Tom Wolf | Governor

W. Gerard Oleksiak | Secretary

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

News & Notes

Vol. 23 | No. 4 *"Serving all Pennsylvanians"* Fall 2018

Workers' Compensation in Pennsylvania Past, Present and Future

As many of us know, 2015 marked the 100th anniversary of the workers' compensation system in Pennsylvania. With the passage of the WC Act in 1915, injured employees were guaranteed the right to wage loss and medical benefits on a no-fault basis when the injured worker sustained an injury arising during the course of employment.

Many changes have taken place during the past 103 years within the WC system. All parties associated with the workers' compensation system have debated the impact of those changes and will continue to do so into the future. Despite the continuing debate, certain aspects of the system remain constant. The facts speak for themselves:

1. Workers continue to be injured, become sick, and are fatally injured on the job each year in Pennsylvania.
    - 174,134 medical-only and lost-time claims; and 82 fatal claims were filed in 2017.
2. The WC system in Pennsylvania has a very large impact on injured workers; their families; employers; providers; and workers' compensation insurance carriers.
    - On average, approximately $1.6 billion in indemnity payments and $1.4 billion in medical benefits are paid annually; totaling approximately $3 billion in benefits paid per year within the Pennsylvania workers' compensation system.

As we move into the future, the system will be shaped by legislation, court decisions, and yes, technology changes. The Bureau of Workers' Compensation will continue to add emphasis to proactive measures to reduce the number of injuries, illnesses, and fatalities through priority initiatives. The Health & Safety Division will continue to expand the Pennsylvania Training for Health and Safety (PATHS) resources to assist employers and employees with their efforts to reduce workplace incidents. We will expand upon utilization of historic WC claims data to build tools to predict when and where incidents will happen in the future. With that information, we will provide preventive training to our stakeholders.

While none of us can predict the future, we can all learn from the past and modify our direction into the future to ensure the workers' compensation system in Pennsylvania preserves the intent of the principles on which it was established. With all parties working towards the goal of a better system for all, system changes in the future can be made that have a real impact on all stakeholders, including the lives of the individuals hurt on the job each day.

Inside This Issue

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.

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

Wolf Administration Introduced Opioid Prescribing Guidelines for Workers' Compensation

On Monday, July 16, 2018, the Wolf Administration introduced opioid prescribing guidelines for workers' compensation to help healthcare providers determine when opioids are appropriate for treatment of someone injured on the job.

"In 2017, there were 174,216 workers' compensation claims made in Pennsylvania, and our state ranks third highest in the nation in the percentage of injured workers who become long-term opioid users," Governor Tom Wolf said. "These prescribing guidelines will help to ensure that health care providers who treat patients with work-related injuries have the guidance they need. I thank the members of the Prescribing Guidelines Task Force for all of their hard work in developing this essential guidance."

The guidelines are designed to:

- Promote delivery of safe, quality health care to injured workers.
- Ensure patient pain relief and functional improvement.
- Be used in conjunction with other treatment guidelines, not in lieu of other recommended treatment.
- Prevent and reduce the number of complications caused by prescription medication, including addiction.
- Recommend opioid prescribing practices that promote functional restoration.

"The workers' compensation prescribing guidelines are intended to supplement, not replace clinical judgment.", Secretary of Health Dr. Rachel Levine said. "These prescribing guidelines add to the 10 others we have developed for health care practitioners like dentists, OB/GYN and emergency room physicians. We are constantly reviewing and updating these guidelines as medical research and evidence move the science forward."

The guidelines include recommendations for the treatment of acute, subacute and post-operative pain; and treatment of chronic pain.

View opioid prescribing guidelines Safe Prescribing for Workers' Compensation.

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 208 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.

Safety Committee Box Score

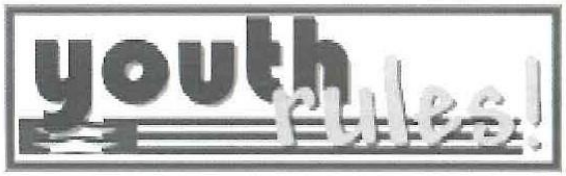
Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of Sept. 22, 2018:

12,015 committees covering 1,536,109 employees

Cumulative grand total of employer savings:

$702,892,669

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.



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.

Pennsylvania Governor's Occupational Safety and Health Conference

Governor's Occupational Safety & Health Conference

92nd Annual
Pennsylvania Governor's Occupational Safety & Health Conference
Oct. 29-30, 2018
Hershey Lodge and Convention Center
Hershey PA

For more information please visit: www.pasafetyconference.com.
There is still time to register or you can pay at the registration desk the day of the event.

REGISTER NOW!

