

# **Legal Updates 2023 Workers' Compensation Conference**

## **Moderators:**

**Barbara Hollenbach, Esq. Norris McLaughlin P.A., Allentown**

**Steven Minnich, WCJ, Office of Adjudication, Pittsburgh**

## **Panelists:**

**Barbara Holmes, Esq., Blaufeld Schiller & Holmes LLP,  
Pittsburgh**

**Peter J. Weber, Esq., Weber, Gallagher, Simpson, Stapleton,  
Fires & Newby, Philadelphia**

**MEDICAL BILL AND  
PAYMENT ISSUES  
MEDICAL MARIJUANA CASES**

**Fegley v. Firestone Tire & Rubber  
(WCAB), No. 680 C.D. 2021, 291 A.3d 940  
(Pa.Cmwth. 2023)**

- **Workers' Compensation carriers may be required to reimburse injured workers for medical marijuana where such treatment is related to the work injury and has been found to be reasonable and necessary on Utilization Review.**

**Appel v. GWC Warranty Corp. (WCAB),  
No. 824 C.D.2021, 291A.3d 927(Pa.  
Cmwlth. 2023)**

**A workers' compensation carrier can be found to be responsible to reimburse an injured worker's medical marijuana on a Petition to Review Medical Treatment and/or Billing, if same is reasonable, necessary and related to the work injury.**

**Ambrogio v. Pocono Mountain School  
District (WCAB), No. 236 C.D.2021 (Pa.  
Cmwlth. 6/29/22)**  
**(unreported)**

**No reimbursement for medical  
marijuana where the condition for  
which same is prescribed is not part  
of the accepted work injury.**

# **OTHER MEDICAL BILL AND PAYMENT ISSUES**

**UPMC Benefit Mgmt. Servs. Inc. d/b/a/  
UPMC Work Partners v. United Pharmacy  
Servcs. (BWC Fee Rev. Hrg. Off.), 287  
A.3d 474 (Pa.Cmwlt. 2022)**

- **Where insurer did not challenge payment for the prescribed compound cream through the UR process, the provider's fee review was not "premature."**
- **The insurer's dispute on causality grounds did not meet one of the three specific prerequisites for rendering a fee review application premature under the Regulations.**

**SWIF v. Harburg Med. Sales Co. (BWC  
Fee Rev. Hrg. Off.), 287 A.3d 981 (Pa.  
Cmwth. 2022)**

- **The insurer's dispute on causality grounds did not meet one of the three specific prerequisites for rendering a fee review application premature under the Regulations.**
- **Insurer's challenge to standing to bring fee review application waived if not raised at the fee review level.**



**Skay v. Borjeson & Maizel LLC  
(WCAB), 280 A.3d 19 (Pa.Cmwlth.  
2022).**

- **Utilization Review favorable to the injured worker is not sufficient to establish a causal relationship with the work injury in a subsequent penalty petition regarding non-payment of prescription medication.**
- **An employer is free to deny bills based on causation but risks a penalty if causation is established.**

**Ralph Martin Construction v. Castaneda-Escobar (WCAB), 280 A.3d 1089 (Pa.Cmwlth. 2021)**

- **Defendant is not responsible to pay for a new home for an injured worker when home modifications to the existing home are impractical or prohibitively expensive.**

# OPIOIDS

**Mushow v. Doyle & Roth Manufacturing  
(WCAB), 279 A.3d 633 (Pa.Cmwth. 2021)**

**WCJ ordering opioid tapering  
protocol is acceptable.**

**Hughes v. Wawa (WCAB), 271 A.3d  
922 (Pa.Cmwlt. 2021)**

**Long term opioids were not  
reasonable and necessary and UR  
doctors were not required to provide  
weaning protocols.**

**Rotegliano v. Clinton Hospital Corp.**  
**(WCAB), Nos. 616 and 628 C.D. 2021**  
**(Pa.Cmwth. 5/12/22)**  
**(unreported)**

- **UR decision that opioid use was not reasonable and necessary was supported by substantial evidence.**
- **Requirement for drug testing for opioids was not inconsistent with the UR determination, where it appeared that worker's testimony she no longer used opioids was not deemed fully credible.**

# **CIVIL COURT CASES**

**Franczyk v. The Home Depot, Inc.,  
\_\_\_ A.3d \_\_\_, No.11 WPA 2022 (Pa.  
4/19/2023)**

- **Supreme Court reverses the lower court's denial of summary judgment, previously affirmed by Superior Court.**
- **Potential third-party claim is “intertwined inextricably” with the workplace injury and the exclusive remedy applies to bar the tort claim against the employer.**



**Mercer v. Newell, 254 A.3d 755,  
(Pa.Super.2022), *remanded by* 278  
A.3d 309 (Pa.2022).**

- **Superior Court permitted injured worker to civilly sue his employer where the employer allegedly concealed doctor's order that employee be removed from work due to lead exposure and accumulation of lead in his brain.**
- **The Supreme Court granted appeal, but that appeal has been dismissed by the Court without objection.**
- **Case now remanded to trial court.**

**Loftus v. Decker, 289 A.3d 1093,  
(Pa.Super.2023)**

**Workers' compensation carrier cannot intervene to protect its subrogation right and file a complaint, where all that has occurred in the civil suit is the filing of a writ of summons.**

**Employer/carrier cannot take over civil litigation in place of the injured worker.**

# **Yoder v. McCarthy Construction, etal., 291 A.3d 1, (Pa.Super.2023)**

- **Five million dollar verdict reversed because defendant general contractor was statutory employer of injured worker.**
- **Employee cannot disclaim employment relationship after entering into a Compromise and Release.**

