



News & Notes

Vol. 24 | No. 1

“Serving all Pennsylvanians”

Winter 2018-2019

Joseph DeRita Appointed to Director of Workers’ Compensation Office of Adjudication



On Nov. 12, 2018, Secretary of Labor & Industry Jerry Oleksiak appointed Joseph DeRita as the new director for the Workers’ Compensation Office of Adjudication. Director DeRita was formerly a Workers’ Compensation Judge at the Allentown office hearing cases in Easton and Doylestown. Prior to that, Mr. DeRita represented injured workers for 30 years as a partner at the firm of Shor, Levin and DeRita, PC in Jenkintown, Pa. and later as a sole practitioner before assuming the bench.

He graduated from St. Joseph’s University in Philadelphia with a B.A. in Industrial Relations in 1983. He earned his J.D. from Widener University School of Law in 1987, and an LL.M. in trial advocacy from the Temple University Beasley School of Law in 2005. Before taking the bench, he earned the Workers’ Compensation Law Certified Specialist test in 2013 from the PBA Workers’ Compensation Law Section.

He is married to Jennifer DeRita, an associate director of marketing at Merck, Inc. The couple lives in New Hope, Pa., a small borough just off the Delaware River in Bucks County, Pa. They have two daughters: Rachel Marianna DeRita, 29, who is close to completing her doctorate in Genetics, Genomics and Cancer Biology from Jefferson University Medical School in Philadelphia, and Sarah Elizabeth DeRita, 26, a regional sales director for the Real-Real Co. in San Francisco.

Mr. DeRita brings a wealth of experience and knowledge to the office. He has stressed the importance of maintaining professionalism and independence of the Workers’ Compensation judiciary. He also seeks ways to inspire the WCOA staff.

Away from the job, he is an avid freshwater fisherman, golfer, fitness buff and Philadelphia sports fan. He is looking forward to fishing the Susquehanna River, having already mastered the Delaware River smallmouth bass population, when the weather turns warmer this spring.

We wish him well in his new position.

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 the workers’ compensation community.

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

- Vacant, Director – Bureau of Workers’ Compensation
- Joseph DeRita, Director – Workers’ Compensation Office of Adjudication

Inside This Issue	
Note from Deputy Secretary for Compensation & Insurance, Scott G. Weiant	2
2018 Governor’s Award for Safety Excellence Winners	2
It’s Time to Apply – 2019 Governor’s Award for Safety Excellence	3
2019 Statewide Average Weekly Wage	3
2019 Fee Schedule Available Online Soon	3
PATHS	3
YouthRules!	3
Kids’ Chance of PA	4
Save the Date! PA Workers’ Compensation Conference	4
Prosecution Blotter	4
Physicians Interested in Performing Impairment Rating Evaluations as a Designated Physician for Pennsylvania Workers’ Compensation	5
Updated Conflict of Interest Policy for Impairment Rating Evaluations (IREs)	5
Notice to all PA WC Self-Insurers with TPAs – Update TPA Information	6
Notice to all PA WC Self-Insurers – Timely Submission of Renewal Application	6
Notice to all PA WC Self-Insurers - Assessment Process	6-7
A View from the Bench	7-12
Game Time	12

Employer Information Services	Claims Information Services	Hearing Impaired	Email
717-772-3702	toll free inside PA: 800-482-2383 local & outside PA: 717-772-4447	PA Relay 7-1-1	ra-li-bwc-helpline@pa.gov

Note from Deputy Secretary for Compensation & Insurance, Scott G. Weiant



Reflecting upon 2018, it was a very active legislative year for workers' compensation. On Oct. 24, 2018, Governor Wolf signed into law two bills.

Act 111 of 2018, which re-established the Impairment Rating Evaluation (IRE) process in Pennsylvania was signed into law. The new IRE provisions, Section 306(a.3) of the Workers' Compensation Act, require IREs to be performed under the 6th edition (second printing April 2009) of the AMA Guides to Evaluation of Permanent Impairment, and set the threshold for the presumption of total disability at 35 percent.

Act 132 of 2018, was also signed into law on Oct. 24, 2018. Act 132 made amendments to the Uninsured Employers Guaranty Fund (UEGF) provisions. The changes incorporate administrative provisions including funding increases, as well as significant enforcement mechanisms aimed at identifying employers failing to comply with WC coverage mandates. In addition, the new statutes empower the department to initiate "stop work" orders relative to enterprises that continue to operate without insurance. A list of some of Act 132 highlights include the following:

- Currently the statutes provide that notice to the fund must be provided within 45 days after the worker knows that the employer was uninsured. Act 132 states that the period begins 45 days after the worker "has been advised by the employer, or another source" that the employer was uninsured.
- Post-Act 132, the employer that is liable for a Pennsylvania claim would not be considered uninsured for UEGF purposes if the employer carries insurance in its state of domicile. This means UEGF is provided the power to proactively determine the insurance status of the out-of-state employer.
- Section 1604(b), allows seven different types of proofs to establish the average weekly wage.
- Post Act 132, when a claim is submitted to UEGF, the UEGF is now empowered to establish a list of designated physicians. This change is featured at new subsection 1603(e).
- Section 1605(b) has been clarified to provide that the UEGF has broad rights of restitution even in the extraterritorial situation. The right extends to reimbursement of the fund's costs and the fees of its lawyers.

