



News & Notes

June 1 – 2 Workers' Compensation Conference Cancelled

Due to the outbreak of COVID-19, to protect the health and safety of our attendees, speakers and guests, the Workers' Compensation Conference scheduled for June 1 – 2, 2020 in Hershey, PA, has been cancelled.

If you have already registered, your registration will be automatically cancelled, and a refund will be processed as quickly as possible.

If you made reservations for overnight accommodations

at the Hershey Lodge and Convention Center under the room block "BWC Conference," your reservation will automatically be cancelled.

For questions or additional information, please contact Luanne Bell at lubell@pa.gov.

Your understanding is appreciated. Thank you, and we look forward to seeing you at next year's conference.

A Note from BWC Director, Marianne Saylor

Enhancements to WCAIS this year have resulted in the implementation of requesting records through WCAIS. Later this year, we will enable requesters to receive their responses electronically. The WCAIS Digital Modernization project recently began with its pilot program. This improvement process is focused on enhancing the user experience with WCAIS by converting to a digital platform. The look and functionality of the screens will be modernized. This is a three-year project which will touch all aspects of WCAIS.

Within the internal workers' compensation system, as with other state agencies, the culture of operating Lean is an ongoing initiative. Program area staff are encouraged to use Lean to identify waste and improve services for our customers. Lean is a way of thinking and doing business that puts the customer first! To advance this culture, staff attend Lean trainings, learn new skill sets, and are urged to submit Lean suggestions to eliminate waste. We have staff members who are officially certified in the Lean process, and it is

evident through interactions with staff that culture shifts have changed the way we do business.

Pennsylvania remains at the forefront of innovation within many areas of the workers' compensation administration. Our staff regularly receive calls from other states asking for lessons learned or advice on how Pennsylvania managed a specific change in the system. Staff often engage in collaborative discussions and brainstorming sessions with other states to solve problems within the workers' compensation system. The bureau has partnered with Carnegie Mellon University to develop a computer model which can predict where the most injuries will occur so we can focus our efforts on prevention of injuries.

The staff and stakeholders within the Pennsylvania workers' compensation system are to be commended for their hard work and collaborative efforts.

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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)

Employer Information Services

717-772-3702

Claims Information Services

toll free inside PA: 800-482-2383
local & outside PA: 717-772-4447

Hearing Impaired

PA Relay 7-1-1

Email

ra-li-bwc-helpline@pa.gov

Auxiliary aids and services are available upon request to individuals with disabilities. Equal Opportunity Employer/Program

▼ 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 more accessible to employers and employees everywhere. In 2019, PATHS conducted 465 training sessions for more than 35,000 individuals in 48 states and eight countries.

More than 215 safety-training topics are available for employers, most free of charge. These trainings impact all health & safety areas within the

workplace, including substance abuse and opioid-related topics. Trainings are aimed at reducing business costs in Pennsylvania, and saving lives.

Questions? Give us a call at 717-772-1635, send us an email at ra-li-bwc-paths@pa.gov, or visit our website at www.dli.pa.gov/PATHS.

▼ Workplace Safety Committee Certification \$775 million and counting

More and 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 annual 5 percent discounts on workers' compensation insurance premiums. Application is made 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.

More than 12,500 workplace safety committees already certified in Pennsylvania have accumulated more than \$775 million in total savings just from the 5 percent workers' compensation insurance premium discounts. That's money that is being reinvested in expanding businesses along with implementation of further safety and prevention

efforts - but it's no longer going toward insurance premiums!

In addition to the 5 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 www.dli.pa.gov/Businesses/Compensation/WC/safety/committee/Pages/default.aspx. You can reach us with questions at 717-772-1635, or by email at ra-li-bwc-safety@pa.gov.

▼ It's Time to Apply 2020 Governor's Award for Safety Excellence

If you're proud of your safety and prevention program for its impact on reducing employee injuries, financial 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.

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

All applications must be submitted by June 1, 2020, to:

Barbara White
Program Coordinator
Bureau of Workers' Compensation
Health & Safety Division
1171 South Cameron Street
Harrisburg, PA 17104-2501



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

▼ 2019 Governor's Award for Safety Excellence Winners

Governor Tom Wolf announced the two employers who were honored last year with a Governor's Award for Safety Excellence. The Governor's Award for Safety Excellence recognizes employers that have achieved the highest standards in workplace safety. Any Pennsylvania employer is eligible for the Governor's Award for Safety Excellence. Information and criteria used to determine finalists include workplace injuries/illnesses vs. industry standards, as well

as innovation and strategic development of safety policy and approaches.

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

The two 2019 Governor's Award for Safety Excellence winners are:



Ernest D. Menold, Inc.



