Tom Wolf | Governor | W. Gerard Oleksiak | Secretary

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

News & Notes

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A Message from Director, Marianne Saylor

Like most people, for the past several months the bureau has been working remotely. We have a small, but very dedicated, staff who have been onsite to process mail and ensure the essential functions of the bureau are carried out. With hardly a moment's notice, the bureau was quickly able to get set up at home and provide the same level of customer service our stakeholders expect. Although we are not working on Cameron Street presently, rest assured that the bureau is fully functional and ready to help. Thank you to the bureau staff who have done an exemplary job these last few months!

PA Workers' Compensation Subpoenas Online Submission Coming Soon

You asked and we heard you! At the end of September, stakeholders will be able to submit record requests online for PA Workers' Compensation Judges' Subpoenas. The process will be simple, just like it is for requesting regular requests online. You will need to select the request type of subpoena, input the claimant's first and last name, and upload your subpoena documentation as a non-fillable PDF file. You should include the same information you do when mailing a subpoena request currently. The only difference will be that you will upload the documentation as a single PDF file rather than mailing the documents to the bureau.

We have also recently transitioned to a new digital technology for the records request process to improve your user experience. Although the look and feel of the Records Request Dashboard has changed, the process of requesting records or using the dashboard remains the same.

We continue to work hard to make the process a positive one for users and we encourage you to submit all your record requests online. This online submission is easy, allows you to know immediately that a request has been successfully submitted, reduces unnecessary paper, allows you the ability to view, print or save the response PDF file, receive notification when a request is available in WCAIS, and enables access to the records request response at any time for up to 90 days.

To utilize the process, you need to be a registered WCAIS user. If you are not currently a registered user, you can become a part of the system today through the WCAIS homepage at: https://www.wcais.pa.gov; select "Are you a New User" to get started. If you have any registration questions, our Helpline is available to assist you at 800-482-2383.

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News & Notes is a quarterly publication issued to the Pennsylvania workers' compensation community by the Bureau of Workers' Compensation (BWC) and the Workers' Compensation Office of Adjudication (WCOA). The publication includes articles about the status of affairs in the workers' compensation community, as well as legal updates on significant cases from the Commonwealth Court. Featured is the outstanding article entitled "A View from the Bench," in which judges from the Pennsylvania Workers' Compensation Judges Professional Association summarize recent key decisions from the Commonwealth Court that are of interest to the workers' compensation community.

We trust that stakeholders in the Pennsylvania workers' compensation system will find this publication interesting and informative, and we invite your input regarding suggested topics for inclusion in future publications. Suggestions may be submitted to RA-LIBWC-NEWS@pa.gov.

- Marianne H. Saylor, Director – Bureau of Workers' Compensation (BWC)
- Joseph DeRita, Director – Workers' Compensation Office of Adjudication (WCOA)

Employer Information Services	*Claims Information Services*	*Hearing Impaired*	*Email*
717-772-3702	toll free inside PA: 800-482-2383 local & outside PA: 717-772-4447	PA Relay 7-1-1	ra-li-bwc-helpline@pa.gov

WCAIS Enhancements

Self-Insurance continues to work on WCAIS enhancements to better functionality for internal and external stakeholders. Two of our upcoming enhancements include:

- The Self-Insurance Permit Addendum will be sorted by Bureau Code. This will make it easier for stakeholders to locate specific self-insured entities on a multi-page addendum.
- As our stakeholders are aware, documents that are uploaded to our WCAIS system cannot be deleted. We will implement the ability for internal staff to update document descriptions so that mistakenly uploaded documents can be easily identified.

COVID-19 Workers' Compensation Fee Schedule Information

As Pennsylvania and the nation continue to implement mitigation efforts to slow the spread of COVID-19, the Department of Labor & Industry, Bureau of Workers' Compensation has taken rapid and impactable measures to keep the workers' compensation system operating in Pennsylvania.

The fee schedule now includes the following six (6) new CPT/HCPCS codes (87635 / U0001 / U0002 G2023 / G2024/ T5999) in the Part B Fee Schedule for payment relating to the COVID-19 testing. These new codes are effective for dates of service on or after January 1, 2020. There are no rates currently established for these codes, so please refer to §127.102 of the Medical Cost Containment regulations regarding payment. For more information on the fee schedule, please click here.

