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pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

News & Notes

Vol. 23 | No. 3 *"Serving all Pennsylvanians"* Summer 2018

Elizabeth Crum and Michael Vovakes, Deputy Secretary for Compensation and Insurance

Elizabeth Crum, director of the Workers' Compensation Office of Adjudication (WCOA), retired in June after 30 years' service with the commonwealth. During her tenure with WCOA, she was responsible for Pennsylvania's workers' compensation judges, judge managers, and staff in 22 offices located throughout the Commonwealth of Pennsylvania. Prior to assuming the position of director of Adjudication, Liz was deputy secretary for Compensation and Insurance with the Pennsylvania Department of Labor & Industry. She also served as judge manager for the Eastern District of Pennsylvania and as a judge in Philadelphia. Prior to her appointment as judge, she served as an attorney and chief of the Compliance Division with the Bureau of Workers' Compensation. Liz began her legal career as an attorney/advisor with the United States Department of Labor in Pittsburgh. She is a 1987 graduate of the University of Pittsburgh School of Law.

In 2017, the Pennsylvania Bar Association Workers' Compensation Law Section presented its Irvin Stander Memorial Award to Liz. The award is named in honor of the late Judge Irvin Stander and is presented to an attorney whose dedication to the administration of workers' compensation law, and whose professionalism and regard for clients and colleagues serves as an example to others.

Liz has been a frequent speaker and faculty member on workers' compensation issues at state, national, and international seminars. She is also a council member of the PBA Workers' Compensation Law Section and a fellow of the College of Workers' Compensation Lawyers.

Her ceaseless efforts, innovative leadership, and enduring dedication to the Workers' Compensation Office of Adjudication will be greatly missed. Best wishes to Liz in all her future endeavors.

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.

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ra-li-bwc-helpline@pa.gov

A Message from Scott G. Weiant

Director – Bureau of Workers' Compensation

On June 7-8, 2018, staff members from the three workers' compensation program areas, led by Mistie Snyder, organized and accomplished another successful workers' compensation conference. Nearly 1,400 people registered to attend this year's conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor and others.

As you can imagine, there are many individuals that contribute to the success of this program. Members of the conference committee include volunteers from various stakeholder groups throughout Pennsylvania.

Thank you to all conference committee members, and a special thank you must be provided to Elizabeth Crum who has chaired the conference committee for the last several years. Liz retired in June and will be missed by the planning committee. Liz's hard work and leadership on the committee was certainly a contributing factor to the success of the event throughout the years. Speaking on behalf of the bureau, I want to thank Liz for all her efforts to make the conference a success.

This year's event featured topics and speakers related to subjects such as medical marijuana, opioid use, the gig economy, and more interesting topics that are impacting the WC systems throughout the country. The various workers' compensation systems throughout the country are realizing many challenges due to societal changes and their impacts. There is not a state in the nation that is not dealing with the opioid issue, and many states are shaping the impacts of medical marijuana within the workers' compensation system. The breakout session titled "The Gig Economy" was very interesting and addressed another issue that is at the forefront for many states.

Beginning this month, the committee will begin preparations for the 2019 conference. We are fortunate to have subject matters experts who are willing to share their expertise and educate stakeholders on issues of interest each year.

In closing, I would like to thank the committee, speakers, staff, and everyone that has attended the conference over the years and participated in the breakout session conversations. This is what makes the Pennsylvania WC Conference a success!

Thank you!

Pennsylvania Workers' Compensation & Workplace Safety Annual Report

The 2017 Pennsylvania Workers' Compensation and Workplace Safety Annual Report is **now available**.

PATHS

Your No-Fee Safety Training Resource

PATHS (PA Training for Health and Safety) is a no-fee, statewide service that provides employers and employees with easy access to cost-effective health and safety resources. PATHS provides a single, comprehensive website where you can register for webinars on over 200 safety-related topics, including the annually required training for both initial and renewal certification of a workplace safety committee. PATHS offers numerous PowerPoint presentations, videos, safety posters, toolbox talks, and safety forms that cover a wide variety of health and safety topics. These resources are available for use by employers to maximize their employee safety training efforts.

Safety Committee Box Score

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

12,015 committees covering 1,536,109 employees

Cumulative grand total of employer savings:

$702,892,669

Visit PATHS at www.dli.pa.gov/paths. You can contact the Health & Safety Division by phone at 717-772-1635 or by email at ra-li-bwc-paths@pa.gov.

Kids' Chance of Pennsylvania

Hope, Opportunity and Scholarships for Kids of Injured Workers

Paying for college is hard. Paying for college when one or both of your parents have been seriously or fatally injured in a workplace accident seems nearly impossible. For more than 21 years, Kids' Chance of Pennsylvania Inc. (Kids' Chance of PA) has helped to lessen the impact of these high costs by providing scholarships to the children of these families.

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 $175,000. These scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors.

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 of PA, please contact us at 215-302-3598 or visit www.kidschanceofpa.org.

Pennsylvania Governor's Occupational Safety and Health Conference

MEET WITH 80+ VENDORS IN THE EXHIBIT HALL!

EARN CONTINUING EDUCATION CREDITS!

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

Keynote Presentations:
The Safety Coach presented by David Sarkus, MS, CSP
Leadership in a Crisis by Jeff McCausland, PhD
The Work Lady: Finding the Funny in Change by Jan McInnis

Additional Topics Include:
Fall Hazard Basics
Leading Change Management
The Workers' Compensation Process
Prevention Thru Design (PTD)
The Impact of Employee Education, Training, and Culture on Injury Rates
Silica Compliance
Permit Required Confined Space Hazards
Building a Community, Not Just a Culture for Safety
25,000 Clients Can't Be Wrong
Labor/Management
Incorporating Risk Assessment into JSAs
and much more...

FOR MORE INFORMATION PLEASE VISIT: WWW.PASAFETYCONFERENCE.COM
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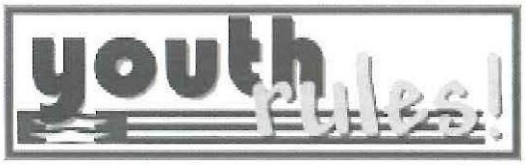

Every year, millions of teens work in part-time or summer jobs that provide great opportunities for learning important life skills and acquiring hands-on experience. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

TIPS for Achieving and Maintaining Compliance with Youth Employment Laws*

Train Employees	Identify Violations	Promote Compliance	Share Accountability
+ 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.	+ 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 16 at the time payroll data is collected, and track and transcribe any violations. + Establish a hotline for employees, parents, and 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.	+ 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 16 and one for employees aged 16 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.	+ 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 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.

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

Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to insure its workers' compensation liability is a criminal offense and classifies each day's violation as a separate offense, either a third-degree misdemeanor or, if intentional, a third-degree felony.