2018 Governor's Award for Safety Excellence Winners

Governor Tom Wolf recently announced the three employers who were honored last year with a 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. Information and criteria used to determine finalists include workplace injuries/illnesses vs. industry standards, as well as innovation and strategic development of safety policy and approaches.

The application process for the Governor's Award for Safety Excellence is highly competitive. The award recognizes successful employer-employee safety programs that produce tangible safety improvements.

The three 2018 Governor's Award for Safety Excellence winners are:

- Matric Limited
- Lockheed Martin Missiles and Fire Control
- Corelle Brands, Inc.



Matric Limited



Lockheed Martin



Corelle Brands

It's Time to Apply! 2019 Governor's Award for Safety Excellence

If you're proud of your safety and prevention program for its impact on reducing employee injuries, financial benefits, and other achievements, why not apply for the Governor's Award for Safety Excellence? The purpose of the award is to recognize outstanding prevention programs and the superior efforts that make these programs so successful. Companies can nominate themselves or be nominated by a third party.

If you would like to nominate your committee you can [download the nomination form](#) or [get more information](#).

All applications must be submitted by June 1, 2019, to:

Barbara White
Program Coordinator
Bureau of Workers' Compensation
Health & Safety Division
1171 South Cameron Street
Harrisburg, PA 17104



For additional information or assistance, call 717-772-1917 or email barbawhite@pa.gov

2019 Statewide Average Weekly Wage

Based upon the statewide average weekly wage, as determined by the fiscal year ending June 30, 2018, the maximum compensation payable under the Workers' Compensation Act, under Article 1, subsections 105.1 and 105.2, shall be \$1,049.00 per week for injuries occurring on and after Jan. 1, 2019. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2019, the percentage increase in the statewide average weekly wage is 2.3 percent.

2019 Fee Schedule Available Online Soon

PATHS

Your No-Fee Safety Training Resource

PATHS (PA Training for Health and Safety) is a no-fee, statewide service that provides employers and employees with easy access to cost-effective health and safety resources. PATHS provides a single, comprehensive website where you can register for webinars on 209 safety-related topics, including the annually required training for both initial and renewal certification of a workplace safety committee. PATHS offers numerous PowerPoint presentations, videos, safety posters, toolbox talks, and safety forms that cover a wide variety of health and safety topics. These resources are available for use by employers to maximize their employee safety training efforts.

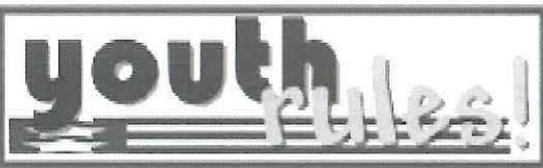
Visit PATHS at www.dli.pa.gov/paths. You can contact the Health & Safety Division by phone at 717-772-1635 or by email at ra-li-bwc-paths@pa.gov.

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of Dec. 21, 2018:

12,175 committees
covering
1,549,630 employees

Cumulative grand total of employer savings:
\$725,708,645



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.

Information about YouthRules! can be found at <https://www.youthrules.dol.gov/>.

For information about the laws administered by the Wage and Hour Division, log on to <https://www.dol.gov/whd/regs/compliance/whdfs43.pdf>, or call the Department of Labor's toll-free helpline at 866-4USWAGE.

Kids' Chance of Pennsylvania

Hope, Opportunity and Scholarships for Kids of Injured Workers

At Kids' Chance of Pennsylvania, we're dedicated to helping our kids who need it most - those who need assistance for college or vocational education because a parent was killed or injured in a work-related accident. The hardships created by the death or serious disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams. That is how Kids' Chance of Pennsylvania continues to make a significant difference in the lives of affected Pennsylvania families by providing scholarship support to help eligible students pursue and achieve their higher educational goals.

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 2017-2018 academic year, 53 scholarships were

awarded to students, totaling more than \$185,000. In 2018-2019, we are pleased that we had 65 applications. The scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors. Donations can be made online, by check or through United Way.

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.

For more information about how you can help support Kids' Chance, please contact us at 215-302-3598 or info@kidschanceofpa.org or visit www.kidschanceofpa.org.

