



News & Notes

Vol. 24 | No. 2

“Serving all Pennsylvanians”

Spring 2019

Scott G. Weiant, Deputy Secretary for Compensation & Insurance

Greetings to all our stakeholders. Spring is here and that means that the 2019 workers’ compensation conference is right around the corner. The Pennsylvania workers’ compensation conference is recognized nationally as a first-class event where presenter expertise is unmatched, as is the conference agenda and event venue. If you have never attended the Pennsylvania workers’ compensation conference and have duties or interests relating to workers compensation, or workplace safety and health, I encourage you to give this year’s conference a try. Conference dates are June 3 and 4 at the Hershey Lodge and Convention Center. Staff, conference committee members, and presenters are to be commended once again for an impressive lineup of educational sessions. Additional information relating to the conference can be found in this edition of News and Notes.

The Bureau of Workers’ Compensation, Workers’ Compensation Office of Adjudication, and Workers’ Compensation Appeal Board have completely revised their internal methodology of conducting business within their program areas over the last few years. The design and implementation of the WCAIS system resulted in a complete business process reengineering. Staff and external stakeholders have been and continue to see change on a regular basis, and I think have been the true leaders in the workers’ compensation system change management process. Daily, I see staff display the pride they obtained as a result of streamlining processes, enhancing customer service, and making their, and co-workers’ jobs, as well as stakeholder tasks, more efficient.



Within the internal workers’ compensation system, like other state agencies, program area staff are learning new skills to advance this culture forward. Staff are attending “Lean Six Sigma” training sessions to obtain the

skillset to move process and customer service change to the next level. Staff members have volunteered to become officially certified within the Lean Six Sigma process. I hear conversations when I interact with staff that provide evidence that culture shifts are taking place.

All of the above comments will be the foundation that builds upon the future workers’ compensation system in Pennsylvania. I am proud to say that in many areas, Pennsylvania is at the forefront of innovation within the national workers’ compensation process. It is not by accident that staff entertain calls regularly from other states asking for lessons learned, or advice on how Pennsylvania managed a specific change in the system. Pennsylvania staff regularly participate in collaborative discussions, and sit on committees with other states to solve workers’ compensation problems.

At times, it is difficult being a leader, or blazing new trails within a multi-diversified system. The staff and stakeholders within the Pennsylvania workers’ compensation system are to be commended for their hard work and collaborative efforts in recent years. This is truly a first-class effort!

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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.

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

<i>Employer Information Services</i>	<i>Claims Information Services</i>	<i>Hearing Impaired</i>	<i>Email</i>
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

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

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

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

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

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



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

▼ PATHS Your No-Fee Safety Training Resource

Pennsylvania Training for Health and Safety (PATHS) provides employers and employees across the Commonwealth with easy access to cost-effective health and safety resources. PATHS is now offering several new courses:

Alive at 25!

This survival course is a 4.5-hour class developed by the National Safety Council for an audience of young drivers. The goal is to assist them in recognizing risks that they face and focuses on choosing safe, responsible, and respectful driving behaviors.

First AID/CPR/AED Course

The American Red Cross First Aid/CPR/AED class will help participants recognize and respond appropriately to cardiac, breathing, and first aid emergencies. The training is a combination of lessons, discussion, and hands-on participation and can be customized to focus on adult or pediatric skills. There is a \$30.00 fee for this course.

OSHA Outreach Training Program – General Industry

The OSHA Outreach is offered in a 10-hour program for entry-level workers or a 30-hour program to provide workers with some safety responsibility and a greater depth and variety of training. The program covers an overview of the hazards a worker may encounter on a job site, with an emphasis on hazard identification, avoidance, control, and prevention. There is a nominal \$8.00 fee for completion cards.

Forklift Safety

This training is presented on-site with your equipment and covers equipment basics, stability concepts, how to perform inspections, safe operating procedures and hazard recognition, and forklift charging and refueling. This class will satisfy OSHA's regulation in 29 CFR 1910.178 "to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely."

Visit PATHS online at www.dli.pa.gov/paths to register for webinars on many safety-related topics or to access PowerPoint presentations, safety posters, toolbox talks, and other resources. You can contact the Health & Safety Division by phone at 717-772-1635 or by email at ra-li-bwc-paths@pa.gov.

