



News & Notes



Diversity, Equity, Inclusion, & Accessibility (DEIA) Matters at the Bureau of Workers’ Compensation

In January of 2021, the bureau established its’ DEIA Team. Employees across the commonwealth had begun some grassroots initiatives designed to make their workplaces more diverse, equitable, inclusive, and human-centered. Here at the bureau, we wanted to engage our employees because we recognized the need to support and value each other and to create a welcoming and cohesive workplace.

Since March of 2021, the team has presented bi-monthly Table Talks to raise awareness and create discussion of DEIA/Human-centeredness issues. In addition, each month the team publishes the IDEA Playbook to provide information and resources on a wide variety of DEIA issues.

Rachel Werner, Chair of the DEIA team, has seen changes since beginning the program. “It has been exciting to see members of our team come together who may not otherwise relate with each other in the workplace,” Werner said. “We have seen an increase in participation and look forward to growing more from the roots that are taking hold.”

During the upcoming fourth quarter, the team will focus on National Bullying Prevention Month, Native American heritage, and Disability Awareness. If you are interested in sharing resources on these topics or volunteering as a guest facilitator at one of our bureau dialogues, please contact our team at RA-LIBWC-DEI@pa.gov.

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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 Saylor, Director – Bureau of Workers’ Compensation (BWC)
- Joseph DeRita, Director – Workers’ Compensation Office of Adjudication (WCOA)
- Alfonso Frioni Jr., Chairman - Workers’ Compensation Appeal Board (WCAB)

▼ Pay Online to Save Time!



The Bureau of Workers' Compensation is pleased to announce that self-insurance application fees can now be paid electronically via ACH or EFT.

Upon submission of your self-insurance application, a detailed confirmation message will appear. On the

following business day email communications will be sent providing specific instructions for how to make an online payment.

Please reach out to the bureau if you have any questions or concerns at ra-libwc-si@pa.gov.

▼ PA Training for Health & Safety (PATHS) Your No-Fee Safety Training Resource

The Pennsylvania Training for Health and Safety (PATHS) program makes safety resources and training accessible to individuals everywhere. So far this year, PATHS has conducted 585 training sessions for more than 26,160 individuals in 48 states and 14 countries. Safety training on 219 topics is available for employers, and most are free of charge. These trainings apply to health & safety

concerns within the workplace, including substance use disorder and opioid abuse-related topics. Training is aimed at reducing business costs, reducing injuries, and saving lives in Pennsylvania.

Questions?

Email PATHS at ra-li-bwc-paths@pa.gov or visit our website at www.dli.pa.gov/PATHS.

▼ Workplace Safety Committee Certification Nearly \$865 million and counting

More employers are discovering that safety really does pay! Employers who follow Pennsylvania's workplace safety committee requirements and regulations can apply for state certification and receive an annual five percent discount on workers' compensation insurance premiums. Apply through the Pennsylvania Department of Labor & Industry, Bureau of Workers' Compensation, Health & Safety Division.

The basic committee requirements for certification include that a minimum of two employee representatives and two employer representatives meet monthly and that the committee be in operation and in compliance with requirements for at least six months prior to submitting an initial application.

Almost 13,000 workplace safety committees certified in Pennsylvania and representing over 1.6 million employees have accumulated over \$865 million in total savings from the five percent workers' compensation insurance premium.

In addition to the five percent workers' compensation insurance premium discount, certified workplace safety committees help reduce the employer's cost of workers' compensation insurance by identifying workplace hazards, reducing injuries, and reducing claims.

In an increasingly competitive business climate, any opportunity to save money is welcomed. 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, visit [Workplace Safety Committee Certification Resources](#).

Questions? Email us at ra-li-bwc-safety@pa.gov.

▼ OSHA and Pennsylvania Alliance for Workplace Safety

The Pennsylvania Department of Labor & Industry's Bureau of Workers' Compensation, Indiana University of Pennsylvania, and OSHA formed an alliance to promote safety information and training to workplaces.

In support of this alliance, the PATHS program offered Warehouse Safety training webinars in

response to OSHA's recent announcement of a regional initiative in Pennsylvania and the Mid-Atlantic region to protect workers and reduce injuries and illnesses in the warehousing, storage, and distribution yards' industries.

▼ 22nd Annual PA Workers' Compensation Conference



Hershey Lodge & Convention Center
Hershey | PA
June 1-2, 2023
Stay tuned for further details!