First-time offenders may be eligible to enter the Accelerated Rehabilitative Disposition (ARD) program. Defendants who enter the ARD program waive their right to a speedy trial and statute of limitations challenges during the period of enrollment; they further agree to abide by the terms imposed by the presiding judge. Upon completion of the program, defendants may petition the court for the charges to be dismissed. Although acceptance into the program does not constitute a conviction, it may be construed as a conviction for purposes of computing sentences on subsequent convictions.

The violators and locations are as follows:

Allegheny County On June 4, 2018, John Elwood Dorr, d/b/a Dorr Moving Exchange, of Wilmerding, PA, pled guilty to four (4) misdemeanor counts of the third degree for failure to procure worker's compensation insurance before Judge Anthony M. Mariani in the Court of Common Pleas of Allegheny County. Mr. Dorr was sentenced to four (4) years' probation and ordered to pay restitution of $54,922.50 to the Uninsured Employers' Guaranty Fund.

Bucks County On March 29, 2018, Anthony Soule on behalf of AC Soule Scapes Inc., located in New Hope, PA, pled guilty to seven (7) misdemeanor counts of the third degree in the Bucks County Court of Common Pleas, was sentenced by Judge Raymond F. McHugh to serve seven (7) years' probation and ordered to pay $134,442.40 restitution to the Uninsured Employers' Guaranty Fund.

Chester County On March 20, 2018, Maximino Hernandez for Max's Mushrooms Inc., in Kennett Square, PA, agreed to and paid $7,086.94 in restitution to the Uninsured Employers' Guaranty Fund in exchange for a withdrawal of the charges in lieu of prosecution.

Indiana County On April 6, 2018, Tracy L. (Carrol) Brown pled guilty to five (5) misdemeanor counts of the third degree for failure to procure workers' compensation insurance for Live Well Estates. Judge William J. Martin of the Court of Common Pleas of Indiana County ordered Ms. Brown to pay court costs of $286.50, pay restitution of $62,091.04 to the Uninsured Employers' Guaranty Fund and to serve one (1) year of probation for each of the five (5) offenses.

To report suspected workers' compensation fraud, or if you have workers' compensation fraud-related questions, please contact the Bureau of Workers' Compensation by email at ra-liwc-compliance@pa.gov or by telephone at 717-787-3567.

RECENTLY IN WCAIS

WCAIS Enhancements

Set Your Profile to be an "Electronic Recipient" in WCAIS.

To set your profile to be an electronic recipient:

1. From the WCAIS Navigation Menu, select Profile and then Change Profile
2. "Send Correspondence By:" select the radio button for "Email"
3. Type in your email address
4. Click Submit

EDI Community

Change Transactions submitted with blank fields, where previous transactions populated that field, will return a TA ACK (Transaction Accepted Acknowledgement) with a message stating: Blank Field(s) = No Change. Trading Partners do not need to update their claims processing systems.

As a reminder, filers seeking to change data in a field must replace the previously submitted data with new data rather than leaving the field blank. Leaving a field blank will NOT remove the previously submitted information.

Notice to All Pennsylvania Workers' Compensation Self-Insurers

The Department of Labor & Industry, Bureau of Workers' Compensation (Bureau) 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 twelve (12) calendar months; all permits issued under this section expire and terminate on the last day of the 12-month period for which they are issued. Section 125.3(b) of the Workers' Compensation Self-Insurance Regulations, 34 Pa. Code § 125.3(b), provides that renewal applications shall be filed with the bureau no later than three months prior to the expiration of the current permit.

Compliance with the three-month requirement is necessary to ensure that all required information and documentation can be submitted and reviewed prior to the expiration date of the current permit. The bureau will not issue a decision on an application until the application, including any and all additional items that may be requested by the bureau pursuant to Section 125.3, have been submitted. 34 Pa. Code § 125.3(e).

Where the bureau requests additional information or documentation from a renewal applicant, the applicant is generally required to submit those items within 21 days; if the renewal applicant does not provide the additional information within the prescribed time period, the application will be deemed withdrawn. 34 Pa. Code § 125.3(d). Further, even where the renewal applicant has or is in the process of submitting the required additional items, if the renewal applicant failed to timely file a renewal application under Section 125.3(b), they will not be entitled to an automatic extension of their current permit beyond its expiration date. 34 Pa. Code § 125.7(b).

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

Notice to All Pennsylvania Workers' Compensation Self-Insurers and Group Fund Self-Insurers

Please ensure that your "Application Contact" and "Program Contact" sections are completed and up to date in WCAIS. You may list one application contact and up to three program contacts. The bureau is only permitted to speak to the individuals listed as application or program contacts in WCAIS about your self-insurance programs. It would be beneficial to your company to have a different person listed for each contact type, so that if one person is unavailable, the bureau can still communicate with another authorized individual in your company to keep the process moving and resolve issues timely.

In deciding who to list as your contacts, please keep in mind that the application contact is usually the person who prepares, or oversees preparation and/or submission of, the annual renewal application. The program contact is someone who can be contacted regarding pertinent self-insurance matters. The program contact may also be an alternative person to contact if the application contact is not available. Program contacts are copied on all correspondence and emails.

If you have any questions, please contact our office at 717-783-4476. Thank you for your prompt attention to this important notice.

Notice to All Pennsylvania Workers' Compensation Self-Insurers with Third Party Administrators (TPA)

Please ensure that your TPA information is accurate in WCAIS. If you have a change in a TPA, please immediately notify Karen Carroll (Claims Management) at 717-772-0621 or karcarroll@pa.gov so that your information can be updated.

A View from the Bench

Child Support Non-Disbursement Order is Enforceable Against C&R Award for Less than $5,000, and Insurer is in Contempt When it Fails to Pay Domestic Relations

In *Coffman v. Kline,* 167 A.3d 772 (Pa. Super. 2017), the Superior Court again clarified that domestic relations' non-disbursement orders, issued under 23 Pa. C.S.A. §4305(b)(10)(i) and (ii), take priority over workers' compensation compromise and release (C&R) settlements, even when the claimant's net award is less than $5,000 and thus not subject to the provisions of 23 Pa. C.S.A. §4308.1(F). See *Faust v. Walker,* 945 A.2d 212 (Pa. Super. 2008).

The claimant had a Lehigh County child support arrearage of nearly $14,000. When the county's domestic relations section learned that he was going to settle his compensation claim by C&R, it promptly issued a March 2015 common pleas non-disbursement order directed to the third-party administrator, Sedgwick Claims Management. When the compensation case settled in September 2015, claimant's share was less than $5,000. Although the workers' compensation judge (WCJ) was aware of the substantial arrearage through the required verifications, Sedgwick did not disclose the existence of the non-disbursement order. Relying on §4308.1(F), the WCJ did not order payment of the known arrearage. Based on the WCJ's decision, and despite the earlier non-disbursement order, Sedgwick paid claimant's entire share to him.

When domestic relations found out that Sedgwick had ignored its order, it had the child's mother file a civil contempt petition against Sedgwick in the Court of Common Pleas of Lehigh County. The trial court dismissed the petition, finding that the specific language in §4308.1(F) was inconsistent with, and took priority over, §4305(b)(10)(i) and (ii). The trial court concluded that, although domestic relations offices have general seizure power against all settlement proceeds without limitation, there was no specific implementation mechanism set forth in those provisions to effect such seizures.