Vanalt Electrical Construction, Inc.

▼ 2020 Statewide Average Weekly Wage

Based upon the Statewide Average Weekly Wage, as determined by the Department of Labor & Industry for the fiscal year ending June 30, 2019, the maximum compensation payable under the Workers' Compensation Act, under Article 1, subsections 105.1 and 105.2, shall be \$1,081.00

per week for injuries occurring on and after Jan. 1, 2020. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2020, the percentage increase in the Statewide Average Weekly Wage is 3.1 percent

▼ 2020 Fee Schedule Available Online

To view the 2020 Fee Schedule visit:

<https://www.dli.pa.gov/Businesses/Compensation/WC/HCSR/MedFeeReview/Fee%20Schedule/Pages/default.aspx>

▼ Coming Soon!

Return of Records Requests via WCAIS

In January, the bureau implemented access in WCAIS for stakeholders to submit records requests online. In April, we will be taking that process one step further and will begin sending those requests back to you via WCAIS as well. We will be introducing a one-stop page for all your records information. When you click on the Records Request online link (renamed), it will take you to your Record Request Dashboard. On this page, you will be able to see your pending requests, so you will know your request has been received; a link to submit new requests; and when requests are ready, they will be available on this page for viewing/printing.

You can view this page at any time but will know when a new request is ready because you will be

receiving email notifications to alert you to their availability. Alerts will be sent to the email address listed in the WCAIS profile of the requester (which can be updated at any time). Please note, all requests submitted online will only be returned to you online as well. Requests that are submitted by mail, including Subpoenas, can be returned to you through WCAIS if you request that with the submission. As always, all request information remains confidential.

You will be seeing additional updates to this process as we keep working to make it an even better experience and we appreciate your patience as it evolves. Look for more specifics about the records process, including screenshots and direction, coming soon to the BWC website.



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.

TIPS for Achieving and Maintaining Compliance with Youth Employment Laws*

Train Employees	Identify Violations	Promote Compliance	Share Accountability
<ul style="list-style-type: none"> + Obtain compliance-assistance materials (posters, fact sheets, employer's guides and forklift stickers) from www.youthrules.dol.gov or request training from your local Wage and Hour Office. + Incorporate youth employment laws and company policies regarding the employment of youth into training and orientation seminars for managers and teens. + Provide a worksheet for youth to sign as part of initial training to test and verify their awareness of what Equipment is off limits to them and what hours they can work. + Attach a monthly youth safety reminder to a paycheck or time card. + Conduct refresher training for all levels of management at regular staff meetings or special training sessions. 	<ul style="list-style-type: none"> + Designate a youth employment compliance director whose responsibility is to monitor compliance. + Conduct unannounced inspections of your establishment or branch location. + Make checking for compliance a regular part of any routine quality or store inspection. + Monitor the hours and times worked by youth under the age of 18 at the time payroll data is collected, and track and transcribe any violations. + Establish a hotline for employees/parents/ the public to report potential problems or concerns. + Take time to Interview youth at some regular interval to question them on the types of equipment they are operating. 	<ul style="list-style-type: none"> + Create a "buffer zone" to prevent employees from being scheduled up to the latest time or longest shift that could be worked. + Prepare two separate schedules: one for employees under age 18 and one for employees aged 18 and over. Only permit shift swapping among employees on the same schedule. + Require a manager's signature on the schedule for all shift swaps. + Verify the ages of all youth by requiring legally-acceptable proof of age at the time of hiring. + Post the hours that youth can work next to the time clock. + Color-code time cards, badges and/or uniforms so that youth can be easily identified. + Post a warning sticker or a stop sign on hazardous equipment. 	<ul style="list-style-type: none"> + Encourage youth to say "no" to a manager who is asking them to work too late or to operate hazardous equipment. + Add "monitoring to maintain compliance" to job descriptions of managers. + Include "compliance with youth employment laws" as a performance factor in managers' reviews and recognize those who successfully maintain compliance on their shifts, in their departments or at their branch locations. + Test youth about their understanding of policies and safety procedures before they start work. + Send a letter to the parents of newly-hired teens informing them of the youth employment laws and who to contact to report any concerns.

Information about YouthRules! can be found at www.youthrules.dol.gov. For information about the laws administered by the Wage and Hour Division, log on to www.dol.gov/whd/regs/compliance/whdfs43.pdf, or call the Department of Labor's toll-free helpline at 866-4USWAGE.

Different rules apply to farms, and state laws may have stricter rules.

▼ 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 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 or visit www.kidschanceofpa.org.