▼ YouthRules!

The *YouthRules!* initiative promotes positive and safe work experiences for teens by providing information about protections for young workers to youth, parents, employers, and educators. Through the *YouthRules!* initiative, the U.S. Department of Labor and its partners promote positive and safe work experiences that help prepare young workers in the 21st Century workforce.

From the [YouthRules! website](#) you can quickly access information about federal and [state](#) labor laws that apply to young workers. The website educates teens on the rules, and provides information for parents, educators, and employers.

As part of the *YouthRules!* initiative, the U.S. Department of Labor and its partners develop and distribute informational materials, provide training

on federal and state rules governing young workers, increase awareness through public service announcements, and develop other tools designed to increase compliance with federal and state laws.

The Wage and Hour Division (WHD) is committed to providing employers with the tools they need to operate in compliance with the variety of labor laws enforced by the division. WHD offers several useful compliance resources intended to provide employers with readily accessible, easy-to-understand information relevant to both their rights and to their responsibilities under the law. From our interactive E-laws advisor to a complete library of free, downloadable workplace posters, this site offers employers critical information to guide them toward operating their businesses in full compliance with federal labor regulations. [View available resources for employers.](#)



Entry of Appearance, List of Attorneys, Manage Matter Access, Healthcare Services (*including Impairment Rating Evaluation, Med Fee Review and Utilization Review*) and Change Profile will become digitally transformed November 2022.

Screens and process flows will have a different

color scheme, look, and feel, while content remains the same. Please watch alerts and read our email blasts for more information.

Workers' Compensation Office of Adjudication becomes digitally transformed February 2023!

▼ Kids' Chance of Pennsylvania

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.

Since its inception in 1997, Kids' Chance of PA has awarded over 1,000 scholarship grants to eligible students amounting to more than \$2.5 million in tuition assistance. During the 2021-2022 academic year, we awarded \$120,250 in scholarships to 40 students. Through our involvement with the PHEAA/PATH program, in many cases we have been able to double our awards to qualified students,

further relieving their financial burden! Seventeen of our recipients received an additional \$46,250 in PATH grants.

Kids' Chance of Pennsylvania scholarships are made possible by the generous contributions of our scholar sponsors, corporate and community partners, and donors. Donations can be made on-line, by check, by making us your charity of choice using Amazon Smile or through corporate donation programs like United Way or SECA.

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.



Automation of Trading Partner Packet Process Coming Soon!

Say goodbye to the outdated paper process! We are excited to begin introducing the automation of the Trading Partner process into WCAIS. Soon, company administrators and trading partner contacts can log in to WCAIS to submit your annual application renewal or changes as they occur.

Additional benefits to going paperless include:

- Previously entered data will be saved and pre-populated, so you don't have to maintain lists outside the system.
- Adding new Claim Administrators is as easy as entering the FEIN. The system will populate the rest. Additionally, you will know instantly if the company isn't valid in Pennsylvania.
- We will send annual reminder notifications for your renewal to your admin users and contacts identified within your application.
- Once approved by BWC, a transcript of entered information will be available for you to retain for your files.

Keep an eye out for this soon-to-come WCAIS access. We will roll out the first phase of this work-in-progress in January. We will continue to make these screens as user-friendly as possible, so additional improvements are yet to come!

We added new EDI edits to the claimant's information.

As of Sept. 30th, 2022, the claimant's last name can no longer contain numbers or invalid characters. Social Security numbers can no longer be updated using a 02-change transaction. Details about these edits are available on the bureau's [website](#).

If any questions regarding SSNs or names should arise, please direct them to EDI staff via a Customer Service Ticket in WCAIS.

Important Notes to Remember when Uploading Claim Forms to WCAIS:

On the Actions Tab, selecting the document type that matches the form you are uploading is important to keep the Claim History Grid accurate.

If you do not see the form you are uploading in the Document Type dropdown list, you must upload your form to the Documents and Correspondence Tab of the claim. The form information, including its name or form number, for any miscellaneous upload, can be indicated in the free-form text box on the screen.

When uploading a form to the Documents and Correspondence Tab, after receiving a successful upload message, you must hit the submit button on the screen to complete the upload.

You should not mail claim forms to the bureau. Instead, upload them directly to the claim. Uploading documents will expedite processing, provide a same day filing date, reduce postage, and provide instant access to all parties.