However, in the 2009 decision of *Campbell v. Walker*, 982 A.2d 1013 (Pa. Super. 2009), the Superior Court had already held that the cited sections were complementary, not inconsistent, and that a non-disbursement order for child support arrearages was enforceable against the *entire* award and not just the amount over $5,000. Here, Superior Court discussed the two sections at length, held that *Campbell* was controlling and concluded that the non-disbursement order was enforceable against the whole amount of claimant's share. Sedgwick's arguments, that it did not want to be involved in claimant's domestic dispute and that he would not have settled his compensation claim had he known that he would not receive it, were unavailing. The court reversed the dismissal of the contempt petition and remanded the matter to the trial court for a hearing, making it clear that Sedgwick was in contempt due to its failure to obey the non-disbursement order.

***Dorvilus v. WCAB (Cardone Industries)*, 166 A.3d 1238 (Pa. Cmwlth. 2018)**

On Nov. 12, 2009, claimant filed a Claim Petition alleging an injury occurring in September 2009. The WCJ granted the Claim Petition, awarding both medical and indemnity benefits. Defendant appealed to the Board. The Board affirmed the WCJ's determination that claimant sustained a work injury, but reversed the WCJ's award of indemnity benefits. Claimant appealed the Board's decision to the Commonwealth Court. The Commonwealth Court affirmed in March 2014 and the Supreme Court denied allocatur.

On May 5, 2015, claimant filed a Reinstatement Petition alleging his work injury had worsened and caused a loss of his earning power as of June 26, 2013. Defendant moved to dismiss the Reinstatement Petition as barred by the doctrines of collateral estoppel and *res judicata*. The WCJ denied defendant's motion. Defendant then moved to dismiss the petition as time barred by Section 413(a) of the Workers' Compensation Act.

Section 413(a) of the Act limits the time-period for seeking a reinstatement of compensation. Section 413(a) states, in relevant part, as follows:

> Such modification, reinstatement, suspension, or termination shall be made as of the date upon which it is shown that the disability of the injured employee has increased, decreased, recurred, or has temporarily or finally ceased, or upon which it is shown that the status of any dependent has changed: Provided that, except in the case of eye injuries, no notice of compensation payable, agreement

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> or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition.

77 P.S. §772. The WCJ granted defendant's motion and dismissed claimant's reinstatement petition. The Board affirmed, and claimant appealed to the Commonwealth Court.

On appeal, claimant argued that his last payment of disability compensation was made on July 21, 2013, and he filed his reinstatement petition on May 8, 2015, which was within three years after the date of the most recent payment of compensation under Section 413. Defendant argued that as it won the underlying appeals and claimant was never entitled to any wage loss benefits that the benefits that were wrongfully paid to the claimant were irrelevant to the three-year deadline in Section 413(a) for filing a reinstatement petition. Defendant argued that claimant was not entitled to a reinstatement of benefits that would never have been paid except for the error of the WCJ. Defendant cited to *Sloane v. WCAB (Children's Hospital of Philadelphia),* 124 A.3d 778 (Pa. Cmwlth. 2015).

The court also discussed *Gieniec v. WCAB (Palmerton Hospital and HM Casualty Insurance Company)* 130 A.3d 154 (Pa. Cmwlth. 2015).

The court concluded that defendant did not accept claimant's claim that he suffered a work injury that caused a loss of earning power, and this claim had been fully litigated. In the end, it was established that claimant sustained a work injury, but not one that caused a loss of earning power. As in *Sloane*, the Board did not suspend wage loss benefits; rather, it held that claimant was not entitled to disability compensation. Furthermore, as in *Gieniec*, claimant fully litigated his claim for indemnity benefits and lost. Thus, there were no benefits to be reinstated. Claimant proved a work injury, but he did not prove that it caused a disability. He cannot now seek reinstatement after the three-year statute of limitations has run, based upon his collection of compensation payments reversed on appeal.

When a Disabling Mental Injury is Claimed, the Physical Stimulus of the Work Incident Must be Sufficient to Require Medical Treatment in Order to Avoid the Enhanced Abnormal Working Conditions or Event Threshold

Frankiewicz v. WCAB, (Kinder Morgan, Inc.), No. 20 C.D. 2017 (Pa. Cmwlth. Nov. 14, 2017).

This Nov. 14, 2017, Commonwealth Court decision, initially unreported and then ordered published on Feb. 21, 2018, discusses the distinction between physical-mental and mental-mental standards and reviews the relevant cases.

Claimant worked as a chemical worker for employer and, on April 22, 2012, was exposed to a diesel oil spill from a nearby facility. He developed numerous symptoms, claiming headache, nausea, vomiting, choking, runny nose, watery eyes, sweating, shaking, and abdominal and throat pains. He was taken to the emergency room (ER), examined, given Tylenol and intravenous saline and anti-nausea medications, and discharged from care, with no remaining symptoms, three and one-half hours later, with a recommendation to see his family doctor if he did not feel better. He then worked for several more months but developed even more symptoms that he blamed on the exposure, including sinus infection, sore throat, vomiting, acid reflux, breathing difficulty, chest pain, fatigue, cellulitis, blood infection, panic attacks, anxiety, depression, and domestic and parenting problems. He stopped working on September 15th, five months after the event.

During the claim, penalty, and review petitions proceedings, claimant's family physician witness listed 18 allegedly disabling, work-related diagnoses. His unlicensed psychologist witness identified five disabling psychological diagnoses. Employer's two medical witnesses denied any injury. Its board-certified internist/ pulmonologist/allergist/immunologist opined that there was no physical injury or disability or any need for treatment. Its board-certified psychiatrist opined that claimant had pre-existing depression, not aggravated by the work incident.

Pursuant to §420(a) of the Act, *as amended*, the WCJ appointed an impartial physician – Board-certified in occupational, environmental, and emergency medicine and in medical toxicology. He opined that claimant suffered no physical injury at all, and the only positive finding was symptom magnification, resulting in anxiety and depression. There was no evidence of sufficient toxic exposure to any chemical to cause any physical injury.

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The WCJ found claimant credible but found employer's witnesses and the impartial physician more credible than claimant's witnesses. Thus, claimant did not suffer a physical injury, but he did suffer a psychological injury. The WCJ then used the mental-mental standard, and found that, despite the abnormal event of the oil spill, this was not an abnormal working condition for a chemical operator. As a result, the WCJ found that claimant did not suffer a work-related injury due to his exposure to diesel fumes and denied benefits. Claimant appealed, asserting that he suffered a physical injury, so that the abnormal working conditions mental-mental test did not apply. WCAB affirmed.

