



News & Notes

A Message from Deputy Secretary, Scott Weiant

I would like to take a moment to recognize the efforts by many to keep the workers’ compensation system operating during the unprecedented COVID-19 situation. L&I leadership, staff, external stakeholders and the legal community are to be commended on their efforts and agility during this time. As we are all aware, in a very rapid period, the entire system

operation model shifted to a work from home methodology. The number of claimants, insurers, members of the legal community, and families that depend on this system have all reaped the benefits of your continued efforts. For this I say “Thank You.” My best to all of you and your families. Be safe!

A Message from Director, Marianne Saylor

As the leaves change colors, BWC is also changing to adapt to the new “normal.” You may have noticed the records request process has been completely integrated into WCAIS. All requests, including those utilizing a WCJ subpoena, can now be completed and returned via WCAIS. BWC is continuing to review all processes to adapt into electronic or online processes where possible. You can do your part by utilizing

online filings and email whenever possible. BWC continues to maintain a small, but dedicated, staff of essential workers who are ensuring that we continue to meet our statutory obligations. A special thank you goes out to those workers who have put themselves at higher risk to make sure that BWC is continuing to provide excellent customer service to our stakeholders.

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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.

- Marianne H. Saylor, Director – Bureau of Workers’ Compensation (BWC)
- Joseph DeRita, Director – Workers’ Compensation Office of Adjudication (WCOA)

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▼ Are You Requesting Your Records Through WCAIS?

Registered WCAIS users can now complete online records requests authorized by a Workers' Compensation Judge's subpoena! This enhances existing functionalities of requesting regular records, receiving request responses, viewing pending requests, and the ability to view, save and print request responses.

Most registered users have access to the Records Request Dashboard (found in the Quick Links of your regular WCAIS Dashboard). If you are not currently registered, do so today to get access to requesting records online and so much more 24/7.

This process is efficient, easy to use, and eco-friendly. For more information about the WCAIS Records Request Dashboard, [visit the bureau's announcement page](#).

But don't just take our word for it, here's what users have to say:

"WCAIS has come a long way since the system was finalized to full usage on September 9, 2013. I have been a huge fan since I started using the automation and integration system and am now an even bigger fan of the Records Request Dashboard and being able to obtain the requested bureau records electronically. I highly recommend this new process to all staff because not only is the process convenient, but you don't have to wait for your records via snail mail OR receive incomplete records via facsimile." - S. B., paralegal - defense law firm

"The WCAIS portal is so easy to use. I use it several times per day to submit and retrieve record requests

and results. The process is greatly improved by allowing everything to be uploaded to and downloaded from the website directly. Each request is issued a record request number, and the request status can be viewed simply by logging into the portal. I get an email notifying me when the request has been completed and results are available for download, and the results are available for several months. This new system is a big improvement and has improved the overall time it takes to get the information we need." - M. S., research assistant, employer

The online bureau document request portal is incredibly easy to use. It is much faster to request, and it has an even faster turnaround time for the request to be fulfilled. You don't have to worry if the fax "went through" to the bureau or worry if the fax "came through" back to you with the record response. It cuts down the time staff is spending requesting and waiting on the records. It also speeds up the case having the records immediately and knowing where the claim stands with the bureau. Just enter the claimant's name, upload an authorization, and you're done. - L. H., case status manager, claimant's firm

The ability to request records online and/or request mailed subpoenas be returned to you via WCAIS (by adding a note for this to your request's cover letter) are services available NOW. So, if you aren't already requesting records in this manner, get started today to see what everybody's talking about!

