



# News & Notes

## Welcome Marianne H. Saylor, Director for the Bureau of Workers’ Compensation



Please welcome Marianne H. Saylor, Esq. to the Bureau of Workers’ Compensation. Marianne began her duties as director on June 3. She joins the bureau with over 25 years’ experience in the workers’ compensation arena. Having previously represented employers, insurance companies, and for the last 18 years injured workers, she brings a broad understanding of all aspects of the Pennsylvania Workers’ Compensation Act to this position. Marianne is a 1987 graduate of Bennington College with a Bachelor of Arts degree, and a 1992 graduate of City University of New York School of Law. She brings a vast amount of experience in leadership roles to her position.

Active in her community, Marianne has served on Lansdowne Borough Council and previously served as a board member and secretary of the Southwest Community Development Corporation, a private non-profit organization that provides assistance to residents and promotes local economic development. She lives in Phoenixville, Pennsylvania.

**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.

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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](mailto:RA-LIBWC-NEWS@pa.gov).

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

<i>Employer Information Services</i>	<i>Claims Information Services</i>	<i>Hearing Impaired</i>	<i>Email</i>
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## ▼ 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. Training, offered via webinars, has been presented to individuals in 48 states and eight countries to date. During the spring quarter, 100 webinars were conducted, at no cost to the participants. Our trainers can also travel to your site to present training on a wide variety of topics. (Conditions apply.) This spring, 49 on-site trainings were held across the commonwealth.

If structured, timed training is not right for you, you can still benefit from a wealth of safety resources on our website at [www.dli.pa.gov/PATHS](http://www.dli.pa.gov/PATHS). If you would like to participate in a webinar, visit our website and select "Training Calendar" to find a course and register online.

Questions? Give us a call at 717-772-1635, or by email at [ra-li-bwc-paths@pa.gov](mailto:ra-li-bwc-paths@pa.gov).

## ▼ Workplace Safety Committee Certification

The Health & Safety division's reviewing staff certified 111 new committees in the spring quarter and renewed the certification for 1,892 returning committees! By establishing and maintaining a certified Workplace Safety Committee, these employers saved 5 percent on their annual workers' compensation insurance premiums.

The efforts of a good safety committee create a safer environment to protect employees. As an added benefit, accident and illness prevention can provide immeasurable savings to employers and their insurers.

Learn how you can join thousands of other employers in the program by visiting [www.dli.pa.gov/HandS](http://www.dli.pa.gov/HandS). You can reach us with questions at 717-772-1635, or by email at [ra-li-bwc-safety@pa.gov](mailto:ra-li-bwc-safety@pa.gov).

### Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers' compensation premium discounts as of July 24, 2019:

**12,368 committees**  
covering  
**1,565,800**  
employees

Cumulative grand total  
of employer savings:  
**\$750,565,818**

## ▼ Kids' Chance of Pennsylvania Hope, Opportunity and Scholarships for Kids of Injured Workers

At Kids' Chance of Pennsylvania, we're dedicated to helping our kids who need it most - those who need assistance for college or vocational education because a parent was killed or injured in a work-related accident. The hardships created by the death or serious disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams. That is how Kids' Chance of Pennsylvania continues to make a significant difference in the lives of affected Pennsylvania families by providing scholarship support to help eligible students pursue and achieve their higher educational goals.

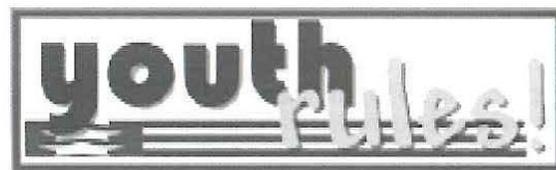
Since its inception in 1997, Kids' Chance of PA has awarded scholarships amounting to over \$1 million, and that number continues to grow. During the 2017-2018 academic year, 53 scholarships were

awarded to students, totaling more than \$185,000. In 2018-2019, we are pleased that we had 65 applications. The scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors. Donations can be made online, by check or through United Way.

Everything our organization does is for the students. Kids' Chance of PA is making a significant difference in the lives of these children, helping them to pursue their educational goals.

For more information about how you can help support Kids' Chance, please contact us at 215-302-3598 or [info@kidschanceofpa.org](mailto:info@kidschanceofpa.org) or visit [www.kidschanceofpa.org](http://www.kidschanceofpa.org).