▼ Workplace Safety Committee Certification

The Health and Safety Division certifies thousands of workplace safety committees annually. This program recognizes employers who establish and maintain active committees to identify and respond to safety concerns within their workplace. When certified by the Commonwealth, these committees earn their employer a 5 percent discount on their annual workers' compensation insurance premiums.

Employers and insurers alike share in the benefits of a committee that successfully serves the purpose of accident and illness prevention. Learn more at www.dli.pa.gov/HandS, or contact us by phone at 717-772-1635 or by email at ra-li-bwc-safety@pa.gov.

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of April 23, 2019:

12,306 committees
covering
1,559,485
employees

Cumulative grand total
of employer savings:
\$739,355,172

▼ 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.

▼ 14th Annual Kids' Chance of Pennsylvania Golf Outing Tee off for the Kids

Sunday, June 2, 2019

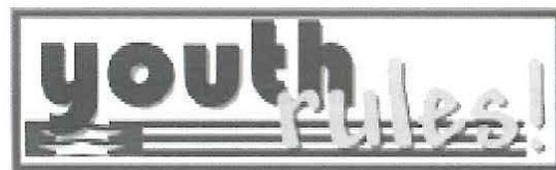
Golfer Registration Opens: 11:00am
Recognition Luncheon: 12:00 noon (For Partners/ Scholars/Friends and Golfers)
Tee-Off: 1:30pm

Hershey Country Club
1000 E. Derry Rd
Hershey, PA 17033



[For more information and to register please visit our website](http://www.kidschanceofpa.org)

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.

Still Time to Register!! 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**

Save the Date!!

Pennsylvania Governor's Occupational Safety and Health Conference

**Hershey Lodge and Convention Center
October 28-29, 2019**

This annual conference promotes and encourages the idea that workplace safety benefits everyone. Reducing workplace accidents and injuries through the creation and maintenance of safe, accident-free workplaces benefits employees, employers and local communities.

The Pennsylvania Governor's Occupational Safety and Health Conference (GOSH) provides invaluable

resources to cultivate safe workplaces and encourage the use of best safety practices to prevent workplace injury and death.

This year's conference features exhibits and multiple workshops that provide timely information to promote the safety of workers in the commonwealth.

More information is available online at <http://pasafetyconference.com>.

[2017 Medical Access Study Executive Overview Available Online](#)

[2019 Medical Fee Schedule Available Online](#)

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

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

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

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

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

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

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

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

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

Certified Impairment Rater

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

▼ 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

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▼ Notice to All Pennsylvania Workers' Compensation Self-Insurers – Cont'd.

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prescribed time-period, the application will be deemed withdrawn 34 Pa. Code § 125.3(d). Further, even where the renewal applicant has or is in the process of submitting the required additional items, if the renewal applicant failed to timely file a renewal application under Section 125.3(b), they will not be entitled to an automatic extension of their current permit beyond its expiration date. 34 Pa. Code § 125.7(b).

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

▼ Notice to All Pennsylvania Workers' Compensation Self-Insurers

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

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

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

Aqua America, Inc. v. WCAB (Jeffers, Deceased), 199 A.3d 482 (Pa. Commw. 2018).

The Commonwealth Court in 2018 held, in a death case, that where a surviving minor child is alleged to have been "dependent because of disability" at the time of the worker's death, (1) such dependent, or his or her representative, has the burden of proof on that fact; and (2) the surviving minor child must show loss of earning power.

A worker sustained fatal injuries in a 2015 truck accident. At the time of his death, he was married and had a number of children, one of whom was 17 at time of hearings. That child (claimant) had a severe vision loss from a degenerative disease.

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A View from the Bench

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The employer paid benefits for the surviving spouse voluntarily, but denied enhanced payments, as sought by the family, on account of the child based upon continuing disability from the vision condition. (Under the Act, if a worker is “dependent because of disability” at the time of the worker’s death, benefits continue during the period of such disability, and no time bar attends the award.) The claimant thereafter produced expert proofs that she indeed had a significant, incurable, impairment. The expert also testified that claimant was “disabled [and] she is not able to [support herself” The employer’s IME physician agreed that claimant’s condition was serious, but opined that “she can read and could do a job that did not require her to drive or use her peripheral vision.”

