Tom Wolf | Governor — Kathy M. Manderino | Secretary

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

News & Notes

Vol. 22 | No. 1 — *"Serving all Pennsylvanians"* — Winter 2017

2017 Annual Conference Registration is Open!

The 16th Annual Pennsylvania Workers' Compensation Conference will be held on **June 12-13, 2017**, at the Hershey Lodge and Convention Center, Hershey, Pennsylvania.

This year's event features a Return-to-Work theme. Come to this exceptional and popular conference for updates on significant and timely topics such as:

- You Can Go Home Again: Return to Work with the Time of Injury Employer
- Dealing with the Unimaginable: Hate Crimes and Mass Violence
- Know Who's Going to Get Hurt at Work: Predictive Modeling
- Complications Down the Road: Consequential Injuries
- Driving Safely: Who's Asleep at the Wheel?
- Jeopardy: Return to Work Edition
- 60 Tips in 60 Minutes

More than 1,400 people registered to attend the 2016 conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor and others. Attendance this event promises a sharing of practical, useful and timely information and provides attendees with the unique opportunity to network with other workers' compensation professionals while renewing valuable contacts. Attendees will also have the opportunity to visit with 100 vendors and learn about their workers' compensation-related goods and services.

To Register:

- **View Complete Details**
- **Register Online Now**

Questions?
800-482-2383 (Toll Free Inside PA)
717-772-4447 (Local and Outside PA)
Email: **RA-LI-BWC-Helpline@pa.gov**

Inside this Issue

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. Featured is the outstanding article entitled "A View from the Bench," in which judges from the Pennsylvania Workers' Compensation Judges Professional Association summarize recent key decisions from the Commonwealth Court that are of interest to all workers' compensation attorneys.

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

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

2017 Medical Fee Schedule Available

The **2017 Medical Fee Schedule** is now available. Please note the changes below to the PT and OT evaluation and re-evaluation HCPCS codes.

Effective Jan. 1, 2017, CMS (Medicare) has deleted the PT and OT evaluation and re-evaluation HCPCS codes as follows:

97001 PT Evaluation
97002 PT Re-evaluation
97003 OT Evaluation
97004 OT Re-evaluation

CMS has added the following new HCPCS codes for these services:

97161 PT Eval Low Complex 20 min
97162 PT Eval Mod Complex 30 min
97163 PT Eval High Complex 45 min

97165 OT Eval Low Complex 30 min
97166 OT Eval Mod Complex 45 min
97167 OT Eval High Complex 60 min

97164 PT Re-eval Est Plan Care
97168 OT Re-eval Est Plan Care

The Pennsylvania Workers' Compensation Part B Fee Schedule reimbursements for all new HCPCS codes have been calculated in compliance with 34 Pa. Code Section 127.153(c), which states that on or after Jan. 1, 1995, payment rates under the act for new HCPCS codes will be based on the rates allowed in the Medicare fee schedule on the effective date of the new codes, and 34 Pa. Code Section 127.104, which requires that payments to outpatient providers for services rendered under the act be calculated by multiplying the Medicare Part B reimbursement for the services by 113 percent. Furthermore, CMS has determined that the 2017 Medicare fee schedule reimbursement amounts will remain the same for all three levels of the physical and occupational evaluation services, regardless of the time indicator or acuity of services rendered. The re-evaluation codes are not impacted by the newly-introduced tier complexity stratification.

2017 Statewide Average Weekly Wage

Based upon the Statewide Average Weekly Wage, as determined by the Department of Labor & Industry for the fiscal year ending June 30, 2016, the maximum compensation payable under the Workers' Compensation Act, under Article 1, subsections 105.1 and 105.2, shall be $995.00 per week for injuries occurring on and after Jan. 1, 2017. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2017, the percentage increase in the Statewide Average Weekly Wage is 1.7 percent.

Recently in WCAIS

BWC Updates

Forms Solution – Working for you!

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.

You asked, we answered! The Forms Solution product we built has resulted in a measurably quicker and more efficient claims filing process. Since its September release, we have also seen a reduction of over 50 percent in requests for filing assistance!

Forms Solution both completes your bureau filing requirement and returns 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.

Below are important reminders for submitting transactions with Forms Solution, as well as links to training on Forms Solution and other major, recent enhancements.

Important Reminders for Forms Solution

Please make note of these important reminders regarding Forms Solution:

- Improper Use of Award/Order Date Will Prevent Forms Solution Forms from Generating When an Award/Order Date field or settlement code is applied on an EDI transaction, it will prevent the claim administrator from triggering generation of any of the Forms Solution forms (NCP, TNCP, NCD, or Stopping) on that transaction or any similar transaction on the claim going forward. Claim administrators should be aware that removal of the field on a following SROI 02 transaction will not remove the application of the field in WCAIS.

- The Award/Order Date field should be populated in an EDI transaction only when either a judge's decision is on file or when the claim administrator has submitted an agreement (LIBCs 336, 337, 338, 339, 340, or

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Recently in WCAIS

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380) countersigned by the claimant. Once a decision or agreement is on file, it is not statutorily acceptable to submit one of the Forms Solution forms, as it would be out of sequence on the claim flow.

- Carriers who use transaction partners to complete their bureau filing should require that any pre-filling of the Award Order Date field and/or the auto-entry of Lump Sum Settlement codes be discontinued immediately, as this field is only to be used with a judge's order or an agreement.

- Adjusters Are Responsible to Confirm Generation of Intended Form. Claim administrators are responsible for reviewing the claim to verify the accuracy of the transactions and to ensure forms are triggering as needed and being provided to claimant. It is especially important for companies whose forms are processed and mailed offsite to verify that the necessary forms are being triggered and sent to the claimant.

WCOA Updates

In the recent December release, WCOA made the following changes to enhance the external stakeholder's WCAIS experience:

1) Petition To/For Answer Proof of Service – Answer to Petition To/For proof of service documents now include a field called "Petition Type," which lists the full name of the petition(s) answered.

2) Hearing and Mediation Information – Columns were reorganized and resized on the grids in the Hearing and Mediation Information tabs to reduce scrolling.

3) Judges' Procedural Questionnaires – A hyperlink to the Judges' Procedural Questionnaires have been added to the Judge Communication grid on the WCOA dashboard, the Quick Links section on the regular dashboard and the General Information tab of the Dispute Summary.

Training Available for EDI Forms Solution, Training One-Stop Shop and Enhanced Search - Phase 4

Training is available for these recent, major WCAIS enhancements. For the EDI Forms Solution Training Webinar, **click here**. For the Training One-Stop Shop and Enhanced Search - Phase 4 Webinar, **click here**.