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

Workers' Compensation Appeal Board Schedule of Hearings for 2019

All hearing lists will close **40 days prior to date of hearing.**

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC
PHILADELPHIA		5, 6, 7		2, 3, 4		18, 19, 20		6, 7, 8		15, 16, 17		3, 4, 5
PITTSBURGH	15, 16		5, 6		1, 2		10, 11		10, 11		6, 7	
HARRISBURG	2, 3			16, 17		5, 6			24, 25		20, 21	
SCRANTON			20, 21		22, 23		23, 24			2, 3		17, 18
ERIE				30			9				5	
STATE COLLEGE		20, 21										

ALFONSO FRIONI, JR., CHAIRMAN

Commissioners Sandra D. Crawford, Thomas P. Cummings, William I. Gabig, Robert A. Krebs, James A. Zurick, David H. Wilderman

Secretary Steven Loux, Esq.

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:

Westmoreland County: On June 28, 2018, Jeffrey Bollinger, d/b/a Bollinger Construction, of Scottdale, PA, pled guilty to three misdemeanor counts of the third degree for failure to procure workers' compensation insurance before Judge Rita D Hathaway in the Court of Common Pleas of Westmoreland County. Mr. Bollinger was sentenced to three years' probation and ordered to pay restitution of $12,390.08 to the Uninsured Employers' Guaranty Fund.

Centre County: On May 14, 2018, Michael Robinson, located in Milesburg, PA, pled guilty to 15 misdemeanor counts of the third degree in the Centre County Court of Common Pleas. On June 11, 2018, Michael Robinson was sentenced by Judge Jonathan D. Grine to serve 150 months' probation and ordered to pay $150,000.00 restitution 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.

WCAIS Enhancements

EDI Community

The following enhancements were incorporated into the Workers' Compensation Automation and Integration System in October 2018.

The EDI Flat File batch times were changed as follows:

- The ACK and Forms Solution return time for the 9:00 a.m. batch was moved from 11:00 a.m. to noon;
- The 1:00 p.m. batch cutoff time was moved to 2:00 p.m. with an ACK/form return time of 4:00 p.m.;
- The 6:00 p.m. batch cutoff time was moved to 7:00 p.m. with an ACK/form return time of 9:00 p.m.;
- There is no change for the 11:59:59 p.m. batch cutoff time or the 7:00 a.m. ACK/form return time.

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 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 karcarroll@pa.gov so that your information can be updated.

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. 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 Affirms Commonwealth Court Decision Precluding §319 Subrogation Against Third-Party Vehicle Accident Recovery for Heart & Lung Benefits Paid To Police Officer

Pennsylvania State Police v WCAB (Bushta), 149 A.3d 118 (Pa. Cmwlth. 2016), *aff'd*. No. 14 WAP 2017 (Pa. May 29, 2018)

On May 29, 2018, in a unanimous decision, the Supreme Court affirmed the Oct. 26, 2016, Commonwealth Court decision (reviewed in the Fall 2017 BWC News & Notes) that a self-insured municipal employer does not have a §319 subrogation lien against full salary replacement benefits received by a police officer involved in a work-related motor vehicle accident who then receives a civil award from a negligent third-party due to that accident. The court discussed the interplay among §319 of the Workers' Compensation (WC) Act, which authorizes subrogation against a civil recovery from a third-party tortfeasor, the Heart and Lung (H&L) Act, which requires that workers' compensation benefits be turned over to the municipality paying the salary replacement, and §§1720 and 1722 of the Motor Vehicle Financial Responsibility (MVFR) Act, which, in 1993, repealed the preclusion of subrogation against WC benefits but not against H&L benefits. It approved the Commonwealth Court's reasoning, which that court had earlier announced in *Stermel v. WCAB (City of Philadelphia),* 103 A.3d 876 (Pa. Cmwlth. 2014), that both the wage indemnity and medical benefits received by the police officer are actually paid pursuant to the H&L Act, not to the WC Act, so that a civil verdict/settlement in the motor vehicle accident case is still within the non-subrogation provisions of the MVFR Act and, therefore, is not subject to the employer's claim for reimbursement.

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Supreme Court Affirms Commonwealth Court Decision that the Construction Workplace Misclassification Act Applies Only to the Construction Industry

Department of Labor and Industry, Uninsured Employers' Guaranty Fund v WCAB (Lin and Eastern Taste), 155 A.3d 103 (Pa. Cmwlth. 2017), *aff'd.* No. 27 EAP 2017 (Pa. June 26, 2018)

On June 26, 2018, the Supreme Court affirmed, by unanimous decision, the Feb. 17, 2017, Commonwealth Court decision (reviewed at length in the Fall 2017 BWC News & Notes) that found the Construction Workplace Misclassification Act (CWMA), 43 P.S. §§933.1-933.17, inapplicable in the following fact pattern. A restaurant owner wanted to renovate a new restaurant location. He hired the claimant, without any written contract, to do the renovation work, but he was not to work in the restaurant once it opened. The claimant had been in the remodeling business for many years and brought his own tools and determined how to do the work, while the owner supplied the blueprints and bought the materials. After the claimant was hurt doing the work, he filed claims against the uninsured restaurant and the Uninsured Employers' Guaranty Fund (UEGF). Ultimately, reversing the WCAB and affirming the WCJ, Commonwealth Court found that the claimant had not met the standard "right of control" burden of factually proving that he was an employee rather than an independent contractor. In addition, it reviewed the provisions of WCMA, found the act's language ambiguous, analyzed what its purpose was, and held that it only applies to the construction industry, and did not apply in this circumstance. It found that the claimant's argument that anyone who undertook construction was thereby in the construction industry would make employers out of homeowners who hired repairmen and, thus, subject them to civil and criminal penalties if they did not obtain workers' compensation insurance. The Supreme Court essentially adopted the Commonwealth Court's analysis. It found that the legislative history of the WCMA was instructive and that the act was intended only to apply to the construction "industry." Thus, it did not apply here. It also did a *reductio ad absurdum* analysis of the claimant's position regarding the applicability of WCMA, agreeing with Commonwealth Court that the legislature could have not intended such a broad net. Finally, it held that the WCJ's factual findings that the claimant had not met his burden to prove that he was an employee rather than an independent contractor were binding. Thus, benefits were not owed.