Commonwealth Court affirmed as well. It did a thorough analysis of the standards and the many cases applying and differentiating them. (The decision is a worthwhile read for that recapitulation alone.) Claimant's argument that he had a physical injury and did not have to meet the abnormal working conditions standard was not persuasive. He did not meet his burden of proving the requirement of a "triggering physical stimulus" to meet the "physical-mental" standard. That concept means that there must be a physical injury that requires medical treatment, even if it is not a disabling injury. The court found that claimant's symptoms were transient and quickly and completely resolved, with only minimal treatment, while he was in the ER. He had no symptoms when he left the ER a few hours later, and he worked for several months thereafter. Thus, the standard was mental-mental, requiring an abnormal working condition for compensability.

Separated Surviving Spouse Seeking Benefits Must Prove Actual Dependence and Receipt of Substantial Portion of Support from Deceased Employee

In *Grimm on behalf of Grimm v. WCAB (Federal Express Corporation),* 176 A.3d 1045 (Pa.Cmwlth. 2018), the Commonwealth Court held that the claimant/widower did not prove entitlement to benefits on a Section 307(7) death claim. Claimant and decedent married in 1988 and separated in 2010 after decedent filed, but did not complete, a divorce action. Decedent died due to a work-related injury in 2012. After a fatal claim petition was filed, employer conceded compensability for their children and for funeral benefits, but the parties could not agree on claimant's right to dependency benefits. After hearing the evidence, the WCJ denied the fatal claim and the Appeal Board affirmed. The Commonwealth Court, after discussing the issues and evidence at length, affirmed the denial of benefits. Claimant argued that separation without divorce does not prevent a finding of "living with" under Section 307(7) of the Act, in which case dependency is presumed. The court disagreed; it distinguished earlier cases based upon the adjudicated facts. The court next reviewed the facts supporting the WCJ's determination that claimant was not "actually dependent" and receiving a "substantial portion of [his] support" from decedent at the time of her death. Claimant argued that decedent paid for his health insurance through an employer-provided policy. The evidence, however, showed that was done more as a convenience because it was cheaper than an individual policy for claimant. There was no evidence claimant could not otherwise have paid for his own insurance; therefore, it did not rise to a "substantial portion" of claimant's needs. Further, although claimant was self-employed and had losses in many tax years (based on 2009 through 2013 joint tax returns in evidence), his business expenses artificially decreased his earnings. Moreover, claimant made much more than decedent on the date of decedent's death. Finally, there was no evidence decedent provided any financial support for claimant. On the contrary, claimant was financially supporting decedent and the children. As such, claimant failed to establish "actual dependency."

***Joseph Caffey v WCAB (City of Philadelphia)*, ___ A.3d___ , 2018 WL 1747255 (Feb. 2, 2018)**

In March 2013, claimant filed a claim petition alleging an occupational disease in the form of bladder cancer as a result of exposure to IARC Group 1 carcinogens while working as a firefighter. The alleged date of injury was his last day of employment, Dec. 12, 2003.

After the General Assembly passed Act 46, P.L. 251, 77 P.S. §27.1(r), in July 2011, claimant contacted his union to have his case investigated. Act 46, specifically, Section 108(r) recognizes "[c]ancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer," as a compensable occupational disease under the Act. In addition, Act 46 added Section 301(f), which established standards for cancer claims under Section 108(r). Section 301(f) limits cancer claims to firefighters who can show four or more years of

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continuous firefighting service and the absence of cancer prior to that service. Further, Section 301(f), in conjunction with Section 108(r), requires that a firefighter be diagnosed with a type of cancer caused by exposure to a known Group 1 carcinogen. *See, City of Phila. Fire Dep't v. WCAB (Sladek)*, 144 A.3d 1101 (Pa. Cmwlth. 2016), *appeal granted*, 167 A.3d 307 (Pa. 2017). Section 301(f) also requires that a claim under Section 108(r) be filed within 600 weeks of a firefighter's last date of exposure to a Group 1 carcinogen. However, if a firefighter files his claim within 300 weeks of his last date of workplace exposure and establishes that his type of cancer is an occupational disease, Section 301(f) provides a presumption that his workplace exposure caused his cancer. *Sladek*

Claimant's testimony was found credible in its entirety. Claimant became a firefighter in June 1972 and passed the physical. He was not under active treatment for cancer and passed a second physical in 1998 when he received a promotion. Claimant faced exposure to soot while fighting fires, and diesel fumes while at the fire station. In March 2009 claimant was diagnosed with bladder cancer. Claimant's diagnoses and treatment occurred less than 300 weeks from his last exposure at work. Each party submitted medical evidence both for and against a causal link between firefighting and bladder cancer.

The WCJ made no credibility determinations regarding the medical evidence. The WCJ found that claimant's last day of exposure occurred in November 2003, and he last worked as a firefighter on Dec. 12, 2003. The WCJ then noted the pre-Act 46 version of Section 301(c)(2) of the Act, 77 P.S. §411(2), remained in effect until Act 46's effective date in July 2011. Under the prior version of Section 301(c)(2), claimant's claim for benefits must have manifested within 300 weeks of his last date of employment. Because the claim did not manifest within that period, the WCJ determined that it was barred.

Claimant appealed to the WCAB and the Board affirmed, citing *City of Warren v. WCAB (Haines),* 156 A.3d 371 (Pa. Cmwlth.), *appeal denied*, 170 A.3d 1039 (Pa. 2017). In *Haines*, the court specifically determined that Act 46's provisions could not be applied retroactively and established a new statute of repose for occupational disease claims brought under Section 108(r) only where the right to bring the claim had not previously expired under Section 301(c)(2).

Claimant appealed to the Commonwealth Court and argued that he did not know that he had the ability to bring an occupational disease claim for his bladder cancer until he received his doctor's February 2013 report. Relying on the discovery rule, claimant argued that the three-year statute of limitations in Section 315 of the Act, began to run at the time he learned that he suffered from an occupational disease. *Price v. WCAB (Metallurgical Res.),* 626 A.2d 114 (Pa. 1993); *City of Phila. v. WCAB (Sites),* 889 A.2d 129 (Pa. Cmwlth. 2005). Furthermore, claimant argued that under the newly added presumption of compensability in Section 301(f) of the Act he had 600 weeks from his last exposure within which to bring a claim.

The court noted that the claim petition was filed less than 600 weeks after claimant's last day of work. As discussed in more detail below, if claimant's medical-only claim was still viable, this filing would not run afoul of Act 46's new 600-week statute of repose for firefighter cancer claims set forth in Section 301(f) of the Act, 77 P.S. §414. *See, City of Warren v. WCAB (Haines)*, 156 A.3d 371 (Pa. Cmwlth.), *appeal denied*, 170 A.3d 1039 (Pa. 2017).

In analyzing this argument, the court first discussed the 300-week statute of repose. Section 301(c) of the Act imposes a time limit upon a claimant's ability to present an occupational disease claim. The operative time-limit language of 300 weeks in Section 301(c)(2) pre-existed and was essentially unchanged by the passage of Act 46. The court indicated that the disease did manifest within the 300-week period, and as a result the claimant's rights were not extinguished by the 300-week statute of repose previously created by Section 301(c)(2). The court next discussed *Haines*, and noted that under *Haines* Section 301(f) of the Act, 77 P.S. §414, which established a new 600-week statute of repose for firefighter cancer claims, did not have a retroactive effect. Thus, for occupational diseases occurring before the effective date of Act 46 in July 2011, a claimant must satisfy the 300-week limitation period of pre-existing Section 301(c)(2).