SAVE THE DATE!!! Pennsylvania Workers' Compensation Conference



**18th Annual
Workers'
Compensation
Conference
June 3-4, 2019**

**Hershey Lodge and Convention Center
Hershey Pennsylvania**

Nearly 1,400 people registered to attend the 2018 conference, representing employers, case managers, third-party administrators, defense and claimant counsel, labor and others. Attendance at

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 125 vendors and learn about their workers' compensation-related goods and services.

Questions:

800-482-2383 (Toll Free inside PA)

717-772-444 (Local and Outside PA)

Email: RA-LI-BWC-HELPLINE@PA.GOV

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 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:

Dauphin County: On Sept. 14, 2018, Carlton Burns, Jr, d/b/a Cab Transportation Service, of Harrisburg, PA, pled guilty to 27 misdemeanor counts in the third degree for failure to procure workers' compensation insurance before Judge Evans in the Court of Common Pleas of Dauphin. Mr. Burns was sentenced without further punishment and ordered to pay restitution of \$10,000 to the Uninsured Employers' Guaranty Fund.

To report suspected workers' compensation fraud, or if you have workers' compensation fraud-related questions, please contact the Bureau of Workers' Compensation by email at ra-liwc-compliance@pa.gov or by telephone at 717-787-3567.

▼ Attention Physicians Interested in Performing Impairment Rating Evaluations as a Designated Physician for Pennsylvania Workers Compensation

On Oct. 24, 2018, Governor Wolf signed into law Act 111 of 2018, which re-established the Impairment Rating Evaluation (IRE) process in Pennsylvania. The new IRE provisions may be found in Section 306(a.3) of the Workers' Compensation Act.

Physicians placed on the Bureau of Workers' Compensation's designated physician list must meet all four of the below qualifications:

- Active Pennsylvania MD or DO License
- Active specialty certification by an American Board of Medical Specialties (ABMS) or its American Osteopathic Association (AOA) equivalent
- An active clinical practice of 20 or more hours per week (*active clinical practice is defined as the evaluation, treatment, and management of medical conditions of patients on an ongoing basis*)
- Certification and/or training in the April 2009 second printing of the 6th edition of the AMA Guides to Evaluation of Permanent Impairment

Physicians who do not have documentation of certification or training in the April 2009 second printing of the 6th edition can obtain training through a variety of organizations. For your convenience, some organizations provide live training and others offer online trainings. Below is a list of organizations that have offered the requisite 6th edition trainings and certifications in the past:

American Board of Independent Medical Evaluators (ABIME)
www.abime.org

American Board of Independent Medical Examiners (ABIME)
www.abime.org

Venue Location
March 28-31, 2019
Holiday Inn Orlando East UCF
1724 Alafaya Trail
Orlando, FL
1-800-465-4329
407-658-9098

American College of Occupational and Environmental Medicine (ACOEM)
www.acoem.org

Certified Impairment Rater

International Academy of Independent Medical Evaluators (IAIME)
www.iaime.org

You can go to www.wcais.pa.gov to file your IRE designated physician application. Once you are approved, you will be eligible to receive designations immediately.

▼ Updated Conflict of Interest Policy for Impairment Rating Evaluations (IREs)

The Bureau of Workers' Compensation has updated the IRE physician conflict of interest policy to provide improved clarification for physicians operating in group practices.

Physicians are to immediately return a designation if the physician has been a treating physician of the claimant who is the subject of the designation or has been involved with the treatment or care of the claimant through a supervisory, associate, or consulting capacity with the claimant's treating physician.

Example: If an IRE doctor had any actual involvement with the treatment or care of the

claimant, through interaction with the treating doctor this would constitute a conflict.

Example: If the IRE doctor is connected to the treating provider, such as a supervisor, managing partner or an associate, but had no involvement with the treatment or care of the claimant, then this would not be considered a conflict.

New annual agreements reflecting the policy will be circulated to physicians on the bureau's designation list. Please contact Karla Henneman at khenneman@pa.gov with any questions you may have regarding the updated policy.

▼ Notice to All Pennsylvania Workers' Compensation Self-Insurers with Third Party Administrators (TPA)

Please ensure that your TPA information is accurate in WCAIS. If you have a change in a TPA, please immediately notify Karen Carroll (Claims Management) at 717-772-0621 or karc Carroll@pa.gov so that your information can be updated.

▼ Notice to All Pennsylvania Workers' Compensation Self-Insurers

The Department of Labor & Industry, Bureau of Workers' Compensation would like to provide this important reminder concerning the required timeframes related to the submission of renewal applications for self-insurance in Pennsylvania. The bureau is providing this reminder to encourage ongoing compliance and facilitate the timely submission and processing of renewal applications prior to the expiration of a current self-insurance permit.