▼ Workplace Safety Committee Certification \$780 million and counting

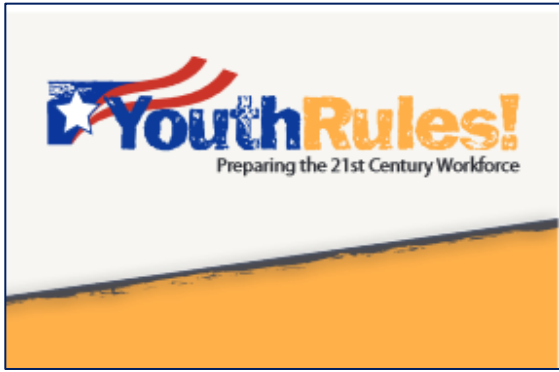
Employers who follow Pennsylvania's workplace safety committee requirements and regulations can apply for state certification and receive annual five percent discounts on workers' compensation insurance premiums. Application is made online, through the Bureau of Workers' Compensation, Health & Safety Division's HandS system. This has allowed the process to remain active throughout the COVID-19 pandemic.

Over the past six months, certification staff have responded to four times more customer service inquiries than this time last year, while continuing to review over 3,000 incoming certification renewal applications, and welcoming 141 new committees to the program with their initial certification. Approximately 10,000 more employees in Pennsylvania are now represented by certified safety

committees, for a total of 1,591,125 reported employees.

Certified workplace safety committees work to identify and eliminate workplace hazards, reducing injuries and claims. Fewer claims can reduce the employer's cost of workers' compensation insurance. A workplace safety committee not only improves the safety of your operations, but also adds to the bottom line and clearly shows employees that management cares about their well-being. When that's the case, everybody wins.

For more information on setting up a workplace safety committee for your business and to learn more about the program and requirements please [visit the PATHS website](#). You can reach us with questions at ra-li-bwc-safety@pa.gov.



YouthRules! is an initiative to promote positive and safe work experiences for teens by distributing information about young workers to youth, parents, employers and educators. Components of the initiative include a website, printed materials, outreach events, training seminars and partnering activities.

Every year, millions of teens work in part-time or summer jobs. Early work experiences can be rewarding for young workers – providing great opportunities for teens to learn important work skills. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

YouthRules! – an innovative approach to bring teens, parents, educators, employers, government, unions and advocacy groups together to ensure young workers have safe and rewarding work experiences.

Information about YouthRules! can be found at www.youthrules.dol.gov. For information about the laws administered by the Wage and Hour Division, call the toll-free helpline at 866-4USWAGE.

Kid's 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 to more than 900 students amounting to more than \$2.2 million in scholarship assistance. During the 2019-2020 academic year, 57 scholarships were awarded to students, totaling more than \$179,000. 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. For more details visit our website at www.kidschanceofpa.org.

"I have been a recipient of this scholarship for four years now and I am just as grateful, if not more, to receive it this time as I was the last three times. I will be getting my Bachelors degree in May, and I feel as though I must give some credit to Kids' Chance for that because without the scholarship awards they have given me over the years, I would definitely not be where I am right now which is a senior in college. I am eternally grateful and so is my mother. With the help of this scholarship, there was much less concern and stress about how I would afford my college education and my loans are much less than they would've been without the Kids' Chance scholarship.

So Kids' Chance, I do not take for granted that you have decided another year to help lessen the financial burden for me to continue my education. I am so appreciative to once again be receiving a scholarship from your organization."

**Shayana
Neumann University**

▼ Requester Must Notify Claimant of Request for Designation and IRE Appointment

The IRE process begins when the party representing the employer files a Request for Designation of a Physician to Perform an Impairment Rating Evaluation (RFD) in WCAIS. The electronic form requires the requestor to indicate the parties he/she will be notifying of the (RFD). WCAIS then generates a document with the RFD information. Requesters log into WCAIS, print the document out, and use it to serve the appropriate parties.

The bureau assigns an IRE physician and sends notification of the assignment to the parties involved. After receiving this notice, the IRE requester is responsible for setting up the employee's appointment with the designated physician.

After the requester establishes an appointment, they must log into WCAIS and enter the appointment details. This allows WCAIS to generate the required LIBC form used to notify the applicable parties specifying when, where, and with whom the appointment will take place. The requester is required to mail that form to the claimant to notify them of the appointment details.