- Training One-Stop Shop offers an updated resource for accessing training-related help, including page-level, step-by-step process instructions, simulations and training recordings

- Enhanced Search - Phase 4 allows attorneys to search WCAB hearings, and insurers and TPAs can search EDI transactions

- EDI Forms Solution allows automatic form creation after the submission of certain EDI transactions

2016 Governor's Award for Safety Excellence Winners

Governor Tom Wolf recently honored five employers with the 2016 Governor's Award for Safety Excellence. The Governor's Award for Safety Excellence recognizes employers that have achieved the highest standards in workplace safety. Any Pennsylvania employer is eligible for the Governor's Award for Safety Excellence; however, the application process is highly competitive. Information and criteria used to determine finalists include workplace injuries/illnesses vs. industry standards; and innovation and strategic development of safety policy and approaches. The award recognizes successful employer-employee safety programs that produce tangible safety improvements.

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2016 Governor's Award for Safety Excellence Winners

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The five 2016 Governor's Award for Safety Excellence winners are:

- West Penn Power, Greensburg
- Met-Ed, Reading
- Lycoming Engines, Williamsport
- G.R. Noto Electrical Construction, Clarks Summit
- Global Advanced Metals, Boyertown

2017 GASE Award Nominations Open

Each year, select Pennsylvania employers are presented with the Governor's Award for Safety Excellence for demonstrating outstanding progress in accident and injury prevention. The Governor's Award is a great way to recognize both the hard work that goes into preventing injuries and the remarkable results that can be achieved by safety excellence. Employers may nominate themselves, or they can be nominated by another party. All nominations must be submitted by June 1, 2017.

Click here for more information, nomination forms and overviews of past winners. Award information may also be obtained by contacting Peggy Day, program coordinator, at 717-772-1635 or by email at **marday@pa.gov**.

BWC Appoints New Division Chiefs

BWC is pleased to announce the recent appointments of two new division chiefs. Patricia Clemens has been appointed chief of the Health Care Services Review Division (HCSR), following the retirement of Debra Novakovich. Laura Keller has been appointed chief of the Special Funds & Compliance Division (SF&C), a new division bringing together several existing units.

Both new division chiefs are long-time members of the BWC family who are returning to the bureau for these appointments.

SF&C Chief Laura Keller has a wide-ranging background in workers' compensation administration. She began working with the bureau in 1991 as an administrative officer in the Self-Insurance Division, later becoming manager of the Medical Treatment Review Section in the Health Care Services Review Division. Laura finished her initial tenure with the bureau as chief of the Claims Management Division from 1999-2002, after which she joined the Pennsylvania Insurance Department's Bureau of Special Funds, where she served as a claims manager until her 2016 return to BWC.

In her new duties as chief of Special Funds & Compliance, Laura manages the Special Funds Unit, the Compliance Unit and the Uninsured Employers Guaranty Fund. Her division acts as conservator of the Supersedeas Reimbursement and Second Injury funds and pays claims where the bureau has liability under 305.1(WCOD), 306(h), Occupational Disease, the Subsequent Injury Fund and the Supersedeas Fund. It also monitors the UEG fund, manages claims against the fund and benefit payments, and pursues monetary recovery activities with the Office of Chief Counsel. Additionally, the SF&C Division ensures compliance with the Workers' Compensation Act, regulations enacted according to the act and orders issued by workers' compensation judges, duties which it accomplishes by educating employers of their responsibility to injured workers, investigating reports of noncompliance and prosecuting in accordance with the criminal provisions of the act.

Among its other duties, the division also refers allegations of employee fraud to the proper authority, reviews and refers cases of potential child labor law violations, notifies dependents of their survivor rights after a work-related fatality and processes statutorily permissible elections, exceptions and exemptions to the act's mandate requiring employers to insure their workers' compensation liability.

HCSR Chief Patricia Clemens returns to the bureau with extensive experience in the healthcare field in both the private and public sectors. Patricia began her nursing career in the U.S. Navy in 1991, going on to become a registered nurse in a variety of civilian settings and eventually entering state civil service. In 2008 she joined the Pennsylvania Insurance Department as a medical facility records examiner, later joining BWC in that role from 2011 to 2015. Her next appointment was as a

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BWC Appoints New Division Chiefs

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medical facility records supervisor with the Department of Human Services, after which she returned to BWC in 2016 as chief of Health Care Services Review.

As HCSR chief, Patricia manages the division's three sections. The Fee Review section administers the fee review process for health care providers who are disputing the timeliness or amount of payment received for medical care provided to an injured worker. The section also manages and monitors chargemaster fee schedule data. The Utilization Review section authorizes utilization review organizations (UROs) to review the reasonableness and necessity of medical treatment when requested by the employer/insurer or employee. Additionally, the section trains, audits and monitors UROs in procedural and informational requirements. The Impairment Rating Examination section promulgates a list of physicians qualified to perform impairment rating examinations (IREs), designates IRE physicians as requested by employers/insurers, monitors physicians for adherence to procedural requirements and provides IRE training to physicians. As a whole, the division also provides certification of coordinated care organizations and acts as liaison to independent consultants performing medical access studies.

Please join BWC in congratulating Patricia and Laura and wishing them success in their new positions.

PA Training for Health and Safety

"PATHS" Your No-Fee Safety Training Resource

New Safety Training: Opioid Addiction and Medical Marijuana

The Pennsylvania Bureau of Workers' Compensation, Health and Safety Division's PATHS (PA Training for Health and Safety) continues to grow in popularity, as more and more companies and individuals realize the superb value and effectiveness this FREE workplace safety resource!

PATHS now offers 180 topics, including the ever-popular "Active Shooter" and recent, timely additions such as **"Opioid Addiction"** and **"Medical Marijuana."**

Employers and employees from **46 states** and **five countries** have taken advantage of this program so far, and we train tens of thousands of workers in Pennsylvania every year. Last year, our staff held 414 training sessions on 140 different topics and trained over **33,600 Pennsylvania workers**.

You, too, can take advantage of this outstanding free resource by visiting PATHS at **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**.

Have you seen our Facebook? Meet our team and follow us at **https://www.facebook.com/BWCPATHS** to keep up with all the latest safety news, tips, and ideas! We have 290 likes so far, coming from as far away as Alaska – check us out!

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of Jan. 23, 2017:

11,580 committees covering 1,497,500 employees

Cumulative grand total of employer savings:
$645,908,027

Kids' Chance of Pennsylvania

Hope, Opportunity, and Scholarships for Kids of Injured Workers

Paying for college is hard. Paying for college when one or both of your parents have been seriously or fatally injured in a workplace accident seems nearly impossible. For more than 20 years, Kids' Chance of Pennsylvania Inc. (Kids' Chance of PA) has helped to lessen the impact of these high costs by providing scholarships to the children of these families.