PROTZ II AFTERMATH

***Whitfield v. Workers' Comp. Appeal Bd. (Tenet Health Sys. Hahnemann LLC)*, No. 608 C.D. 2017, 2018 WL 2701272, (Pa. Commw. Ct. June 6, 2018)**

The facts are clear that claimant, Paulette Whitfield, (1) exhausted her 500 weeks of partial disability, (2) previously litigated the defendant's modification petition based upon the IRE, (3) did not appeal the WCJ's initial decision modifying her benefits and (4) did not challenge the constitutionality of the IRE process in the initial litigation.

On Nov. 3, 2015, approximately one month after the Commonwealth Court decision in *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 124 A.3d 406, (Pa. Cmwlth. 2015) (*Protz I*), claimant filed a petition seeking reinstatement to total disability based on that decision. The parties stipulated that claimant did not raise the constitutionality of the IRE before the original WCJ or the board. The WCJ denied Claimant's petition. Claimant appealed. The WCAB affirmed. Both the WCJ and Board determined that claimant waived the constitutionality arguments. The WCJ cited *Winchilla v. Workers' Compensation Appeal Board (Nexstar Broadcasting)*, 126 A.3d 364 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 634 Pa. 753, 130 A.3d 1293 (2015) and the board cited *Riley v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania)*, 154 A.3d 396 (Pa. Cmwlth. 2016). Claimant then filed a petition for review to the Commonwealth Court in May 2017, approximately one month before the Supreme Court decision in *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 639 Pa. 645, 654, 161 A.3d 827, 832 (2017) (*Protz II*).

The Commonwealth Court thoroughly summarized the development of the law, including *Protz I* and *Protz II* as well as the different burdens for seeking a reinstatement after benefits have been terminated or suspended. The Commonwealth Court then found that because claimant filed her petition within three years from the date of her last payment of compensation as permitted by Section 413(a) of the WC Act, she was entitled, as a matter of law, to seek modification of her disability status based upon the *Protz* decisions, which found the IRE provision unconstitutional.

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A View from the Bench

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Allowing claimant to seek modification under these circumstances does not prejudice employers or insurers by upsetting their expectation of finality because such determinations are not yet truly "final" until three years have passed since the date of last payment. However, in order to be entitled to reinstatement, a claimant must testify that her work-related injury continues, and the WCJ must credit that testimony over any evidence that an employer presents to the contrary." (*Id at 14)* The claimant did present this testimony, but the WCJ did not make any credibility determinations as to whether the claimant remained disabled. Therefore, the board's order was vacated and the case was remanded for further proceedings consistent with the Commonwealth Court's opinion.

***Timcho v. Workers' Comp. Appeal Bd.*, No. 158 C.D. 2017, 2018 WL 3943013, (Pa. Commw. Ct. Aug. 17, 2018)**

Claimant sustained a work injury on May 20, 2008. He underwent an IRE based on the 6th Edition on July 25, 2011. Employer filed a modification petition to change claimant's status from total to partial. This modification was granted on July 23, 2013, claimant appealed and the WCAB affirmed. Claimant appealed to the Commonwealth Court which affirmed on Jan. 27, 2016 (*Timcho I).* However, on Jan. 5, 2016, claimant filed another reinstatement petition (*Timcho II)* based upon *Protz I*. Employer filed a motion to dismiss claimant's reinstatement petition, arguing that claimant was precluded from raising a constitutional challenge to his IRE because he had not raised or preserved that issue in his appeal in *Timcho I*. The WCJ granted the motion and dismissed the reinstatement petition on July 1, 2016 in *Timcho II*. Claimant appealed and the WCAB affirmed. While claimant's challenge to the dismissal of his reinstatement petition was pending in Commonwealth Court, the Supreme Court issued its decision in *Protz II*. Commonwealth Court then determined that the issues raised by the parties in *Timcho II* have been resolved by *Whitfield v. Workers' Comp. Appeal Bd. (Tenet Health Sys. Hahnemann LLC)*, No. 608 C.D. 2017, 2018 WL 2701272, (Pa. Commw. Ct. June 6, 2018), which held that the claim is not waived and finality is not an issue, so long as the reinstatement petition is filed within three years of the date of the most recent payment of compensation. The WCAB order in *Timcho II* was vacated and the case was remanded with direction to further remand to the WCJ to hold a hearing on the merits of claimant's reinstatement petition to determine whether claimant continues to be disabled by his work injury.