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



Information about YouthRules! can be found at <https://www.youthrules.dol.gov/>.

For information about the laws administered by the Wage and Hour Division, log on to <https://www.dol.gov/whd/regs/compliance/whdfs43.pdf>, or call the Department of Labor's toll-free helpline at 866-4USWAGE.

## 18<sup>th</sup> Annual Workers' Compensation Conference A Success

On June 3-4 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 attended this year's conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor and others.

This year's event featured topics and speakers related to subjects such as the medical marijuana process in Pennsylvania, telematics/geosocial, health information privacy, how to manage generational differences in the workplace, and more interesting topics that are impacting the workers' compensation systems throughout the country. Various workers' compensation systems are observing challenges due to societal changes. 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.



**19<sup>th</sup> Annual Pennsylvania Workers' Compensation Conference**  
**June 1-2, 2020**  
**Hershey Lodge & Convention Center, Hershey, Pennsylvania**

## Pennsylvania Governor's Occupational Safety and Health Conference



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

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

The Pennsylvania Governor's Occupational Safety and Health Conference (GOSH) provides invaluable resources to cultivate safe workplaces and encourage the use of best safety practices to prevent workplace injury and death.

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

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

## ▼ International Association of Industrial Accident Boards and Commissions (IAIABC) 105th Convention



Join the International Association of Industrial Accident Boards and Commissions (IAIABC) for the 105<sup>th</sup> Convention on Oct. 21-24, 2019. Inspired by Pittsburgh's economic revitalization as a major technology hub, the theme of this year's conference is "Rewire." Attendees will have a number of opportunities to share, discuss, and formulate ways to "rewire" their thinking about workers' compensation throughout the convention, and we invite you to take part!

The 2019 keynote will feature Pittsburgh native, Mr. Bill Strickland, Founder and Executive Chairman, Manchester Bidwell Foundation, who will share his insights on leadership, hope, and social change. Hear his powerful statements about leading people to appreciate their own intelligence, experience, and talents and use them to have a successful life. Other program topics include work disability, modernization, permanent impairment and the AMA Guides, post-traumatic stress disorder, and more.

Forty-three jurisdictions were represented at last year's conference. The opportunity to connect with industry professionals and government officials from around the world is unparalleled.

To learn more and register visit [www.iaiaabc.org/convention](http://www.iaiaabc.org/convention).

## ▼ Special Funds and Compliance Announces New Division Chief



Callie Dow became the Special Funds and Compliance Division Chief May 25. Callie joined the Commonwealth in 2008 as a Clerk/Typist 2 with the Bureau of Worker's Compensation's Regulatory Adherence and Educational Outreach (RAEO - now known as Special Funds) Section. From there she progressed to Clerk/Typist 3 in the BWC Fee Review Hearing Section before leaving the bureau to serve as the Executive Secretary in the Office of Vocational Rehabilitation.

In 2010, Callie returned to the bureau (and RAEO) to serve as the Administrative Assistant, where she contributed to the development and implementation of the new Worker's Compensation Automation and Integration System (WCAIS). She became Administrative Officer of RAEO in 2015; leading the RAEO team through a bureau reorganization. During this period RAEO was renamed Special Funds and moved to a newly created Special Funds and Compliance Division. As the Administrative Officer of Special Funds, Callie was responsible for administering several budget and assessment funds, including the Occupational Disease, Workers' Compensation (306(h)), Subsequent Injury, and Supersedeas Reimbursement Funds; as well as organizing, planning and directing the design, development, and implementation of Special Funds process and procedures both in and outside of WCAIS.

## ▼ [2018 Workers' Compensation and Workplace Safety Annual Report Available Online](#)

## ▼ Important Impairment Rating Evaluation Notice

### **Impairment Rating Evaluation - Use the Required LIBC-765 to Notice an IRE appointment.**

In October 2018, Act 111 restored the Impairment Rating Evaluation (IRE) process. Unfortunately, more than one out of every three IREs are not recorded correctly in WCAIS. As a result, insurers are not complying with § 123.102(e) which requires the insurer to request the employee's attendance at the IRE appointment on the LIBC-765 "Impairment Rating Evaluation Appointment" form.