Since its inception in 1997, Kids' Chance of PA has awarded scholarships amounting to over $1 million, and that number continues to grow. During the 2016-2017 academic year, 57 scholarships were awarded to students, totaling $186,500. These scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors.

In addition to monetary assistance, the Kids' Chance national organization has a Planning for College program that helps eligible students connect to the right state organization. Students of any age can register, and when

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Kids' Chance of Pennsylvania

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the time is right to apply for college, they will be connected to their state organization in order to submit a scholarship application. In 2015, the inaugural year of the program, there were 105 submissions. This past year, the program received 313 submissions. We want to see more of these submissions come from Pennsylvania this year!

Everything our organization does is for the students. Kids' Chance of PA is making a significant difference in the lives of these children, helping them to pursue their educational goals. John K., a current scholarship recipient attending Bloomsburg University says:

> The mission of [Kids' Chance of PA] is to provide scholarships and grants for college and vocational education to children of Pennsylvania workers who have been killed or seriously injured in a work-related accident, resulting in financial need. And because of all of you, young people all over Pennsylvania have the opportunity to purse a college education that helps us ultimately succeed in the future. You also have taken stress off our families by turning the hardships faced by them being injured into a chance for us to attend college.
>
> I believe I speak for all of us, both students and families that have benefitted from this organization, that we are forever grateful to this organization and for the support.

For more information about how you can help support Kids' Chance, please contact us at 610-850-0150 or **info@kidschanceoforg.com**, and visit **www.kidschanceofpa.org**.

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. In lieu of prosecution, defendants may pay restitution of monies owed to the Uninsured Employers Guaranty Fund.

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:

Bucks County

On April 11, 2016, Andrew Hummel, appearing on behalf of D & L Towing, 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. Hummel was sentenced to five years' probation and ordered to pay restitution to the Uninsured Employers Guaranty Fund in the amount of $26,640.18.

Fayette County

On Oct. 26, 2016, Hometown Landscaping & Supply Inc./Amy Murray, paid full restitution of $7,000 to the Uninsured Employer Guaranty Fund.

Lackawanna County

In April 2016, Franklin W. Ritter, d/b/a Timberline Tree and Landscaping, Inc., entered into an agreement with the Department of Labor & Industry to reimburse the Uninsured Employer Guaranty Fund in the amount of $50,000, as restitution in lieu of prosecution for 290 felony counts of Failure to Procure Workers' Compensation Insurance.

Montgomery County

Gary R. Grimm, d/b/a Grimm Brothers Realty Co., pled guilty to one misdemeanor count of Failure to Procure Workers' Compensation Insurance in the Montgomery County Court of Common Pleas. Grimm was sentenced to five years' probation and ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of $20,613.09.

A View from the Bench

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

Baumann v. WCAB (Kellogg Company)

In *Baumann v. WCAB (Kellogg Company)*, No. 2603 C.D. 2015, 2016 WL 5323129, 147 A.3d 1283, (filed Sept. 23, 2016), the Commonwealth Court affirmed the WCAB's order affirming a decision of the WCJ that granted a 2010 termination petition, after a 2009

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termination petition was denied by a different WCJ, and affirming the WCJ's decision granting a penalty petition, but assessing a zero percent penalty. On the termination petition, the same doctor conducted the 2009 and 2010 IMEs and rendered the same opinion of full recovery. The WCJ for the 2010 termination petition found that the employer proved a sufficient change in condition since the adjudication of the 2009 termination petition to satisfy the *Lewis* requirements. The WCAB and Commonwealth Court affirmed, with the Commonwealth Court stating: "This Court has declared that a change sufficient to satisfy the *Lewis* requirement exists if there is a lack of objective findings to substantiate a claimant's continuing complaints." In the consolidated penalty petition, the claimant sought a penalty award because of the employer's refusal to pay for a March 2010 shoulder surgery. As a result, the surgery was canceled and never performed. The WCJ found a violation, because the second IME had not yet occurred to support a denial of the surgery, but awarded a zero percent penalty, and explained the reasons for the non-award, including that she did not find the claimant's pain complaints to be credible, he traveled to Los Angeles and got a tattoo on the injured arm, which would have been the arm to receive surgery, and he was no longer actively treating for the arm. The WCAB and Commonwealth Court affirmed the zero percent penalty, finding that the WCJ provided sufficient reasoning and did not commit and abuse of discretion.

Firefighter Cases

In *City of Williamsport v. Workers' Comp. Appeal Bd. (Cole (Deceased))*, 145 A.3d 806, (Pa. Cmwlth. Ct. 2016), the decedent was a firefighter for Williamsport who died from gastric cancer. His widow filed fatal claim petitions under Section 108(o), relating to diseases of the heart and lungs caused by overexertion or exposure to heat, smoke, fumes or gases arising out of the duty of a firefighter, and Section 108(r), firefighter's cancer. She testified to her observations of her husband smelling like smoke when he came home from work. Her medical witness testified that the decedent would have been exposed to carcinogens, specifically asbestos, simply by being a long-term firefighter. The city's medical witness opined that the decedent had many other risk factors for gastric cancer, that this type of cancer was not a proven risk for firefighters, and that asbestos exposure is not associated with this type of cancer. The WCJ granted benefits and the WCAB affirmed. The Commonwealth Court reversed, citing *Gibson v. WCAB (Armco Stainless & Alloy Products)*, 861 A.2d 938 (Pa. 2004) and provided that for an expert's testimony to be competent, it must be based on facts warranted by the record or reasonable inferences drawn therefrom. The Commonwealth Court found the widow's lay testimony and the claimant's medical opinion based on assumptions incompetent.

In *City of Philadelphia Fire Department v. WCAB (Sladek)*, 144 A.3d 1011 (Pa. Cmwlth. Ct. 2016), the court cited The Statutory Construction Act of 1972 and determined that Section 108(r) required the claimant to "prove that his malignant melanoma is a type of cancer caused by the Group 1 carcinogens to which he was exposed in the workplace to establish an occupational disease. Only then do the presumptions in Section 301(e) and (f) of the Act come into play." (id. at 1022) The claim petition was vacated and remanded to the WCAB, to first determine whether the Workers' Compensation Act even requires a medical expert to satisfy Pennsylvania Rule of Evidence 702 (the *Frye* standard). If so, the WCAB must determine whether the claimant's medical expert met that standard and, if it did, then remand to the WCJ for credibility findings.