Remember, WCAIS's information is only as accurate as what is added. We appreciate your help with this ongoing effort!

Before you upload your Notification of Modification or Suspension (LIBC-751), remember:

This form cannot be used to stop temporary compensation per Section 121.17(c) of the PA Rules and Regulations.

An EDI transaction to accept indemnity in WCAIS (Compensable status) should be submitted before suspending or modifying a claim.

The form must be provided to the claimant and the bureau within *seven days of the suspension or modification effective date*.

Please be sure your form is:

- the most current version of the form (2/22)
- provided to both the claimant and the bureau
- complete; verification checkboxes both marked and form signed and dated
- Indicative of whether you are suspending or modifying the claim

*WCAIS has a screen for the LIBC-751 that will collect the required information and create the form, which must then be printed, signed, and uploaded to WCAIS. A copy of this form must be sent to the injured worker.

▼ Fall Safety Tips



It's that time of year again, pumpkin spice everything, Halloween decorations lining store shelves, leaves changing colors, and crisp morning air.

The fall also brings some hazards we need to be cautious about. But with the right fall safety tips, you can still enjoy everything you love about this time of year.

Living in Pennsylvania means we get to enjoy four beautiful seasons, each with their own amazing features. But it's important to understand how to stay safe in specific weather conditions.

These essential fall safety tips will help make sure you enjoy the season to the fullest and avoid unnecessary injuries or accidents.

Be Cautious of Back-to-School Traffic

School is back in full swing, which means that there's more traffic on the roads in the morning and late afternoon. You might have noticed it takes a little longer to get to work now.

Be alert when you're crossing the street or driving in a school zone. People can be absent minded in the morning as they rush around trying to get their kids to school and make it to work on time.

Don't be Fooled by Falling Leaves

The fall is a gorgeous time of year, those green leaves turn to wonderful shades of brown, yellow, red, and orange and fall to the ground in those piles we love to jump in.

But falling leaves can pose a hazard, no matter if you're driving or walking. Leaves can be very slippery, which is a big trigger for autumn slip and falls.

Jumping in piles of leaves can also be dangerous and lead to injury if you're not cautious. You never know what kind of garbage or debris ended up in

that pile you just raked. This is especially important if you live on a busy street.

Get Your Fire Safety up to Speed

This time of year, when the temperature starts dropping, means we're putting away our bathing suits and getting our boots out. It also means we're starting to run our heating equipment.

Your furnace and heaters have been sitting untouched all summer long. Turning them on at the first sign of chilly air without properly inspecting and servicing them can be a big fire hazard. Be sure to get an inspection of your heating systems and anything else that hasn't been used in a while.

If you have a wood burning fireplace, make sure you follow the proper safety procedures when using it. Keep the screen shut and make sure that the flu is clean, open, and free from debris.

Fall is also a time when a lot of people like to break out their candle collection and get cozy on a chilly evening. However, misuse of candles is one of the biggest causes of house fires in Pennsylvania. Always make sure you blow out your candles before you leave a room and never leave open flame unattended.

Avoid Slip and Falls from the Rain

In the fall, we get a lot of rain. And rain can often cause surfaces to be slippery, especially when it's cold and takes the water longer to evaporate.

This is a recipe for harmful slip and falls that can leave you with serious injuries.

When you're outside, double check everything before you use it or walk on it. For example, if you need to clean out your gutters, examine the ladder before you climb it. The rungs could be wet and slippery, causing a potential slip and fall.

Sidewalk grates are often slippery when wet, so take caution walking down the street. Walk with your hands free just in case you fall.

Be Prepared for Unexpected Cold Weather

It's fall in Pennsylvania, which means that the temperature could be hot one day and cold the next. In fact, it could drop at any minute.

Always be prepared if you're going out for the night, especially if you're going to be outdoors for any period of time. Make sure you have an extra

Fall Safety Tips

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jacket, scarf, or hat in case the temperature drops unexpectedly.

If you don't have an emergency car kit in your vehicle, now is a good time to make sure you have one in there before winter starts.

Wash Your Hands Constantly

While the fall brings back some of our favorite things, like pumpkin spice everything and NHL hockey, it also brings something we all hate, cold and flu season.

If you've recently recovered from a major injury, like a traumatic brain injury, one cold or flu could set your recovery process back.

Wash your hands frequently and use hand sanitizer if you can't wash them. Any time you touch a publicly used item, like a railing or a subway handle, make sure you lather up and avoid touching your face.