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:

Bucks County: Judge Wallace H. Bateman, Jr. entered Wen You Zhang, owner of Kyoto Japanese Restaurant, Inc., into the Accelerated Rehabilitative Disposition Program for first-time offenders on Jan. 30, 2020 in Bucks County Court of Common Pleas. Zhang was placed on probation for a period of two years, was ordered to pay the costs of prosecution, complete 10 hours of community service, and pay restitution to the Uninsured Employers Guaranty Fund in the amount of $22,731.65.

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

The Pennsylvania Training for Health and Safety (PATHS) program makes safety resources and training more accessible to employers and employees everywhere. In 2020, PATHS conducted 237 training sessions for more than 24,918 individuals to date. On March 30, PATHS recorded the highest attendance at any single event when trainers presented Pandemic Preparedness to 1,013 participants.

More than 215 safety-training topics are available for employers, most free of charge. These trainings impact all health & safety areas within the workplace, including substance abuse and opioid-related topics. Trainings are aimed at reducing business costs in Pennsylvania, and saving lives.

The PATHS program is pleased to introduce the recent development of "Safety Shorts," a series of half-hour courses which will be offered from 11:00 a.m. – 11:30 a.m. beginning in July. Safety Shorts are condensed summaries of popular topics, designed as a more convenient option for individuals who cannot dedicate more time for training.

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

Workplace Safety Committee Certification
$780 million and counting

More and more employers are discovering that safety really does pay. Employers who follow Pennsylvania's workplace safety committee requirements and regulations can apply for state certification and receive annual 5 percent discounts on workers' compensation insurance premiums. Application is made through the Pennsylvania Department of Labor & Industry, Bureau of Workers' Compensation, Health & Safety Division.

Applications are submitted and reviewed online through the division's HandS system. This has allowed the process to remain active throughout the COVID-19 pandemic, during which 61 newly recognized committees have been approved for their initial certification, and over 1,200 other committees have successfully renewed their certification.

Since the certification program's inception, a total of more than 12,600 workplace safety committees in Pennsylvania have accumulated over $780 million in total savings, just from the 5 percent workers' compensation insurance premium discounts. That's money that is being reinvested in expanding businesses along with implementation of further safety and prevention efforts - but it's no longer going toward insurance premiums!

In addition to the 5 percent workers' compensation insurance premium discount, certified workplace safety committees help reduce the employer's cost of workers' compensation insurance by identifying workplace hazards, reducing injuries, and reducing claims.

In an increasingly competitive business climate, any opportunity to save money is welcomed. A workplace safety committee not only improves the safety of your operations, but also adds to the bottom line and clearly shows employees that management cares about their well-being. When that's the case, everybody wins.

For more information on setting up a workplace safety committee for your business and to learn more about the program and requirements, visit www.dli.pa.gov/Businesses/Compensation/WC/safety/committee/Pages/default.aspx. You can reach us with questions at ra-li-bwc-safety@pa.gov.

Deadline Extended to Aug. 1 to Apply for Governor's Award for Safety Excellence

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

If you would like to nominate your committee you can download the nomination form or get more information here.

All applications must be submitted by Aug. 1, 2020, to:

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

For additional information or assistance email barbawhite@pa.gov.

YouthRules! is an initiative to promote positive and safe work experiences for teens by distributing information about young workers to youth, parents, employers and educators. Components of the initiative include a website, printed materials, outreach events, training seminars and partnering activities.

Every year, millions of teens work in part-time or summer jobs. Early work experiences can be rewarding for young workers – providing great opportunities for teens to learn important work skills. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

YouthRules! – an innovative approach to bring teens, parents, educators, employers, government, unions and advocacy groups together to ensure young workers have safe and rewarding work experiences.

Information about YouthRules! can be found at www.youthrules.dol.gov. For information about the laws administered by the Wage and Hour Division, call the toll-free helpline at 866-4USWAGE.

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

Kids' Chance of Pennsylvania

Hope, Opportunity and Scholarships for Kids of Injured Workers

At Kids' Chance of Pennsylvania, we're dedicated to helping our kids who need it most - those who need assistance for college or vocational education because a parent was killed or injured in a work-related accident. The hardships created by the death or serious disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams.

That is how Kids' Chance of Pennsylvania continues to make a significant difference in the lives of affected Pennsylvania families by providing scholarship support to help eligible students pursue and achieve their higher educational goals.

Since its inception in 1997, Kids' Chance of PA has awarded scholarships to more than 900 students amounting to more than $2.2 million in scholarship assistance. During the 2019-2020 academic year, 57 scholarships were awarded to students, totaling more than $179,000. The scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors. Donations can be made online, by check or through United Way.