UNREPORTED DECISIONS

***Pavlack v. Workers' Comp. Appeal Bd. (UPMC S. Side)*, No. 702 C.D. 2017, 2018 WL 2708524, (Pa. Commw. Ct. June 6, 2018)**

In this unreported opinion, claimant had not exhausted her 500 weeks of partial disability. However, she previously litigated the defendant's modification petition based upon the 5th Edition IRE, did not appeal the WCJ's initial decision modifying her benefits and did not challenge the constitutionality of the IRE process in the initial litigation. In this case, there was no testimony at all from the claimant. The Commonwealth Court, following *Whitfield v. Workers' Comp. Appeal Bd. (Tenet Health Sys. Hahnemann LLC)*, No. 608 C.D. 2017, 2018 WL 2701272, (Pa. Commw. Ct. June 6, 2018), vacated the board's order and remanded it to the board with instructions to further remand to the WCJ to hold an evidentiary hearing to determine whether claimant's work-related injury continues.

***Moore v. WCAB (Sunoco, Inc. (R&M))*, No. 715 C.D. 2017, 2018 WL 2708527 (Pa. Commw. Ct. June 6, 2018)**

In this second unreported opinion, there had not been any prior litigation. Claimant underwent a 5th Edition IRE and defendant issued a notice of change of workers' compensation disability status, which claimant did not challenge. There was no challenge to the constitutionality of the IRE process until two weeks after *Protz I*, when claimant filed a reinstatement petition. He had not yet exhausted his 500 weeks of partial disability at that time. The WCJ concluded claimant satisfied his burden of proof that the change in disability status on April 21, 2007, was unconstitutional pursuant to *Protz I* and granted the reinstatement petition. Defendant appealed to the WCAB citing *Winchilla v. Workers' Compensation Appeal Board (Nexstar Broadcasting)*, 126 A.3d 364 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 634 Pa. 753, 130 A.3d 1293 (2015). The board reversed, citing *Riley v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania)*, 154 A.3d 396 (Pa. Cmwlth. 2016). Claimant then filed a petition for review to the Commonwealth Court on June 6, 2017, several weeks before *Protz II* and by which time claimant's 500 weeks of partial disability had expired.

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Citing *Whitfield v. Workers' Comp. Appeal Bd. (Tenet Health Sys. Hahnemann LLC)*, No. 608 C.D. 2017, 2018 WL 2701272, (Pa. Commw. Ct. June 6, 2018), the Commonwealth Court concluded that there was no finality and claimant's challenge was not untimely, as he had three years following the date of the most recent payment of compensation to file a petition seeking to reinstate benefits. To be entitled to reinstatement of total disability benefits when the change in status was based upon a now-unconstitutional IRE, claimant must demonstrate that he continues to be disabled. Since claimant had not testified, the case was remanded to the board with direction to further remand to the WCJ to make factual findings related to whether claimant's work-related injury continues.

Supplemental Agreements Filed to Document Change in Disability Status While Still Under TNCP is Not Acceptance of Claim

Life Quest Nursing Ctr. v. Workers' Comp. Appeal Bd. (Tisdale), No. 1250 C.D. 2017, 2018 WL 3463329 (Pa. Commw. Ct. July 19, 2018)

Claimant was injured on April 23, 2014. On May 9, 2014, employer issued an NTCP for a left leg sprain injury. Employer made work available to claimant and on June 27, 2014, employer filed two supplemental agreements. On July 11, 2014, claimant stopped working. The employer filed a timely notice stopping temporary compensation and notice of denial.

Claimant filed a claim petition for the April 23, 2014 injury, and a penalty petition alleging that employer violated the WC Act by discontinuing her partial benefits considering the supplemental agreements. The WCJ ultimately granted the claim petition, in part, terminated claimant's benefits as of Oct. 9, 2014 and determined that employer was not bound by the supplemental agreements because the notice stopping temporary compensation properly stopped benefits, so the penalty petition was denied. Claimant appealed.

On Aug. 24, 2016, the WCAB modified the WCJ's decision to include left sacroiliitis sprain and left leg sprain in the description of claimant's work injury, reversed the WCJ's denial of claimant's penalty petition and termination of claimant's benefits, and remanded for the WCJ to determine the penalty. On Dec. 16, 2016, the WCJ issued a decision and awarded no penalties to claimant. Employer appealed from the WCJ's decision to the board, asking the board to reconsider its Aug. 24, 2016 decision or make it final pursuant to *Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Commission)*, 745 A.2d 1282 (Pa. Cmwlth. 2000). The WCAB made its Aug. 24, 2016 decision final and appealable. Employer then appealed to the Commonwealth Court.

Commonwealth Court reversed the WCAB, finding that the supplemental agreements in this case were filed merely to document a change in the claimant's status when she returned to work. They were not admissions of liability. Therefore, because employer timely filed the notice stopping temporary compensation and notice of denial, employer retained all its rights and defenses with respect to the underlying claim. The original judge's decision was supported by substantial, competent evidence such that the initial award and termination were upheld.