Upon completion of the IRE report, the IRE physician will mail hard copies of the report to the parties. The IRE physician must also log into WCAIS, upload the report, and complete the required electronic form used to serve the bureau.

For further questions regarding this process and its flow via WCAIS please contact the Health Care Services Review Division at ra-li-bwc-hcsrd@pa.gov.

▼ A View from the Bench

American Builders Insurance Company v. Custom Installations Contracting Services, Inc. Department of Labor & Industry, et. al.

On May 29, 2020, the Third Circuit in Docket No. 19-3291 (807 Fed. Appx. 193) upheld a District Court's decision which dismissed and vacated a previous order granting a carrier's request to rescind a workers' compensation insurance policy based upon the insured employer's misrepresentations, which decision the carrier sought to use in a workers' compensation proceeding to terminate its liability to the injured worker and shift liability to the Uninsured Employers Guaranty Fund. The carrier had originally requested the policy's rescission from the District Court after it issued a Notice of Compensation Payable and while the workers' compensation proceeding was pending; the insured employer did not oppose the carrier's request for summary judgment on its declaratory judgment action, and the Uninsured Employers Guaranty Fund was not a party to the declaratory judgment action before the District Court had granted the carrier's motion for summary judgment.

In affirming the District Court's decision to vacate its previous order rescinding the carrier's policy, the Third Circuit approved of the District Court's reliance on *Winterberg v. Transportation Insurance Company*, 72 F.3d 318 (1995), where the Third Circuit held that the exclusivity provision at section 303 of the

Pennsylvania Workers' Compensation Act ("Act"), 77 P.S. section 481, bars a state-court action for bad faith and other common law and statutory claims against her employer's workers' compensation carrier. The Third Circuit noted that it continues to approve of its observation in *Winterberg* that courts "have been very cautious about permitting common law litigation in matters arguably connected with workers' compensation injuries." 72 F.3d at 322. Additionally, the Third Circuit noted that the Pennsylvania Supreme Court's has admonished in *Kuney v. PMA Insurance Company*, 578 A.2d 1285 (1990) that the Act was "designed and intended to establish exclusive jurisdiction, practice and procedure in all matters pertaining to such subject matter", *id.* at 1287 (citations omitted), and that "[w]hen the allegations of a claim have as their ultimate basis an injury compensable under the [Act], the claim must be considered within the framework of the statute.", *id.*

Dickerson v. WCAB, No. 1218 C.D. 2019 (December 6, 2019)

The Commonwealth Court affirmed the decision of the WCAB, affirming the WCJ who found that a Claim Petition filed more than three years after the date of injury was barred by the Section 315 Statute of Repose, and that the payment of a medical bill did not toll the filing period. In this factually specific case, the claimant was in a motor vehicle accident on