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

For more information about how you can help support Kids' Chance, please contact us at 215-302-3598 or info@kidschanceofpa.org. For more details visit our website at www.kidschanceofpa.org.

US Court of Appeals Upholds Decision Affirming that the Act Provides Exclusive Forum for Matters Involving Workers' Compensation Claims *(American Builders Insurance Company v. Custom Installation Contracting Services, No. 19-3291 (3d Cir., May 29, 2020)*

American Builders Insurance Company (American) had issued a workers' compensation policy to Pennsylvania employer Custom Installation Contracting Services (Custom). After the issuance of the policy, a Custom employee was seriously injured at work. Shortly thereafter, American issued a Notice of Compensation Payable accepting liability for the employee's claim for workers' compensation benefits under the Workers' Compensation Act.

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

When Custom declined to oppose American's request to rescind the workers' compensation insurance policy, the federal court granted summary judgment, issuing an order rescinding the policy and declaring that "American had and has no legal or contractual obligation to Custom or its employees, including [the injured employee], under the rescinded policy, or under any theory of law or equity."

American then promptly sought to terminate its obligation to pay compensation benefits to the injured employee 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 the injured employee and his medical providers. As a result, the injured employee filed a penalty petition and the treating hospital provider requested a medical fee review.

In response, American sought an injunction from the federal district court to prevent the state workers' compensation proceedings regarding its workers' compensation payment obligations from going forward. The Department of Labor & 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 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.

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US Court of Appeals Upholds Decision Affirming that the Act Provides Exclusive Forum for Matters Involving Workers' Compensation Claims

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The federal district court ultimately revoked its previous order granting American rescission of the workers' compensation policy and dismissed American's rescission claim for lack of jurisdiction. The federal district court found that exclusive jurisdiction to determine workers' compensation claims resides within the state workers' compensation system, and therefore that American's policy rescission claim must be pursued before a 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."

American subsequently appealed the federal district court's decision to the Third Circuit Court of Appeals. On appeal, the Third Circuit agreed with the reasoning of the district court. In its recent opinion, the Third Circuit succinctly upheld the dismissal of the action, relying upon established federal and state court precedent that this matter was more properly brought under the state's workers' compensation act and decided by the state workers' compensation authorities. The court noted that the Workers' Compensation Act was designed and intended to establish exclusive jurisdiction, practice and procedure in all matters pertaining to such subject matter. Specifically, the court reinforced the principle of the Workers' Compensation Act's exclusivity as the forum for addressing matters involving workers' compensation claims, stating that "[w]hen the allegations of a claim have as their ultimate basis an injury compensable under the [Workers'] Compensation Act, the claim must be considered within the framework of the statute."

A View from the Bench

***Colagreco v. WCAB (Vanguard), No. 788 C.D. 2019*, filed May 14, 2012**

Commonwealth Court considered the claimant's Petition for Review of an adjudication of the WCAB that affirmed a workers' compensation judge's order that terminated benefits in the absence of a termination petition and found that certain medical treatments were neither reasonable or necessary because they were provided after the claimant had fully recovered from her injury.

By way of background, on Oct. 14, 2013, the claimant sustained a work-related injury when she received a flu shot while at work. A Notice of Compensation Payable recognized the injury as "subacromial bursitis" of the right arm "secondary to a needle stick." Thereafter, the claimant filed a Review Petition to expand the description of her injury to include chronic regional pain syndrome (CRPS) of the right upper extremity. The employer then filed a Modification/Suspension Petition alleging that a specific job was offered. The claimant filed a second Review Petition seeking to further expand the description of her injury. The employer filed a Petition for Review of a Utilization Review Determination that determined Ketamine drip procedures, office visits, and prescriptions provided by two different providers were reasonable and necessary to treat CRPS. Claimant filed a Penalty Petition alleging that the employer failed to pay for these treatments.

The claimant testified on her own behalf, and provided medical testimony from two doctors.

The employer provided testimony from two medical experts, one of whom opined that the claimant was fully recovered from her work injury. The workers' compensation judge discredited the claimant's testimony about her symptoms, as it was not corroborated by her medical experts. The judge credited the testimony of the employer's medical experts that the claimant's work injury did not include CPRS, or the other conditions asserted by the claimant. The judge credited the employer's medical expert's opinion that the claimant had fully recovered from her work injury as of a second IME, and benefits were terminated as of that date. The judge denied the claimant's Review Petitions, dismissed the Modification/Suspension Petition as moot, and granted the employer's Petition for Review of the UR Determination for treatment rendered after the date of full recovery.