Kids' Chance of PA,

"I am really thankful and appreciative for the generous gift of a scholarship that was given to me. I became eligible for the scholarship when my father

had an accident at work. It was very detrimental to my whole family. With my father being out of work, the financial burden of continuing my education in college started to soon become a scary thought. This scholarship helped take some of the worry away.

I am currently studying chemistry at Duquesne University, and I couldn't be happier with where I am in life. This scholarship is letting me set my dreams high without having to deeply worry about the financial ends of things. This scholarship is a blessing, and it is helping me become the person I have always wanted to be.

Thank you so much,"
Hannah
Duquesne University '22

▼ 15th Annual Kids' Chance of PA Golf Outing

Friends of Kids' Chance of Pennsylvania, Inc. would like to take this opportunity to cordially invite you to our 15th Annual Golf Outing benefiting Kids' Chance of Pennsylvania at Hershey Country Club, Sunday, May 31, 2020.

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

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

****SPONSORSHIP OPPORTUNITIES AVAILABLE****

For more information or to register visit: www.kidschanceofpa.org/events/15th-annual-kcpa-golf-outing-hershey/

Workers' Compensation Appeal Board Schedule of Hearings for 2020

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC
PHILA		4, 5, 6	31	1, 2	19, 20, 21	16		4, 5, 6		6, 7, 8		1, 2, 3
PITTS	22, 23		3, 4		6, 7		8, 9		9, 10		4, 5	
HBG	7, 8		17, 18			3, 4	22, 23		15, 16		17, 18	
SCRN		19, 20		21, 22		17, 18		26, 27		20, 21		16, 17
ERIE					5		7			28		

ALFONSO FRIONI, JR, ESQ., CHAIRMAN

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

A View from the Bench

Pittsburgh Steelers Sports, Inc. v. WCAB (Trucks), No. 1257 C.D. 2018, January 3, 2020

Pittsburgh Steelers Sports, Inc. (employer) petitioned for review of an order of the WCAB, which affirmed an order of the WCJ granting the claimant's claim petition and calculating the average weekly wage pursuant to Section 309(c) of the act.

The WCJ calculated the average weekly wage under Section 309(c) of the act, dividing the annual salary of \$200,000 by 52 weeks to yield an average weekly wage of \$3,846.15 per week. Temporary total disability benefits were ordered to be paid at the maximum compensation rate of \$807.00 per week. The employer appealed, arguing that the claimant was a seasonal employee, and that benefits should have been calculated pursuant to Section 306(e) of the act. It cited the court's prior decision in *Ross v. WCAB (Arena Football League)*,

702 A.2d 1099 (Pa.Cmwlt. 1997), appeal denied, 724 A.2d 937 (Pa. 1998), in support of its position that professional football players do not play football throughout the entire year, and are thus seasonal employees.

The Commonwealth Court distinguished its holding in *Ross*, as well as *Station v. WCAB (Pittsburgh Steelers Sports, Inc.)*, 608 A.2d 625 (Pa. Cmwlt.), appeal denied, 615 A.2d 1315 (Pa.1992), wherein it also found a professional football player to be a seasonal employee, concluding that whether a professional athlete is a season employee depends on the particular facts of the case and the terms of the contract.

In both *Ross* and *Station*, the court found that the particular terms of the contracts were evidence of seasonal employment, particularly that the contracts only obligated the players to play within a specified period, the players could not engage in off-season football with another team, the players were compensated after the completion of each game, and the players were not compensated outside of the regular season.

Under the terms of the claimant's contract with the employer, which spanned two football seasons, the claimant's responsibilities included attending mini-camps, pre-season training camp, all employer meetings, practice sessions and pre-season, regular season, and post-season games. In addition, the claimant was obligated to attend ten assigned appearances throughout the year, and cooperate with news media in promoting the NFL. The claimant was prohibited from playing football or engaging in football-related activities outside of his employment.

The employer agreed to pay the claimant a yearly salary of \$200,000 for his first season, and \$230,000 for his second season. The employer was required to pay the claimant's compensation in weekly or bi-weekly installments over the course of the regular season.

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A View from the Bench

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The court held that Ross and Station do not stand for proposition that all professional football players are seasonal employees, but rather that a fact specific analysis must be performed for each individual case. Based on the totality of the circumstances, the terms of the claimant's contract are evidence that he was not a seasonal employee, but rather an employee whose wages are fixed by the year.