In *Hutz v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, No. 2140 C.D. 2015, 2016 WL 4648529 (Pa. Cmwlth. Ct., filed Sept. 7, 2016), 147 A.3d 35, the claimant was diagnosed with prostate cancer in March 2006, had surgery, and was back to work three months later. He had no further disability before he retired in January 2008. He filed a claim petition in April 2012. The WCJ denied benefits, finding that the claimant's evidence did not prove that his prostate cancer was caused by his firefighter activities. In addition, the WCJ found the Sections 301(e) and (f) presumptions not applicable, and, even if they were, the employer's medical evidence rebutted them. The WCAB affirmed the denial of benefits because the claimant did not meet the causation burden of proof, but it also found the presumption inapplicable because the claim petition was filed more than 300 weeks after his last date of employment. The Commonwealth Court determined that since the petition was filed within 600 weeks, the claimant did not have a statute of limitations problem. However, because he could not establish a medically-recognized causal relationship between his prostate cancer and Group I carcinogens, the presumption did not apply, and there was no need to decide whether it only applies if the petition is filed within 300 weeks or if late discovery of a potential relationship extends that timeframe. Finally, the court noted that because the claimant did not have the benefit of the presumption and did not carry his burden, the employer's doctors' opinions were not necessary to the decision, so that his competency was not an issue.

In *Fargo v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, No. 2239 C.D. 2015, 2016 WL 5888940, (Pa. Cmwlth. Ct., filed Oct. 11, 2016), 148 A.3d 514, the claimant was diagnosed with squamous skin cell carcinoma in 1997. He kept working until July 31, 2001, when he suffered a non-work injury. After retiring on Sept. 16, 2002, he was diagnosed with malignant melanoma in 2005 and bladder cancer in 2012. He filed his claim petition for the bladder cancer on March 14, 2014, but amended the petition at the

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first hearing to include squamous skin cell carcinoma and malignant melanoma. Finding that the last date of work exposure was July 31, 2001, and that the petition was filed on March 14, 2014, more than 600 weeks after his last work exposure, the WCJ dismissed the claim petition. The WCAB affirmed. The Commonwealth Court analyzed and interpreted the two applicable sections, Section 108(r), firefighter cancer, and Section 301(f), requiring the claim to be brought within 600 weeks of the most recent exposure. It determined that neither discovery nor manifestation apply. The Section 301(f) limitations period runs from a specific date, the last date of exposure. It is a statue of repose, not limitations. The petition was barred as untimely.

Jackson v. WCAB (Radnor School District and ACTS Retirement Community)

In *Jackson v. WCAB (Radnor School District and ACTS Retirement Community)*, No. 228 C.D. 2016 (Pa. Cmwlth., filed Oct. 29, 2016), 148 A.3d 939, the Commonwealth Court held that a joinder petition, which was filed more than 20 days after claimant's testimony that he had increased pain over the years from performing his job duties at another employer, was untimely filed. The claimant worked as a security guard for Radnor School District when he had a 2002 knee injury. He had concurrent employment with ACTS, also as a security guard. He never returned to work for Radnor, but he did resume working for ACTS from late 2002 until 2013. He filed a reinstatement petition against Radnor in April 2013. At the May 6, 2013, hearing, he testified that he was able to work for ACTS because it accommodated his problems until late 2012. He then had to do more work, which made his symptoms worse, so he had to stop working there. Claimant's doctor testified on Oct. 2, 2013, that his work for ACTS over the years aggravated his degenerative joint disease, resulting in his total disability. Radnor then joined ACTS on Oct. 22, within 20 days of the doctor's deposition. ACTS objected, alleging late joinder, which was overruled. The WCJ found that the joinder was timely because it was filed based on the doctor's testimony. The WCJ then found that claimant's current disability was not a recurrence of disability from the 2002 injury at Radnor but was due to his continuing work for ACTS, dismissed the reinstatement petition, treated the joinder as a claim petition, and awarded benefits against ACTS. On appeal by ACTS, the WCAB found that claimant's May testimony put Radnor on notice, triggering the 20-day clock and making the October joinder untimely, and the board reversed the award. Claimant appealed. Citing the regulation governing petitions for joinder at 34 Pa. Code Section 131.36, and its decision in *Uninsured Employers Guaranty Fund v. WCAB (Dudkiewicz)*, 89 A.3d 330 (Pa. Cmwlth. 2014), the court affirmed the WCAB. The clock begins when evidence is offered regarding the reason for joinder, not evidence establishing the reason for requesting joinder. Here, the 20-day clock started with claimant's testimony, not the doctor's. In a lengthy footnote, the court discussed the WCJ's discretionary power to extend the time for joinder, but the WCJ had not found late joinder, and Radnor had not offered any evidence of good cause for the late joinder, nor had it requested an extension of time to file the joinder petition.

Nagle vs. Labor Ready and Rye Township

In *Jeffrey Lynn Nagle, Executor for Douglas Bell (Deceased) v. Labor Ready, Inc. and Rye Township*, No. 247 C.D. 2016 (Pa. Cmwlth., filed Oct. 24, 2016), 2016 WL 6156217, 148 A.3d 946, the court addressed an appeal from an order of the Court of Common granting the defendants' motions for summary judgement. The Commonwealth Court explored two issues, whether equitable principles precluded Nagle from suing the defendant, Labor Ready, and whether the trial court erred in concluding that these defendants were entitled to immunity under the Workers' Compensation Act. Decedent, Bell, was hired by Labor Ready, a temporary employment agency, to work for Rye Township, with whom Labor Ready had a contract to supply temporary workers. Decedent was assigned to work on a trash truck, fell off, and eventually died from his injuries. Labor Ready paid the decedent workers' compensation benefits. Executor Nagle filed a common pleas civil suit against both Labor Ready and Rye Township. Both entities filed preliminary objections, claiming immunity under section 303(a) of the Workers' Compensation Act, which the trial court granted to both defendants. On direct appeal to the Commonwealth Court, it affirmed the dismissal. There is a lengthy discussion of the facts concerning the relationship among all three parties. The court's analysis concluded that: (1) Having received workers' comp benefits from Labor Ready, the decedent was judicially estopped from alleging that it was not his employer; and (2) The township was a borrowing employer, with the right and duty to control the decedent's method and manner of work, so that it, too, enjoyed immunity from the civil suit. The Commonwealth Court discussed and adopted the reasoning of the Vermont Supreme Court in *Candido v. Polymers, Inc.*, 687 A.2d 476, 478-79 (Vt. 1996) on that point. The court found that a worker can have two employers under certain circumstances, and in such cases, both are immune.