**IRE POTPOURRI**

**Sicilia v. API Roofers Advantage Program (WCAB), 277 A.3d 1213 (Pa.Cmwlth. 2022), *app.granted*, No. 287 MAL 2023 (2/15/2023).**

**IRE opinion was rejected by WCJ because it considered conditions never recognized; Commonwealth Court reversed, citing *Duffey v. WCAB (Trola-Dyne, Inc.)*, 152 A.3d 984 (Pa.2017) .**

# **Sicilia (cont.).**

## **Supreme Court will consider:**

- 1. Did the Commonwealth Court impermissibly expand the holding in *Duffey v. WCAB (Trola-Dyne, Inc.)*, 152 A.3d 984 (Pa.2017) to usurp the authority of the WCJ to determine the nature and extent of compensable injury?**
- 2. Did the Commonwealth Court err in reversing the WCAB by substituting its assessment of the credible testimony for that of the fact finder?**

**City of Pittsburgh v. Dobbs (WCAB), No. 1431 C.D. 2021 (Pa.Cmwth.2022)**  
**(unreported)**

- **IRE provisions of Act 111 held to apply to an individual whose 1993 injury pre-dated all IRE provisions.**
- **Act 111 did not “automatically change his disability status or deprive him of vested rights.”**

# **TERMINATION OF BENEFITS**



**Pocono Mountain School District v. Kojeszewski (WCAB), 280 A.3d 12 (Pa.Cmwlt. 2022)**

- **Employee can add diagnoses even after an original adjudication of the work injury where the disputed diagnoses were not litigated earlier.**
- **A partial termination of benefits is not a cognizable concept where a claimant recovers from some, but not all, recognized medical conditions.**

**Wolfe v. Martellas Pharmacy (WCAB),**  
**281 A.3d 1129 (Pa.Cmwth.2022)**

**Opinion of full recovery pre-dating  
an NCP accepting medical a claim  
for payment of medical bills only  
does not preclude the grant of a  
Petition to Terminate.**

**EMPLOYMENT ISSUES:  
DISCHARGE,  
RETIREMENT and  
VOLUNTARY REMOVAL**

**Montano v. Advance Stores, Inc. (WCAB),**  
**278 A.3d 969 (Pa.Cmwlth.2022)**

**WCJ legitimately denied employee's petition to reinstate TTD after his purported fault based discharge, occurring in the midst of his post-injury accepted light duty assignment.**

**Hi-Tech Flooring Inc. v. WCAB (Santucci),  
280 A.3d 112 (Pa.Cmwlt.2022)**

**Receipt of Social Security disability and a union disability pension, along with a failure to look for work, were not sufficient under the “totality of the circumstances” test to show a removal from the workforce.**

# **LIGHTNING ROUND**

**Columbia County Commissioners v.  
Rospendowski (WCAB), 286 A.3d 486  
(Pa.Cmwth.2022)**

**Employer/carrier cannot offset an overpayment of benefits in one workers' compensation claim through a credit against benefits payable for a subsequent injury claim.**

**Lawhorne v. Lutron Electronics Co.**  
**(WCAB), 284 A.3d 239(Pa.Cmwth.2022)**

- **Even though the WCJ did not credit employee's medical expert testimony, cost awarded.**
- **So long as the rejected testimony bore some relationship to the petition on which employee prevailed, the cost can be recouped as a reasonable litigation expense.**



**Hymms v. Commonwealth of Pennsylvania (WCAB), 281 A.3d 375 (Pa.Cmwth.2022)**

**Injured worker unsuccessfully challenges a Compromise and Release on the basis that the C&R included a mistake regarding the settlement amount.**

**Payne v. Americold Logistics LLC  
(WCAB), 279 A.3d 641 (Pa.Cmwth.2022)**

**Sending appeal form to the WCJ  
office rather than the Workers'  
Compensation Appeal Board does  
not perfect an appeal.**

# **ADDITIONAL CASE LAW OF INTEREST**

**Commonwealth Dept. of Transportation  
v. WCAB (Clippinger), 38 A.3d 1037  
(Pa.Cmwlth.2011)**

- **In home therapy pool is a reasonable and necessary medical expense.**

**Philadelphia Surgery Ctr. v. Excalibur  
Ins. Mgmt. Servs. LLC (WCAB), 289  
A.3d 157(Pa.Cmwth.2023)**

- **Although the Fee Review Section and Hearing Office admitted overpayment, there is no authority to order a provider to reimburse an insurer for prior overpayment of fees for medical services.**

**DiPaolo v UPMC Magee Women's  
Hospital (WCAB), 278 A.3d 430  
(Pa.Cmwlth.2022)**

- **Act 111 survives constitutional scrutiny.**
- **The right to continuing workers' compensation benefits is not guaranteed.**

**Lynch v. Commonwealth of Pennsylvania  
(WCAB), 275 A.3d 113 (Pa.Cmwth.2022)**

- **Employee's receipt of full salary benefits for 104 weeks under Act 534 constitutes receipt of total disability benefits under the Act and triggers employer/carrier entitlement to the IRE process.**

**Riemenschneider, Admin. Of Estate  
of David Macleary v. D. Sabatelli,  
Inc., 277 A.3d 612, (Pa.Super.2022)**

**A non-dependent adult child of a worker who is fatally injured in the course of his employment has no cognizable tort claim against the worker's employer.**



**Herold v. University of Pittsburgh,  
291 A.3d 489 (Pa.Cmwlt. 2023)**

**An occupational disease tort claim based on a disease manifesting itself more than four years after the last exposure to the hazard in the workplace is not barred by the exclusive remedy provisions of the Act.**