Section 305 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 501(a)(3), provides for the issuance of a self-insurance permit for a period of 12 calendar months; all permits issued under this section expire and terminate on the last day of the 12-month period for which they are issued. Section 125.3(b) of the Workers' Compensation Self-Insurance Regulations, 34 Pa. Code § 125.3(b), provides that renewal applications shall be filed with the bureau no later than three months prior to the expiration of the current permit.

Compliance with the three-month requirement is necessary to ensure that all required information and documentation can be submitted and reviewed prior to the expiration date of the current permit. The bureau will not issue a decision on an application until the application, including any and

all additional items that may be requested by the bureau pursuant to Section 125.3, have been submitted. 34 Pa. Code § 125.3(e).

Where the bureau requests additional information or documentation from a renewal applicant, the applicant is generally required to submit those items within 21 days; if the renewal applicant does not provide the additional information within the prescribed time period, the application will be deemed withdrawn. 34 Pa. Code § 125.3(d). Further, even where the renewal applicant has or is in the process of submitting the required additional items, if the renewal applicant failed to timely file a renewal application under Section 125.3(b), they will not be entitled to an automatic extension of their current permit beyond its expiration date. 34 Pa. Code § 125.7(b).

Whether the renewal application is deemed withdrawn due to the applicant's failure to provide additional items under Section 125.3(d), or the bureau is simply unable to issue a decision on the renewal application before the expiration of the current permit following a late filing of that application, the self-insurer would be required to obtain workers' compensation insurance coverage effective as of the permit expiration date, and provide evidence of that coverage to the bureau, to avoid a lapse in coverage for its employees.

▼ Notice to All Pennsylvania Workers' Compensation Self-Insurers

The Self-Insurance division recently issued a notice advising self-insurance programs in Pennsylvania to ensure that their "Application Contact" and "Program Contact" sections are completed and up to date in WCAIS. We further advised that the bureau **is only permitted to speak to the individuals listed as application or program contacts in WCAIS about their self-insurance programs**. If an individual calls the bureau with questions about a particular self-insurance program, and that individual is not listed in WCAIS, we will not speak with that individual until the program contact has confirmed that the individual is authorized to communicate with the bureau on behalf of the company and updated that individual's information under the contacts section in WCAIS. This process has been put in place by

the bureau to protect the integrity of the information of our stakeholders.

The bureau's policy extends to the "Assessment Process." The assessment contact is the authorized person to communicate with the bureau about the specifics of the assessment invoice information (e.g. how it was obtained, and how it was calculated), and assessment notices are mailed to the assessment contact's attention. Unlike application/program contact information, assessment contact information is entered into WCAIS by the bureau.

Continued on Page 7

Notice to All Pennsylvania Workers' Compensation Self- Insurers

Continued from Page 6

Requests to update assessment contact information in WCAIS must be either: (1) sent to the bureau in writing (on official company letterhead, by email or by fax to 717-772-1878) or (2) included on the assessment contact section of the assessment invoice coupon (returned with the remittance of payment). After the person is verified by the program contact, the bureau will enter the new assessment information into WCAIS.

Additionally, assessment notices are mailed to self-insurance programs and insurance companies

annually. The bureau requires the originally mailed, detached stubs to be remitted to the bureau with payment. Many assessment contacts will call to request an emailed copy of their assessment notice. If someone requests an emailed invoice, the email will include the following language: Your official assessment invoice has been mailed to the assessment contact of record for your company. A copy of the invoice is being emailed to you for informational purposes; however, please ensure that your payment is remitted to the bureau with the original detached invoice stub that was mailed to you.

Please contact the Self-Insurance division at 717-783-4476 with any questions.

▼ A View from the Bench

Supreme Court Grants Appeal Concerning Parking Lot / Course of Employment Issue

U.S. Airways, Inc. and Sedgwick Claim Management Services, Inc. v. Workers' Compensation Appeal Board (Bockelman), 179 A.3d 1177 (Pa. Cmwlth. 2018), *appeal granted*, No. 185 WAL 2018 (Pa. Oct. 3, 2018)

This Commonwealth Court decision from Feb. 22 of this year was not included in earlier *News & Notes*. Claimant worked for employer as a flight attendant. She drove to work, parked in one of two designated, but not-employer-owned, parking lots, and took a designated, but not-employer-owned, shuttle bus to the airport terminal where employer's operation was located. She gained access to the bus through an employer-provided identification and security badge. She reversed the procedure at the end of her workday, getting on the bus at the terminal and riding it to the lot where she had parked her car. Employer gave no directions or instructions on commuting and did not require employees to use the provided lots, as they were for convenience only. On the injury date, claimant boarded the bus to return to the parking lot at the end of a flight. As she walked along the aisle, she slipped on water on the floor and suffered disabling injuries. Employer defended her claim petition, arguing that she was not in the course of employment when she was hurt. Notwithstanding that the bus was not owned by employer and that claimant was not required to park where she did, the WCJ awarded benefits, holding that: the injury occurred on employer's premises; claimant was required to be there by the nature of her employment; and she was injured by a condition of employer's premises. WCAB affirmed the award.