On appeal, the claimant argued that the judge erred in *sua sponte* ordering a termination of benefits when a Termination Petition was not filed. The board held that the judge had the authority to order a termination of benefits even though the employer had not filed a Termination Petition because the claimant had notice and an opportunity to be heard regarding whether she had recovered from the injury.

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The board explained that in determining whether a claimant has adequate notice, the petition before the judge must raise an issue of the claimant's recovery or a similar inquiry, such as the extent of disability. The board explained that in this case the issue of recovery and extent of disability were before the workers' compensation judge.

The claimant was notified that the employer's medical expert issued an affidavit of recovery. In response, she filed two Review Petitions. Both of claimant's medical experts were questioned as to whether they agreed with the IME opinion of full recovery, and both indicated that they disagreed. The board held that the claimant had the opportunity to fully defend against the allegation of a full recovery. The Commonwealth Court agreed with the board that the claimant received adequate notice that her recovery from the work injury was at issue and had the opportunity to defend against this allegation, even though a Termination Petition was not filed.

The claimant further argued that the workers' compensation judge's decision was not reasoned, challenged the judge's reliance of the employer's medical experts, and argued that the employer's medical expert opinions did not support the decision to deny her two Review Petitions. The Commonwealth Court rejected these arguments, citing to the long-standing rule that credibility determinations of a judge are not disturbed on appeal.

The claimant also argued that the judge erred in granting the employer's Petition for Review of the URO Determination arguing that the judge erred in finding that the treatment was not related to the work injury, as only the reasonableness and necessity of treatment is at issue in a utilization review. The Commonwealth Court rejected this argument because the treatments at issue were rendered after a full recovery. The court stated that it goes without saying that treatment rendered after a full recovery is not reasonable or necessary.

***Communication Test Designs v. WCAB (Simpson)*, ___ A.3d ___, 2020 WL 1932744 (Pa. Cmwlth. 2020)**

The Commonwealth Court has held that an employer's issuance of a Notice Stopping Temporary Compensation (NSTC) more than five days following the last date of temporary compensation paid does not compel conversion of a Notice of Temporary Compensation Payable (NTCP) to a Notice of Compensation Payable (NCP).

This is so as long as the NSTC is filed within the overall 90-day period allowed for temporary compensation. By way of background, the workers' compensation law allows for payments without prejudice for 90 days after a worker's claimed injury. If the employer's investigation during that period of time yields a conclusion that the claim is to be denied, it may act on that conclusion and deny the claim. However, the law states that, within five days of the last payment of temporary compensation, the employer must notify the worker of its decision. This notice, among other things, signals to the worker that he or she must take action on his or her own to pursue the claim. An issue has long existed: what happens if the employer's notice (the NSTC) is issued more than five days after last payment? The answer has been provided in this new decision, *Communication Test Designs*.

There, the claimant had allegedly been injured in December 2016. Employer issued a Medical-Only NTCP, describing the injury as an eye laceration. In January 2017, employer issued an amended NTCP, and began paying disability benefits. In February 2017, employer issued an NSTC and NCD, denying that the claimant had sustained any work injury at all.

The claimant then filed a claim petition, alleging more extensive injuries, including concussion. He also filed reinstatement and penalty petitions, asserting that employer had failed to issue an NSTC within five days following the last payment of temporary compensation; reinstatement, meanwhile, was sought on the basis that the employer had misused bureau documents.

Ultimately, the WCJ denied the claimant's claim petition, but granted the reinstatement and penalty petitions. The WCJ found that the claimant was entitled to a reinstatement of benefits based upon a conversion of the amended NTCP to an NCP by operation of law, as a result of employer's failure to timely file a NSTC and NCD; and assessed a penalty for the same reason. The Appeal Board affirmed.

The Commonwealth Court, however, reversed. The court noted that no evidence existed in the record as to the precise last date of temporary compensation paid. Thus, no evidence existed upon which the WCJ could find that the NSTC was not filed within five days of the last payment. Thus, the penalty was improper. More importantly, however, the court held that the Act does not sanction conversion of an NTCP to an NCP for failure to file an NSTC within five days of stopping payment of temporary compensation. Indeed, as the court pointed out, the Act sets forth *no remedy* for the untimely filing of a NSTC; there is, however, a remedy for failure to file an NSTC within 90 days of the filing of an NTCP – that being conversion to an NCP. Here,

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as the NSTC was filed within 90 days of the NTCP, the NTCP could not have converted to an NCP by operation of law.