The WCJ awarded benefits, but Commonwealth Court vacated and remanded. As a preliminary matter, it was claimant that had the burden of proof. Further, the claimant was required to show disability, not merely impairment, on an ongoing basis, in order for an award of continued benefits. A showing of loss of earning power is required in this context, as in others. On remand, the WCJ was to convene a hearing “to determine the extent, if any, of the child’s earning power.”

Erie Insurance Company and Powell Mechanical, Inc., v. WCAB (Commonwealth of Pennsylvania, Department of Labor & Industry, Bureau of Workers’ Compensation), No. 20 C.D. 2018 (Pa. Cmwlth. Feb. 21, 2019)

Claimant was injured in a motor vehicle accident after delivering equipment to a job site in April 2003. Employer issued a notice of temporary compensation payable, which converted. Later, employer learned that claimant had stopped at a bar after the delivery, then had the accident, and was charged with drunk driving. In September 2003, employer unilaterally stopped paying both wage indemnity and medical benefits. Asserting the intoxication defense, employer then filed termination and review petitions and requested supersedeas, and claimant filed a penalty petition for the unilateral stoppage of benefits. In March 2004, WCJ #1 granted supersedeas, without further specification. In his June 2008 decision, he found that claimant was not entitled to benefits because of his intoxication, but he also found that employer did not have the right to unilaterally stop paying the benefits when it did and granted claimant’s penalty petition. He ordered payment of the wage benefits from the September 2003 stoppage date through his March 2004 grant of supersedeas, and he ordered payment of the

medical benefits from stoppage through his June 2008 final decision, finding that he did not have the authority to grant supersedeas as to medical benefits. Upon cross-appeals, WCAB affirmed. Claimant took a further appeal, and, in December 2011, Commonwealth Court affirmed. Employer paid the withheld sums.

In March 2012, employer filed for reimbursement from the supersedeas fund of both the wage and medical benefits paid. WCJ #2 granted reimbursement as to both, finding that failure to do so would only compound the error of employer having made payments for a non-compensable injury. The bureau appealed only the medical reimbursement award. WCAB reversed the WCJ, finding that WCJ #1 did not have the authority to grant supersedeas as to medical expenses, so that his interlocutory order only applied to the wage benefits. It reasoned that employer paid the medical bills, not because of any supersedeas issue, but because of the penalty award. Thus, employer was not entitled to reimbursement of the medical bills paid.

Citing some earlier decisions, and setting aside both parties’ arguments concerning whether the payments were made pursuant to supersedeas denial or, rather, to the penalty award, Commonwealth Court has affirmed the denial of reimbursement of the medical benefits. Since employer had no right to unilaterally stop paying medical benefits, it still owed the bills, even though they were later found to be for a non-compensable injury. Had it not exercised unlawful self-help, it would have paid the bills before supersedeas, and, since WCJ #1 did not have the authority to grant supersedeas as to medical bills, they remained payable until his 2008 decision on the merits. Violations of the Act may not be excused; employer’s subsequent victory was irrelevant. Employers are not entitled to supersedeas fund reimbursement when the withheld benefits are paid retroactively due to a penalty award.

Caveat: In footnote 3, citing its 1991 decision in ADIA Personnel Agency v. WCAB (Coleman), 586 A.2d 507 (Pa. Cmwlth.), appeal denied, 597 A.2d 1154 (Pa. 1991), the court stated that WCJs do not have the authority to grant supersedeas as to medical bills.

This appears to be contrary to the Supreme Court’s statement (*dicta*) in Department of L&I v. WCAB (Crawford & Co.), 23 A.3d 511 (Pa. 2011) in which that court apparently indicated that WCJs do have that authority. This decision does not mention the Supreme Court decision.