Commonwealth Court affirmed the WCJ and WCAB. The opinion discussed the leading case of *WCAB (Slaughaupt) v. United States Steel Corporation*, 376 A.2d 271 (Pa. Cmwlth. 1977), which set forth a three-pronged test to determine whether an injury is in the course of employment when, at the time of the injury, the employee is not actually furthering the interests of the employer. It also discussed several other "parking lot" cases. In response to employer's arguments that the bus was not "employer's premises" because it did not own, lease, maintain or control it, and the bus was not an integral part of its business because it did not require claimant to use it, the court held that an employer's premises includes a reasonable means of access to the workplace, because being able to get to and leave the employer's facility is a necessary and, thus, integral part of the employer's business. Once she was on employer's premises, she had to leave when her workday ended; an injury occurring while on the employer's premises and reasonably near quitting time is compensable. Once the bus was established to be employer's premises, its condition caused her injury, so that it was compensable.

On Oct. 3, the Supreme Court granted employer's petition for appeal on the issue of whether an employee who is injured while traveling between a parking lot and the workplace is within the course of employment when the employer does not mandate how the employee commutes to work or does not designate a specific parking location.

Continued on Page 8

A View from the Bench

Continued from Page 7

Second Parking Lot / Course of Employment Decision Now Reported

Piedmont Airlines, Inc., and New Hampshire Insurance Company c/o Sedgwick Claims Management Services, Inc. v. WCB (Watson), No. 468 C.D. 2018, Aug. 20, 2018, ordered reported Oct. 29, 2018

This Aug. 20 Commonwealth Court initially unreported decision was reported on Oct. 29. It followed and adopted the reasoning of the *US Airways/Bockelman* decision. This case involved Piedmont Airlines and the same Philadelphia airport employee parking lot. This claimant's wife drove him to one of the two designated parking lots and dropped him off, as she did not have the required security badge to drive in it. As he walked through the lot to get to the shuttle bus to report for work, he slipped and fell on snow, suffering an injury. The WCJ granted benefits, WCAB affirmed, as did Commonwealth Court, which held, using the same rationale as *US Airways*, that the parking lot was the employer's premises, because the lot was a reasonable means of access to the workplace and was so connected to the business of the employer as to be an integral part of it. Benefits were owed because the injury was caused by a condition of those premises.

On Oct. 3, Commonwealth Court issued a decision denying employer's request for reconsideration or re-argument. On Oct. 22, employer filed a petition for allowance of appeal to the Supreme Court, 407 WAL 2018.

Armour Pharmacy v. WCAB (National Fire Insurance Company of Hartford), 192 A.3d 304 (Pa. Cmwlth. 2018)

In this case, involving a 1999 injury, defendant/insurer filed a 2015 utilization review request regarding a compound cream prescription. The utilization review organization found the treatment reasonable and necessary and defendant did not file a petition to review the utilization review determination. In 2016, the provider prescribed the same cream. The pharmacy filled the prescription, but defendant refused to pay, citing a utilization review request. It appears defendant did not discuss the fact it had been unsuccessful with the earlier utilization review and had not filed an updated request for utilization review.

Based on defendant's failure to issue payment, the pharmacy filed a fee review. The bureau's medical fee review section granted the pharmacy's request for payment. Employer requested a fee review hearing, claiming unreasonableness and prohibited self-referral, as the prescribing provider allegedly had a financial interest in the pharmacy seeking payment.

In the meantime, in late 2016, after the fee review determination but before the hearing officer hearing, claimant and defendant entered into a compromise and release agreement which indicated that no payments would be made for past, present or future compound creams and that defendant's had reason to believe that the prescribing doctor had a financial interest in the pharmacy in violation of the prohibition against self-dealing contained in the Workers' Compensation Act.

Following the approval of the compromise and release agreement, the fee review hearing officer dismissed the fee review, before addressing the merits, finding that he had no jurisdiction because the matter had already been resolved pursuant to the compromise and release agreement. The pharmacy appealed and appeals from the fee review hearings are appealed directly to the Commonwealth Court.