▼ A View from the Bench

On Aug. 9, 2022, the Commonwealth Court affirmed the Workers' Compensation Appeal Board's ("WCAB's) decision in ***Hi-Tech Flooring, Inc. v. WCAB (Santucci), 280 A.3d 1141***, that the totality of the circumstances did not support a finding that claimant Michael Santucci had voluntarily withdrawn from the workforce. The workers' compensation judge ("judge") below had found that claimant, a tile setter, was not fully recovered from his 2014 work-related right knee injury but that he had voluntarily withdrawn from the workforce by virtue of his acceptance of a union disability pension and Social Security Disability ("SSD") benefits and his admission that he has not looked for work since 2014. On appeal employer did not challenge the judge's denial of its termination petition.

Before the Commonwealth Court, employer maintained that claimant's admission that he was not looking for work coupled with the union pension documentation and SSD decision not referencing the right knee injury, showed that claimant had voluntarily removed himself from the workforce. It further argued that the Supreme Court's decision in *Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson)*, 669 A.2d 911 (Pa. 1995), supports employer's position that the WCAB's decision be reversed.

Make Sure Your Batteries are in Order

Test your batteries and replace them if necessary. Make sure you have backups on hand in case of power outages or other emergencies.

As we mentioned earlier, house fires are common in the fall because of the change in temperature and the fact that people are turning on their heaters after months of inactivity.

Make sure your smoke detectors, carbon monoxide detectors, and other important emergency devices are in working order and have fresh batteries.

Wear Something Reflective When Walking at Night

It's starting to get darker earlier, but that doesn't mean that the dog still doesn't need to be walked. At this time of year, it's starting to get dark before we even get home from work, which doesn't leave much time outside in the daylight.

Make sure you wear reflective clothing if you're out at night. You should also put reflective materials on your dog's collar or leash to make sure they're visible to people driving by.

In concluding that employer had not shown that claimant had voluntarily left the workforce, the court noted that the judge credited claimant's medical expert that he is unable to return to his pre-injury position. Also, contrary to employer's assertion, the SSD decision did consider and rely on claimant's work-related right knee injury, as well as his inability to perform his pre-injury job of tile setting and lack of transferrable skills, to conclude that claimant was totally disabled. With respect to the union pension, the court stated that claimant's receipt of a pension based on his disability from his trade does not show that he is forgoing all work.

Finally, the court rejected the applicability of *Henderson* to claimant's situation, as *Henderson* involved a claimant's receipt of a pension based on age and Social Security old-age benefits. In contrast, claimant's union and government benefits derive from his on-going work-related disability.

Mushow v. Doyle & Roth Manufacturing (WCAB), 279 A.3d 633 (Pa. Commw. 2022)

In *Mushow*, the Commonwealth Court affirmed the order of the Workers' Compensation Appeal Board (board) that affirmed the decision of the workers' compensation judge (WCJ) denying the claimant's Petition for Review of a Utilization Review Determination.

A View from the Bench

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By way of background, the claimant sustained a work injury in December of 2012, in the form of a right knee medical meniscus tear, which was accepted through a Notice of Compensation Payable. In June of 2019, the employer filed a request for a UR determination regarding treatment provided by the claimant's pain management physician, Dr. Griver, beginning June 2019 and ongoing. The request specifically sought review of the reasonableness and necessity of the prescriptions for OxyContin 60 mg twice a day and oxycodone 10 mg four times a day. On Aug. 15, 2019, the URO reviewer, Dr. Kaplan, rendered a determination that the use of opioids was in general reasonable and necessary, but recommended a specific tapering plan to reduce the claimant's opioid usage from its current level of 240 MED to a level within the CDC/Pennsylvania Guidelines of 90 MED or less. The claimant then filed a Petition to Review UR Determination, which was assigned to the WCJ. The WCJ credited Dr. Kaplan in full, discrediting Dr. Griver as to an alternate tapering plan. The claimant appealed to the board, which affirmed the WCJ. The claimant then petitioned for review by the Commonwealth Court.

In his arguments to the Commonwealth Court, the claimant asserted that the WCJ and board erred in crediting Dr. Kaplan's opinions over those of the claimant's treating providers. He asserted that Dr. Kaplan ignored certain statements of Dr. Griver. The court disagreed, noting that Dr. Kaplan spoke to Dr. Griver at length and documented their discussion about alternative treatment options for the claimant.