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A View from the Bench

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Rogele, Inc., v. WCAB (Hall), No. 595 C.D. 20-18 (Pa. Cmwlth. November 30, 2018)

Claimant suffered a serious 1999 back injury and entered into an approved wage- indemnity-only compromise and release agreement in 2004. In employer's 2008 review compensation and review medical treatment petitions, WCJ #1 found oral narcotics (over which claimant had frequency of dosage control) reasonable, but ordered that a toxicology test be performed before each doctor's visit to insure claimant's compliance with the prescription. In 2010, claimant had an intrathecal pump inserted. (Only the prescribing physician could adjust the dosage and frequency; the pump was automatic.) After implantation, the doctor did not do the drug tests, so employer denied payment for the medication.

In 2014, after 2012 and 2013 petitions, WCJ #2 denied claimant's penalty petition, granted employer's utilization review petition as to the unreasonableness of the oral medication because the pump completely replaced that method, and denied employer's utilization review petition as to the pump; its continued use was reasonable. There was a litigation costs award that employer paid, but, on appeal, the WCAB reduced it.

In 2016, employer filed a review petition to recoup the overpaid costs, and claimant filed penalty and review medical treatment petitions because employer had not paid for his replacement intrathecal pump, inserted in 2015, or for the medication refills. WCJ #1 was assigned the new petitions, ordered reimbursement of the overpaid litigation costs, and found both the replacement pump and the medications payable. On cross-appeals, WCAB reduced the cost reimbursement award and upheld the pump replacement and the medication refills. Employer appealed on the medical issues (but apparently did not raise the cost issue, as the court does not discuss it.)

First, employer argued that WCJ #1 did not have jurisdiction to order payment for the medication, because the doctor who inserted the pump did not do drug testing, so that WCJ #1's 2008 decision that the narcotic medication was reasonable only if testing was done was binding; without such testing, no payments were required. The court found that the testing was only needed for the oral medication because claimant controlled its use and had to be monitored for overuse/abuse by testing. However, because the pump was programmed by the doctor and was automatic and was not under any control by claimant, the reason for testing failed, so that the restriction did not apply. Moreover, in 2014, WCJ #2 had specifically found the use of the pump reasonable. The medicines were to be paid.

The second issue raised by employer concerned the replacement pump. Employer argued that the first pump failed and had to be replaced because claimant suffered an electrical shock at home, so that the replacement device was unrelated to the injury. Claimant countered that the pump had reached its normal life expectancy (about five years) and was replaced due to normal wear and tear. In fact, he had had problems with it before the shock incident. The court noted that WCJ #1 had found claimant's evidence credible and that employer offered no evidence that the shock was a substantial contributing factor to the pump's failure. The WCJ's fact findings were binding, and they were sufficient to support payment for the replacement pump.

Lack of Jurisdiction Precludes Pennsylvania Workers' Compensation Claim filed by Bridge Maintenance Worker Injured on New Jersey Side

In *Kreschollek v. WCAB (Commodore Maintenance Corp.)*, No. 297 C.D. 2018, decided Jan. 7, 2019, ___ A.3d ___, the Commonwealth Court held that a workers' compensation claimant's injury, sustained under a bridge spanning Pennsylvania and New Jersey, fell outside the jurisdiction of the Pennsylvania Workers' Compensation Act. Claimant, a resident of Pennsylvania, was employed by a bridge maintenance company. Claimant was working on the Benjamin Franklin Bridge, which is jointly owned by Pennsylvania and New Jersey. It was undisputed claimant was standing on the ground in New Jersey when he sustained wrist injuries in a fall. Claimant initially received workers' compensation benefits under New Jersey law. When the New Jersey benefits were exhausted, Claimant filed a Pennsylvania workers' compensation claim. The workers' compensation judge denied and dismissed the claim for lack of jurisdiction and the Workers' Compensation Appeal Board affirmed. The Commonwealth Court also affirmed. At the outset, the court noted that Section 101 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 1, specifically states that the Act applies to injuries occurring within the Commonwealth, except in very limited circumstances as provided by the extraterritorial exceptions set forth in Section 305.2 of the Act, 77 P.S. § 411.2(a)(1)-(4). In this case, claimant's injury occurred in New Jersey and none of the 305.2 exceptions applied. Moreover, the joint ownership of the bridge by the two states did not confer jurisdiction in matters under the Workers' Compensation Act.