WCJ Can Weigh Conflicting Credible Evidence in Rendering a Decision

Hernandez v. Workers' Comp. Appeal Bd. (F&P Holding Co.), No. 1820 C.D. 2017, 2018 WL 3463326, (Pa. Commw. Ct. July 19, 2018)

Employer issued a medical-only notice of compensation payable on July 31, 2012 acknowledging claimant's Aug. 12, 2011 injury as a thoracic sprain. At the time of the injury, claimant was performing modified duty resulting from an earlier 2006 work-related lumbar spine injury. In September 2013, claimant presented employer with work restrictions. Claimant was then laid off. Claimant filed a reinstatement petition alleging a decrease in earnings due to the 2011 work injury. Employer acknowledged that claimant was laid off because employer could not accommodate claimant's restrictions, but said the restrictions were not due to the work injury. An IME performed on March 14, 2014 supported employer's position and they filed a termination petition. The WCJ granted both petitions, reinstating for a closed period and then terminating benefits as of March 14, 2014. The WCAB reversed the reinstatement and remanded only on the termination petition for consideration of additional medical evidence by claimant. Thereafter, the WCJ found claimant's testimony credible and found employer's medical evidence more credible than claimant's. The termination petition was granted.

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The reinstatement was again granted, but the WCAB determined that this issue was not properly before the WCJ since only the termination petition was remanded. The sole issue before the Commonwealth Court in this appeal is whether the board erred by affirming the WCJ's decision granting the termination petition.

Claimant's primary argument in this appeal was that the WCJ found claimant credible and his testimony that he was not fully recovered from the work injury, needed work restrictions and additional treatment, and still experienced pain, was sufficient to deny the termination petition. He contended that the WCJ's crediting of the testimony of employer's medical expert and granting termination of claimant's benefits is inconsistent with the WCJ's finding that claimant's testimony of ongoing pain and lack of full recovery was credible.

Commonwealth Court affirmed the WCJ's termination of benefits, finding that the WCJ, as factfinder, had the sole authority to weigh conflicting evidence and reach this conclusion.

***City of Pittsburgh and UPMC Benefit Management Services, Inc., v. WCAB (Flaherty*), No. 29 C.D. 2018, filed June 1, 208, 2018 WL 2450567**

Claimant, a female firefighter with over four years' service, developed breast cancer, which totally disabled her. Her last day of work was Sept. 9, 2004. Sometime after the enactment of Act 46 on July 7, 2011, claimant received a letter from the union advising her of the new firefighter cancer presumption law. Claimant no longer had the letter and could not state exactly when she received it. On Sept. 23, 2011, within two months of the new law, she filed a claim petition, seeking benefits from September 2004. Several months later, on Feb. 24, 2012, she received her doctor's causation opinion report.

The first workers' compensation judge granted the petition and awarded benefits as of Sept. 10, 2004, finding that claimant filed her petition within 300 weeks of her last day of work and was entitled to the §301(f) presumption. The workers' compensation judge also found that she met the causation burden of proof, even without the presumption.

On employer's appeal, the Workers' Compensation Appeal Board found that claimant missed the presumption, as her petition was actually filed 367 weeks after her last date of employment but also finding that she proved causation. The Appeal Board noted, however, that the WCJ made no finding concerning the §311 and §312 discovery/reasonable diligence rules concerning notice to the employer. The Appeal Board found that the 21- and 120-day rules were implicated, so that a determination had to be made as to whether benefits should start as of 2004 or as of 2011.

On remand, a different WCJ found that the union's letter put claimant on notice of the possible relationship, that she had the burden to, but did not, prove that she gave notice to employer within 21 days thereof, even though she filed her petition within 120 days of receiving the letter, so that benefits could only be awarded as of the date she gave notice, specifically when she filed her claim petition on Sept. 23, 2011.

On employer's appeal, the Appeal Board reversed and awarded benefits as of Sept. 10, 2004, finding that claimant did not have notice of the causal relationship until the doctor's February 2012 letter, so she met the 21-day rule, and benefits would be retroactive to her first date of disability. See, *Carrier Coal Enterprises v. WCAB (Balla)*, 544 A.2d 1111 (Pa. Cmwlth. 1988).

The court affirmed, awarding benefits as of the day after her last day of work in September 2004. It discussed the various discovery/reasonable diligence cases. See, Sections 311 and 312 of the Act, 77 P.S. §§ 631 & 632, *Martinic v. WCAB (Greater Pittsburgh International Airport),* 529 A.2d 600 (Pa. Cmwlth. 1987), *Republic Steel Corp. v. WCAB (Wojtaszek),* 413 A.2d 768 (Pa. Cmwlth. 1980), *Sell v. WCAB (LNP Engineering)*, 771 A.2d 1246 (Pa. 2001), *The Bullen Companies v. WCAB (Hausmann)* 960 A.2d 488 (Pa. Cmwlth. 2008) and *A & J Builders, Inc., v. WCAB (Verdi)*, 78 A.3d 1233 (Pa. Cmwlth. 2013). The court indicated that the union's letter did not start the 21-day meter, but it did require her to exercise due diligence, which the court found that she had, by filing her claim petition two months later. Claimant did not have confirming medical evidence until well after she filed the petition. Thus, she met the Section 311/312 requirements and was entitled to benefits as of her original disability date, Sept. 10, 2004.

