

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lung disease. Rather, he opined that if an individual has other significant causal factors, he will not attribute firefighting as the number one cause. As to the claimant's second argument, that the WCJ abused his discretion by not permitting the rebuttal testimony of the claimant's additional expert, the Commonwealth Court noted that it is well-established law that "the admission of evidence is a matter within the sound discretion of the WCJ." *CVA, Inc. v. Workers' Comp. Appeal Bd. (Riley)*, 29 A.3d 1224, 1230 n. 12 (Pa. Cmwlth. 2011). After citing scheduling rules from the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges, 34 Pa. Code § 131.3(a), the Commonwealth Court noted that the claimant's medical expert was deposed on Feb. 20, 2012, and the employer's medical expert was deposed on May 3, 2012. By May 16, 2012, the claimant stated that he wished to leave open the possibility for rebuttal testimony through another physician. However, the claimant did not schedule that rebuttal deposition until March 27, 2013, while the WCJ had set the record to close on April 2, 2013. The WCJ, therefore, sustained the employer's objection to this rebuttal deposition. The Commonwealth Court held that the WCJ did not abuse his discretion in precluding this rebuttal medical deposition.

### Reinstatement Following a Specific Loss Due to Worsening of Condition

In *Lindemuth v. WCAB (Strishock Coal Co.)*, No. 812 C.D. 2015, 2016 WL 730644, Pa. Cmwlth., filed Feb. 24, 2016, the court addressed reinstatement of wage loss benefits due to a worsening of claimant's medical condition following a prior determination that he had sustained a specific loss of use of an eye.

Injured workers under the Pennsylvania system are generally able to reinstate disability checks upon a showing of worsening of condition. The principle is illustrated in a 2016 case. There, the claimant, Lindemuth, had sustained significant facial injuries in a battery explosion at his coal company employer. He was paid benefits voluntarily. Later, upon consideration of both employee and employer petitions, the WCJ found that the claimant had sustained the complete loss of use of his right eye and that he suffered from headaches caused by an injury to the trigeminal nerve. Still, as the WCJ was unpersuaded that the headache condition was independently disabling, the award of benefits was limited to the specific loss of the eye.

Roughly two years later, the claimant filed to reinstate, alleging that the headache condition had worsened to the point of disabling pain. He supported that allegation with the testimony of two physicians, while employer defended with the testimony of its own examiner. On this occasion, the WCJ rejected the claimant's complaints of worsening, discredited his experts' testimony, and accepted that of employer.

The Appeal Board and court affirmed. The court held that the WCJ had committed error in stating that claimant had not specifically injured his trigeminal nerve as part of the injury, as that fact had already been determined. Still, that statement was harmless error because, in the end, the finding that no worsening of the headache condition had unfolded was supported by the evidence.

The case is remarkable because the court ruled that a worker who has been adjudicated as having a specific loss, at least in this type of situation, can still potentially show an independent cause of disability and *again* receive temporary total disability. In this regard, the court interpreted claimant's benefits relative to a trigeminal nerve injury – once the specific loss award had been made – as having been *suspended*. The court declared, "Where, as here, a WCJ recognized a work-related injury, but suspended benefits based on a conclusion that such injury does not cause a loss of earning power, the WCJ maintains the authority to reinstate benefits or modify an award upon proof that an injury has worsened and resolved into a disability."

### Reinstatement Petition Barred by Pending Appeal

In *Gieniec v. WCAB (Palmerton Hospital and HM Casualty Insurance Co.)*, No. 195 C.D. 2015, 130 A.3d 154, filed Nov. 3, 2015, claimant had filed a reinstatement petition (regarding a 2007 work injury) while an appeal of WCJ Kutz's January 2012 decision, involving termination, claim, and review petitions for that injury, was pending with the WCAB. Subsequent to the January decision, claimant had also filed a claim petition alleging a Dec. 9, 2011, injury. The claim and reinstatement petitions were assigned to WCJ Rapkin, since WCJ Kutz had moved to the Harrisburg office. The court stated that: "The employer argued that the reinstatement petition could not proceed because an appeal related to the 2007 injury was pending." WCJ Rapkin permitted the litigation to proceed, and both parties presented witnesses and medical depositions. The court wrote: "WCJ Rapkin denied ... (the) Claim petition...However, WCJ Rapkin granted her reinstatement petition on a contingent basis. Importantly, WCJ Rapkin suspended benefits until the Board decided the pending appeal that involved 'identical issues..., i.e. [,] whether ...claimant suffered...any disability' from the 2007 Injury."