Bryn Mawr Landscaping Co. v. WCAB (Cruz-Tenorio), Pa. Cmwlth. No. 1268 C.D. 2018, filed Oct. 18, 2019 Defendant's burden to establish loss of earnings caused by immigration status

Claimant in this case was a Mexican citizen, working legally in the U.S. pursuant to an H-2B visa. He worked for the same employer for 3 years performing tree-trimming services. His injury occurred on May 15, 2015 when he was struck on the head with a tree branch. The claim was accepted voluntarily under a medical-only NCP recognizing the injury as a concussion.

A second medical-only NTCP was issued recognizing a head contusion as the accepted injury. The carrier denied the claim for disability, even though disability slips were presented.

Claimant filed a claim petition for various diagnoses related to the head trauma/concussion, as well as, neck pain that radiates to the right shoulder, anxiety, and depression. Claimant also filed a penalty petition for defendant's refusal to pay disability benefits and alleging that defendant interfered with claimant's ability to receive medical treatment. Defendant filed a termination petition seeking a full recovery after having an IME on Oct. 8, 2015, and a suspension petition alleging that claimant was not lawfully able to work in the United States. After the IME of Oct. 8, 2015, the defendant agreed to pay total disability benefits until the date of the IME, since the defendant's medical expert found the claimant had a head injury and post-concussive syndrome, but also opined that claimant was fully recovered. Claimant's medical experts testified by deposition and supported his injury allegations.

Defendant's medical experts testified by deposition and supported the relief they sought. The adjuster who was handling the claim also testified acknowledging that she had disability notes from

claimant's physicians, but did not pay disability benefits because she was waiting for an affidavit of recovery. She also acknowledged that claimant had a valid work visa on the date he was injured. The employer's company president testified that the employer sponsors workers each year who are authorized to work pursuant to an H-2B visa. The witness did not know about claimant's immigration status after the May 15, 2015 date of injury.

The WCJ credited claimant's medical evidence and rejected defendant's medical evidence. The WCJ granted the claim in all respects, denied the suspension and termination petitions, and awarded partial unreasonable contest fees.

The WCJ also granted claimant's penalty petition, but this was reversed by the WCAB as there was no violation of the act. There was a remand by the WCAB for claimant to submit itemized litigation costs. The litigation costs were then approved by the WCJ.

On appeal the defendant argued that claimant offered no evidence that he can lawfully work in the United States, the WCJ erred in denying the suspension petition because the record showed that claimant's work visa had expired and claimant was physically capable of returning to sedentary work, the WCJ's findings of fact on disability and scope of injuries were not supported by substantial evidence, the WCJ erred in awarding litigation costs and in finding that claimant's counsel was entitled to quantum meruit attorney fees. In response, claimant alleged that defendant's petition for review was frivolous and sought an award of counsel fees.

In its decision affirming the WCAB, the Commonwealth Court noted that claimant's burden in a claim petition did not include proving his eligibility to work in the United States. In the suspension petition, claimant was working legally in the United States pursuant to his H-2B visa when he suffered the work injury and it was defendant's burden to establish that claimant's loss of earnings was caused by his immigration status. Regarding defendant's other arguments: The WCJ did not find defendant's evidence credible, litigation costs shall be paid if claimant is successful, and the record may be held open if it is determined that additional evidence needs to be submitted. 34 Pa. Code Section 131.101(c).

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A View from the Bench

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The Commonwealth Court also held that no error was committed in the WCJ's assessment of partial unreasonable contest fees.

The employer presented no evidence which, even had it been believed, would have supported the initial denial of disability benefits. The contest only became reasonable at the time of the IME. And further, the WCJ committed no error in calculating the value of fees at \$4,000.00.

The WCJ has the power to analyze the record and generate a fee award even if counsel does not submit an itemized billing statement. Finally, the Commonwealth Court agreed with claimant that defendant's appeal arguments were mere impermissible assaults on credibility determinations and imposed frivolous appeal attorney's fees on the appellant.

In Sota Construction v WCAB (Czarnecki, Zawilla d/b/a Gorilla Construction, and UEGF), ---A.3d ---, 2019 WL 6971522, decided Dec. 20, 2019, (Pa. Cmwlth. 2019), the Commonwealth Court held that the Section 319 statute of repose did not bar a petition for joinder where the underlying claim petition was filed within three years of the alleged date of injury.

Claimant filed a claim petition against his employer Gorilla Construction, on Aug. 27, 2012, 2 years and 10 months after his Oct. 26, 2009 injury. When he learned of the employer's uninsured status, he filed a timely UEGF clam petition on Oct. 3, 2012, 3 weeks before the statute of limitations ran. The UEGF filed a petition for joinder against an alleged statutory employer Sota Construction within 20 days of its knowledge of the entity, but beyond the 3-year statute of limitations. In the initial round of litigation, the WCJ dismissed the joinder as untimely. Specifically, the WCJ noted that the joinder had been filed more than three years from the alleged date of injury, and was thus barred by the statute of limitations. The WCJ also found Gorilla Construction to be the employer and granted the claim petition against Gorilla and the UEGF. Both appealed to the Workers' Compensation Appeal Board (WCAB).