In its decision remanding the matter to the fee review officer, the court discussed the utilization review process and fee review processes and their purposes. It noted that only the UR process can be used to challenge reasonableness. It then held that the pharmacy had been denied due process, because it had a property interest in receiving payment for the prescriptions it had filled. The court noted that the pharmacy was not a party to the compromise and release agreement, and was not given notice and an opportunity to be heard before it was allegedly deprived of its right to payment by the compromise and release agreement. The court cited *In Re Upset Scale*, 479 A.2d 940 (Pa. 1984), *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950), *Baksalary v. Smith*, 579 F. Supp. 218 (E.D. Pa. 1984) and *Gingerich v. WCAB (U.S. Filter)*, 825 A.2d 788 (Pa. Cmwlth. 2003) concerning the due process issue. The Commonwealth Court vacated and remanded to the fee review hearing officer for a hearing on the merits of employer/insurer's hearing request.

Continued on Page 9

A View from the Bench

Continued from Page 8

Protz II Applies to IRE Being Litigated at Time Of Protz II Decision

In *Dana Holding Corp. v. Workers' Comp. Appeal Bd. (Smuck)*, No. 1869 C.D. 2017, 2018 WL 4923577, (Pa. Cmwlth. Ct. Oct. 11, 2018), claimant suffered a work injury described as an upper back disc protrusion on April 6, 2000. He submitted to an IRE under the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment on June 20, 2014. A modification petition was filed to change claimant's disability status from total to partial. While this petition was pending, *Protz I* determined that use of the 6th Edition was invalid. Over claimant's objections, defendant was granted leave to re-open the record to submit the results of the prior IRE, but now using the 4th Edition guidelines. The WCJ dismissed the modification petition based upon the 6th Edition, but granted a modification based upon the IRE using the 4th Edition criteria. Claimant's benefit status was changed from total to partial as of June 20, 2014. Both parties appealed. While the appeal of this decision was pending before the WCAB, *Protz II* was decided, finding the IRE process unconstitutional. The WCAB reversed the WCJ's modification order and claimant's benefit status was reinstated to total disability as of June 20, 2014. Defendant appealed and Commonwealth Court affirmed the WCAB and held that because claimant's change in disability status based upon an IRE was still being litigated at the time *Protz II* was decided, *Protz II* applies.

In reaching its decision, the Commonwealth Court in *Dana Holding* noted that "there are four approaches in deciding what effect a decision announcing a new rule of law should be given: (1) purely prospective, meaning the new rule does not even apply to the parties in the case in which it was announced; (2) retroactive, but limited to the case where the principle was announced; (3) retroactive to all cases pending at the time it was announced; and (4) full retroactive effect, which applies even to cases which are otherwise final. *Blackwell v. State Ethics Comm'n*, 527 Pa. 172, 589 A.2d 1094, 1098-99 (Pa. 1991)." As a general rule, the Pennsylvania Supreme Court has held that an appellate court should "apply the law in effect at the time of appellate review." *Passarello v. Grumbine*, 624 Pa. 564, 87 A.3d 285, 307 (2014); *Blackwell*, 589 A.2d at 1099. In other words, "a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occur before the judgment becomes final." *Blackwell*, 589 A.2d at 1099. However, the Supreme Court has cautioned against applying this general rule "rotely." *Passarello*, 87 A.3d at 307. Rather,

"whether a judicial decision should apply retroactively is a matter of judicial discretion to be decided on a case-by-case basis." *Id.*

The court reviewed defendant's arguments in detail and determined that defendant was arguing against "full retroactive effect" while claimant was only seeking "partial retroactive effect". In this case, finality could not be an expectation since the case was still being litigated. In addition, defendant did not demonstrate how applying *Protz II* to a pending case violates its right to the due course of law under the Remedies Clause of the Pennsylvania Constitution and, finally, claimant raised *Protz II* at the first available opportunity, even though he was not required to raise a constitutional issue before either the WCJ or Board.

***Commonwealth of Pennsylvania v. WCAB (Piree)*, No. 195 WAL 2018, Aug. 28, 2018**

The Pennsylvania Supreme Court denied the petition for allowance of appeal in *Commonwealth of Pennsylvania v. WCAB (Piree)*, No. 995 C.D. 2017 (Pa.Cmwlth. Nov. 22, 2017), therefore, the Commonwealth Court decision stands that there is no subrogation for Heart & Lung benefits paid by a self-insured employer against a claimant's third party personal recovery in a motor vehicle accident.

In the *Piree* case, the claimant, who worked as an agent in the Office of the Attorney General (OAG), sustained injuries in a motor vehicle accident on Dec. 23, 2011. The employer issued a notice of compensation payable. The WC third-party administrator (TPA) paid the weekly workers' compensation benefits directly to the OAG payroll, and the claimant received his full salary from the OAG payroll under the Heart & Lung Act. On Oct. 31, 2014, claimant was notified that his Heart & Lung benefits were ending because his injuries were found to be permanent and that he would begin receiving workers' compensation benefits on Nov. 4, 2014. On Dec. 1, 2014, the employer and claimant entered into a third-party settlement agreement. There was a lien of approximately \$300,000, with a third-party recovery to the claimant of \$1.255 million.