Claimant further argued that Dr. Kaplan's opinion must necessarily be rejected as incompetent, as he had not reviewed all of his past medical records and providers' reports. Claimant specifically asserted that Dr. Kaplan failed to speak to Dr. Nelson, who ruled out any surgical alternatives to treat the claimant's pain. The court stated that because the issue of Dr. Kaplan's competency was not raised before the WCJ or the board, the issue was waived. The court noted that even if the issue had not been waived, it would not have found that the claimant was entitled to relief based on a failure of Dr. Kaplan to speak with all providers or review all records, citing *Solomon v. WCAB (City of Philadelphia)*, 821 A.2d 215 (Pa. Commw. 2003). The court noted that based on *Solomon* a UR reviewer's failure to speak with a health care provider, or review an entire medical file, does not preclude the UR reviewer from making a determination regarding the reasonableness or necessity of the treatment at issue, nor does it

preclude a WCJ from crediting and relying on a UR report.

Claimant also argued that the WCJ and board "erred by accepting Dr. Kaplan's UR determination, which impermissibly speculated upon the need for care six months or more into the future." The court found that this issue was waived because the claimant did not raise it before the WCJ or in his appeal to the board.

Pro Se Appeal Untimely

In ***Payne v. Americold Logistics LLC, No. 1086 C.D. 2021, 2022 WL 2335524 (Pa. Commw. Ct. June 29, 2022)***, a pro se claimant petitioned for review of the Workers' Compensation Appeal Board's (WCAB) order dismissing his appeal from the workers' compensation judge (WCJ) decision that granted in part claimant's petition for workers' compensation benefits. The WCJ granted benefits for a closed period and granted employer's petition to permanent benefits. The sole issue before the court was whether the WCAB properly dismissed claimant's appeal as untimely. After review, the Commonwealth Court affirmed.

The court laid out the timeline. On Aug. 24, 2020, the WCJ rendered her decision granting claimant's claim petition for partial wage loss benefits from Jan. 19, 2018, through Feb. 12, 2018, and suspending them commencing Feb. 13, 2018. The WCJ further granted employer's termination petition as of Oct. 17, 2019. On Sept. 12, 2020, claimant submitted his appeal via the USPS to the WCJ at the Philadelphia Field Office. The envelope was postmarked Sept. 14, 2020. The appeal was stamped as received at the Philadelphia Field Office on Sept. 17, 2020. The Philadelphia Field Office forwarded the appeal to the WCAB for its consideration, and the WCAB date-stamped the appeal as received on Oct. 19, 2020. On Nov. 4, 2020, employer filed a motion to quash claimant's appeal with the WCAB. On Aug. 24, 2021, the WCAB dismissed claimant's appeal as not timely. Because claimant improperly mailed his appeal to the WCJ, instead of the WCAB, the WCAB did not receive claimant's appeal until Oct. 19, 2020. Claimant appealed to the Commonwealth Court but did not address his untimely appeal before the WCAB, only the merits of the appeal.

The commonwealth noted the rules for filing by mail and the clear language on the appeal form expressly stating: "An appeal will be considered filed within the 20-day period if it is mailed to the board (properly stamped and addressed) or is

A View from the Bench

Cont'd.

entered into the [WC] Automation and Integration System (WCAIS) no later than the twentieth day after notice of a WCJ's decision." Accordingly, the WCAB properly dismissed claimant's appeal as untimely. They further provided that even if claimant timely filed his appeal with the WCAB, he would not prevail on the issues presented. Claimant arguments merely wanted the WCAB and now the Commonwealth Court to reweigh the evidence, which they cannot do.

In *Hymms*, the Commonwealth Court affirmed the WCAB which upheld the judge's order granting a petition to seek a compromise & release. In so doing, the Commonwealth Court dismissed claimant's argument that a mutual mistake had occurred as to the dollar value of the settlement.

In January 2020, claimant filed a claim petition alleging a work-related hearing loss. Employer filed a timely answer denying the allegations. The parties proceeded through discovery, but ultimately came to a resolution for a lump sum of \$34,000 plus a year of open medical benefits.

In October 2020, the parties appeared before the WCJ to seek approval of the compromise & release agreement. Both counsel and the judge questioned claimant as to his understanding of the agreement and its terms. Specifically, the judge informed claimant that once she approved it, claimant "would not be able to come back to worker's compensation for any money relating to this injury" and that "if at some time in the future you believe you settled for too little money, it is still over when [I] approve it." After hearing claimant's testimony that he understood the full legal significance of his actions and the effects of the agreement on his rights, the judge granted the C&R petition and circulated an order approving the agreement.