The employer appealed WCJ Rapkin's order as to the reinstatement. The WCAB vacated WCJ Rapkin's decision and dismissed the reinstatement petition based upon *Bechtel Power Corp. v. WCAB (Miller)*, 452 A.2d 286, (Pa. Cmwlth. 1982). Claimant appealed to the Commonwealth Court.

The court analyzed the procedural chronology and the issues in the case after first summarizing the general legal principle in the following manner: "*Bechtel Power* generally applies to prevent premature petitions, relitigation of identical issues, and to preclude a party

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from advocating inconsistent positions.” The court first explained that the “reinstatement petition was premature in that it depended on the outcome of the appeal of the initial claim.” Second, the court explained that the issue of the possible “award (of) indemnity benefits” was identical in both the decision on appeal and in the reinstatement petition. (In his decision on the claim petition involving the 2007 injury, WCJ Kutz had suspended claimant’s possible entitlement to indemnity benefits, and this was an issue involved in the appeal of WCJ Kutz’s decision.) Finally, the court stated that the claimant was “also maintaining two mutually exclusive positions.” The court explained: “In the reinstatement petition, ostensibly she seeks to reinstate the benefits as set forth in WCJ Kutz’s Jan. 30, 2012 decision. Simultaneously, in the appeal of her Initial Claim, she challenged the adequacy of the award because it did not include any ongoing disability benefits or wage loss. These positions are inconsistent.” Following its complete explanation, the court concluded: “As the circumstances warrant application of the *Bechtel Power* rule here, we affirm the Board’s dismissal of Claimant’s reinstatement petition.”

### **Injury During FCE Not in Course and Scope of Employment**

In *Reichert v. WCAB (Foxdale Village)*, No. 2018 C.D. 2014, 126 A.3d 358, filed Sept. 10, 2015, the Commonwealth Court concluded that any injury which claimant experienced during a functional capacity evaluation (FCE), ordered by her treating doctor, was not an injury which occurred while in the course and scope of employment.

The facts, as summarized by the court, appear to be undisputed. The facts had to be applied to Section 301(c)(1) of the act, which requires an injury to occur in the course and scope of the employment. Claimant was employed as a CNA with the employer for many years. She went out of work in August 2011, for “... back pain unrelated to any work injury.” Shortly after Jan. 9, 2012, the claimant informed her employer that she wanted to return to work. Thereafter, she was given a letter dated Jan. 19, 2012, which indicated in relevant part that “... you must have your doctor provide a fitness for duty certification.” Enclosed with the letter was copy of a job description for the claimant’s position. Claimant’s doctor subsequently testified that he “...did not ‘feel comfortable’ certifying the claimant’s return to work without referring her for an FCE.” The FCE was conducted on Feb. 17, 2012, and “Claimant testified that she ‘was in so much pain at the end of the test’ that she ‘could hardly move the whole weekend’... and that after the ...FCE, she did not feel that she could return to work even on a limited basis.”

Claimant filed a claim petition on Sept. 19, 2012, alleging that on Feb. 17, 2012, “she sustained a work-

related injury in the nature of a thoracic strain and aggravation of a pre-existing degenerative condition... while in the course and scope of her employment with Foxdale Village...” The WCJ determined that *Moberg v. WCAB (Twining Village)*, 995 A.2d 385 (Pa. Cmwlth. 2010) was controlling. (Moberg involved an injury following a reaction to a tuberculin test that was required as part of the application for employment.) The WCJ concluded that having to undergo the FCE as a precondition of returning to work following a period of non-work-related disability was not in the course and scope of employment under the act. Claimant appealed, and the WCAB “agreed with the WCJ and concluded that Moberg controlled.”