Crocker v. Workers' Compensation Appeal Board (Georgia Pacific, LLC), 225 A.3d 1201(Pa. Cmwlth. 2020)

Commonwealth Court held that no statutory mechanism exists to permit an employer to disgorge litigation costs that it paid in error. By way of background, claimant prevailed on a claim petition and, pursuant to Section 440 of the Act, the workers' compensation judge ordered the employer to pay litigation costs. After employer tendered litigation costs, the WCAB reversed the workers' compensation judge's decision on appeal. Employer then filed a petition seeking disgorgement of the litigation costs from claimant. Relying on Barrett v. WCAB (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010), the workers' compensation judge ordered claimant to reimburse the litigation costs and the WCAB affirmed. Claimant appealed, and the Commonwealth Court reversed, finding Barrett was overruled by the Pennsylvania Supreme Court in County of Allegheny v. WCAB (Parker), 177 A.3d 864 (Pa. 2018) (holding, generally, that an employer cannot obtain reimbursement for improperly awarded and paid unreasonable contest attorney fees under Section 440 of the Act). Both litigation costs and unreasonable contest attorney fees are governed by Section 440. There is no statutory provision for repayment, and the equitable doctrine of unjust enrichment cannot be read into the Act as an "extra-statutory mechanism" to support reimbursement.

Neves v. WCAB (American Airlines), Commw. No. 1431 C.D. 2018, 2020 WL 2501028 (Pa. Cmwlth. 2020)

20% Attorney Fee includes medical bills

In a very lengthy en banc decision, Commonwealth Court held that claimant's contingent fee agreement with his attorney providing that 20% of any benefits awarded would be paid as counsel fees, applied to both wage loss and medical benefits. It was noted that claimant's agreement and understanding that the medical providers could seek the additional 20% from him resolved any potential conflict of interest issue regarding repayment of the balance to the health care provider. This decision provided a long discussion of case law and statutory history that make it worthwhile to read this decision in its entirety. The conflict as to repayment of the additional 20% that was being deducted from payment to the healthcare provider was addressed, but since claimant acknowledged that he understood he might have to pay this balance, neither the defendant nor the court was concerned. Commonwealth Court acknowledged that there may be policy reasons, as the dissent observes, to regulate the counsel fee differently, depending on whether the fee was incurred for pursuing an award of medical compensation as opposed to indemnity compensation. These policy concerns should be addressed to the General Assembly. Simply, "[t]he wisdom of the policy behind legislative enactments is generally not the concern of the court." *Mayhugh v. Coon*, 331 A.2d 452, 456 (Pa. 1975). The court's job is to "interpret legislative enactments and not to promulgate them." *Id.* at 456. When a statute is clear and free from ambiguity, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. §1921(b).

The dissent reviews the same detailed statutory and case law. It reasoned that due to amendments to the Workers' Compensation Act, a pecuniary benefit no longer inures to the claimant since Section 306(f.1)(7) of the Act prohibits providers from billing claimants for the difference between the provider's charge and the amount paid by the employer or the insurer. Therefore, since claimant does not receive payment of the medical bills, this is not part of claimant's "recovery" from which the 20% attorney fee was initially awarded by the WCJ. Further analysis noted that attorney's fees representing 20% of medical expenses should not be reasonable per se but should require further analysis by the WCJ. The dissent also highlighted that our courts have long recognized the requirement that a WCJ approve attorney's fee agreements to protect claimants against unreasonable fees imposed upon them by their attorneys. There also was concern that claimant would be held responsible to the medical providers for this unpaid 20% of the bill which would require dlaimant to pay a fee higher than 20% of his benefits and cause him to be responsible for medical bills he was not required to pay under the Workers' Compensation Act.

Burgess v. WCAB (Patterson-UTI Drilling Company, LLC), No. 778 C.D. 2019, 2020 WL 2089719 (Pa. Cmwlth. 2020)

WCJ has no jurisdiction in a Petition to Review Utilization Review that was not initially reviewed by a URO

This Utilization Review appeal considers defendant's initial request(s) to review the reasonableness and necessity of claimant's continued presence in a long-term acute care (LTAC) facility. The UR request(s) were returned without being assigned to a URO providing that the treatment to be reviewed is not a healthcare service.