Claimant appealed to the board contending that the parties made a mutual mistake resulting in an incorrect lump sum amount. Claimant argued that employer was in "total agreement" with the claimant's specialist's hearing loss percentages, and that based upon the formula contained in Section 306(c)(8)(ii) of the Act, the settlement amount was incorrectly calculated. Claimant sought to remand the matter to the judge, seeking a re-calculation which would increase the settlement amount by approximately \$2,000. Claimant's appeal explicitly denied that the alleged error was due to "fraud, deception, duress or any other type of similar misbehavior." Employer argued that no such "total agreement" existed, and that there was no evidence of record as to a hearing loss percentage. Additionally, employer contended

that the only evidence of record was the C&R agreement and claimant's clear testimony that he understood its terms and conditions.

The court agreed with the employer. In undertaking a robust analysis of the case law on the subject, the court explained that in order to invalidate a C & R agreement on the basis of mutual mistake, the party seeking to set aside the agreement must present "clear, precise, and indubitable" proof that "both parties are mistaken as to a present, material fact that existed at the time the agreement was executed." In this case, claimant failed to sustain his burden. The court pointed out that the C&R agreement did not establish that the lump sum would be based on a formula or a percentage impairment and, more importantly, the claimant clearly testified that he understood the terms of the agreement and its finality, once approved.

Finally, it is worth mentioning that claimant raised the argument of unilateral mistake, but not until he reached the Commonwealth Court level. Regardless, although the court quickly deemed that the argument had been waived, it did supplement its decision with a footnote indicating that the court would likely find this to be meritless based upon the lack of evidence of record.

Pocono Mountain School Dist. v. Kojeszewski (WCAB), No. 1002 C.D. 2021, filed 4.21.2022, reported July 7, 2022

The court in this matter denied the employer's appeal and upheld the granting of review and reinstatement petitions and denial of a termination petition.

In prior litigation, a WCJ granted the claim petition, rejecting the opinion of defendant's expert, Dr. Culp. That WCJ found that the claimant's work injuries were left wrist and elbow strains, sprains, and contusions, and left post-traumatic carpal tunnel syndrome.

The present review and reinstatement petitions sought to amend the work injuries to include left brachial plexopathy and to reinstate wage loss benefits, due to the resulting disability from that diagnosis. The termination petition was filed based on the opinion of defendant's expert, who opined that claimant had recovered from the injuries recognized in the first WCJ's decision.

Employer's first basis of appeal was under the doctrine of *res judicata*. Employer argued that the WCJ in the first round of litigation (when the claim

A View from the Bench

Cont'd.

petition was granted) rejected the opinion of Dr. Culp that claimant's symptoms were the result of a left ulnar nerve injury. According to employer, the WCJ in the present litigation erred by making a finding inconsistent with the prior WCJ's findings, i.e., crediting the opinion of claimant's expert that claimant sustained a left ulnar nerve injury, when the prior judge had rejected Dr. Culp's contention that the symptoms were the result of an ulnar nerve injury.

The court rejected this argument because Dr. Culp's opinion in the first litigation was that claimant had a *congenital* ulnar nerve condition, not that there was a work-related ulnar nerve *injury*. Moreover, the first WCJ rejected specifically the testimony of Dr. Culp that claimant only sustained wrist and elbow contusions. Thus, there was no indication that the same issues of the ulnar nerve injury were litigated or were central to that prior litigation, making *res judicata* inapplicable to that issue.

Employer next argued that it was error for the termination petition to be denied, given that the WCJ found claimant to have recovered from the recognized work injury of left wrist and elbow strain and sprain contusion and left post-traumatic carpal tunnel syndrome. The court rejected the argument, because the WCJ also added left brachial plexopathy to the accepted injuries. The court reasoned that a partial grant of termination is improper, as termination requires *all* disability to cease, and claimant still had disability from the added injury of left brachial plexopathy.