The WCAB remanded to the WCJ for consideration of the joinder. On remand, the WCJ found that Sota was the statutory employer and awarded benefits against Sota rather than Gorilla and the UEGF. Sota then appealed. This time, the WCAB affirmed.

On appeal to the Commonwealth Court, Sota raised five issues for review. Specifically:

1. whether the WCAB erred by reversing the WCJ's decision dismissing the joinder petition pursuant to Section 315 of the act;
2. whether the joinder petition contained a new cause of action after the statute of limitations under Section 315 of the act had expired;
3. whether the WCAB erred by concluding that Section 131.36(d) and (h) of the board's regulations supersedes and subverts the statute of repose set forth in Section 315 of the act;
4. whether the WCAB exceeded its scope and standard of review by improperly engaging in fact-finding and concluding that the joinder petition was timely pursuant to Section 131.36(d) of the WCAB's regulations; and
5. whether the WCAB should have reversed the WCJ's decision when the UEGF failed to file an appeal within 20 days of the WCJ's Dec. 9, 2013 decision for dismissing the joinder petition.

The court found the issue of whether a joinder must be filed with three years of the injury to be one of first impression. It discussed, and distinguished, *Viwinco v. WCAB (Horner)*, 656 A.2d 566, (Pa. Cmwlth. 1995) and *CRL of Maryland, Inc. v. WCAB (Hopkins)*, 627 A.2d 1238 (Pa. Cmwlth. 1993) as factually different. In *Horner* the underlying claim was time-barred, thus the joinder was also time barred, and in *Hopkins*, the fatal claim was based on an independent theory of recovery which was not alleged until after the three years had expired. Both cases were distinguishable from the present case. Based on this analysis, the court in *Sota* held that the claim against the UEGF was within the statute of repose, that UEGF followed the joinder regulations, and that the regulations were a valid exercise by the bureau. The joinder was timely.

With respect to whether the joinder petition contained a new cause of action arising after the statute of limitations under Section 315 of the act had expired, the court discussed *Mangine v. WCAB (Consolidated Coal Company)*, 487 A.2d 1040 (Pa. Cmwlth. 1985) and *Zafran v. WCAB (Empire Kosher Poultry, Inc.)*, 713 A.2d 698 (Pa. Cmwlth. 1998).

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A View from the Bench

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In both cases, the claimant sought to proceed under a different theory of recovery and was making the amendments after the statute of limitations had expired. Again, the court distinguished these cases noting that in the present case the joinder did not seek to change the theory of recovery and thus was not a new cause of action.

With respect to whether the WCAB erred by concluding that Section 131.36(d) and (h) of the board's regulations supersedes and subverts the statute of repose set forth in Section 315 of the act, the court analyzed both the section of the act and the regulations and found no conflict. As the claim petition was timely, the joinder arising out of that original claim petition was also timely so long as it was filed within 20 days of the knowledge of the joinder issue in accordance with the regulations.

The court also determined that the WCAB did not engage in fact finding, but rather interpreted a potential error of law. While the WCJ did analyze the statute of limitations issue in a "finding of fact" the WCJ confirmed the outcome of his analysis in a "conclusion of law." In addition, it was clear that the determination was making a conclusion of law, and thus within the WCAB's purview.

Finally, the court addressed whether the UEGF failed to file a timely appeal of the WCJ's interlocutory order dismissing the petition for joinder during the initial round of litigation. The UEGF did not appeal the joinder dismissal at the time but raised the issue in its appeal of the final decision to WCAB.

Technically, because it was "out of court" when the joinder was dismissed, the UEGF could have appealed at that time. However, as in the 2016 decision in *Dept of Labor v WCAB (Gerretz, Reliable Wagon & Auto Body, Inc.)*, 142 A.3d 148 (Pa. Cmlwth. 2016), the WCJ specifically stated in the order dismissing the joinder that it was an interlocutory order and not subject to appeal. Thus, as in that case, the court found that UEGF did not miss the appeal deadline. Furthermore, the court concluded that as in *Gerretz*, the order dismissing the joinder petition is final, not interlocutory, and thus it was error to advise the parties in the order dismissing the joinder that it was interlocutory and not subject to appeal.

Based on the foregoing the court affirmed the opinion of the appeal board.