### **Did you know that the only valid version of LIBC-765 is only available through WCAIS?**

To obtain a valid LIBC-765, insurers must enter the appointment details for the IRE appointment in WCAIS. This will generate a printable version of the LIBC-765 for insurers to mail to the appropriate parties and provide information to the bureau necessary for oversight and reporting efforts.

### **Why can't we just use the old paper LIBC-765 forms?**

When the insurer fails to create the electronic LIBC-765 form, WCAIS does not create a place for the IRE doctor to upload their report and document the percent of impairment. This information is critical for mandated data collection requirements used by the Pennsylvania Compensation Rating Bureau and other agencies to assess the impact that the return of IREs has had on the Workers' Compensation program.

### **What can we do to be compliant with § 123.102(e) and improve the data?**

- Always create an electronic LIBC-765 in WCAIS as soon as an appointment has been made.
- Respond thoroughly and in a timely manner to bureau email inquiries regarding IREs.
- Notify the bureau immediately at [khenneman@pa.gov](mailto:khenneman@pa.gov) if
  - o You decide you want to withdraw or cancel the IRE.
  - o The appointment is on hold because of litigation.
  - o You need help performing a WCAIS task related to IRE.

## ▼ 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**

David S. Golomb, agent for Reed-Saul, Inc., was sentenced on April 22, 2019 by Judge Robert J. Colville in Allegheny County Court of Common Pleas. David S. Golomb pled guilty to six misdemeanor counts in the third degree, was sentenced to six years' probation, and was ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of \$24,304.23.

## ▼ Workers' Compensation Insurance and Municipalities

Did you know there is a section of the Worker's Compensation Act that is specific to municipalities?

- A contractor shall not subcontract all or any part of a contract unless the subcontractor has presented proof of insurance under this act.
- Prior to issuing a building permit to a contractor, contractors must provide proof of WC insurance, or an affidavit that the contractor does not employ other individuals, and is not required to carry WC insurance.
- Every building permit issued by a municipality to a contractor must clearly list the name and WC policy and the contractor's federal or state EIN, in addition to any information required by the municipality. If the contractor is not required to carry WC insurance, the permit must list the contractor's federal or state EIN and the substance of the affirmation and that the applicant is not permitted to employ any individual to perform work pursuant to the building permit.
- Every municipality issuing a building permit will be named as a WC policy certificate holder of a contractor-issued building permit.
- A municipality shall issue a stop-work order to a contractor who is performing work upon receiving notice that the contractor's WC insurance of state-approved self-insured status has been cancelled, or if it is discovered that a contractor has hired persons, but does not have WC insurance. This also applies to contractors performing work for a public body or political subdivision.
- Municipalities should be notified if a contractor's WC insurance policy expires or is cancelled during the duration of the work, or if the status of self-insurance should change within three working days of the change.

Please refer to the Pennsylvania Workers' Compensation Act, Section 302 for more detail.

## ▼ A View from the Bench

### **Supreme Court grants allocatur for limited issues in *Dana Holding Corp. v. WCAB (Smuck)*, 195 A.3d 635 (Pa. Cmwlth. 2018)**

This case involved a modification petition attempting to change claimant's status from total to partial after an IRE. IRE reports were submitted under the 4<sup>th</sup> edition and 6<sup>th</sup> edition AMA Guidelines. The WCJ granted relief to defendant under the 4<sup>th</sup> edition. After appeals, the WCAB reversed the WCJ's modification order (based upon a 4<sup>th</sup> edition IRE) and claimant's benefit status was reinstated to total disability as of June 20, 2014. Defendant appealed and Commonwealth Court affirmed the WCAB and held that because claimant's change in disability status based upon an IRE was still being litigated at the time *Protz II* was decided, *Protz II* applies. The Supreme Court has granted allocatur limited to the following issues:

1. Whether the Commonwealth Court erred in applying the [*Protz II*] standard to the case on appeal at the time of this court's decision retroactive to the date of the IRE instead of as of the date of the Supreme Court changed in the law?
2. Whether the Commonwealth Court's failure to grant the employer credit for the three-year period

between the date of the IRE evaluation and the date of this court's decision in [*Protz II*] unlawfully violates employer's constitutional right pursuant to the "Due Course of Law" provisions of the Pennsylvania Constitution Article I, Section 11?