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After two (2) returned requests, the employer filed a UR request to determine the reasonableness and necessity of claimant's treatment with specific providers at the LTAC facility. It was determined that the reviewed medical treatment was reasonable and necessary, and defendant filed petitions to review the UR determinations. At hearings, employer clarified that the UR petitions were filed to permit the WCJ to address the reasonableness and necessity of claimant's continued residency at the LTAC facility as opposed to a skilled nursing facility. Based on the evidence presented, the WCJ concluded that employer had sustained its burden of demonstrating that claimant's continued stay at the LTAC facility was not reasonable and necessary, and that claimant should be moved to a skilled nursing facility.

Claimant appealed and the WCAB affirmed. Claimant filed a Petition to Review with Commonwealth Court where it was concluded that employer's UR determination requests regarding the reasonableness and necessity of claimant's continued stay at the LTAC facility were not prohibited by Section 127.406(b) of the department's regulations and should have been referred for a UR determination. Because a URO never conducted a review with respect to the reasonableness or necessity of claimant's LTAC facility stay, the court was unwilling to hold that the WCJ had jurisdiction to consider claimant's presence at the LTAC facility. The court vacated the WCAB decision, remanded to the board with instructions to further remand to the WCJ, who is directed to order the bureau to accept the UR request and refer it to a URO on the issue of the reasonableness of the claimant's presence at the LTAC facility.

***Weidenhammer v WCAB (Albright College),* No. 546 C.D. 2019, May 14, 2020**

The Commonwealth Court issued a panel opinion concerning a scenario in which the claimant's 500 weeks of temporary partial disability (TPD) benefits expired more than three years before she sought reinstatement of her temporary total disability (TTD) benefits, arguing the invalidity of her March 2004 Impairment Rating Evaluation (IRE) based upon the Supreme Court's June 2017 decision in *Protz v. WCAB (Derry Area School District,* 161 A.3d 827 (Pa. 2017) that declared §306(a.2) unconstitutional in its entirety. Claimant suffered a November 2001 compensable injury and began to receive TTD benefits. Employer filed a timely request for an IRE, which evaluation claimant attended without objection. The examiner determined her to be less than 50% disabled.

Employer filed a timely status change but continued to pay benefits at the TTD benefit rate as required. Other petitions were filed by both parties thereafter, but in none of them did claimant raise a constitutional, or any, issue concerning the IRE result. She received her last benefit payment in December 2013, after her 500 weeks of TPD status expired. There was no active litigation thereafter until she filed a reinstatement petition in October 2017, several months after the Supreme Court's *Protz* decision in June of that year. Claimant argued that *Protz* made all IREs void *ab initio*, without regard to when conducted. The WCJ denied reinstatement of TTD benefits under §413(a) of the Act, which requires that such petitions must be filed within three years of the last payment of benefits. Here, the last benefit payment was nearly four years before the *Protz* decision and the petition. Claimant appealed. The WCAB affirmed the denial, citing the *Whitfield v WCAB (Tenet Health System Hahnemann)*, 188 A.3d 599 (Pa. Cmwlth. 2018) *(en banc)* decision in which the claimant had filed her reinstatement petition after the expiration of 500 weeks of TPD status but within three years of the last payment, so her reinstatement request was granted.

Claimant appealed to Commonwealth Court, arguing that all pre-*Protz* IREs were invalid, and, if not, that *Whitfield* should be overruled for limiting the time period for requesting relief. Commonwealth Court has affirmed the denial of reinstatement. It performed a lengthy analysis of the leading Supreme Court retroactivity decision of *Blackwell v. State Ethics Commission*, 589 A.2d 1094 (Pa. 1991) and its three-factor retroactivity standard: (1) the purpose to be served by the new rule; (2) the extent of everyone's reliance on the old rule; and (3) the effect on the administration of justice if the new rule is made applicable retroactively. It looked at full retroactivity, as suggested by claimant here, but held, based on the *Blackwell* analysis, that the *Protz* Court did not intend full retroactivity. It noted that employers had relied on IREs for many years instead of pursuing alternative remedies. Further, insurance companies set reserves and premium rates based on the IRE provisions. It held that IREs would be reviewable only in cases where the constitutionality issue was preserved, which claimant had not done, or in active cases, meaning where petitions were pending, benefits were still being paid, or within three years of the last payment of those benefits, as provided in §413, a statute of repose.