Employer argued that claimant failed to establish either disability or death within the 300-week period in Section 301(c)(2). Employer therefore argues the WCJ properly denied claimant's Claim Petition. The court disagreed, noting the manifestation of the bladder cancer and the incursion of medical bills for the treatment of that

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cancer occurred within the 300-week period. The court also specifically distinguished *Haines* from the present case as the claimant here was not seeking either death or disability benefits.

The court further noted that claimant could assert a firefighter's cancer claim for medical benefits under Sections 108(r) and 301(f) of the Act. *Sites, supra.* The court concluded that claimant satisfied both the pre-Act 46 occupational disease statute of repose of 300 weeks and the post-Act 46 statute of repose of 600 weeks. Because claimant's cancer constituted an occupational disease prior to the Act 46 amendments, Section 301(f) was not being applied retroactively. *Sites, supra.*

The court then indicates that because claimant failed to file a Claim Petition within the first 300 weeks after his last date of exposure to the hazards of the disease, he is not entitled to the presumption of compensability in Section 301(f) of the Act. Furthermore, the court rejected employer's contention that claimant's Claim Petition must be considered as filed exclusively under Act 46. If a claimant is entitled to relief under any section of the Act, his petition will be considered as filed under that section. (Citations omitted)

The court noted that despite being within the 300-week statute of repose, the claimant still had to comply with the three-year statute of limitations under Section 315 of the Act. Here the court referred back to the claimant's "discovery" argument and remanded to the WCAB and the WCJ for a determination of whether claimant filed a timely claim petition for medical benefits for an occupational disease under *Price* and *Cospelich*; and, if so, whether claimant met his burden of proving that he sustained an occupational disease, in the nature of bladder cancer, under either Sections 108(n) and 301(c)(2) of the Act, or Sections 108(r) and 301(f) of the Act. If so the medical portion of his claim would be compensable.

Supreme Court, Reversing Commonwealth Court, Holds that Unreasonable Contest Attorney's Fees, Once Paid, but then Disallowed on Appeal, are not Subject to Disgorgement

County of Allegheny v. WCAB (Parker), 177 A.3d 864 (Pa. 2018) [Nos. 28 & 29 WAP 2017, filed Jan. 18, 2018, Baer, J.) (unanimous).

The Supreme Court, reversing Commonwealth Court, and restoring the orders of the compensation authorities, has held that unreasonable contest fees, once awarded, paid, but then disallowed, are not subject to disgorgement.

The claimant was an employee of Allegheny County at its detention center for unruly and other delinquent youths. He sustained an injury arising in the course of his employment on Sept. 12, 1993, and was paid benefits voluntarily.

Ten years passed. Then, the county filed to suspend compensation benefits on a "voluntary withdrawal from the workplace" theory. A WCJ denied relief.

Another five years passed. At that time, the county sought a suspension of benefits on the basis of actual job availability, that is, under *Kachinski*. The county averred that claimant had improved in condition and that a job was available to which he had not returned. On this occasion, the WCJ agreed and suspended benefits.

The Appeal Board, however, reversed, holding that the county was collaterally estopped from seeking such relief as it was purportedly on the same basis as the initial petition. Indeed, not only did the Board throw out the county's case, it awarded unreasonable contest attorney's fees.

The Appeal Board and Commonwealth Court denied supersedeas. At that point, "the county, having no other recourse," paid the $14,750.00 unreasonable contest fee award. Ultimately, however, on the merits, Commonwealth Court reversed. The second petition, the court reasoned, had indeed raised "new grounds for suspension and the WCAB erred in reversing…." The court also reversed the order awarding fees.

Thereafter, the Supersedeas Fund denied reimbursement to the county of the $14,750.00. The county then filed a review petition asking for disgorgement – in the opinion simply referred to as a "refund." The WCJ denied relief, finding no authority in the statute for disgorgement, and the Appeal Board affirmed. Commonwealth Court, however, reversed. The court reasoned (among other things), that since *litigation costs* (*e.g.*, trial deposition fees) could be disgorged, so, too, could *attorney's fees.* The court, for this proposition cited *Barrett v. WCAB (Sunoco, Inc.)*, 987 A.2d 1280 (Pa. Commw. 2010).

On appeal to the Supreme Court, claimant argued that *Barrett* was not good authority. *That* case dealt with litigation costs reimbursement and,

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further, claimant maintained that "the court's decision … will have a chilling effect [on] claimants' attorneys seeking unreasonable attorney's fees in future cases. Moreover, to the extent there should be a mechanism for reimbursement of erroneously awarded fees …, (claimant) maintains that only the General Assembly can address the problem." The county, for its part, argued that it would be inequitable to force it to bear the unreasonable contest fees in this context. It complained of alleged unjust enrichment on the part of claimant's counsel and, in advancing this equity-based argument, pointed out that in at least two areas the Commonwealth Court had "used equitable principles when interpreting provisions of the Workers' Compensation Act." These instances included cases (1) allowing employers to get monies back from claimants for "mistaken overpayments"; and (2) applying the doctrine of laches. *See Kiebler v. WCAB (Specialty Tires of America)*, 738 A.2d 510 (Pa. Commw. 1999); and *Roadway Express v. WCAB (Allen)*, 615 A.2d 1224 (Pa. Commw. 1992).

In reversing, the Supreme Court first noted that the precedent which purportedly supported the law that litigation costs were subject to disgorgement *was not*, in fact, supportive of that proposition at all. That case was *Lucey v. WCAB (Vy-Cal Plastics PMA Group)*, 732 A.2d 1201 (Pa. 1991). Thus, the integrity of the *Barrett* case itself was in question.

In any event, the court agreed with claimant's argument. As a preliminary matter, the legislature had taken account of reimbursement for overpayments via creation of the Supersedeas Fund, and that law does not allow for reimbursement of attorney's fees. "Thus," the court stated, "an inference can be drawn from the General Assembly's decision to create a specific fund for reimbursement of compensation benefits, but not for attorney's fees and costs, that it intended the latter to be openly borne by the employer once paid." *Slip opinion* at 17.

Further, the court reasoned, some protection against imposition of attorney's fees exists in the employer's ability to request supersedeas. The court declared, "it appears that the General Assembly may have contemplated that the ability to request supersedeas of an attorney's fee award on appeal would suffice to protect employers from having to pay out erroneous awards under Section 440, and that where, as here, an inappropriate award is paid, employers are the better party to absorb the loss."

The court also agreed with the WCJ and claimant's counsel that disgorgement obligations "would chill claimant's attorneys from bringing [workers' compensation] claims and would, therefore, make employers more apt to bring unreasonable challenges to their liability." *Id.* at 18. The court concluded, "it is not the function of this court to add missing language to a statute in order to provide relief; particularly when doing so would undermine that statute's goals of protecting workers and discouraging workers from unreasonably contesting their liability…."