### **Supreme Court denies Petition for Allowance of Appeal *LifeQuest Nursing Ctr. v. WCAB (Tisdale)*, 190 A.3d 811 (Pa. Cmwlth Ct. 2018), reconsideration denied (Sept. 6, 2018), appeal denied, 205 A.3d 1232 (Pa. 2019)**

Commonwealth Court held that filing supplemental agreements modifying claimant's benefits, during a period in which employer was paying workers' compensation benefits pursuant to a Notice of Temporary Compensation Payable (NTCP), did not act as admission of liability for alleged work-related injury. Filing the supplemental agreements did not convert the NTCP into a Notice of Compensation Payable and acceptance of the injury. The NTCP could still be stopped and denied within the 90-day window.

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### ***Bristol Borough v. WCAB (Burnett)***

This case involves the reporting requirements for a cancer claim by a volunteer firefighter under Sections 108(r) and 310(f) of the act. Pursuant to Section 301 (c)(2) of the act, the term “injury” as used in the act includes an “occupational disease” as defined in Section 108 of the act. Act 46 amended Section 108 to include: “(r) Cancer 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.” Act 46 also added Section 301(f), which requires that any claim by a member of a volunteer fire company be based on evidence of direct exposure to carcinogens referred to in Section 108(r) as documented by reports filed pursuant to the Pennsylvania Fire Information Reporting System (PennFIRS).

In this case, the claimant was an active volunteer firefighter in a volunteer fire company in Bristol Borough from 1976 until January of 2015. In 1979, he began working for USPS, and, during the 1980s he was a part-time paid firefighter for the borough. In February of 2015, he was diagnosed with large B-cell NH-lymphoma. He was disabled from the USPS from February to August 2019, a period of less than 52-weeks. He filed a claim petition under Section 108(r) averring his specific form of cancer resulted from exposure to Group 1 carcinogens while working as a volunteer firefighter for the defendant.

In support of his claim, he offered a medical report opining there was a direct link between his firefighting activities and Group I carcinogen exposure and his specific form of cancer. The claimant also offered the testimony of PA Fire Commissioner Mann concerning the PennFIRS reports, as required in a volunteer’s case, who said the reports cannot include information on every carcinogen to which a firefighter is exposed at every fire. Rather, the purpose of the report is to prove that a given individual was at the fire. The WCJ found that the presumption under Section 301(f) applied. The judge found the claimant and his medical expert to be credible. The judge also found that the claimant’s incident participation report, based on information compiled from his volunteer fire company’s PennFIRS reports, met the reporting requirements in Section 301(f) of the act. The WCJ granted the claim petition and awarded total disability benefits for the closed period of time the claimant was off work.

The WCJ also ordered the defendant to pay a medical lien in favor of Highmark.

On appeal to the WCAB, the defendant argued that WCJ erred in determining that the claimant met his burden of proving direct exposure to Group 1 carcinogens by documentation filed under PennFIRS. The WCAB recognized that PennFIRS documentation is required to meet his burden of proof. It found that the reporting requirements were met by using the PennFIRS documentation to establish the claimant’s fire service. Regarding the medical lien, the WCAB found that it was properly preserved, but erroneously named Independence BC rather than Highmark as the entity entitled to subrogation. The WCAB considered this to be a typographical error and corrected it.

On appeal, the employer argued the WCAB (1) erred by disregarding the plain language of Section 301(f) of the act, which requires that a volunteer firefighter use only PennFIRS reports to prove exposure to a known Group 1 carcinogen; (2) the WCJ erred in allowing testimony from the Pennsylvania Fire Commissioner regarding the legislative history of Section 301(f)’s requirements regarding the forms of proof from volunteer firefighter claims; (3) the WCAB erred by failing to require proof that claimant’s specific cancer was directly related to firefighting exposure; and (4) the board erred in sustaining a subrogation lien.

The Commonwealth Court affirmed. It noted that the parties had submitted their briefs prior to the Supreme Court’s decision in [City of Phila. Fire Dep’t v. WCAB \(Sladek\)](#), 195 A.3d 197 (Pa. 2018), which addressed the causation requirement in Section 108(r) of the act. The Commonwealth Court then discussed the PennFIRS reporting requirement and found the fire commissioner’s testimony to be competent and sufficient. It did not accept the defendant’s argument that the reports had to specify carcinogen exposure, holding that volunteers should not be held to such a difficult burden. It agreed that the reports document attendance, and do not establish the carcinogens at each fire. It held that the commissioner’s testimony was competent to establish the purpose of the PennFIRS reports. It distinguished this case from its prior holding in [Steele v. WCAB \(Findlay Township\)](#), 155 A.3d 1173 (Pa. Cmwlth. 2017), wherein it determined that lay testimony from the claimant and two firefighters regarding exposure to carcinogens did not satisfy the reporting requirements.