Thereafter, both parties filed review petitions, seeking a determination on whether the employer was entitled to subrogation under Section 319 of the Act.

Continued on Page 10

A View from the Bench

Continued from Page 9

Claimant requested that the workers' compensation judge review the subrogation agreement and remove payments made under the Heart & Lung Act from the calculation of the lien. The employer averred that the amounts included in the third-party settlement agreement were only amounts payable under the WC Act, and therefore the lien should not be reduced for Heart & Lung benefits. Employer presented testimony from two witnesses who explained the interplay of the funds for WC benefits and Heart & Lung benefits. The workers' compensation judge granted the employer's review petition and denied the claimant's review petition, finding that the employer had a valid subrogation lien as set forth in the third-party settlement agreement, and was entitled to reimbursement of the lien.

The claimant appealed, arguing that the WCJ erred in finding the employer was entitled to subrogation from benefits that were paid to him under the Heart & Lung Act. The board reversed based on the decision in *Stermel v. WCAB (City of Philadelphia)*, 103 A.3d 876 (Pa. Cmwlth. 2014), wherein it was held that self-insured public employers compensating employees injured in motor vehicle accidents under both the WC Act and Heart & Lung Act were excluded "from subrogating any indemnity or medical expenses, regardless of how they were categorized." The *Stermel* holding was reiterated in *Pennsylvania State Police v. WCAB (Bushta)*, 149 A.3d 118 (Pa. Cmwlth. 2016), where the court stated, "self-insured employers are not entitled to be subrogated for [WC] when these funds are really used to reimburse Heart & Lung Act benefits." In this case, the board recognized that claimant's Heart & Lung benefits ended Nov. 4, 2014, and therefore held that employer was entitled to subrogation from that date and into the future.

On appeal, employer argued that under Section 319 it is entitled to subrogation against the proceeds of the claimant's third-party settlement to the extent of the compensation payable under the WC Act notwithstanding claimant's concurrent receipt of Heart & Lung benefits.

The court provided a review of the Workers' Compensation Act, the Heart & Lung Act and the Motor Vehicle Financial Responsibility Law. Consistent with the court's prior holdings, it again affirmed that the employer was not entitled to subrogation of Heart & Lung benefits, but it recognized that the claimant's Heart & Lung benefits ended on Nov. 4, 2014 and remanded for a calculation of the subrogation lien from Nov. 4, 2014 and after.

Medical Fee Review Limited to Amount and Timeliness of Payment; Issues of Reasonableness and/or Necessity of Treatment under the Utilization Review Process not Preempted by Medicare Policy

In *Workers' Compensation Security Fund v. Bureau of Workers' Compensation, Fee Review Hearing Office (Scomed Supply, Inc.)*, ___ A.3d ___ (Pa. Cmwlth. 2018), No. 429 C.D. 2018, decided Oct. 5, 2018, Commonwealth Court held that the medical fee review process permits a medical provider to dispute the amount and timeliness of payment. Disputes concerning reasonableness and/or necessity must be handled through the utilization review process.

The facts were not in dispute. Claimant uses a medically-prescribed neuromuscular electrical stimulation device. Provider, Scomed Supply, Inc., dispensed supplies for the device, including two replacement lead wires on a bimonthly basis and billed insurer, Workers' Compensation Security Fund. Insurer denied payment, stating provider was only entitled to payment for lead wires annually. Provider filed applications for fee review for the amount and timeliness of payment. Insurer denied the applications and provider appealed to the medical fee review hearing office. Insurer presented a Medicare policy statement to the hearing officer suggesting replacement of lead wires may not be filled more often than once every twelve months. The hearing officer concluded she lacked jurisdiction to determine reasonableness and necessity and awarded payment to provider. Insurer appealed to Commonwealth Court.

Commonwealth Court affirmed. The fee review process for provider to dispute the amount and timeliness of payment presupposes that liability has been established. The court rejected insurer's argument that Medicare policy preempts the issue of reasonableness and/or necessity of treatment under the utilization review process. To the contrary, the application of Medicare billing policy to Worker's Compensation billing, pursuant to Section 306(f.1)(3)(1) of the Act, limits rates of reimbursement but does nothing to preempt determinations of reasonableness and necessity of treatment under the utilization review process, which is not available to provider. Between the parties, the remedy of seeking utilization review belongs to insurer, and not to provider. Insurer's remedy would have been through the utilization review process, not as a defense in the fee review process.