Ralph Martin Construction v. Castaneda-Escobar (WCAB), 280 A.3d 1089 (Pa. Commw. 2022)

In *Ralph Martin Construction v. Castaneda-Escobar (WCAB)*, the Commonwealth Court held that the Workers' Compensation Act did not require employer to pay claimant for home modifications that were never done or to contribute toward the cost a new home purchased rather than making modifications to the existing home. In this fact-specific case, claimant was rendered paraplegic in 2010 after falling off a roof. In 2013, a consultant retained by employer projected *modifications* to the two-story home in which claimant was residing would cost \$119,722.21. The modifications were never performed. In 2018, claimant purchased a new home for \$230,000. The new home generally accommodated his needs, although some modifications were required, and employer reimbursed claimant for \$5,905.04 spent to make those modifications. The litigation commenced

when employer filed a petition to review medical treatment and/or billing, asserting that the new home purchase was not a reimbursable expense under Section 306(f.1)(1)(ii) of the Act. The WCJ agreed with employer and held it was not liable to reimburse claimant for the new home purchase or for the projected cost to modify his prior residence. The WCJ did, however, hold employer liable for closing costs incurred, reasoning that the new home purchase relieved employer of the obligation to modify the prior residence. Both parties appealed, and the WCAB ordered employer to pay claimant the projected cost of modification to the prior residence, minus a credit for the \$5,905.04 it had paid for the modification to the new home. The WCAB disallowed the closing costs. Employer sought review in Commonwealth Court, asserting it was not responsible for home modifications that were never done. At the outset, the court noted Section 306(f.1)(1)(ii) of the Act requires employers to pay for "orthopedic appliances" and that term has been construed to cover the acquisition of vehicles and the construction of home modifications where necessary to allow the claimant to use the orthopedic appliances such as a wheelchair. The court noted further that the act did not authorize windfalls to claimants; therefore, the particular circumstances must be considered in each case in determining an employer's obligations. In this case, the court agreed with employer, noting claimant failed to demonstrate that the purchase of the new home was necessary to facilitate the use of his wheelchair or otherwise essential to his medical treatment. Significantly, claimant did not testify and there was evidence he purchased the new home after receiving third-party settlements totaling at least \$6 million. If claimant had not been willing, or had not been able, to move from his old home, employer would have been responsible for modifications to that home. Noting claimant did not appeal the WCAB's disallowance of the closing costs, the court declined to order employer to reimburse claimant for those costs. Finally, the court disallowed claimant's request for litigation costs because claimant had not prevailed on any disputed issue. The takeaway from this fact-specific case is employers are liable for home modifications where necessary to facilitate the use of orthopedic appliances, including wheelchairs. The extent of liability depends on the particular circumstances, and an analysis must be undertaken to weigh the remedial purposes of the act against the need to avoid windfalls to claimants.

Skay v. Borjeson & Maizel, LLC

This Commonwealth Court decision involves the denial of a penalty petition for failure to pay medical expenses found to be reasonable and

A View from the Bench

Cont'd.

necessary by two separate utilization review organizations. Claimant was injured on Dec. 18, 2009. By May of 2013, the injury was expanded to include status post fusion of L5-S1, bilateral joint disease with sciatic joint pain and reflex sympathetic dystrophy of the left lower extremity. Other conditions alleged were not added to the injury description. In the years 2015 and 2017, the treatment of Dr. Aradillas-Lopez was found to be reasonable and necessary by utilization review organizations. On Nov. 12, 2019, claimant filed a penalty petition alleging employer failed to pay for medical treatment found to be reasonable by two prior utilization review organizations. Claimant submitted the two prior utilization review determinations as evidence in the penalty. Employer submitted medical expert opinions that the treatment was not related to the work injuries. The WCJ denied the penalty petition. The board affirmed the denial and noted claimant did not present evidence of a causal relationship of the medical treatment to the work injury. Claimant argued to the Commonwealth Court that the WCJ erred as a matter of law in denying the penalty because the prior utilization review determinations were not appealed. The Commonwealth Court found that the prior utilization review determinations only decide reasonableness and necessity and do not determine whether the treatment in question is related to the work injury. The Commonwealth Court upheld the denial of the penalty petition.

In Wolfe v. Martellas Pharmacy (WCAB), No. 432 C.D. 2021, 2022 WL 3868057 (Pa. Commw. Ct. Aug. 31, 2022), the Commonwealth Court upheld the WCAB, which reversed the decision of the WCJ denying a termination petition and reducing the amount of unreasonable contest attorney's fees.