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Claimant's benefit rights had been extinguished in 2013, more than three years before she filed her petition, so it was untimely. Finally, it gave short shrift to claimant's argument that *Whitfield*, a decision by the full court, should be overruled.

***Fedchem et al. v. WCAB (Wescoe),* No. 772MAL 2019 (Pa. May 5, 2020)**

The Supreme Court has denied the claimant's petition for allowance of appeal from Commonwealth Court's Nov. 18, 2019, decision that was summarized in the Winter 2019 News & Notes. That decision had vacated and remanded a §306(b) labor market survey/earning power assessment decision in which the WCJ had denied the employer relief because the claimant said he applied for some openings but did not get the jobs, (meaning the jobs were "open"), and the WCAB found that analysis faulty, as no job offer was needed, but affirmed the denial on another ground, *i.e.,* the WCJ found the claimant credible when he said that he could not do the jobs. (They were not "available.") Commonwealth Court agreed with the WCAB that job offers are not necessary in earning power assessment cases. But it further held that, because the evidence from the competing vocational experts was at variance and the doctors noted those variances as significant, the WCJ was required to reconcile or resolve those discrepancies in a reasoned decision. Claimant's testimony alone, which was contradicted by employer's vocational witness, did not suffice to support a finding that the jobs were not suitable without a discussion of why it was more credible. It remanded so the WCJ could make those crucial findings. This appeal denial allows that remand and reconsideration to occur.

***Kenney v. WCAB (Lower Pottsgrove Township, et al.),* 596 MAL 2019 (Pa. April 6, 2020)**

The Supreme Court has denied the employer's petition for allowance of appeal from the Aug. 2, 2019, decision by Commonwealth Court that denied §319 subrogation against Heart & Lung Act benefits paid to a police officer injured in an on-duty motor vehicle accident. We reviewed that court's decision at page 6 of the Fall 2019 News & Notes. The only nuance from the litany of cases denying such recovery was the employer's argument that the benefits paid to this claimant were issued by a group self-insurance fund; employer was not a stand-alone self-insurer, as those earlier employers were. The WCJ denied subrogation; the WCAB reversed; Commonwealth Court reversed the WCAB. It recited the applicable statutes and held that the identity of the payor is not significant; if the benefits paid derive from the officer's rights under the Heart & Lung Act, there is no subrogation.

Sadler v WCAB (Philadelphia Coca-Cola Company), 413 EAL 2019 (Pa. January 28, 2020)

On Jan. 28, 2020, the Supreme Court granted employer's petition for allowance of appeal from Commonwealth Court's May 22, 2019, decision on one issue and denied it on the other. That decision was discussed in the Fall 2019 News & Notes at page 7.

The issue on which appeal was denied involved the calculation of the average weekly wage under §309(d.2) where the injured worker has not been employed for 13 weeks. Commonwealth Court vacated and reversed the WCJ and WCAB, holding that the "expectations" language of that section required a *Hannaberry HVAC v WCAB (Snyder),* 834 a.2d 524 (Pa. 2003) analysis, which is based on economic reality with the claimant getting the benefit of the doubt. Here, claimant testified to substantial overtime and employer conceded probable overtime and the payroll records established many overtime hours worked during the four weeks before the injury, but the WCJ did not consider those hours in the calculation. The court remanded, as overtime hours must be considered when they are part of the expectation. The appeal of that issue has been denied.

However, it granted employer's appeal on the incarceration credit issue. Section §306(a.1) of the Act grants an employer a suspension of benefits during a claimant's incarceration after a conviction for a criminal offense. Subsequent to his injury, claimant was arrested, could not make bail, was incarcerated, and, when he pled guilty, he was given credit for the 525 days' pre-incarceration time served. The WCJ and WCAB allowed employer a suspension of benefits for the pre-conviction period of incarceration. Commonwealth Court reversed the credit, finding that the statutory language had to be narrowly construed. It relied on the Supreme Court decision in *Harmon v UCBR*, 37 EAP 2017 (Pa. April 26, 2019) decided just a few weeks earlier in an unemployment compensation decision that narrowly construed similar language in that Act to permit payment of benefits despite the ex-employee's weekend incarceration. Because claimant's incarceration was pre-conviction, it did not permit suspension/credit, even though the common pleas court had considered it for sentencing purposes. The appeal issue granted is whether an employer is entitled to suspend benefits for a pre-conviction incarceration because the claimant could not make bail when that time is then credited, essentially being treated as post-conviction jail time, as part of the subsequent sentence by the criminal court.