***Commonwealth of Pennsylvania v. WCAB (Piree)*, No. 995 C.D. 2017 (Pa.Cmwlth. Nov. 22, 2017)**

The Commonwealth Court has again reaffirmed *Stermel*, *Bushta*, and *Zampogna* (and *Hargraves*, an unpublished Feb. 28, 2018 decision) that there is no subrogation for Heart & Lung benefits paid by a self-insured employer against a claimant's third party personal recovery in a motor vehicle accident. In this case, the claimant, who worked as an agent in the Office of the Attorney General (OAG), sustained injuries in a motor vehicle accident on Dec. 23, 2011. The employer issued a Notice of Compensation Payable. The WC third-party administrator (TPA) paid the weekly workers' compensation benefits directly to the OAG payroll, and the claimant received his full salary from the OAG payroll under the Heart & Lung Act. On Oct. 31, 2014, claimant was notified that his Heart & Lung benefits were ending because his injuries were found to be permanent and that he would begin receiving workers' compensation benefits on Nov. 4, 2014. On Dec. 1, 2014, the employer and claimant entered into a third-party settlement agreement. There was a lien of approximately $300,000, with a third-party recovery to the claimant of $1.255 million.

Thereafter, both parties filed Review Petitions, seeking a determination on whether the employer was entitled to subrogation under Section 319 of the Act. Claimant requested that the WCJ review the subrogation agreement and remove payments made under the Heart & Lung Act from the calculation of the lien. The employer averred that the amounts included in the third-party settlement agreement were only amounts payable under the WC Act, and therefore the lien should not be reduced for Heart & Lung benefits. Employer presented testimony from two witnesses who explained the interplay of the funds for WC benefits

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and Heart & Lung benefits. The WCJ granted the employer's Review Petition and denied the claimant's Review Petition, finding that the employer had a valid subrogation lien as set forth in the third-party settlement agreement, and was entitled to reimbursement of the lien.

The claimant appealed, arguing that the WCJ erred in finding the employer was entitled to subrogation from benefits that were paid to him under the Heart & Lung Act. The Board reversed based on the decision in *Stermel v. WCAB (City of Philadelphia)*, 103 A.3d. 876 (Pa. Cmwlth. 2014), wherein it was held that self-insured public employers compensating employees injured in motor vehicle accidents under both the WC Act and Heart & Lung Act were excluded "from subrogating any indemnity or medical expenses, regardless of how they were categorized." The *Stermel* holding was reiterated in *Pennsylvania State Police v. WCAB (Bushta),* 149 A.3d 118 (Pa.Cmwlth. 2016), where the court stated, "self-insured employers are not entitled to be subrogated for [WC] when these funds are really used to reimburse Heart & Lung Act benefits." In this case, the board recognized that claimant's Heart & Lung benefits ended Nov. 4, 2014, and therefore held that employer was entitled to subrogation from that date and into the future.

On appeal, employer argued that under Section 319 it is entitled to subrogation against the proceeds of the claimant's third-party settlement to the extent of the compensation payable under the WC Act notwithstanding claimant's concurrent receipt of Heart & Lung benefits.

The court provided a review of the Workers' Compensation Act, the Heart & Lung Act and the Motor Vehicle Financial Responsibility Law. Consistent with the court's prior holdings, it again affirmed that the employer was not entitled to subrogation of Heart & Lung benefits, but it recognized that the claimant's Heart & Lung benefits ended on Nov. 4, 2014 and remanded for a calculation of the subrogation lien from Nov. 4, 2014 and after.

***Sarmiento-Hernandez v. Workers' Comp. Appeal Bd. (Ace Am. Ins. Co.)*, 179 A.3d 105 (Pa. Cmwlth. 2018).**

A workers' compensation claimant, who injured her right wrist at work, appealed the decision of the WCAB, which reversed the WCJ's award of unreasonable contest attorney fees. The Commonwealth Court determined that the defendant had not engaged in an unreasonable contest and affirmed the decision of the WCAB.

The underlying dispute involved a claimant who sustained an injury to her right wrist at work on June 25, 2012. The defendant issued a Notice of Compensation Payable, accepting the injury as a right wrist sprain. A 2013 Suspension Petition was resolved by stipulation in May 2014. Prior to the entry of the stipulation, the defendant deposed the claimant's treating physician, who diagnosed the claimant's work injury as right wrist symptomatic ulnar impaction, triangular fibrocartilage complex tear, and extensor carpi ulnaris tendinitis, which required surgery. Since the Suspension Petition was resolved via stipulation, the doctor's testimony was never admitted as part of that proceeding. On June 27, 2014, the defendant filed a Termination Petition, asserting that the claimant fully recovered from her work injury and could return to work without restriction as of June 2, 2014. The claimant denied that she fully recovered and filed a Review Petition, alleging that the description of her injury was incorrect. The WCJ ultimately granted the Review Petition and denied the Termination Petition. The WCJ also found employer's contest of the petitions was not reasonable and awarded attorney fees for unreasonable contest. The only issue presented on appeal was whether the defendant's actions related to these two petitions were reasonable.

The defendant's appeal to the WCAB resulted in a reversal of the attorney fee award. The Commonwealth Court affirmed. Although the defendant's medical expert did not believe the claimant suffered any work injury, and did not know until the day of the deposition that there was an acknowledged wrist sprain injury, the doctor ultimately testified that "if" there was a strain injury, the claimant was recovered. This was enough to render his opinion competent and reasonable, even though it was not found credible by the WCJ. Regarding the Review Petition, the claimant had the burden, even considering the earlier testimony of the claimant's treating physician that was elicited by the defendant for a separate petition. The defendant's medical expert's lack of knowledge as well as his opinion of non-relatedness for the additional injuries did not render his opinions unreasonable in this circumstance.

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A View from the Bench

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***City of Philadelphia v. Zampogna*, 177 A.3d 1027 (Pa.Cmwlth. 2017)**

The Commonwealth Court held that there is no right to subrogation by workers' compensation payors against Heart and Lung Act benefits in motor vehicle tort recovery cases.

This case involved a police officer injured in a motor vehicle accident. As a result of his injuries, he was unable to work for several years. The city issued a Notice of Compensation Payable (NCP) accepting liability for the injury. The NCP also stated that the city was paying the claimant Heart and Lung Act benefits in lieu of workers' compensation benefits.

The claimant filed a tort action against the driver of the motor vehicle involved in the accident. The city petitioned to intervene in the tort action to protect the subrogation lien it intended to assert against any recovery. The third-party case settled, and the money was placed in escrow while the parties litigated the city's entitlement to its asserted lien. The city initiated a declaratory judgement action to establish its right to recover the Heart and Lung Act benefits it paid to claimant from his settlement.

A trial court granted judgement in favor of claimant, holding Section 1720 of the Motor Vehicle Financial Responsibility Law prohibited the city's subrogation against the tort recovery. The city appealed.