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A View from the Bench

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May 15, 2014. On June 4, 2014, the employer issued a Medical-Only Notice of Temporary Compensation Payable. On July 31, 2014, it issued a Notice Stopping the Medical-Only Notice of Temporary Compensation Payable, along with a Notice of Workers' Compensation Denial. On Aug. 12, 2014, the employer paid a medical bill for treatment rendered July 24, 2014, which was during the period of effectiveness of the Medical Only Notice of Temporary Compensation Payable. The claimant then filed a Claim Petition June 5, 2017, more than three years after the date of alleged injury. The employer raised the defense that the Claim Petition was time barred under the Section 315 Statute of Repose. The claimant argued that the Aug. 12, 2014 payment of the medical bills constituted a payment in lieu of compensation, which extended the filing period as in Harley Davidson, Inc. v. WCAB (Emig), 829 A.2d 1247 (Pa. Cmwlth. 2003). The employer argued that based on Sloane v. WCAB (Children's Hospital of Philadelphia), 124 A.3d 778, 785 (Pa. Cmwlth. 2015), there was no acceptance of disability and the payment was for services rendered before the Medical Only Notice of Temporary Compensation Payable was stopped. The Commonwealth Court relied on Sloane, and discussed the meaning of "payment in lieu of compensation," under Schreffler v. Workers' Compensation Appeal Board (Kocher Coal Company), 788 A.2d 963, 971 (Pa. 2002). For payments to be "in lieu of compensation," they must be (1) work related, and (2) made with the intent that they be in lieu of compensation, i.e. with the intent to compensate for a work injury. In quoting Sloane, the court stated that the employer in the instant case "made its intent expressly clear that it would pay claimant's medical expenses but accepted no liability for wage-loss benefits." It noted that no disability benefits were ever paid, and that the medical bill paid in August of 2014 was for treatment rendered while the Medical Only Notice of Temporary Compensation Payable was still in effect. The court held that the claimant failed to show that the payment of the medical expense qualified as payments in lieu of compensation under Schreffler. It thus held that the claimant was not entitled to toll the statute of repose under Section 315 requiring that her Claim Petition be filed within three years of the date of injury.

Arlet v. Workers' Comp. Appeal Bd., ___ A.3d ___ WL 4342288 (Pa. Commw. Ct. July 29, 2020)

The claimant was employed as a shipwright by Flagship Niagara League, a nonprofit in charge of the

ship Niagara docked at the Erie Maritime Museum. His job was essentially a carpenter, performing duties only for the Brig Niagara while the ship was in winter drydock. Acadia Insurance Company provided a commercial hull policy providing coverage for maritime issues through the Jones' Act. Until three days before this injury, the employer also had workers' compensation coverage through SWIF. After claimant slipped and fell on an icy sidewalk, Acadia investigated the claim and paid "Maintenance & Cure" benefits (\$50 per day for 92 days plus medical expenses of \$42,233.36) under the maritime policy. Two years later claimant filed a workers' compensation claim petition seeking total disability benefits. When the workers' compensation coverage lapse was discovered, UEGF was joined.

The WCJ found that claimant was a "seaman" as claimant's job duties were "exclusively to contribute to the functioning of the vessel". Claimant properly received benefits through the Jones' Act. Since Jones' Act benefits and workers' compensation benefits are mutually exclusive remedies, the claim was denied. Claimant appealed and the WCAB found that claimant was land-based, not a seaman, and remanded for evidence on the merits.

The WCJ then awarded a closed period of total disability, but deducted the benefits received from Acadia to prevent double recovery. Claimant was awarded an additional \$5,046.71 and no medical expenses (since these bills had already been paid), to be paid by the employer (or, if necessary, the UEGF). Acadia's claim for subrogation for the monies it paid was denied since the evidence demonstrated that Acadia had investigated the claim and had themselves concluded that they were responsible for payment of these benefits. Claimant and UEGF both appealed to the WCAB. The WCAB said Acadia correctly paid as claimant was a "crewmember" under its policy, and therefore it could not assert subrogation as it was responsible. It also found claimant was entitled to workers' compensation wage loss benefits. Claimant appealed, and Flagship intervened; UEGF did not appeal.

On appeal to the Commonwealth Court, claimant argued that WCAB first found claimant was not a seaman precluded from recovery under the Workers' Compensation Act and then found Acadia was obligated to pay because claimant was a crewmember and entitled to the Jones' Act maritime benefits. The court did a long discussion of "seaman" and "crewmember" and ultimately found the terms to

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A View from the Bench

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be the same and found WCAB erred; the Acts were exclusive, and claimant was not entitled to both remedies. The court denied subrogation to Arcadia because an insurer cannot subrogate against its own insured. Recovery is permitted only against a third party. Here, there was no third party from whom to recover so subrogation was not allowed.