In Deloatch v. WCAB (City of Philadelphia), No. 1684 C.D. 2018, Jan. 3, 2020, the Commonwealth Court reversed an order of the WCAB, which reversed a decision and order of a WCJ granting the claimant's claim petition for benefits under Section 108(r) and 301(f) of the act. The only issue before the court was whether the claimant established that he developed a compensable occupational disease in the form of lung cancer, as provided by Sections 108(r) and 301 (f) of the Act.

The claimant started working for the Philadelphia Fire Department in 1988 and retired twenty years later in 2008. He was diagnosed with non-small cell lung cancer in 2011. In the course of the proceedings he testified about his diesel and fire exposures, and acknowledged that he smoked one pack of cigarettes "per week" for thirty to thirty-five years in addition to being exposed to secondhand smoke from his coworkers.

The claimant submitted a medical report from Dr. Virginia Weaver opining that firefighters are exposed to IARC Group 1 carcinogens in the course of their work, and further opined that the protective equipment used is incomplete to prevent exposure. The claimant submitted a report and the deposition testimony of Dr. Barry Singer who opined that the claimant's exposure to carcinogens while working for the employer was a "substantial contributing factor in the development of his lung cancer." The employer submitted the deposition testimony of Dr. Tee Guidotti. Dr. Guidotti opined that he could not determine what, if any, methodology Dr. Singer used to form his opinions. He opined that smoking cigarettes may add to the risk of exposure to carcinogens that are similar to those firefighters could be exposed to during their employment. The employer also offered a report from Dr. Howard Sandler, who also opined that Dr. Singer provided "no scientifically-reliable methodology" that could have led Dr. Singer to conclude that there is a causal link between firefighting and lung cancer. Dr. Sandler further noted that the claimant's medical records referenced a forty-five year history of smoking, and also indicated that the claimant had reduced his smoking habit from a peak of one pack "per day," which is in contrast to the claimant's testimony regarding the amount and duration of his cigarette smoking habit.

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A View from the Bench

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Dr. Sandler opined that the epidemiologic evidence did not support the conclusion that the claimant's exposure to Group 1 carcinogens from his employment was a substantial contributing factor in causing his lung cancer.

Dr. Sandler opined that the claimant's lung cancer was not caused by occupational exposure to carcinogens, but more likely by his smoking history.

The WCJ rejected the claimant's testimony regarding his smoking history as not credible, but otherwise found the claimant's testimony credible but not competent as to the medical issue of causation.

The WCJ accepted that the claimant was exposed to Group 1 carcinogens in the course of his employment. The WCJ found that the claimant was not entitled to the presumption of Section 301(f) that his lung cancer arose during the course of his employment, but rather found that the claimant was subject to general causation principles. The WCJ rejected the opinions of Dr. Singer and found Drs. Sandler and Guidotti to be more credible. The WCJ denied the claim petition finding that the credible, competent evidence failed to establish that claimant's non-small lung cancer was caused by his work as a firefighter.

The claimant appealed to the WCAB, which reversed and remanded. The board concluded that the claimant established entitlement to the statutory presumption and that the employer failed to provide sufficient evidence to rebut the presumption. The matter was remanded to the WCJ to make findings of fact regarding an award and any recoverable lien.

On remand, the WCJ granted the claim petition and awarded medical benefits, and issued new findings only regarding the amount of the award and subrogation lien.

The employer appealed the second WCJ decision to the board, which reversed based on its application of Sladek II.

On claimant's appeal, the Commonwealth Court reversed the WCAB and reinstated the second WCJ award. It found that a claimant only has to establish a general causative link, i.e. that it is "possible" that the carcinogen caused the cancer, to get the presumption.

Both parties may present epidemiological studies, subject to the Frye standard. If the claimant meets that burden, the presumption applies and burden shifts to the employer.

To meet its burden the employer must establish a specific non-firefighting cause, and cannot rely on general epidemiologic evidence to satisfy its burden.

The court held that the employer did not meet its burden because the opinions of Drs. Guidotti and Sandler were not specific enough. Dr. Guidotti essentially said that Dr. Singer's opinions were medically incompetent, but did not provide an opinion on the cause of the claimant's cancer. Dr. Sandler said that the claimant's cancer was "most likely" caused by his cigarette smoking habit and exposure to secondhand smoke, but the court found this language to be insufficient.