In the decision, the court discusses the interaction of each of the three applicable statutes: the Workers' Compensation Act, the Heart and Lung Act, and the Motor Vehicle Financial Responsibility Act. The Workers' Compensation Act, which applies to both public and private employers, compensates employees injured at work for their medical bills and lost wages, with wage loss benefits typically being paid at two-thirds of an employee's pre-injury wages. The Heart and Lung Act applies only to public employers, and requires the payment of full salary to police officers and other public safety employees who are temporarily unable to work due to a work injury. These employees are also entitled to benefits under the Workers' Compensation Act. However, the statute provides that any workers' compensation benefits received by a public employee who is receiving Heart and Lung benefits shall be turned over to the employer. Typically, self-insured public employers that pay Heart and Lung benefits do not pay workers' compensation payments because they would simply be returned. However, public employers issue a Notice of Compensation Payable to employees receiving Heart and Lung Benefits.

When a work injury is caused by a third-party, Section 319 of the Workers' Compensation Act provides that an employer is subrogated to the right of the employee against a third party, but the Heart and Lung Act does not contain a similar provision. The court explained that it was long understood that common law authorized subrogation of an employee's Heart and Lung benefits from a third party. However, the 1984 enactment of the Motor Vehicle Financial Responsibility Law upended this practice, and Section 1720 expressly abolished an employer's ability to subrogate workers' compensation payments. In 1993, through Act 44, the legislature amended the Workers' Compensation Act and Motor Vehicle Financial Responsibility Act, reinstating an employer's right to subrogation for worker's compensation benefits paid to a claimant whose work injury resulted from a motor vehicle accident. However, Act 44 did not revise Sections 1720 and 1722 of the Motor Vehicle Financial Responsibility Act, and Act 44 is silent on subrogation of Heart and Lung payments. The silence led to litigation, and the Commonwealth Court discussed three leading cases that resulted.

The first case discussed by the court was *Fulmer v. Pennsylvania State Police*, 647 A.2d 616 (Pa.Cmwlth. 1994), which involved a settlement of a third-party action in 1989, prior to the enactment of Act 44. Although the *Fulmer* Court agreed that the pre-amendment version of Section 1720 controlled in that case, it noted that the outcome would be the same under either the pre- or post-amendment statute. It held that Heart and Lung benefits were not subrogable because they fall within "benefits in lieu thereof or payable" language, and that those benefits effectively replace workers' compensation benefits for covered employees.

The court next discussed *Oliver v. City of Pittsburgh*, 11 A.3d 960 (Pa. 2011), in which it was argued that Act 44 restored subrogation not only for workers' compensation benefits, but also for Heart and Lung benefits. The Supreme Court held that Act 44 only restored an employer's right to subrogation insofar as it relates to workers' compensation benefits, but did not mention Heart and Lung benefits and those benefits remained beyond the reach of subrogation by a public employer.

The court then discussed the most recent ruling on the issue in *Stermel v. WCAB*, 103 A.3d 876 (Pa.Cmlwth. 2014).

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In that case, the board concluded that two thirds of the Heart and Lung Act benefits paid by the city actually represented workers' compensation benefits, and subrogation should be allowed on the portion of the benefits that could be attributable to workers' compensation payments. The court reversed, holding that the issuance of an NCP "does not transform Heart and Lung Benefits into workers' compensation; they are separate." It explained that the legislature decided to treat Heart and Lung benefits differently, at least with respect to subrogation from a claimant's tort recovery arising from a motor vehicle accident.

The city attempted to distinguish *Zampogna* from the cited case law on the argument that the prior cases did not specifically analyze the language of the 1990 amendment to Section 1720. The court rejected the city's arguments, holding that subrogation of the Heart and Lung Act benefits is prohibited by Section 1720 and the 1990 amendments did not restore a public employer's right to subrogation of these benefits. It further held that the city may not subrogate a portion of the Heart and Lung Act benefits under the artifice that those benefits are payable as workers' compensation benefits. It likewise stated that a plaintiff may not include the receipt of Heart and Lung Act benefits as an item of damages in its tort against a third-party with liability for a work-related motor vehicle accident.

Judge Leadbetter filed an opinion concurring in the result only. She wrote that *Stermel v. WCAB*, 103 A.3d 876 (Pa.Cmwlth. 2014) was wrongly decided. Judge Leadbetter concluded that the city should be able to pursue subrogation for two-thirds of its Heart and Lung Payments, which would be the amount attributable to workers' compensation pursuant to its Notice of Compensation Payable.

Utilization Review

In *Allison v. WCAB (Fisher Auto Parts, Inc.),* No. 704 C.D. 2017, 2018 WL 385142 (Pa. Commw. Ct. Jan. 12, 2018), the claimant sustained severe and significant injuries, including, fractures on the left side of his face, a fractured left eye socket, a displaced fracture of the right clavicle, fractured ribs, a fractured pelvis, whiplash, and a left shoulder impingement. He filed a Petition to Review the Utilization Review Determination that found his treatment unreasonable and unnecessary. In this case, the provider under review did not supply records, however the URO still assigned a reviewer and forwarded medical records from other medical providers. The UR reviewer discussed the records that were received, talked to the provider, and found the treatment unreasonable because there were no records from the provider to justify the treatment. During litigation of the claimant's Petition to Review a Utilization Review Determination, the WCJ allowed claimant to testify and accepted the provider's report, even though it was dated after the UR determination date. There was also a Penalty Petition that was resolved with counsel stipulating that the employer would pay for nerve blocks until changed by a UR determination. The WCJ granted claimant's Petition for Review of the Utilization Review Determination. Employer appealed. The WCAB reversed, finding that the WCJ lacked jurisdiction, since the medical provider under review failed to supply records. The claimant appealed, arguing that (1) the reviewer did a substantive review and (2) he was denied due process because he had a property right in the treatment. The Commonwealth Court determined that the WCJ did not have jurisdiction to decide the issue because the provider did not supply the required records. Under these circumstances, the URO should not have assigned this to a reviewer. The treatment was unreasonable because of failure to supply records (not because of the adverse determination, which was not required to have been done.) The court further determined that there is no property right in treatments not yet determined to be reasonable. The stipulation did not alter that determination. Since the treatments were not reasonable, they were not yet property.

Massage Therapy

Massage Therapy was found to be compensable in *Schriver v. WCAB (Pennsylvania, Dep't of Transportation),* No. 289 C.D. 2017, 2017 WL 6612675 (Pa. Commw. Ct. Dec. 28, 2017). Litigation commenced when the claimant filed a Petition to Review Medical Treatment and a Penalty Petition because the defendant failed to reimburse claimant for out-of-pocket massage therapy expenses. The defendant relied upon prior case law finding that these expenses were not reimbursable since massage therapists were not considered medical providers within the meaning of the Workers' Compensation Act. Because the therapist worked out of a chiropractor's office, the WCJ found that the providers communicated sufficiently such that the therapist could be considered to be under the chiropractor's supervision, making the therapy compensable.