***Dana Holding Corp. v. WCAB (Smuck)*, 232 A.3d 629 (Pa., filed June 16, 2020), affirming, 195 A.3d 635 (Pa. Commw. 2018).**

The Supreme Court, per the Chief Justice, affirmed, in all critical aspects, the Commonwealth Court's 2018 decision in *Dana Holding Corp. v. WCAB (Smuck)*. The court, specifically, confirmed that the *Protz* decision applies to all cases currently pending on appeal at the time *Protz* was decided and where IRE constitutionality was appropriately raised. The court expressly avoided employer's desire that it delve more deeply into case situations and address retroactivity (or lack thereof) relative to other cases "in which specific IRE determinations had been *fully litigated*" prior to the issuance of *Protz*.

The court, in the case at hand, thus allowed reinstatement back to the date of the now-defunct IRE. This was so because the case, ever since the IRE, had always been in litigation.

The court, notably, did not seem impressed by the Commonwealth Court concept that it was not applying *Protz* retroactively in the first place. The court, indeed, undertook a long and highly critical analysis of its own precedents on retroactivity and found (as noted above) that *Protz* applied to cases on appeal where constitutionality had been preserved.

A notable passage in its ultimate resolution is the court's characterization of the employer's rhetorical disregard for claimant's rights as "parsimonious." A claimant, the court declared, has the right to be free of having his rights defined without improper delegation. Specifically, "Claimant had a right to be free from an unconstitutional delegation of legislative power affecting his substantive rights, which will be vindicated here."

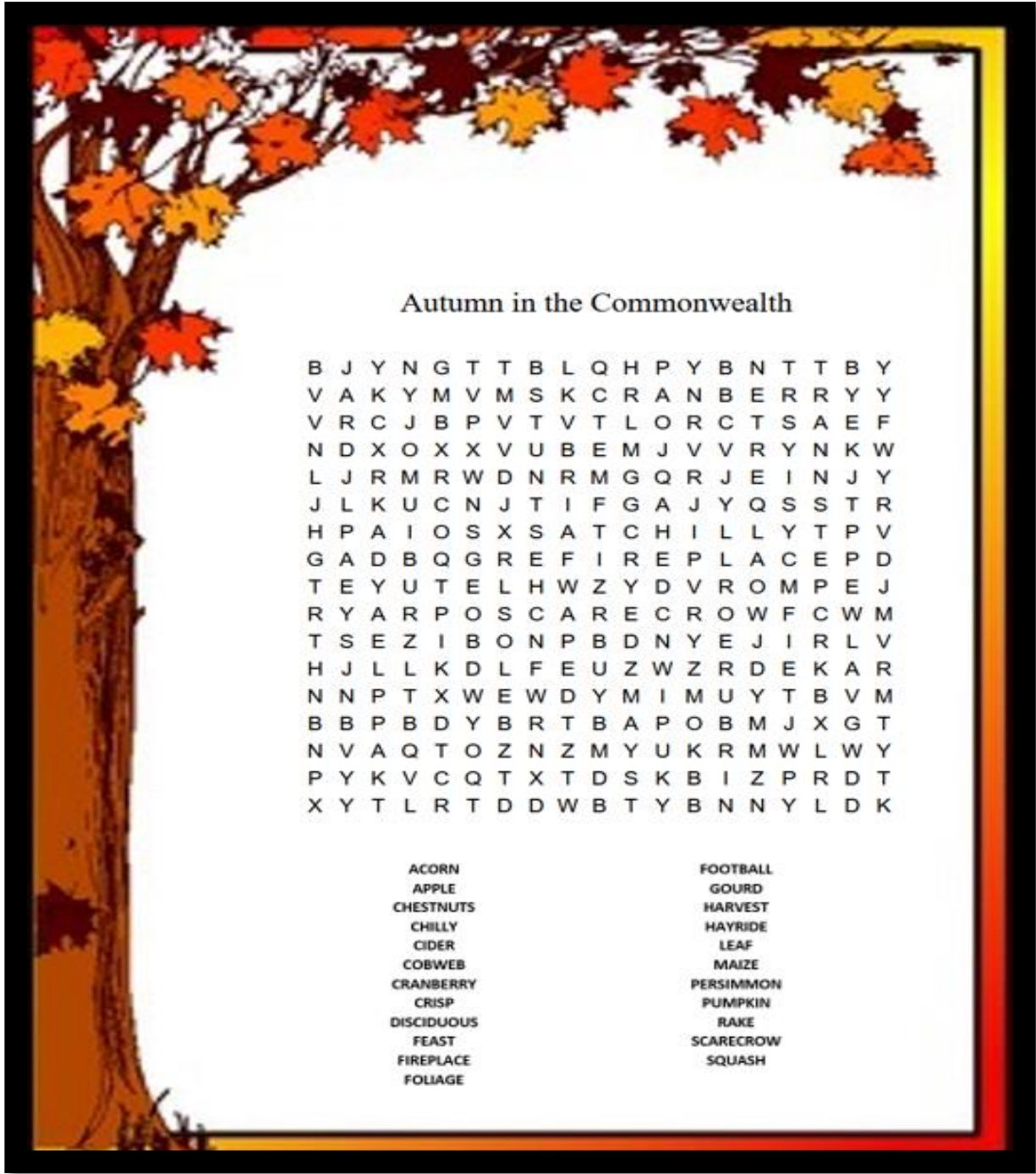
The court, meanwhile, rejected employer's argument that retroactive application would violate its "due course of law" constitutional rights.