On appeal to the court, the claimant argued that “*Moberg* is distinguishable and does not control the outcome of this case.” Claimant’s basic argument was that, unlike the claimant in *Moberg*, the claimant was still an employee when she underwent the FCE. The court discussed the factual circumstances and explained that there is a difference between an event (such as the FCE in this case) being “work-related” and being “in the course of employment.” The court pointed out that the FCE was not offered by the employer, but by claimant’s doctor. The court’s reasoning is succinctly summarized at the end of the opinion as follows:

This does not mean that Employer either directed or mandated Claimant’s participation in the FCE, but only that it did have certain prerequisites for employment that Claimant needed to complete in order to return to work. Moreover, the fact that Claimant was an employee prior to commencing her non-work long-term disability is not dispositive, because Claimant may not have returned to employment if she was unable to complete any of Employer’s other pre-requisites for employment... Hence, an injury that arises while participating in a pre-requisite for employment is only work-related insofar as the event has the potential to alter the employment relationship by allowing the Claimant to return to employment, but it does not arise in the course of employment. Accordingly, we affirm the order of the Board.

### **Employer Had Sufficient Notice of Desired Corrective Amendment to Description of Injury**

In *Walker v. WCAB (Evangelical Community Hospital)*, No. 139 C.D. 2015, 128 A.3d 367, filed Nov. 23, 2015, the NCP had described the claimant’s May 20, 2007, work injury as a “left shoulder ‘strain.’” Following a 2009 termination petition and two review petitions, in a Feb. 24, 2010, decision, the WCJ denied the termination petition and added eight additional medical conditions to the described work injury. On July 23, 2010, the claimant underwent a second shoulder surgery, which was described as a “left open suprascapular nerve decompression.”

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Shortly after an April 29, 2011, IME, the employer filed a termination petition, alleging that the claimant was fully recovered from the May 5, 2007, work injury as of April 29, 2011. At the first hearing, employer's counsel indicated that employer was seeking a termination and intended to depose Dr. Rubenstein. Claimant's counsel responded in relevant part as follows: "[Claimant] had surgery just about a year ago on July 23, 2010, by Dr. Reish. She continues to be symptomatic at this time. She continues to treat... So at this point it is our position that she is not fully recovered. She remains in treatment. She remains on medication, and continues to have restrictions for the shoulder." Claimant did not file any review petition. The employer took the deposition of Dr. Rubenstein, and the claimant took the deposition of Dr. Reish. The WCJ granted the termination for several of the medical conditions which had been added to the work injury in the Feb. 24, 2010, decision, denied the termination for the remaining conditions, and "expanded the work injury to include suprascapular neuropathy, from which the claimant had not fully recovered."

Employer appealed the WCJ's modification of the work injury description, arguing that the WCJ had erred in adding the new medical condition in the absence of any review petition. The court summarized the board's decision in the following manner: "The Board agreed and reversed this part of the WCJ's decision. The Board concluded that although a WCJ can expand the work injury in the absence of a review petition, it was inappropriate to do so here because Employer did not have notice that the injury description was at issue in the proceeding." Claimant then appealed to the court.

The Commonwealth Court reversed the decision of the board, concluding that the board misconstrued *Cinram Manufacturing, Inc. v. WCAB (Hill)*, 975

A.2d 577 (Pa. 2009). The court concluded that the statement by claimant's counsel at the first hearing was significant. The court also stated: "The July 2010 surgery was a suprascapular nerve decompression, a fact of which Employer was aware from utilization review proceeding questioning the need for the decompression surgery. This procedure was done to relieve Claimant's suprascapular neuropathy." The court also pointed out that Dr. Rubenstein did address the subject of a possible suprascapular nerve injury during his deposition. The court concluded: "In short, Employer had adequate notice that Claimant considered chronic suprascapular neuropathy part of the work injury."

Employer also argued the amendment by the WCJ was not a "corrective" amendment; therefore, a review petition was required. The court summarized the relevant legal principle as follows:

An amendment is corrective if the WCJ adds a diagnosis that is part of the original work injury. *Cinram*, 975 A.2d at 580-81. On the other hand, where a claimant develops another new injury as a consequence of the original injury, the WCJ cannot add that injury to the NCP without a review petition. *Id.* at 581. The party seeking to amend the NCP has the burden of proving that the NCP is *materially incorrect*. *Namani v. Workers' Compensation Appeal Board (A. Duie Pyle)*, 32 A.3d 850, 856 n.4 (Pa. Cmwlth 2011).

The court referred to portions of the testimony of Dr. Rubenstein and of Dr. Reish and stated: "This evidence supports the conclusion that suprascapular neuropathy was part of the original work injury and not a consequential condition. In sum, the Board erred in reversing the portion of the WCJ's order amending the NCP to include an additional left shoulder injury. Accordingly, the order of the Board in that respect is reversed."

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