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The WCJ granted the claimant's Review and Penalty Petitions. The defendant appealed and the WCAB reversed, basically holding that massage therapy was not compensable. The Commonwealth Court discussed the original decisions denying payment to massage therapists, the subsequent Massage Therapy Act (the language of which) did not make such care compensable, and analyzed the facts of this case. The court reversed the WCAB. It held that evidence supported the WCJ's findings that the massage therapy was provided under the supervision of a licensed health care provider (chiropractor) in conjunction with the claimant's overall work injury treatment plan. Therefore, the massage therapy treatment was compensable.

***Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance)* 176 A.3d 374, (Pa. Cmwlth. 2017)**

On May 22, 2018, the Supreme Court denied the Petition for Allowance of Appeal in *Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance),* 176 A.3d 374, (Pa. Cmwlth. 2017).

In *Valenta*, the Commonwealth Court held evidence of an employer's vocational expert credited by the WCJ supported the granting of a Modification Petition, even though the claimant was not hired.

The claimant testified she was either turned down for job opportunities located by employer's vocational expert, the position was unavailable, or she was unable to reach the contact persons. The judge credited the employer's vocational expert.

The court held that the mere evidence of an unsuccessful application to jobs listed in a labor market survey and earning power assessment does not require a finding that positions were not open and available and claimant lacked all earning power. The court noted that was especially so when the judge did not credit the claimant and her vocational expert. The court noted that the claimant's vocational expert was able to contact all six opportunities, even a year after the claimant said she could not contact some of those job opportunities.

The court held that not being hired is not dispositive, but relevant, and the court modified benefits based on the lowest paying job.

The Commonwealth Court observed the issue was one of "first impression" following the Supreme Court's decision in *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d 830 (Pa. 2013). Here, like the facts in *Phoenixville Hospital*, the employer established "meaningful employment opportunities."

***Smith v. WCAB (Supervalu Holdings PA, LLC)* 177 A4d 394 (Pa. Cmwlth. 2018)**

In *Smith v. WCAB (Supervalu Holdings PA, LLC)*, 177 A3d 394 (Pa. Cmwlth. 2018), in an *en banc* decision, the Commonwealth Court affirmed the WCAB, which affirmed the WCJ's modification of benefits based on a labor market survey, but the Commonwealth Court modified the modification based on a lower paying job opportunity.

The employer's Modification Petition alleged that there were five open and available positions within the claimant's restrictions. The vocational witness testified that all of the positions were open and available when the labor market survey was done, and averaged the earnings to opine on the claimant's residual earning capacity. The claimant testified that he applied to all five positions, was contacted and interviewed for two positions, but did not get either job. The WCJ modified benefits based on the labor market survey.

The WCAB affirmed, holding that under *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d 830 (Pa. 2013), the jobs had to be open and available at the time of the survey, meaning that they were not already being performed by someone else. It found that the claimant did not offer evidence that the jobs were not open, and noted that that fact did not shift the burden of proof to the claimant.

The Commonwealth Court affirmed, but modified the modification. It discussed *Phoenixville Hospital* and *Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance),* 176 A.3d 374, (Pa.Cmwlth.2017). It noted that *Phoenixville* required that the jobs be open and available for a period of time so that a claimant could have the opportunity to apply for them. It noted that in *Valenta* it held that the mere applying for jobs and not being hired for them was not dispositive that the positions were not open and available. The court noted that the burden is on the employer to demonstrate that the positions are open and available, and that burden does not shift to the claimant. It held that the jobs did not have to be open and available on the survey date, clarifying that *Phoenixville* requires that they be open for some indeterminate period of time. However, once

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a claimant applies for an open job, but does not get it, that does not automatically mean that the job was not open and available. In *Smith*, the court found that since the claimant was interviewed for two jobs, those jobs were open and available. The court held that is all that is required for the employer to meet its burden of proof, and a claimant does not actually have to be hired for the job. The court held that because the employer did not offer affirmative evidence that the other three jobs remained open and available, and the claimant said he did not get any response to his application for any of those three jobs, there was insufficient evidence that those jobs remained open long enough. The court modified benefits based on the earning capacity established by the two jobs that the claimant interviewed for but was not hired, and did not consider the three jobs that were not proven as open and available.

Another Case of Interest

Federal Court Lacks Subject-Matter Jurisdiction Over an Action Filed by an Insurer to Rescind a Worker's Compensation Insurance Policy and Thus to Avoid its Liability to an Injured Worker (*American Builders Insurance Company v. Custom Installation Contracting Services, Inc.*, Civil Action No. 3:15-cv-295 (U.S. Dist. Ct. W.D.Pa. Aug. 18, 2017)

James Scott, a Custom Installations employee, was seriously injured at work. American Builders Insurance Company (American) had issued a workers' compensation policy to Custom Installation Contracting Services (Custom). Shortly after Mr. Scott's injury, American issued a Notice of Compensation Payable accepting liability for Mr. Scott's claim for workers' compensation benefits.

Soon afterwards, American filed a lawsuit in federal court seeking to rescind the policy it issued to Custom alleging that Custom misrepresented the nature of the work it performed. American asserted that it had paid more than $1 million for Scott's medical care and expected the costs to escalate.

When Customs declined to oppose American's request to rescind the workers' compensation insurance policy, the federal court issued an order rescinding the policy and declaring that "American had and has no legal or contractual obligation to Custom or its employees, including Scott, under the rescinded Policy, or under any theory of law or equity."

American promptly sought to terminate its obligation to pay compensation benefits to Mr. Scott in proceedings before a workers' compensation judge (WCJ). American argued that the federal court order rescinding Custom's workers' compensation insurance policy required the WCJ to grant the termination petition. American also unilaterally ceased its payments to Mr. Scott and his medical providers. As a result, the hospital treating Mr. Scott requested a medical fee review hearing.

In response, American sought an injunction from the federal court to prevent the state workers' compensation proceedings from going forward. The Department of Labor and Industry (L&I) sought to intervene in the federal case, having learned of it only after American petitioned to terminate its benefit payment obligations in the state workers' compensation proceedings. L&I argued that the federal court lacked subject-matter jurisdiction over American's rescission claim because the Workers' Compensation Act establishes the exclusive forum for resolving disputes regarding an employee's right to compensation, coverage and the payment of benefits.

After reviewing briefs filed by American and L&I addressing whether the federal court had jurisdiction over this dispute involving workers' compensation benefits, the federal court revoked its previous order granting American rescission of the workers' compensation policy and dismissed American's rescission claim for lack of jurisdiction.

The federal court found that exclusive jurisdiction to determine the validity of the workers' compensation policy resides with the state WCJ. The court agreed with L&I that "[a]llowing insurers to file parallel cases in federal court in an attempt to relieve themselves of their obligations in ongoing workers' compensation proceedings could threaten the stability of Pennsylvania's workers' compensation scheme."

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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 9×9 grid with each of the above words so that each column, each row, and each of the nine 3×3 sub-grids contain all of the above words.

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