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A View from the Bench

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In *Thomas Kurpiewski v. W.C.A.B. (Caretto, Inc.)*, ---A.3d---, 2019 WL 287893, (Pa. Cmwlth. 2019) the Commonwealth Court dealt with three issues arising out of a bricklayer's development of "contact dermatitis as a result of occupational exposure to chromium."

Specifically, the court addressed whether claimant's benefits should be terminated based upon a resolution of his current symptoms, the correct calculation of claimant's average weekly wage, and whether or not a penalty was to be awarded. Each of the issues was addressed separately in the court's decision; however, they arise from a single set of facts which were not in dispute.

Claimant was a long-time union bricklayer. In April 2012, while working for this employer, he developed a rash, later diagnosed as contact dermatitis due to a chromium allergy which had developed over a long time. Chromium is an element found in bricks, concrete, and mortar cement. During his many years in the industry, working for different employers, claimant had a long history of allergic reactions beginning while employed by a different employer in 2007, with his symptoms worsening over the years. His symptoms from this exposure were resolved by August 2012. However, his doctor removed him from work and told him he could never return to that occupation, because continuing exposure could make the ongoing use of oral steroid medication used to treat the allergic reaction life-threatening.

In June 2012, he filed claim and penalty petitions, which were employer's first notice of the alleged work-relatedness. He later requested unreasonable contest attorney's fees because employer's independent medical examination doctor agreed with his doctor's diagnosis. The workers' compensation judge awarded benefits from April and continuing indefinitely and awarded an unreasonable contest fee based on the continued defense after the IME. Employer did not appeal the unreasonable contest award but did appeal the benefit award, first arguing the 21-day notice rule that where notice is not provided within 21 days, payments begin on the date actual notice was provided, here the filing date of the claim petition in June 2012; and arguing that under *Bethlehem Steel Corp. v. W.C.A.B. (Baxter)*, 708 A.2d 801 (Pa. 1998) benefits should end in August when claimant returned to baseline.

On appeal, the WCAB reversed and remanded. On remand, the workers' compensation judge found that the first notice was in June and terminated benefits in August. Claimant appealed. This time the Workers' Compensation Appeal Board affirmed. Claimant then appealed to the Commonwealth Court.

The Commonwealth Court reversed on the extent of disability issue and held that benefits continued. Claimant's situation was more akin to claimant's work injury in *Lash v. W.C.A.B. (General Battery Corp.)*, 420 A.2d 1325 (Pa. 1980), the lead absorption case, than *Baxter*, the pulmonary allergy decision. It reviewed both of those opinions extensively. Claimant's work over his professional life caused this problem, similar to the claimant in *Lash* whose constant work exposure caused and then worsened his condition. The court in *Lash* noted it would be barbaric to require employees to continue in a position where they are exposed to a toxic substance until they are so ill that they are physically incapable of performing their job. In *Baxter*, the claimant's asthma was a pre-existing, non-work-related condition that was temporarily aggravated by environmental exposure, after which the claimant "returned to baseline." Here, claimant's condition was caused by his work so he was not required to return to work and risk a worse injury. In addition, as this was a cumulative allergy claimant's threshold now was lower than when he began working as a bricklayer, thus he could not really be said to have returned to baseline.

On the AWW issue, claimant argued that since he worked sporadically for employer, with layoffs, and his most recent stint had been less than three months, 309(d.2), not (d) applied. Further claimant argued that as he worked at other employers when he was laid off, that employment should be treated as concurrent employment. Employer argued under *Reifsnnyder v. W.C.A.B. (Dana Corp.)*, 883 A.2d 537 (Pa. 2005), that all 52 weeks should be counted as their employment relationship continued, despite the brief layoffs. The workers' compensation judge found 309(d.2) applied and also considered the others as concurrent employment. On appeal, the Workers' Compensation Appeal Board reversed and remanded. On remand, the judge found that 309(d) applied and also found no concurrent employment. Claimant appealed.