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Tyson Shared Services, Inc. v. Workers' Compensation Appeal Board (Perez), 225 A.3d 1212 (Pa. Cmwlth. 2020)

Claimant's benefits were previously suspended as of March 2015 by a workers' compensation judge's decision finding claimant refused a job offer within his restrictions; i.e., bad faith job refusal. Claimant then filed a reinstatement petition after undergoing surgery on Aug. 10, 2016. At hearing, employer admitted claimant was entitled to a reinstatement after surgery, but only for a limited time. Upon review of the evidence, the workers' compensation judge reinstated benefits as of Aug. 10, 2016, after which benefits were again suspended as of Oct. 25, 2016, the date claimant was no longer totally disabled from the surgery and was capable of performing the job he refused in 2015. Claimant appealed and the WCAB modified the suspension date to Aug. 8, 2017, the date claimant underwent an IME. On employer's appeal, the Commonwealth Court reinstated suspension as of Oct. 25, 2016. Where the reason for suspension was claimant's bad faith, the burden is on claimant to prove a change in condition such that he cannot do the job that was available. Here, the burden remained on claimant to establish disability through the period sought and did not shift to employer. The workers' compensation judge found claimant filed to meet his burden of proving ongoing disability after Oct. 25, 2016 and the findings were based on sufficient evidence.

***Workers' First Pharmacy Services, LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (Gallagher Bassett Services)*, 225 A.2d 613 (Pa. Cmwlth 2020)**

The court issued an important decision limiting the circumstances under which an application for fee review may be considered "premature", thus allowing an employer to not pay a medical bill within 30 days of its receipt of same.

Employer issued a Medical Only Notice of Compensation Payable ("Med Only NCP"), accepting a work-related right shoulder strain. Subsequently, the pharmacy dispensed a compound cream to be applied to the "affected area." Employer denied payment for the cream because the "diagnosis is inconsistent with the procedure." Litigation ensued between claimant and employer, with claimant seeking to expand the description of injury to include a clavicular avulsion fracture and employer seeking a termination of benefits prior to the date the cream was dispensed.

The litigation concluded with a judge approving the parties' Compromise & Release ("C&R") Agreement, whereby employer agreed to pay any medical bills incurred prior to the date of the C&R hearing that were related to the work injury. The C&R Agreement described the work injury as a right shoulder strain. The bureau's Medical Fee Review Division held that employer was obligated to reimburse the pharmacy for the compound cream.

Employer appealed the bureau's decision to a Fee Review Hearing Officer ("Hearing Officer"), who held that pursuant to 34 Pa. Code § 127.155, the pharmacy's application for fee review was premature because employer had denied liability for the work injury.

In reversing the Hearing Officer, the court held that employer was obligated to file a utilization review if it wanted to suspend its obligation to pay for the compound cream, as employer had accepted liability for claimant's work-related right shoulder sprain in the Medical Only NCP and the C&R Agreement. As the court put it, employer's stating that the diagnosis is inconsistent with the procedure is just another way of saying that the compound cream is not a reasonable or necessary "procedure" for treating claimant's "diagnosis", *i.e.,* right shoulder sprain. Thus, employer needed to file a utilization review request upon receipt of the pharmacy's invoice to halt its payment obligation under the Act.

***Philips Respironics v. WCAB (Mika),* (No. 1317 C.D. 2019; filed May 22, 2020)**

Commonwealth Court upheld a judge's decision to suspend a claimant's benefits based upon his finding that claimant had voluntarily removed himself from the workforce as of Sept. 1, 2017.

On that date and Nov. 1, 2017, claimant testified that he was not looking for work partly because of his shoulder condition and partly because he and his wife had decided it made more financial sense for her to work and him to stay at home with the children. Claimant also admitted that he was not completely disabled and that if he didn't have children, he would be trying to find work consistent with his work restrictions.

In upholding the judge's decision, the court noted that an employer is not required to show that a claimant does not intend to work in order to show a voluntary removal from the workforce.

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A View from the Bench

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Rather, an employer needs to demonstrate that, although the claimant may have been forced to retire from his pre-injury job, the claimant is not disabled from other types of work. Here, claimant acknowledged that there was work he could do, but he had chosen not to pursue it due to personal financial considerations. In sum, employer had produced sufficient evidence that claimant had voluntarily withdrawn from the workforce, allowing employer to suspend benefits without otherwise showing the availability of jobs within claimant's work restrictions.

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