Continued on Page 11

A View from the Bench

Continued from Page 10

Supreme Court, Reversing Commonwealth Court, Holds That ACT 46 Firefighter Claimant Must Show That Cancer is of a Type Potentially Caused by a Group 1 Carcinogen, Though Claimant Need Not Prove that the Cancer is Caused by the Carcinogens to Which He or She was Exposed

Municipal Employer, To Rebut the Presumption, Must identify Non-Work-Related Cause

City of Philadelphia Fire Department v. WCAB (Sladek); Appeal of Sladek, ___ A.3d ___ (Pa. 2018) [No. 13 EAP 2017, filed Oct. 17, 2018, Donahue, J.], reversing, 144 A.3d 1011 (Pa. Commw. 2017).

In a 2017 case, the Commonwealth Court, considering Act 46 (firefighter's cancer), ruled that Section 108(r) (firefighter's cancer), required a firefighter diagnosed with cancer caused by an IARC Group I carcinogen to establish, as a condition precedent, exposure to a specific carcinogen that caused his cancer. The court, disallowing benefits in that case, declared, "it was incumbent upon claimant to prove that his malignant melanoma [the type of cancer implicated in the case] 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." It further concluded that the presumption of causation may be competently rebutted by a general causation opinion, based entirely upon epidemiology, without any opinion specific to the firefighter/claimant making the claim.

The Supreme Court reversed and remanded. The court, made up of seven justices, held that a firefighter, seeking benefits for cancer under Act 46, and invoking the presumption afforded by that law, need only establish (1) that he or she has cancer, (2) that he or she has experienced exposure to a Group 1 carcinogen, as identified by IARC, and (3) that it is the type of cancer than can possibly be caused by such exposure. This latter showing, critically, can be made out by epidemiological evidence. The court rejected the Commonwealth Court's requirement, urged once again on appeal by the employer, that claimant was obliged to "prove that his or her cancer is caused by the carcinogens to which he or she was exposed." This aspect of the holding is referred to as Part I of Justice Donahoe's opinion. It was joined by Justices Baer, Todd, and Wecht.

A remand was ordered so that the claimant's expert testimony could be scrutinized to determine if such testimony was legally competent and otherwise sufficient to meet the Part I test.

The court was less clear with regard to how the presumption is rebutted. This aspect of the holding is referred to as Part II of the opinion. Part II, with its decision "announcing the judgment of the court," held that the employer must show with expert testimony that the firefighter's cancer had its genesis in some other cause; specifically, to rebut the presumption the employer must submit credible proofs "that the cancer from which the claimant suffers was not caused by his occupation as a firefighter." Stated another way, the employer must "produce a medical opinion regarding the specific, non-firefighting related cause of claimant's cancer." However, that aspect of the court's decision was not specifically concurred in by a majority of the justices. Justices Wecht, Saylor, Mundy, and Dougherty did not fully join in this thinking. Justice Mundy and Dougherty, in particular, only "concurred in the result" of Part II. Justice Wecht (concurring and dissenting), for his part, opined that rebutting the presumption could be, in effect, *easier* than how Justice Donahoe and her allies characterized the task. "Logically," Justice Wecht declared, "evidence showing that firefighting never causes malignant melanoma would establish that firefighting did not cause a particular occurrence of melanoma." Chief Justice Saylor (concurring with the need for remand, but otherwise dissenting) agreed, at least in part, with Commonwealth Court that claimant had *some* burden of causation before he or she gained the advantage of the presumption. The chief justice tended to agree, however, with Justice Wecht's position that the presumption could be rebutted via epidemiological proofs. He specifically rejected Justice Donahoe's formulation (see above), and remarked, "nothing on the face of Section 301(f) would foreclose an employer from proving that 'the firefighter' cancer was not caused by the occupation of firefighting."

Justice Mundy (concurring "in the result" of Part II, but dissenting from Part I), joined by Justice Dougherty, rejected the majority's position as to Part I of the analysis. In her opinion, as long as a previously cancer-free claimant with sufficient years of firefighter service developed cancer and was exposed to a Group 1 carcinogen, he or she was entitled to the presumption of causation.

Continued on Page 12

A View from the Bench

Continued from Page 11

She did, however, agree with the majority that the employer cannot rebut the presumption with “testimony on the general causation of cancer, based on epidemiological evidence”

A review of the various opinions strongly suggests that a majority of the justices believe that, to rebut the presumption, the municipal employer must produce evidence that shows that the individual firefighter’s cancer came from some non-work-related cause.



Workers' Compensation Word Scramble

RUINU DSEN	-----
TOACEI ICTFNRI	-----
EMETNDJGU	-----
JDNTOIACUADI	-----
NEDMEMTNA	-----
PLAPEA	-----
ESITOPTNI	-----
CAOLITUANCOP	-----
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ESERUSDSEAP	-----

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