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***Michael DeHoratius v. WCAB (Upper Darby Township),* 187 A.3d 273, (Pa. Cmwlth. 2017)**

Claimant, who was a township patrol officer, petitioned for review of the Workers' Compensation Appeal Board's order affirming order of WCJ directing claimant to satisfy township's Section 319 subrogation lien. The Commonwealth Court reversed finding no subrogation against the payment of the Heart and Lung Benefits. Here the township had two accounts, one to pay Heart and Lung benefits and another to pay workers' compensation benefits. Following a motor vehicle accident, the township paid claimant wage loss benefits from its Heart and Lung account and indemnity and medical benefits from its workers' compensation account. Claimant signed the workers' compensation indemnity benefits and turned the same back over to the township.

Following a lawsuit against the other driver and the township's UIM policy, the township sought subrogation against the third-party recovery based on the payment of benefits from the workers' compensation account. Both the WCJ and the Workers' Compensation Appeal Board allowed subrogation. Relying on its April 18, 2017 decision, *Pennsylvania State Police v. WCAB (Bushta),* 149 A.3d 118, (Pa. Cmwlth. 2016), *appeal granted*, (Pa. No. 483 WAL 2016, filed April 18, 2017), the Commonwealth Court reversed. The court held it did not matter which account the payment came from. What mattered was why it was being paid. If it was for wage loss or medical bill payments for a work-related motor vehicle accident, it was considered Heart and Lung Benefits, and thus not subject to subrogation from the third-party recovery.

***East Hempfield Township v. WCAB (Stahl),* __ A.3d__, No. 1058 C.D. 2017**

Decided June 1, 2018, the claimant, a volunteer firefighter, stopped working due to stomach cancer in 2006, returned briefly as a fire police officer and his last date of employment was Oct. 29, 2008. At some point, not stated, claimant read an article about Act 46, the firefighter cancer presumption, enacted in July 2011. Claimant did not contact counsel until around Aug. 5, 2012 (the date of the fee agreement.) Claimant obtained a doctor's opinion regarding causation two years later, on Sept. 16, 2014.

Claimant filed his claim petition on Nov. 10, 2014, within 120 days of obtaining the doctor's causation opinion. In the claim petition, claimant sought a closed period of benefits from April 1 to June 1, 2006 and the payment of medical expenses.

Claimant testified that after being diagnosed with the stomach cancer he stopped going into fires as he did not want to be exposed to the smoke, and that as early as 2006 he suspected there might have been a connection between the cancer and his firefighting duties.

Claimant's petition was granted by decision and order circulated on Aug. 31, 2015, based on the new statutory presumption. The WCAB remanded because the presumption did not apply; the board noted that claimant's petition was not filed within the required 300 weeks. On remand, the petition was once again granted based on the discovery rule. The WCAB affirmed, finding that he gave timely notice, because he filed his petition within 120 days of obtaining the medical causation opinion. Employer again appealed.

The Commonwealth Court reversed and remanded, citing *Cochran v. GAF Corp.,* 666 A.2d 245 (Pa. 1995), *Allegheny Ludlum Corp v. WCAB (Holmes),* 998 A.2d 1030 (Pa. Cmwlth.), *appeal denied*, 13 A.3d 480 (Pa. 2010), *Sell v. WCAB (LNP Engineering),* 771 A.2d 1246 (Pa. 2001) and *The Bullen Companies v. WCAB (Hausmann)*, 960 A.2d 488 (Pa. Cmwlth. 2008), *appeal denied*, 972 A.2d 523 (Pa. 2009), the same cases as cited in *City of Pittsburgh and UPMC Benefit Management Services, Inc., v. WCAB (Flaherty),* No. 29 C.D. 2018, filed June 1, 208, 2018 WL 2450567, and finding that the WCJ and Workers' Compensation Appeal Board did not make sufficient findings on whether claimant exercised reasonable diligence. The issue is not actual knowledge of causation, but when, through reasonable diligence, he should have known. See, *Delaware Cty. v. WCAB*, 808 A.2d 965, 970 (Pa. Cmwlth. 2002), *appeal denied*, 825 A.2d 1262 (Pa. 2003). The court remanded to the WCJ, to determine whether claimant's actions from July 2011 through August 2012 could be interpreted to indicate that claimant had more than just a bare suspicion regarding the work relatedness of his injury, and whether claimant made a "reasonable effort to discover the cause of his injury" under the facts presented.

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Coming and Going Rule Bars Claim for Injuries Sustained on Route to Temporary Job Site

In *Kush v. Workers' Compensation Appeal Board (Power Contracting Company),* 186 A.3d 1047 (Pa. Cmwlth. 2018), No. 1688 C.D. 2017, decided May 17, 2018, Commonwealth Court held exceptions to the coming and going rule for employees with no fixed place of employment and for employees with an employment contract that included transportation to and from work did not apply to claimant.