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A View from the Bench

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This time the appeal board affirmed, as has Commonwealth Court. "Concurrent" employment means just that - "at the same time." As claimant did not work for the other employers on the date of injury, but only when laid off. As to 309(d) vs 309(d.2), Reifsnnyder controlled. Although claimant had various layoffs over time, he never had to re-apply to employer. He was just called back to work. Thus, the employment relationship was maintained, so that all four preceding quarters, including reduced and zero ones, counted. Subsection (d) applied.

Finally, the workers' compensation judge initially denied a penalty award without discussion. On appeal, the appeal board remanded on "reasoned decision" basis; although the judge could exercise discretion, he still had to say why the relief was denied. On remand, the judge again denied the penalty. The judge found that because claimant did not give notice, and the answer to the claim petition was timely, there was no violation of the Act by not issuing an LIBC-496 denial. On claimant's appeal, the appeal board found a technical violation; even with a timely answer to the petition, employer still had an obligation to issue a separate denial. The board did not remand again but unilaterally ordered a 10% penalty. Employer appealed.

The Commonwealth Court affirmed the penalty finding, as there was a technical violation; the denial is always required. The court also vacated the 10 percent penalty award made by the appeal board. Only the workers' compensation judge has the discretion to decide the amount, if any, of an award. Moreover, even with a violation, an award is not automatic. This portion of the case was remanded for the judge to decide if an award for the violation was appropriate, and, if so, in what amount.

Valley Stairs and Rails v. WCAB (Parsons), No. 1100 C.D. 2017 (Pa. Cmwlth. April 11, 2018)

Claimant alleged that he sustained a low back strain while working for employer on March 27, 2015. He did not finish his shift that day but his employer paid him wages for the entire day. He was not scheduled to work the weekend. His first day of wage loss was Monday, March 30, 2015.

The employer issued a notice of temporary compensation payable on April 13, 2015, which stated that the injury occurred on March 27, 2015, and the 90-day period ran from March 30, 2015 through June 27, 2015. On June 28, 2015, employer filed a notice stopping temporary compensation payable and a denial. On Monday, June 29, 2015, the bureau issued a conversion notice. The claimant then filed a penalty petition alleging that the employer violated the Act by stopping payment of compensation benefits after the notice of temporary compensation payable had converted to a notice of compensation payable.

The judge, noting that for purposes of the Act disability is defined as wage loss, found the first date of disability to be Monday, May 30, 2015, not May 27, 2015, because the claimant was paid wages for the entire day on the 27th. Thus, the judge found that the notice stopping temporary compensation was filed on the 90th day of the claimant's disability. The claimant's penalty petition was dismissed.

On claimant's appeal, the board reversed and remanded for a determination of the appropriate penalty amount, if any. It held that the claimant was eligible for benefits as of March 27, 2015, and the 90-day period ended on June 25, 2015. The employer filed an emergency motion for appellate certification of the board's order, as well as an immediate stay of the order, which the board denied. The Commonwealth Court granted the certification.

The court discussed Sections 306(a)(2) and 406.1(d) of the Act, and noted that neither the Act, nor case law, address how the calculation of time is affected when an employer pays a claimant his full wages on the first day of disability. It notes that Section 121.15(a) of the bureau regulations sheds some light on the ambiguity, stating that "if the injured employee is paid full wages for the day, shift or turn on which the injury occurred, the following day shall be counted as the first day of disability." Based on this, the court held that disability is to be commenced on the following day when a claimant is paid his full wages for the day or shift in which the injury occurred. It therefore held that the employer's notice stopping temporary compensation and denial were both issued timely, and the notice of conversion issued by the bureau was void. Thus, the court reversed the board and affirmed the judge's denial of the penalty petition.

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A View from the Bench

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Van Leer v. WCAB (Hudson), No. 1127 C.D. 2018 (Pa. Cmwlth. Feb. 11, 2019)

The claimant filed a claim petition alleging that she was injured while taking care of a dementia patient, her employer, in the patient's home. The employer denied the allegations in the claim petition and also defended against the claim on the basis that the claimant was precluded from workers' compensation benefits under the Domestic Service Exception to the Act.

The judge bifurcated the proceedings on the issue of whether the Domestic Service Exception was applicable. The judge denied the claim petition on the basis that the claimant was engaged entirely in domestic service. Claimant appealed to the board, and the board affirmed the judge. The claimant then appealed to the Commonwealth Court.