## A View from the Bench

*Continued from Page 7*

It also rejected the defendant's argument that the claimant did not submit a single PennFIRS report, but rather submitted a log sheet noting the calls to which he responded without any indication of the duration of the call or the role the claimant filled on the call, or whether there was any exposure to a Group 1 carcinogen. In this regard, the Commonwealth Court stated that Section 301(f) does not require career firefighters to identify and document the carcinogens encountered at every incident. Rather, a career firefighter may establish direct exposure to a Group 1 carcinogen by evidence of occupational exposure to fire smoke, soot, diesel exhaust and other hazardous substances. It therefore determined that it would be unreasonable to interpret the identical language in Section 301(f), as imposing a more technical and difficult reporting standard for volunteer firefighters as opposed to career firefighters. The court found that the claimant's incident report, which pulled information from the PennFIRS documentation, was sufficient to satisfy the reporting requirements of Section 301(f) of the act.

The court discussed the competency of the medical experts, determining that the claimant's medical expert was competent and was not rebutted by the defendant's medical expert. The court also reviewed the subrogation evidence regarding the Trover lien and found the evidence sufficient to approve subrogation recovery.

**Thomas Kurpiewski v. W.C.A.B. (Caretti, Inc.), ---A.3d---, 2019 WL 287893, (Pa. Cmwlth. 2019)**

Commonwealth Court dealt with three issues arising out of a bricklayer's development of "contact dermatitis as a result of occupational exposure to chromium." Specifically, the court addressed whether claimant's benefits should be terminated based upon a resolution of his current symptoms, the correct calculation of claimant's average weekly wage, and whether or not a penalty was to be awarded. Each of the issues was addressed separately in the court's decision; however, they arise from a single set of facts which were not in dispute.

Claimant was a long-time union bricklayer. In April 2012, while working for this employer, he developed a rash, later diagnosed as contact dermatitis due to a chromium allergy which had

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

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

On appeal, the WCAB reversed and remanded. On remand, the WCJ found that the first notice was in June and terminated benefits in August. Claimant appealed. This time the WCAB affirmed. Claimant then appealed to the Commonwealth Court.

The Commonwealth Court reversed on the extent of disability issue and held that benefits continued. Claimant's situation was more akin to claimant's work injury in Lash v. W.C.A.B. (General Battery Corp.), 420 A.2d 1325 (Pa. 1980), the lead absorption case, than Baxter, the pulmonary allergy decision. It reviewed both of those opinions extensively. Claimant's work over his professional life caused this problem, similar to the claimant in Lash whose constant work exposure caused and then worsened his condition. The court in Lash noted it would be barbaric to require employees to continue in a position where they are exposed to a toxic substance until they are so ill that they are physically incapable of performing their job.

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## A View from the Bench

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In Baxter, the claimant's asthma was a pre-existing, non-work-related condition that was temporarily aggravated by environmental exposure, after which the claimant "returned to baseline." Here, claimant's condition was caused by his work so he was not required to return to work and risk a worse injury. In addition, as this was a cumulative allergy claimant's threshold now was lower than when he began working as a bricklayer, thus he could not really be said to have returned to baseline.

On the AWW issue, claimant argued that since he worked sporadically for employer, with layoffs, and his most recent stint had been less than three months, 309(d.2), not (d) applied. Further claimant argued that as he worked at other employers when he was laid off, that employment should be treated as concurrent employment. Employer argued under Reifsnyder v. W.C.A.B. (Dana Corp.), 883 A.2d 537 (Pa. 2005), that all 52 weeks should be counted as their employment relationship continued, despite the brief layoffs. The WCJ found 309(d.2) applied and also considered the others as concurrent employment. On appeal, the WCAB reversed and remanded. On remand, the judge found that 309(d) applied and also found no concurrent employment. Claimant appealed. This time the board affirmed, as has Commonwealth Court. "Concurrent" employment means just that - "at the same time." Claimant did not work for the other employers on the date of injury, but only when laid off. As to 309(d) vs 309(d.2), Reifsnyder controlled. Although claimant had various layoffs over time, he never had to re-apply to employer. He was just called back to work. Thus, the employment relationship was maintained, so that all four preceding quarters, including reduced and zero ones, counted. Subsection (d) applied.