Northtec, LLC v. WCAB (Skaria)

In *Northtec, LLC v. WCAB (Skaria)*, No. 2488 C.D. 2015 (Pa. Cmwlth., filed Sept. 14, 2016), 2016 WL 4784123, 147 A.3d 63, the Commonwealth Court affirmed the WCAB's ruling that the WCJ's dismissal of a claim petition with prejudice was not warranted under the factual circumstances presented. The claimant filed a

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claim petition in November of 2013 alleging several respiratory diagnoses, then withdrew it at the July 2014 final hearing without having offered evidence. The WCJ marked the petition withdrawn without prejudice. The claimant then refiled the claim petition in August 2014. At the October 2014 hearing, the WCJ directed claimant to present his medical deposition within 90 days. At the January 2015 hearing, counsel for the claimant advised that his medical expert had not been scheduled because the doctor wanted the claimant to undergo further testing to prove causation. Claimant's counsel requested withdrawal without prejudice. Employer objected, asserting that two fact witnesses who would have testified during the first proceedings were no longer readily available, having since left employer's employment. The WCJ dismissed with prejudice. Upon the claimant's appeal, the WCAB modified the order to without prejudice. Employer appealed. The court discussed at length two reported cases regarding when dismissal with prejudice is appropriate. *US Airways v. WCAB (McConnell)*, 870 A.2d 418 (Pa. Cmwlth. 2005) and *Cipollini v. WCAB (Philadelphia Electric Co.)*, 647 A.2d 608 (Pa. Cmwlth. 1994). In distinguishing those cases, the court noted the claimants were expressly warned that their claims would be dismissed if their inaction persisted, the claimants' employers were prejudiced, and neither of those claimants presented any cause for their failure to comply with the established deadlines. Here, the claimant's request for withdrawal was reasonable given the circumstances; the delay in obtaining an expert opinion was due to circumstances beyond his control, and whatever prejudice the employer faced was not the result of the claimant's disregard of the WCJ's deadlines or orders. As such, the claimant should not be punished for his action in withdrawing the petition. The court affirmed the WCAB's modification of the WCJ order to without prejudice.

Savoy v. WCAB (Global Associates)

In *Savoy v. WCAB (Global Associates)*, No. 2613 C.D. 2015, (Pa. Cmwlth., filed Aug. 25, 2016), 145 A.3d 1204, the Commonwealth Court affirmed the WCAB's order affirming a decision of the WCJ that dismissed the claim petition. The WCJ dismissed the petition because the claimant sustained his knee injury on Sept. 11, 2013, while working on a U.S. Navy ship that was, according to claimant's own testimony, "on the water" at the Philadelphia Navy Yard. Claimant presented no evidence that the ship was in dry dock. Instead, the evidence established that the ship was on "navigable waters of the United States." Therefore, there was no concurrent jurisdiction with the provisions of the Longshore and Harbor Workers' Compensation Act (Longshore Act). This opinion compares the relevant provisions of the WC Act and Longshore Act, discusses the United States Supreme Court's "twilight zone" doctrine, which permitted concurrent jurisdiction, and the subsequent amendments to the Longshore Act that effectively expanded concurrent jurisdiction. The court concluded that, under the facts of this case, the claimant's exclusive remedy was under the Longshore Act. In footnote no. 5, the court states: "The 'twilight zone' exception no longer exists in Pennsylvania" for injuries occurring on or after June 14, 2014, as a result of the act of June 18, 2014, P.L. 762 No. 63. as *amended*, 77 P.S.

Unreported Decision Cited in Reported Decision's Holding that Claimant was an Independent Contractor, Not an Employee

In *Edwards v WCAB (Epicure Home Care, Inc. and State Workers' Insurance Fund)*, No. 1106 C.D. 2015, 134 A.3d 1156, Pa. Cmwlth., filed March 10, 2016, the Commonwealth Court, in a 2-1 panel decision, affirmed the Workers' Compensation Appeal Board's (WCAB) decision reversing a decision by the Workers' Compensation Judge (WCJ) regarding whether a personal caretaker for a homebound patient was an independent contractor rather than an employee. The WCJ found that she was an employee and awarded benefits; the WCAB, and now the Commonwealth Court, found that she was an independent contractor, not entitled to benefits.

The court's opinion first listed all the factors and indicia that the WCJ relied upon to find that the claimant was an employee and to award benefits. Upon the employer's appeal, the WCAB, relying on an **unreported** March 26, 2010, Commonwealth Court decision *(Fletcher v. WCAB (Visiting Angels)*, No. 1664 C.D. 2009 (Pa. Cmwlth. March 26, 2010), reversed the WCJ, finding that the claimant was an independent contractor. In *Edwards*, the court also listed the reasons that the WCAB used to determine why the claimant was independent. On appeal to the Commonwealth Court, the claimant argued that the WCAB improperly substituted its fact findings for the WCJ's findings.

The Commonwealth Court upheld the WCAB's reversal of the benefit award, with a dissent. The majority opinion noted that the issue is fact-sensitive, and it discussed the relative importance of all the factors to be considered. The most significant factor in deciding whether there is an employment relationship is the right to control the method and manner of the work performed. It noted that its unreported *Fletcher* decision was almost factually identical to the facts here. In that case, the WCJ had found no employment relationship, and the WCAB and Commonwealth Court affirmed the WCJ's denial of benefits; here, they reversed the WCJ's award of benefits. They then found that neither the WCAB nor the court was reweighing the evidence or taking away the WCJ's prerogative (as the dissenting opinion, supporting the claimant's argument, opined). Furthermore, the court explicitly

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acknowledges the WCAB's (and its own) reliance on unreported decisions - as persuasive, but not binding - since the 2008 change to its internal operating procedures.

Notice of Temporary Compensation Payable Can Be Amended Within the 90-Day Period; Paragraph 4 Denial Is Equivalent to a Medical Only Notice of Compensation Payable; Reinstatement, rather than Claim, Petition Is Allowable in Such Situations; Claimant Must Prevail On the Specific Issue, Not Just the Petition, To Receive Cost Reimbursement

Church v. WCAB (Wayne Cook t/a Cook Landscaping and Fleming Termite and Pest Control), No. 1068 C.D. 2015, 2016 WL 1078336, Pa. Cmwlth., filed March 18, 2016, contains a long discussion of the relationship between the statute and the regulations concerning LIBC acknowledgement documents, as well as a somewhat surprising conclusion on "medical only" documents.

The claimant suffered a 2004 lumbar disc injury while working for Cook. The employer issued a notice of temporary compensation payable (NTCP), dated Aug.10, 2004. The employer then issued an "amended" NTCP, dated the same day but not received by the Bureau of Workers' Compensation (bureau) until seven days after the first NTCP. The second NTCP substantially reduced the average weekly wage (AWW) and temporary total disability (TTD) benefit rate by more than half. Within 90 days, the claimant returned to work, and the employer issued a notice stopping temporary compensation (NSTC) and a denial that acknowledged an injury, but not disability. (This is commonly referred to as the "Paragraph 4" or "Block 4" denial.)