The court indicated that whether work duties constitute only domestic services is a question of law. In this case, the claimant's work involved essentially adult baby-sitting/caretaking responsibilities. The claimant testified that she was to make sure her employer did not fall, get hurt or leave the house. She worked mainly at night, getting her employer into bed and making sure she did not get up at night. She testified that she did not provide any medical care to her employer. The court concluded that the claimant's duties involved only providing service to her employer, and not any medical care. Concluding that the claimant's duties fell within the Domestic Services Exception, the court affirmed the judge's denial of benefits.

Hartford Ins. Grp. on Behalf of Chunli Chen v. Kamara, 199 A.3d 841 (Pa. 2018)

Insurance company cannot file suit against tortfeasor without assignment or voluntary participation

The Supreme Court, in a 5-2 decision, with two dissenting opinions, reversed Superior Court and answered the question of whether a workers' compensation insurance carrier may bring a third-party action against an alleged tortfeasor on behalf of an injured employee to recoup the amount paid in workers' compensation benefits where the employee did not independently sue the tortfeasor, did not join in the insurer's action, and did not assign her cause of action to the insurer. The Supreme Court reversed the Superior Court in *The*

Hartford Ins. Group. on Behalf of Chen v. Kamara, 155 A.3d 1108 (Pa. Super 2017), reargument denied (Apr. 18, 2017), which found that a compensation carrier can proceed with a negligence action against third party tortfeasors for a work-related car accident, even where the injured worker did not elect to do so, if the action is brought "on behalf of" the claimant and attempts to establish the liability of the third-party tortfeasor to the claimant. Reaffirming the well-settled proposition that the right of action against the tortfeasor remains in the injured employee, the Supreme Court held that, unless the injured employee assigns her cause of action or voluntarily joins the litigation as a party plaintiff, the insurer may not enforce its statutory right to subrogation by filing an action directly against the tortfeasor. After reviewing several cases that historically interpreted Section 319 as providing that the right of action remains with the injured worker, they explained that granting an employer an independent cause of action against the tortfeasor would impermissibly split the employee's cause of action, thereby subjecting the tortfeasor to multiple suits for the same harm. The Supreme Court vacated the judgment of the Superior Court and reinstate the order of the trial court, which sustained the preliminary objections filed by the tortfeasor and dismissed the insurer's complaint with prejudice.

DISSENT

Justice Saylor and Justice Todd wrote dissenting opinions seeking to enforce the explicit language of the Workers' Compensation Act at 77 P.S. §671 wherein it states: "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee." They further explained that subrogation provides that the insurer stands in the shoes of the injured worker in attempting to recover what is rightfully owed from the third-party tortfeasor. Justice Todd highlighted the fact that not allowing this leaves the insurer, which has paid an injured employee workers' compensation benefits due to the tortious actions of a third party, without a means to enforce its statutory right to subrogation against the third party in situations such as this one, where the injured employee elects, for whatever reason, not to pursue a tort action against the third party. This, in turn, will unavoidably, and unnecessarily, lead to higher workers' compensation insurance rates.



BWC Word Sudoku

The words used in the puzzle are:

Adjudication
Injury
Defendant

Appeal
Supersedeas
Petition

Decision
Stipulation
Medical

		INJURY		STIPULATION			SUPERSEDEAS	PETITION
STIPULATION			MEDICAL			INJURY	ADJUDICATION	DEFENDANT
MEDICAL	SUPERSEDEAS			PETITION	DEFENDANT			
PETITION	DEFENDANT				MEDICAL	APPEAL		INJURY
				INJURY	DECISION	DEFENDANT	PETITION	
		DECISION	DEFENDANT		PETITION		STIPULATION	MEDICAL
	PETITION	MEDICAL		SUPERSEDEAS			DEFENDANT	
		SUPERSEDEAS		DEFENDANT	INJURY	DECISION		STIPULATION
	STIPULATION				APPEAL	PETITION	INJURY	SUPERSEDEAS

Your objective is to fill the 9x9 grid with each of the above words so that each column, each row, and each of the nine 3x3 sub-grids contain all of the above words.

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