Claimant sustained a work-related injury on June 10, 2017, when a 6-foot metal gate fell and struck her on the top of her head. Employer initially recognized her injury, described as a skull contusion, by way of a notice of temporary compensation payable (NTCP). Employer did not issue a notice stopping temporary compensation (NSTC) but issued a medical only notice of compensation payable (MO-NCP) on Sept. 8, 2017. At that time, claimant stopped receiving indemnity benefits. Claimant filed reinstatement and penalty petitions, asserting that employer's failure to pay indemnity benefits on an "open" notice of compensation payable (NCP) and failure to pay for medical treatment related to the work injury violated the act. Claimant requested an assessment of unreasonable contest attorney's fees. Employer

filed a termination petition alleging claimant had fully recovered from the work injury as of Aug. 10, 2017.

The WCJ rejected claimant's legal argument that the NTCP converted to an open NCP, due to employer's failure to issue an NSTC. The WCJ concluded that employer's MO-NCP properly stopped the NTCP, as authorized by Section 121.17 of the Board's Regulations. The judge acknowledged that the act's provisions set forth that a specific notice was to be sent to the claimant advising of the stoppage of temporary compensation. However, WCJ held that until a court invalidated the regulation, the WCJ would not punish employer for following the regulation. The WCJ found that claimant suffered a work-related skull contusion and concussion and that she was disabled only through Aug. 10, 2017, based on the credited opinions of employer's medical expert. Although the WCJ credited employer's medical expert's opinions, the WCJ found them to be legally insufficient to support a finding a full recovery, as those opinions pre-dated the issuance of the MO-NCP. The WCJ reasoned that employer was burdened to show that the employee's disability had changed after the date of the agreement or NCP. Accordingly, the WCJ denied the termination petition. The WCJ also granted claimant's request for unreasonable contest attorney's fees. Although employer had prevailed in large part, the WCJ found that the termination petition could not prevail as a matter of law. Employer was also penalized for failing to pay for work-related medical expenses, even though it had issued an MO-NCP.

Both parties appealed to the board. Claimant again argued that because the NTCP was never properly revoked, it converted to an NCP, and claimant was entitled to ongoing benefits under that open NCP. Employer disputed the WCJ's denial of the termination petition and award of unreasonable contest attorney's fees.

The board agreed with both claimant and employer in part. The board did not agree that an NSTC was not required. However, the board found that a penalty should be tied to avoidable, wrongful conduct, and the imposition of a penalty is within the WCJ's discretion. The WCJ found none of these factors and exercised discretion to award no penalty. Accordingly, the board determined there was no need for appellate correction of the WCJ's order. The board found that the WCJ erred in denying the termination petition. The court cited to *City of Philadelphia v. WCAB (Butler)*, 24 A.3d 1120 (Pa. Commw. 2011), appeal denied, 37 A.3d 1197 (Pa. 2012) to support this position. *Butler* held that

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where the employer does not seek to disavow the injury or repudiate the NCP, termination may be granted on a showing of a full recovery even if the date of recovery proceeds the filing of an NCP. Accordingly, the board reversed the WCJ's denial of the termination petition, reduced the award of counsel fees for unreasonable contest, and affirmed the remainder of the WCJ's decision.

Claimant appealed to the Commonwealth Court and asserted that the board erred in determining that the MO-NCP was the controlling document because employer's failure to issue an NSTC resulted in the NTCP converting to an NCP by operation of law. Claimant further asserts and that the board erred in concluding that employer met its burden of proof on the termination petition based on Butler.

The Commonwealth Court cited the recent decision in *Raymour & Flanigan v. WCAB*, 264 A.3d 817 (Pa. Commw. 2021), petition for allowance of appeal

denied (Pa., No. 388 EAL 2021, filed June 27, 2022), in which the court held that an employer may stop the payment of temporary compensation under an NTCP by issuing only an MO-NCP. In *Raymour and Flanigan*, the court reasoned that where an MO-NCP is issued, the NSTC and/or NCD contained misstatements of the law, would cause confusion and misinformation to the claimant regarding his or her next steps, would be contrary to the humanitarian purposes of the act, and would lead to an absurd result. When applying this precedent to the case at hand, the court found the NTCP did not convert to an NCP. As a result, the MO-NCP was the controlling document. The Commonwealth Court further relied on *Butler* and found that the board did not err in concluding that employer sustained its burden of proof on the termination petition. The court found that claimant's benefits could be terminated based on employer's expert's opinion of full recovery, even though the date of that opinion pre-dated the issuance of the MO-NCP.

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