The claimant stopped working for Cook in 2008, allegedly because he couldn't stand the pain, and he started working for Fleming in 2009 but stopped within a couple months, allegedly because of increased back pain. He began treating again in 2010, for the first time since 2004, when he had been discharged from medical care to full-duty work. He filed a 2011 reinstatement petition against Cook, relying upon its Paragraph 4 denial as the equivalent of a medical only notice of compensation payable (MONCP) that suspended benefits, and he filed a penalty petition, alleging that the first NTCP (with the higher AWW and TTD benefit rate) had converted into an NCP, with benefits payable, because it had not been specifically stopped by an appropriate notice. (He alleged that the NSTC stopped only the second one.) Cook asserted a statute of limitations (SOL) defense, and he also filed a joinder petition against Fleming and a termination petition.

The first WCJ denied Cook's SOL dismissal motion and then retired. The second WCJ denied reinstatement on the merits, denied the penalty, denied the joinder, and denied the termination, essentially based upon the claimant's non-credible testimony of increased injury and disability coupled with the defense doctor's non-credible opinion of full recovery. The penalty was denied both because the documents were properly issued and because the claimant did not prevail on that issue.

WCAB affirmed, as has Commonwealth Court. The opinion discussed the competing medical evidence as to all petitions and upheld the WCJ's findings on those issues. The more interesting discussion was about the bureau's LIBC documents. The claimant argued that the court's decision in *Gereyes v. WCAB (New Knight, Inc.)*, 793 A.2d 1017 (Pa. Cmwlth. 2002) precluded the use of the second NTCP. In that case, the employer had issued an NTCP but unilaterally reduced the claimant's benefit rate after he returned to work within the 90-day period with an earnings loss. The court held that reduction was impermissible. The claimant asserted that the replacement document here should have been declared a nullity, leaving the first still open and thus converted. The court distinguished *Gereyes* in a lengthy discussion of §406.1 of the act and §121.7 of the Special Rules of Administrative Practice and Procedure before workers' compensation judges concerning NTCPs. It held that the timely-issued, amended NTCP was valid, that it superseded the first, and that it was timely stopped; the first did not convert. Thus, it also affirmed the WCJ's finding that the second NTCP did not violate the act.

The court also disposed of the employer's SOL arguments that the paragraph four denial was not the equivalent of a MONCP, that the reinstatement petition was not the proper form of petition, and that the claimant had three years from the injury date, not 500 weeks from the last payment under the NTCP, to file a claim petition. The WCJ had treated the denial as an MONCP, with wage indemnity benefits suspended, so that reinstatement was the proper form of petition and was timely because it was filed within the required 500 weeks. The WCAB agreed that the denial was the same as an MONCP. Despite some recent decisions, apparently to the contrary, concerning actual MONCPs as still requiring a claim petition and a claim burden of proof on disability, the court simply said that since the WCJ and WCAB treated the denial as equivalent to an MONCP with wage indemnity benefits suspended, there was no error in applying a reinstatement rather than a claim burden. In reaching this result, the court did not discuss the recent cases of *Ingrassia v. WCAB (Universal Health Services, Inc.)*, No. 1212 C.D. 2014, 126 A.3d 394, Pa. Cmwlth., Oct. 26, 2015, (discussed in this issue of *News and Notes*) or *Sloane v. WCAB (Children's Hospital of Philadelphia) et al.*, No. 1213 C.D. 2014, 124 A.3d 778, Pa. Cmwlth., Oct. 1, 2015 (discussed in the Winter/Spring 2016 issue of *News & Notes)*.

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The court gave short shrift to the claimant's unreasonable contest and reasoned decision arguments.

Finally, although the claimant prevailed on the termination petition, he did not offer evidence of costs expended on that specific issue; his medical witness testified only about his worsening condition justifying reinstatement and did not render an opinion that he was not fully recovered, so as to avoid termination of benefits. Thus, his witness fee was not recoverable. The court analyzed §440(a) litigation costs recovery based on issues, not just petitions, seemingly narrowing cost recovery even further. Apparently a claimant may now recover costs only for testimony or evidence regarding the specific issue on which the claimant has prevailed.

Payment of Disfigurement Award; Reinstatement Following Challenge Petition; Suspension Based on Job Offer

In *Edward Dixon v. WCAB (Medrad, Inc.)*, No 1700 C.D. 2014, 134 A.3d 518, Pa. Cmwlth., filed March 30, 2016, the court held that a temporary suspension of total disability benefits pursuant to a notification of suspension does not require the payment of a prior disfigurement award. The court also held that where the challenge petition was timely filed, the employer was required to reinstate the claimant's total disability benefits when a hearing on the challenge petition was not conducted within 21 days following the filing of the challenge petition. Additionally, the court affirmed the WCJ's decision granting a suspension petition, based upon the employer's job offer from the time of injury, citing well-established legal precedent concerning findings of fact made by the WCJ.

On Dec. 26, 2002, the claimant sustained a work injury, described as a cervical strain on an NTCP, which later converted, and he began receiving weekly wage loss benefits. On May 28, 2010, a WCJ awarded 30 weeks of benefits for a cervical surgical scar. At that time, the claimant was apparently still receiving total disability benefits, so the award was not then payable. On July 29, 2011, a notification of suspension or modification was issued, after the claimant returned to work on July 25, 2011. Although the claimant's weekly wage loss benefits were suspended beginning July 25, 2011, pursuant to Section 413(c) of the act, the employer did not pay any of the disfigurement award. The claimant stopped working on or about Aug. 3, 2011, and the defendant filed a suspension petition. On Aug. 8, 2011, the claimant filed a challenge petition. On Sept. 6, 2011, the claimant filed the first penalty petition, alleging that the employer had violated the act when it did not pay the disfigurement award, despite having suspended the claimant's wage loss benefits when he returned to work and had worked approximately one week. The claimant filed a second penalty petition on Sept. 6, 2011, alleging that the employer had violated Section 413(c) of the act.

The WCJ denied the claimant's first penalty petition and was affirmed by the WCAB and the Commonwealth Court. The court cited the Pennsylvania Supreme Court opinion in *Turner v. Jones and Laughlin Steel Corp*, 389 A.2d 42, 45 (Pa. 1978), wherein the Supreme Court, referencing Subsection 306(d) of the act, stated: "… specific loss (benefits) …will not begin until the period of [t]emporary total disability has ended." The WCJ did not issue a decision regarding the challenge petition until the decision addressing all of the petitions was issued on Jan. 9, 2013. The WCJ had, however, issued an interlocutory order on Sept. 7, 2011, in the court's words, "reinstating claimant's temporary total disability benefits beginning Aug. 3, 2011." The court concluded that the suspension of benefits per the notification of suspension or modification (prior to the filing of the first penalty petition) was a "temporary suspension" of the claimant's wage loss benefits, and "did not mandate Employer to begin disfigurement benefits." Therefore, the denial of the first penalty petition was affirmed. With respect to the payment of the disfigurement award, the court stated: "As claimant's temporary total disability benefits were not terminated until the WCJ's January 9, 2013, order granting Employer's Suspension Petition as of July 25, 2011, Employer was not required to begin claimant's disfigurement benefits until that date."