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

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

### **McDermott v. WCAB (Brand Industrial Services, Inc.), 204 A.3d 549 (Pa. Cmwlth. 2019)**

Claimant, a resident of Pennsylvania, was a union carpenter who worked for employer at job sites located in Pennsylvania and in Delaware. Employer is a construction company with no permanent place of business in Pennsylvania. Claimant finished a job in Pennsylvania on Dec. 31, 2015. In January of 2016, he started working for employer at its Delaware facility, where he sustained a work-related injury. Employer paid claimant workers' compensation benefits under Delaware law. Claimant filed a claim petition in Pennsylvania, alleging entitlement to Pennsylvania workers' compensation benefits. Claimant alleged jurisdiction under Section 305.2(a)(1) of the act, which provides in relevant part that an employee who suffers a work-related injury while working outside the territorial limits of Pennsylvania may be entitled to benefits under the act if, at the time of injury, the claimant's employment is "principally localized" in Pennsylvania. Employment is considered principally localized in Pennsylvania where: (1) an employer has a place of business in Pennsylvania and the claimant regularly works at or from that place of business; or (2) where the claimant is domiciled in Pennsylvania and spends a substantial part of his working time in the service of his employer in Pennsylvania. Upon consideration of the evidence, the WCJ denied and dismissed the claim petition for lack of jurisdiction and the WCAB affirmed. The Commonwealth Court also affirmed. In so doing, the court noted employer had no place of business in Pennsylvania and agreed claimant's employment was not principally localized in Pennsylvania at the time of his injury. The evidence showed claimant was not considered a permanent employee. No ongoing employment relationship existed between claimant and employer. He worked for employer sporadically, for finite periods of time, and was given no assurances of guarantees of future work.

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## A View from the Bench

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The WCJ properly concluded the job in Delaware constituted a new employment with employer, exclusively in Delaware. Claimant's prior work for employer at the Pennsylvania job site was not relevant.

**Armour Pharmacy v. Bureau of Workers' Comp. Fee Rev. Hearing Office (Wegman's Food Markets, Inc.), 206 A.3d 660 (Pa. Comwlth 2019)**

On March 29, 2019, the Commonwealth Court issued a decision in *Armour Pharmacy v. Bureau of Workers' Comp. Fee Rev. Hearing Office (Wegman's Food Markets, Inc.)*, 206 A.3d 660, which has arguably expanded the subject matter jurisdiction of the department's fee review hearing officers ("FRHOs").

Armour Pharmacy dispensed a compound cream on three occasions to claimant and invoiced Wegman's \$3,634.17 for each prescription. After employer denied payment, pharmacy filed a fee review application with the Medical Fee Review Section ("Fee Review Section"). The fee review section thereafter awarded provider \$3,322.16 plus 10 percent interest on each invoice. In response, employer filed a request for a *de novo* hearing

pursuant to the medical cost containment regulations.

On appeal to the FRHO, employer filed a motion to dismiss, arguing as a matter of law that the FRHO lacked jurisdiction to hear the dispute because pharmacy was not a "provider" under the Workers' Compensation Act. For support, employer relied upon the court's previous decision in *Selective Ins. Co. of America v. Bureau of Workers' Comp. Fee Rev. Hearing Office (The Physical Therapy Institute)*, 86 A.3d 300 (Pa. Comwlth 2014). Provider argued that it was unfair to extinguish its statutory right to payment without an evidentiary hearing. The FRHO granted employer's motion.

The Commonwealth Court reversed, arguing that it "offends due process . . . as well as the act's careful scheme for resolving fee disputes to place the question of whether a putative provider is actually a 'provider' beyond the reach of judicial review." Thus, the FRHO (though not the fee review section) is empowered to determine whether the service or treatment in dispute was in fact rendered by a provider within the meaning of the act. In so doing, the court noted that to the extent that *Selective Insurance* "is inconsistent with our holding here, it is overruled."

*News & Notes is published quarterly by the Bureau of Workers' Compensation  
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