In Fedchem, LLC v. Workers' Compensation Appeal Board (Wescoe), ___ A.3d ___ (Pa. Cmwlth. 2019), the Commonwealth Court held that a Workers' Compensation Judge (WCJ) is required to consider the testimony of experts rather than determining a claimant's vocational suitability based solely on a claimant's testimony. Claimant, Wesco, sustained a 2011 work-related injury. In 2016, employer, Fedchem, filed a modification petition based upon a labor market survey and earning power assessment pursuant to Section 413(a) of the Workers' Compensation Act. Employer presented testimony from its IME physician and vocational expert. Utilizing the IME physician's light duty restrictions, employer's vocational expert identified four positions deemed medically and vocationally suitable for claimant. Claimant was notified of the positions and instructed claimant to apply. Claimant testified on his behalf and offered testimony from his own medical and vocational experts. Claimant's medical expert testified claimant was physically capable of performing some, but not all, of the positions. Claimant's vocational expert testified the positions were not vocationally suitable for claimant. Claimant testified he applied for the positions and did not receive any offers of employment. Significantly, claimant further testified he lacked the physical ability, skills, or experience to do any of the jobs.

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The WCJ found claimant's testimony credible and determined the jobs were not open and available because claimant was never afforded an opportunity to perform the jobs. The WCJ denied employer's petition.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed. Although the board agreed with employer that the WCJ erred in failing to address the vocational testimony, it determined a remand was not warranted because claimant's credited testimony alone was enough to support the decision. On appeal, the Commonwealth Court noted that where conflicting evidence is presented, a WCJ must resolve those conflicts. In this case, it was error for the WCJ and the board to rely solely on claimant's "self-serving" testimony while ignoring conflicting testimony from the medical and vocational experts. The court remanded the matter for assessment of the expert testimony that conflicted with claimant's own testimony concerning the medical and vocational suitability of the jobs.

On Dec. 12, 2019, the Commonwealth Court in Keystone Rx LLC v. Bureau of Workers' Comp. Fee Review Hearing Office (Compservices Inc./AmeriHealth Casualty Services), (No. 1369 C.D. 2018), created a "new rule going forward" allowing certain entities, such as pharmacies, who are not health care providers as defined in the Workers' Compensation Act (act) the right to intervene in utilization review (UR) requests.

In Keystone Rx, the insurer (AmeriHealth Casualty Services) filed a hearing to contest the Fee Review Hearing Division's (Bureau's) administrative determinations awarding a pharmacy (Keystone Rx LLC) payment for compound cream and Naprelan tablets prescribed by Dr. Bradley Ferrara. At the hearing, insurer argued that the bureau's administrative determinations should be vacated because it had previously filed a UR request, from which it was determined that all treatment rendered by Dr. Ferrara from Nov. 2, 2016 and onward (which would include the prescription for the compound cream and Naprelan tablets at issue in the hearing) was unreasonable and unnecessary. The hearing officer relied on the UR determination to vacate the bureau's administrative determinations ordering payment to the pharmacy.

On appeal to the Commonwealth Court, the pharmacy argued that the UR determination could

not be used as a basis to vacate the administrative determinations because as a pharmacy, it is unable to participate in the UR proceeding. (Per the regulations, the prescribing physician, not the pharmacy, is designated as the provider under review who receives notices of the UR request and copy of the UR determination and may appeal an adverse decision.)

Although affirming the hearing officer's decision relying on the UR determination in the appeal, the Commonwealth Court acknowledged that "there are due process issues for providers such as [the pharmacy] that are precluded from participating in the UR process but nonetheless are bound by the results that follow them to the fee review process." In light of these due process concerns, the court announced that the new rule mentioned above. That rule requires that going forward that entities such as pharmacies, diagnostic testing companies and suppliers of durable medical equipment (DME) shall be given the opportunity to participate in UR proceedings. If they are not, it would appear that UR determinations finding the treatment or services under review unreasonable and unnecessary may not be used as a basis to deny those same pharmacies, diagnostic testing companies, and DME suppliers payment in a fee review proceeding.

Although the decision was in the carrier's favor, it has filed an application for reargument requesting that it reconsider its decision regarding due process rights of pharmacies and other possible health care providers when those entities are aggrieved by a UR determination.

In PetSmart, Inc. v. WCAB (Sauter), No. 85 C.D. 2019, Aug. 15, 2019, the Commonwealth Court considered whether (1) the WCJ erred in granting the claimant's claim petition; and (2) whether the judge capriciously disregarded substantial competent evidence.

Procedurally, the claimant filed a claim petition alleging that he sustained a work-related low back injury. He also filed two penalty petitions. The first was withdrawn. The second alleged that the employer unreasonably failed to accept the claim and pay benefits, even though the independent medical examining physician acknowledged that the claimant was injured. The WCJ granted the claim petition determining that the claimant's work injury was discogenic low back pain and nerve symptomology of indeterminate etiology.