Regarding the second penalty petition, the court held that the employer had violated Section 413(c) of the act when it failed to reinstate the claimant's benefits prior to filing of the second penalty petition on Sept. 6, 2011. This holding was based on the statutory mandate in Section 413(c)(1) of the act, which provides that: "The special supersedeas hearing *shall* be held within twenty-one days of the employee's filing of the notification of challenge." [77 P. S. § 774.2(1), emphasis added.] The court also cited Section 131.50(a) of the "WC Regulations," 34 Pa. Code § 131.50(a), which provides in relevant part that: "A special supersedeas hearing will be held within 21 days of the employee's filing of the notice of challenge." Since the first hearing was not held until more than 21 days had passed following the filing of the notice of challenge on Aug. 8, 2011, the court concluded that the employer had violated Section 413(c). The denial of the second penalty petition was reversed, and the matter was remanded for the WCJ "to determine whether to assess a penalty, and if so, the amount thereof."

With respect to the suspension petition, the essential issues were whether the employer's job offer was a "good faith" offer, and whether the claimant responded to the offer in a "good faith" manner. The WCJ found that the employer offered a position to the claimant that he was physically capable of performing because

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it was within his medical restrictions, e.g. a "good faith" offer. The WCJ also found that the claimant "did not make a good faith effort in his attempted return to work from July 25, 2011[] to August 2, 2011…" In its opinion, the court summarized the conflicting evidence, and it restated the long established principle of judicial review in workers' compensation proceedings as follows: "The Court may not reweigh the evidence or the WCJ's credibility determinations… [I]t is irrelevant whether the record contains evidence to support findings other than those made by the WCJ; the critical inquiry is whether there is evidence to support the findings actually made… (citations omitted)." The court then concluded: "Because the record evidence supports the WCJ's finding, we hold that the WCJ properly suspended Claimant's temporary total disability benefits."

Fee Review – "Usual and Customary Charges"

Three fee review appeals [one reported decision, *Geisinger Health Sys. v. Bureau of Workers' Comp. Fee Review Hearing Office*, No. 1627 C.D. 2015, 2016 WL 1592957, Pa. Cmwlth. Ct., Apr. 21, 2016, and two unreported decisions, *Geisinger Health Sys. v. Bureau of Workers' Comp. Fee Review Hearing Office*, No. 1625 and 1626 C.D. 2015, 2016 WL 1592957, Pa. Cmwlth. Ct., Apr. 21, 2015] filed by Geisinger Health Systems resulted in extensive discussion of statutory construction and just what is meant by "usual and customary charge."

In each case, after a review of undisputed facts, the hearing officer reversed the Medical Fee Review Section's determination. The hearing officer found that the insurer's payment to Geisinger (provider) shall be based on 100 percent of the usual and customary charge as defined in 34 Pa. Code § 127.3 rather than 100 percent of the provider's actual charge. The hearing officer then determined that the insurer properly reimbursed the provider at 100 percent of the usual and customary charge for services in that geographic region for the services rendered to the claimant. On appeal, the provider contended that it is entitled to be reimbursed for the charges for transport and the full course of acute care at its usual and customary charges, not on a calculation based on other providers' charges for similar treatment and services provided in the same geographic area.

The Commonwealth Court acknowledged that Section 127.128(c) of the [MCC Regulations] references "the provider's usual and customary charge," but noted that Section 127.128(a) and (b) of the [MCC Regulations] and Section 306(f.1) (10) of the Workers' Compensation Act clearly indicate that services rendered in a trauma center shall be paid at the usual and customary rate, not at the *provider's* usual and customary charge or at the provider's actual charge. It was also noted that the term "usual and customary charge" has been defined in the act. In Section 109 of the act, one of the general definitional sections contained in the act, provides that "words and phrases when used in this [workers' compensation] act shall have the meanings given to them in this section unless the context clearly indicates otherwise." It provides the following definition: *"Usual and customary charge" means the charge most often made by providers of similar training, experience and licensure for a specific treatment, accommodation, product or service in the geographic area where the treatment, accommodation, product or service is provided.* 77 P.S. § 29. The court noted that "When an agency adopts regulations at variance with the statute, the regulations, and not the statute, fall by the wayside." *Union Electric Corporation v. Board of Property Assessment, Appeals and Review of Allegheny County*, 721 A.2d 823 (Pa. Cmwlth. 1998), reversed on other grounds, 721 A.2d 823 (Pa. 1999).

Ultimately, the Commonwealth Court affirmed the hearing officer's order, finding that a defined term is to be applied unless a different meaning can be ascribed to the word or phrase because of its context. There is nothing in the language of Section 306(f.1) (10) of the act that indicates that "usual and customary charge" is other than how it is defined in Section 109 of the Workers' Compensation Act.

Course of Employment – Injury Sustained While Running in Parking Lot Not Compensable

In *Quality Bicycle Products, Inc. v. W.C.A.B. (Shaw)*, No. 1570 C.D. 2015, 2016 WL 1619465, (Pa. Cmwlth. Ct., April 25, 2016), the Commonwealth Court found that the claimant was not in the course of employment when he injured his knee running in the employer's parking lot.

The claimant in this case was at work when he was advised of a family emergency wherein his nine-year-old daughter was missing from school. As the claimant was hurrying to his vehicle and was about 10–12 feet into the parking lot, he felt a pop in his knee and excruciating pain. The claimant fell to the ground, unable to bear any weight on his leg. Notably, the claimant agreed that there was no specific condition or abnormality in the parking lot that caused his fall. Commonwealth Court reversed the finding of the WCJ and WCAB that the claimant was in the course of employment, finding that the claimant fractured his kneecap while running across employer's parking lot to his car, and after hearing a popping noise and feeling excruciating pain, the claimant's foot *then made contact with the parking lot* and he collapsed. The parking lot did not cause or contribute to the causative chain leading to the claimant's injury. Furthermore, the claimant did not allege that the parking lot caused or contributed to his injury.

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Since the claimant failed to prove any connection between his injury and a condition of employer's premises, the claimant did not meet the third requirement in the three-prong test established in *Markle v. Workers' Compensation Appeal Board (Bucknell University)*, 785 A.2d 151, 153 (Pa. Cmwlth.. 2001), which provided that "An employee who is not furthering the business or affairs of his employer must prove he or she is within the course of his or her employment by satisfying the following three conditions: '(1) the injury must have occurred on the employer's premises; (2) the employee's presence thereon was required by the nature of his employment; and (3) the injury was caused *by the condition of the premises* or by the operation of the employer's business thereon.' "

Medical Only NCP – the Claimant's Burden Thereafter

In *Ingrassia v. W.C.A.B. (Universal Health Servs., Inc.)*, 126 A.3d 394, Pa. Cmwlth. Ct. 2015, the court indicated that a medical only notice of compensation payable (MONCP) is not equivalent to a suspended claim.