Claimant was employed as a union electrical worker for both Power Contracting Company (employer) and Vantage Corporation (Vantage). Vantage provided claimant with a company truck, and he used that truck to travel to jobs for both Vantage and employer. Vantage also provided him with a credit card to purchase gas for the truck. On a typical day, claimant drove directly from home to the assigned job site. He was not compensated for travel time unless he picked up a piece of equipment on his way to a job, or was traveling from the job of one employer to that of another.

Claimant was injured in a motor vehicle accident while driving from home to work at a job site for employer. He filed a claim petition asserting that, at the time of the injury, he was employed as a travelling employee or, alternatively, that he was on a special mission for employer. Employer denied the allegations. The WCJ dismissed the claim petition, finding no exception to the coming and going rule applied and concluding claimant's injury occurred during his commute to a fixed job location. Claimant appealed and the Workers' Compensation Appeal Board affirmed.

On appeal to Commonwealth Court, claimant argued the circumstances of his injury fell within two exceptions to the coming and going rule. Specifically, claimant contended he had no fixed place of employment and that his employment agreement with employer included time spent for transportation to and from work. The court noted that generally, under the coming and going rule, injuries sustained while an employee is traveling to and from his place of employment are considered outside the course and scope of employment and are not compensable. *Holler v. Workers' Compensation Appeal Board (Tri Wire Engineering Solutions, Inc.)*, 104 A.3d 68 (Pa. Cmwlth. 2014). The Pennsylvania Supreme Court, however, has established four exceptions to this general rule: (1) the employment contract includes transportation to and/or from work; (2) the employee has no fixed place of work; (3) the employee is on a special assignment or mission for the employer; or (4) special circumstances are such that the employee was furthering the business of the employer. *Peterson v. Workers' Compensation Appeal Board (PRN Nursing Agency),* 597 A.2d 1116 (Pa. 1991).

The court noted the course of employment is construed more broadly for traveling employees; however, an assignment for a single project at an off-site location does not make an employee a traveling employee. Here, claimant worked exclusively at a specific job site for several weeks prior to the accident and anticipated working only at that site on the day of the accident. Based upon these facts, the Commonwealth Court concluded substantial evidence supported the WCJ's determination claimant had a fixed job location for purposes of the coming and going rule. The court further concluded the WCJ did not err in finding travel was not included in claimant's employment contract. To satisfy the employment contract exception, an employee must satisfy two elements. First, the employee must prove that a travel allowance is related to the actual expense and time involved in the employee's commute. Second, the employee must prove the employer provided or controlled the means of the commute. *Leisure Line v. Workers' Compensation Appeal Board (Walker),* 986 A.2d 901 (Pa. Cmwlth. 2007). Here, Vantage, rather than employer, owned and provided the truck used for claimant's commute to and from work. As such, employer had no control over the means of claimant's commute to work. Moreover, although Vantage paid for fuel for the truck, claimant's wages did not include pay for travel time to the job site from home or vice versa.

Petition for Allowance of Appeal Denied in *Dorvilus, Grimm, Valenta and Smith*

In the Summer 2018 edition of *News & Notes*, pages 7 to 8, we reported on the Commonwealth Court's decision in *Dorvilus v. WCAB (Cardone Industries)*, 176 A.3d 1092 (Pa.Cmwlth. 2018). In that case the Commonwealth Court held that a reinstatement petition filed by the claimant was barred by the Section 315 Statute of Limitations. The claimant originally filed a claim petition for a 2009 date of injury that was granted by the WCJ. The WCAB denied supersedeas, so the employer was obligated to pay wage loss benefits to the claimant. The WCAB then reversed the wage loss portion of the award, so that the last payment of indemnity benefits was made on July 21, 2013.

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The claimant filed a reinstatement petition on May 8, 2015, which was within three years of his last receipt of benefits, but more than three years after the 2009 injury date. Citing *Sloane v. WCAB (Children's Hosp. of Philadelphia),* 124 A.3d 778 (Pa. Cmwlth 2015) and *Gieniec v. WCAB (Palmerton Hosp.),* 130 A3d 154 (Pa.Cmlwth. 2015), the Commonwealth Court held that the effect of the ultimate denial of wage loss benefits by the WCAB made this a "medical only" injury, so that the burden to prove disability remained as if a claim petition, not a reinstatement petition, which required the filing of the claim within three years of the date of injury, not the last payment of compensation benefits. It further noted that once a claim petition is denied, there are no benefits to be reinstated. On July 18, 2018, the Supreme Court denied the claimant's petition for allowance of appeal. *Dorvilus v. WCAB (Cardone Industries)*, 2018 WL 3471843(Table).