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The WCJ also ordered a penalty because the employer failed to accept a work-related injury. The employer appealed to the WCAB. The board affirmed the WCJ decision granting the claim petition, and reversed the decision on the penalty petition, remanding the matter for a hearing on unreasonable contest fees. Subsequently, the WCJ found that the employer had a reasonable basis for contesting the claim petition, and did not award unreasonable contest fees. The employer then filed a petition for review to the Commonwealth Court of the WCAB decision affirming the WCJ decision granting the claim petition.

The employer argued that the WCJ erred in granting the claim petition averring that the claimant's medical evidence was equivocal because his expert opined that his injury was of "indeterminate etiology" and "presumed" the injury was work-related.

The court recognized that there are no "magic words" that a medical expert must use to establish causation; however, the testimony as a whole must contain a requisite level of certainty to deem it unequivocal. The court stated that the medical expert's opinion that the condition was of "indeterminate etiology" and his "presumption" that the diagnosis was work-related did not unequivocally establish a causation connection to the work injury. The court looked to Black's Law Dictionary wherein "indeterminate" is defined as "[n]ot definite, distinct, or precise; impossible to know about definitely or exactly."

Further, "etiology" is defined as "[t]he cause of a disorder or disease as determined by medical diagnosis." Therefore, by definition, the claimant's medical expert opined that it was impossible to know the cause of the claimant's diagnosis. It also cited to *Burneisen v. WCAB (Polk Center)*, 467 A.2d 400 (Pa.Cmwlt. 1983), wherein the court held that the uncertain etiology of an infection was insufficient to meet the claimant's burden of proof.

The Commonwealth Court reversed the WCAB's order, concluding that the claimant's medical expert did not provide competent evidence supporting the WCJ's determination, the claimant failed to meet his burden on the claim petition, and the WCJ erred by granting the claim petition.

Updated Peters Case Note - On Jan. 8, 2020, the Supreme Court of Pennsylvania granted claimant's Petition for Allowance of Appeal

from the Commonwealth Court's Opinion and Order in Peters v. WCAB (Cintas Corporation), ___ A.3d ___ (Pa. Cmwlt. 2019).

In this case, a divided Commonwealth Court held a traveling employee was acting outside the course of his employment when he sustained injuries in a vehicular accident on his way home after attending a happy hour celebration with co-workers.

Claimant, Jonathan Peters, was traveling salesman for employer, Cintas. On the day of the accident, claimant drove to a restaurant after working a full day to attend an event with co-workers. He drove past his home on the way to the restaurant. Claimant's injuries were sustained in a vehicular accident while driving home from the restaurant. Employer denied liability and claimant filed a claim petition. The WCJ denied claimant's claim petition, finding claimant's voluntary attendance at the event was not in furtherance of employer's interests; rather, the event was merely a social gathering.

The WCAB affirmed, and claimant appealed to Commonwealth Court. At the outset, the court acknowledged traveling employees are entitled to a presumption they are in the course and scope of employment when traveling to and from work. To rebut the presumption, an employer must establish the claimant's actions at the time of injury were "so foreign to and removed from" his usual employment that those actions constituted abandonment of employment. Acknowledging that homeward travel and its associated hazards are considered a necessary part of business excursions, the court focused on the fact claimant drove past his home when traveling to the event. Under these facts, reasoned the court, claimant's homeward trip ended when he passed home. Claimant could have avoided the additional hazards of travel by simply going straight home and forgoing the voluntary event.

Two dissenting judges felt the injury was compensable a matter of law because claimant was in furtherance of his employment. Here, employer invited claimant to the event, employer organized and paid for the event, employer regularly held similar events during sales promotions, and the event occurred at the end of claimant's workday. Under the majority's reasoning, noted the dissent, claimant's injuries would have been compensable if the restaurant was geographically situated between claimant's last sales call and his home.

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A concurring judge felt that the location of the event was irrelevant because the WCJ found claimant's attendance at the event was voluntary and not work-related.

In its Jan. 8, 2020 order granting claimant's petition for allowance of appeal, the Supreme Court framed the issues on appeal as follows:

1. A traveling employee is entitled to a presumption that he is in the course and scope of employment when traveling to or from work unless his actions at the time of accident are so foreign and removed from his usual employment to constitute

abandonment of employment. What constitutes an abandonment of employment such that a traveling employee is not entitled to benefits under the Pennsylvania Workers' Compensation Act?

2. A traveling employee is entitled to a presumption that he is in the course and scope of employment when traveling to or from work unless his actions at the time of accident are so foreign and removed from his usual employment to constitute abandonment of employment. Consequently, is an injury compensable under the Pennsylvania Workers' Compensation Act when an employee is injured while returning home after attending a work-sponsored social event?

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