The claimant was injured in an MVA, sought treatment, and returned to work after being cleared by the panel physician but only worked less than one day. Employer issued a medical only NCP that described the injury as a strain/sprain of the neck and lumbar areas and accepted liability for medical treatment. Two months later, the claimant filed a claim petition (later amended to a reinstatement petition), alleging that in addition to suffering a neck and back injury, he also injured his head and left arm in the accident. The petition also alleged that claimant was totally disabled as of June 17, 2011, the day after the work injury.

The WCJ credited Dr. Yang's opinion that the claimant's work injury includes a left ulnar neuropathy over the contrary opinion of Dr. Katz. However, the WCJ rejected Dr. Yang's opinion that the claimant was disabled as of March 2012 because Dr. Yang was unaware of the claimant's guitar playing and driving. As for the claimant's condition before seeing Dr. Yang, the WCJ noted that the claimant did not present "testimony from any physician who treated him during the many months immediately following the work injury" in order to establish that he was disabled. The WCJ credited Dr. Katz's opinion that the claimant could drive, noting that it was consistent with the medical records of the claimant's initial treatments. The WCJ concluded that the claimant proved that his work injury includes left ulnar neuropathy, and the NCP was amended. The WCJ concluded, however, that the claimant failed to offer credible medical evidence that his work injury disabled him from performing his pre-injury job.

The WCAB affirmed, and the claimant petitioned for review, arguing that the WCJ and WCAB used the wrong burden of proof in reaching their determination. The claimant argues that because the employer issued a medical only NCP, his benefits should be treated as though they are in a suspension status. Accordingly, he contended that his burden of proof was that applicable in a reinstatement petition, i.e., where a claimant's testimony alone can support a reinstatement, and that the burden then shifts to the employer to prove that the disability is unrelated to the work injury. The claimant asserted that because he was found credible by the WCJ, he met his burden for a reinstatement.

The Commonwealth Court discussed Section 413(a) of the Workers' Compensation Act and relevant case law concerning the burden of proof in a reinstatement petition, stating: "If the claimant has not established a loss of earning capacity resulting from the work injury, the case has not 'advanced procedurally or in substance to the suspension/reinstatement stage.' *Klarich v. Workers' Compensation Appeal Board (RAC's Association)*, 819 A.2d 626, 629 (Pa. Cmwlth. 2003)." The court concluded that the MONCP did not acknowledge any disability, and the claimant was required to meet the burden of proof for a claim petition, including proving disability by unequivocal medical evidence. The court, however, agreed with the claimant that the WCJ decision was not sufficiently reasoned to allow meaningful appellate review. The WCJ credited the claimant's testimony at the September 2011 hearing that he was not capable of performing his pre-injury job because of his left arm problems. The WCJ rejected the claimant's testimony at the September 2012 hearing, insofar as it could be construed to mean the claimant could not perform his pre-injury job as of July 2012. These two findings of the WCJ, along with the fact that Dr. Yang testified regarding the claimant's initial treatment with other providers, may support some period of disability. The order of the WCAB was vacated in part with respect to the denial of disability benefits and was affirmed in all other respects. On remand, the WCJ was to address all relevant evidence already of record to determine whether the claimant had proven any period of disability.

Penalty Petition filed by Medical Provider After a C & R

In *Peter Schatzberg and Philadelphia Pain Management v. WCAB (Bemis Company, Inc.)*, No 1914 C.D. 2015, 2016 WL 1232675, 136 A3d 1081, Pa. Cmwlth., filed March 30, 2016, the penalty petition, filed by the unpaid medical provider after payment to a claimant following a compromise and release agreement, was dismissed based upon the terms of the C & R.

On Nov. 13, 2009, Eric Green (claimant) experienced

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A View from the Bench

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an alleged work injury. A notice of denial was issued on Nov. 25, 2009. On Dec. 16, 2009, the claimant began treating at Philadelphia Pain Management (provider). At that time the provider had constructive notice that the workers' compensation claim had been denied due to the issuance of the notice of denial. There is no indication in the reported opinion as to whether any of the provider's bills were ever submitted to the employer or its workers' compensation insurer.

On July 1, 2010, a claim petition was filed regarding the alleged Nov. 13, 2009, work injury. On March 14, 2011, the claim petition was amended to seek approval of a compromise and release agreement. In a decision circulated on March 17, 2011, the WCJ approved the C & R, in which the alleged injury was described as an "injury to the neck, thoracic spine and lumbar spine." Paragraph 5 of the C & R agreement provided in part that "the amount of benefits paid or due and unpaid to the [Claimant] up to the date of this agreement… [is]… Medical: 0." Paragraph 7 of agreement provided that the C & R agreement is "a resolution of medical benefits for the injury referenced."

As of Feb. 6, 2013, the provider's bill had apparently not been paid, and the provider filed a penalty petition. In the petition, the provider alleged, in the court's words, "that Employer violated the Workers' Compensation Act (Act) by resolving the WC case through a C & R agreement with the claimant without giving Provider notice and an opportunity to intervene." Following a hearing, the WCJ issued a decision in which Finding of Fact No. 7 provided as follows:

> Employer did not agree to pay medical bills incurred as a result of the [alleged] work injury, and this is consistent with the [C & R] [a]greement. There is nothing set forth in the [C & R] [a]greement itself addressing payment of medical bills. Paragraph 5 indicates that no medical bills were paid pursuant to Claimant's [alleged] work-related injuries and settlement.

The Commonwealth Court summarized the proceedings below as follows: "The WCJ concluded that the provider failed to establish that Employer was required to pay the claimant's medical bills because the C & R agreement does not obligate Employer to pay them… The WCJ denied and dismissed the provider's penalty petition. The provider appealed to the WCAB, which affirmed."

On appeal, the provider continued to argue that the employer's failure to pay the claimant's medical bills is a violation of the act. The court, noting the language of Paragraphs 5 and 7 of the C & R agreement (quoted above), affirmed the decision of the WCAB. The court's reasoning was summarized as follows:

> Section 449(b) of the Act provides that an employer or insurer may submit a proposed C & R agreement stipulated to by both parties to the WCJ for approval. 77 P.S.§1000.5(b). 'The agreement must be explicit with regard to the payment, if any, of reasonable, necessary and related medical expenses.' Id. Here, Employer and Claimant entered into a C&R agreement that was approved by the WCJ. The C&R agreement stated that it was not an admission of liability by Employer. Additionally, the C&R agreement did not require Employer to pay any past or future medical expenses. Thus, contrary to Provider's assertion, nothing in the C&R agreement obligates Employer to pay Claimant's medical expenses.

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