In the Summer 2018 edition of *News & Notes*, pages 9, we reported on the Commonwealth Court's opinion in *Grimm on behalf of Grimm v. WCAB (Federal Express Corporation)*, 176 A.3d 1045 (Pa.Cmwlth. 2018). In that case, the claimant/widower filed a fatal claim petition following the spouse's death in a work-related injury that occurred two years following their separation, but before a divorce was finalized. The WCJ denied the fatal claim. The WCAB affirmed the denial, and then the Commonwealth Court, in a fact specific analysis, affirmed the denial of benefits, finding that the claimant did not established dependency. On July 16, 2018, the Supreme Court denied the claimant's petition for allowance of appeal. *Grimm on behalf of Grimm v. WCAB (Federal Express Corporation)*, 2018 WL 3430325(Table).

On pages 16 and 17 of the Summer 2018 edition of *News & Notes*, we reported on the Commonwealth Court's decisions in the cases of *Smith v. WCAB (Supervalu Holdings PA, LLC)*, 177 A.3d 394 (Pa.Cmwlth. 2018) and *Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance)*, 176 A.3d 374 (Pa.Cmwlth. 2017). In those two opinions, the Commonwealth Court provided an interpretation of the burden of proof required under *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d 830 (Pa. 2013).

In *Valenta*, the employer sought a modification of the claimant's benefits based on six allegedly open and available positions within the claimant's restrictions. The claimant testified to applying to some of the jobs, but not getting them, some jobs were already filled, and some she was unable to contact. The WCJ modified benefits based on the claimant's earning capacity for the lowest paying of the six positions. The Commonwealth Court affirmed, finding that merely not being hired is not enough to defeat the employer's burden of proving that the positions were open and available. Rather, such evidence is relevant, but not dispositive. On May 22, 2018, the Supreme Court denied the claimant's petition for allowance of appeal. *Valenta v. WCAB (Abington Manor Nursing Home and Rehab)*, 186 A.3d 371(Table), (Pa. 2018)

In *Smith*, the claimant testified that he applied to all five positions identified in a labor market survey, was contacted and interviewed for two, but did not receive either job. The WCJ modified benefits based on the labor market survey. The WCAB affirmed. The Commonwealth Court affirmed, but modified the modification, finding that *Phoenixville* required the jobs to be open and available for a period of time so a claimant could apply for them. It found that evidence of the job availability at the time of the labor market survey alone was insufficient to support a modification of benefits. In *Smith* the court found that since the claimant was interviewed for two jobs, those jobs were open and available, which is all that is required for the employer's burden of proof, i.e. the claimant does have to be hired for the job in order to meet the burden. The court modified benefits based on the two jobs for which the claimant was interviewed, but did not find evidence that the other three jobs remained open and available long enough for the claimant to apply. On July 23, 2018, the Supreme Court denied the claimant's petition for allowance of appeal. *Smith v. WCAB (Supervalu Holdings PA, LLC)*, 2018 WL 35328790(Table).

Supreme Court Rules That Employer is Not Entitled to Anticipatory Subrogation to its Continuing Medical Treatment Liability Expenses

Whitmoyer v. WCAB (Mountain Country Meats), 186 A.3d 947 (Pa. 2018)

Under Section 319 of the Act, the employer enjoys broad subrogation rights with regard to its payments of compensation relative to the claimant's third-party recovery. In cases where workers' compensation liability continues after the third-party recovery, the employer is entitled to "anticipatory" subrogation, enjoying an ongoing credit or "grace period" so that it can reduce its workers' compensation payments to account for

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any "balance of recovery" that exists after the lien is deducted from the total third-party recovery. Under the common wisdom, and past custom and practice, this credit applied to employer's ongoing liability for medical treatment expenses, and employer would be free, during the grace period, from payment of such expenses.

In this new case, however, the Supreme Court held that "when a workers' compensation claimant has recovered proceeds from a third-party settlement (following repayment of compensation paid to date), the employer … is limited to drawing down against that recovery [taking the credit] only to the extent that future *disability* payments are payable to the claimant." Medical expenses, meanwhile, are to continue and employer is simply not entitled to anticipatory subrogation with regard to continued medical treatment expense liability.

The critical basis of this holding is that Section 319 refers to an employer's entitlement to anticipatory subrogation relative to "future installments of compensation." The Supreme Court agreed with claimant that the use of the word "installments" in the law necessarily demonstrated that anticipatory subrogation only applies to the regular weekly compensation disability checks which workers enjoy, and not to the by-their-nature random payments for medical treatment.

One of the employer's arguments was that denying subrogation would allow claimant to achieve a double recovery. However, the court replied, "regarding the potential ill of an employee making a 'double recovery' we observe that this would be impossible to know in the context of a settlement, where the amount of recovery is a lump sum that does not neatly or necessarily break down by category of damages."

The new *Whitmoyer* case seems "revisionist," as most of us in the community have been taking for granted for decades that the employer's credit applies to future medicals, and the challenge traditionally has been how to make the credit work.

The reader should, in any event, remember that the employer's lien at time of settlement or jury verdict does include accrued medical; it is simply for medical treatment liability in the future that no credit is allowed. One calculates the grace period as before, but concern exists only as to ongoing liability for weekly disability checks, not medical payments. As a corollary: in an open case, medical treatment expenses are to continue, as before, uninterrupted.

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