***White v. WCAB (City of Philadelphia)*, ___ A.3d ___, 2020 WL 4743532 (Pa. Commw., en banc, filed August 17, 2020).**

In *White v. WCAB (City of Philadelphia)*, the Commonwealth Court confirmed that, in a post-*Protz* case, where the worker is filing to reinstate to TTD, the date of reinstatement is the date of filing of the petition. The court explained in detail the difference between the situation in an earlier case, *Whitfield* (2018) (which establishes this general rule), and the situation in *Dana Holding Corp.* (2020). Of course, in *that case*, both the Commonwealth Court and the Supreme Court allowed reinstatement back to the date of the now-defunct IRE. That reinstatement followed because the case had always been in litigation, ever since the IRE.

***Rose Corporation v. WCAB (Espada)*, ___ A.3d ___, 2020 WL 4743537 (Pa. Cmwlth., filed August 17, 2020).**

In *Rose Corporation v. WCAB (Espada)*, the Commonwealth Court held that an IRE performed in 2013 under the AMA Guides, Sixth Edition, to render a rating less than 35%, could not support a modification of benefits under Act 111 of 2018. The court reasoned that because the Supreme Court declared Section 306(a.2) unconstitutional in its entirety, no law permitted employer to utilize an IRE process until Act 111 took effect on Oct. 24, 2018. *Protz v. WCAB (Derry Area School District)*, 161 A.3d 827 (Pa. 2017). The court determined there is no specific provision in Act 111 that explicitly or implicitly provides for an IRE performed prior to Act 111's enactment to be validated afterward. Moreover, Act 111 is substantive, not procedural, in nature. Thus, under common law and constitutional concepts, no retroactivity applied. The court held employer was required to obtain a new IRE to change claimant's status from total disability to partial disability. It noted that the credit provisions of Act 111 indicate (1) employer could have a new IRE at the current time, and claimant need not collect another 104 weeks of TTD, starting in 2018; and (2) if employer were to be successful, it would be entitled to a credit off the 500 weeks for the period of weeks it paid from the time of the initial IRE in 2013 to the date the board reinstated claimant's total disability benefits based on *Protz* and *Whitfield v. WCAB (Tenet Health System Hahnemann LLC)*, 188 A.3d 599 (Pa. Cmwlth. 2018).



Autumn in the Commonwealth

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