Tom Wolf | Governor

Jennifer Berrier | Secretary Labor & Industry

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

News & Notes

Vol. 26 | No. 3 *"Serving all Pennsylvanians"* Summer 2021

Secretary of Labor & Industry, Jennifer Berrier Confirmed

Jennifer Berrier is the Pennsylvania Secretary of Labor & Industry. Governor Tom Wolf nominated her to the role on Nov. 12, 2020, to replace Gerard Oleksiak. She assumed office in an acting capacity on Dec. 4, 2020. The Pennsylvania State Senate confirmed the nomination on June 22, 2021. Prior to this appointment, Jennifer gained a broad knowledge of L&I through 15 years of impactful and rewarding experience, while serving various leadership roles within the agency. Most recently, she served as Deputy Secretary for Safety and Labor-Management Relations.

As Deputy Secretary, Jennifer was honored to oversee four bureaus that helped vulnerable workers, certified the safety of buildings and other building components, ensured that individuals with disabilities who are unable to work receive social security benefits, and facilitated resolutions in labor mediations and arbitrations.

Previously, Jennifer served as the Director for the Bureau of Occupational & Industrial Safety and prosecuted labor and employment law cases as legal counsel to the department.

Born in Washington state and raised in Central Pennsylvania, Jennifer is a graduate of York College and earned her Juris Doctor from Widener University.

Jennifer currently resides in Harrisburg, Pa., with her four-legged friend, a Boston Terrier/Poodle named "Puck".

A Message from the Director, Marianne H. Saylor

The summer season is bringing along more than weather changes. The bureau began bringing staff onsite in July. The workplace has changed in many ways and those differences will be felt by the entire bureau. Essential workers have become accustomed to a quieter environment and have adapted processes to accommodate their colleagues working remotely. Remote workers will be changing comfortable daily routines to resume onsite work. The adjustment will challenge us all to be adaptable, accepting, and agreeable. Most of all, we are appreciative that, in the face of a global pandemic, the health and safety of staff were prioritized and made remote work possible for the last 16 months.

Annual Workers' Compensation Conference

The Annual Pennsylvania Workers' Compensation Conference will be held June 6-7, 2022 at the Hershey Lodge and Convention Center. Stay tuned for further details.

The 2020 Pennsylvania Workers' Compensation and Workplace Safety Annual Report is available here.

Inside This Issue

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)

WCAIS Digital Transformation
Coming to a Screen Near You!

On Friday, June 25th Digital Transformation Phase 1.1 was released to WCAIS. The Records Request and Self-Insurance screens were transformed into a modern user experience.

Workers' Compensation Automation and Integration System

Screens and process flows have a different color scheme (as shown in the logo above), look, and feel while the content remains the same.

This modernization process will continue as all of WCAIS will be digitally transformed.

Browser Update: As Internet Explorer is no longer supported by Microsoft, using a different internet browser will allow for optimal performance of the WCAIS application. Please use one of the following internet browsers when accessing and using WCAIS: Google Chrome, Microsoft Edge, or Mozilla Firefox.

New Training Requirements for Pennsylvania Workplace Safety Committees

Act 57 was signed into law on June 30, 2021. The act requires that certified workplace safety committees (WSC) receive training regarding the risks associated with substance abuse, including opioid painkiller use, as an additional component of the initial and annual recertification training. All committee members will be required to receive training on Substance Abuse & Opioid Painkiller Use for a committee to be certified. Confirming receipt of this new training component will also be part of the audit process.

The change in training requirements is part of the effort to help combat the opioid crisis in the commonwealth. Recently, Governor Tom Wolf signed the 13th renewal of his January 2018 Opioid Disaster Declaration, working to address the opioid crisis with a focus on three areas: prevention, rescue, and treatment.

WSC members are in a unique position to help with prevention efforts. When trained WSC members share information about the risks of opioid painkiller use with the employees that they represent, those employees can caution their families and friends about the risks, too. In this way, awareness and prevention practices can spread throughout the community. WSC members are also instrumental in preventing workplace injuries to decrease the potential for opioid painkiller dependency.

The Health & Safety Division, responsible for certification of workplace safety committees, has prepared training materials and other necessary documents for this update. The WSC training courses available through the PATHS program now include the opioid training materials. Additional "Opioid Use Disorder" courses have been posted to the training calendar for committees who have already completed annual training and just need the fourth component. WSCs can view the calendar and register for courses at www.dli.pa.gov/PATHS. Qualified training providers can request materials from the PATHS program staff by emailing RA-LI-BWC-PATHS@pa.gov. The Health & Safety Division will begin reviewing applications for completion of the fourth training component on the implementation date of **Oct. 28, 2021.** Questions about the requirements can be directed to the certification staff at RA-LI-BWC-Safety@pa.gov.

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 accessible to employers and employees everywhere. So far this year, PATHS has conducted 384 training sessions for more than 21,700 individuals in 48 states and 14 countries. Safety training on 219 topics is available for employers, most are free of charge. These trainings apply to all health & safety concerns within the workplace, including substance abuse and opioid abuse-related topics. Training is aimed at reducing business costs, reducing injuries, and saving lives in Pennsylvania. Questions? Email PATHS at ra-li-bwcpaths@pa.gov, or visit our website at www.dli.pa.gov/PATHS.

Workplace Safety Committee Certification
$830 million and counting

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

The basic committee requirements for certification include that a minimum of two employee representatives and two employer representatives meet monthly and that the committee be in operation and in compliance with requirements for at least six months prior to submitting an initial application.

More than 12,800 workplace safety committees already certified in Pennsylvania and representing over 1.6 million employees have accumulated more than $830 million in total savings just from the 5 percent workers' compensation insurance premium discounts. That is money being re-invested to expand businesses and implement further safety and prevention efforts.

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 Workplace Safety Committee Certification Resources.

Questions? Email us at ra-li-bwcsafety@pa.gov.

Claims Corner

Notary Requirement for LIBC-751 (Notification of Modification/Suspension) as of October 1, 2021
The Disaster Declaration's temporary suspension of the notarization requirement of Form LIBC-751, Notification of Suspension or Modification, is still in effect and will expire on September 30, 2021. After that date, parties will be required to obtain notarization of Form LIBC-751, Notification of Suspension or Modification.

First Report of Injury
Injuries should be reported to the bureau and claimant using the LIBC-90 (First Report of Injury).

The LIBC-90 replaced the LIBC-344 (Employers' Report of Injury) for notification to the injured worker and the department in September 2013 as the prescribed form to report injuries received in the course of or resulting from employment (Section 438 of the PA Workers Compensation Act).

To print the form for mailing to claimants, go to the EDI Transactions tab of the claim, select the correct FROI from your transaction listing, and then click the view link in the Actions column. If you are unfamiliar with printing this form, please know that the FROI is the LIBC-90, as shown at the bottom of the document. See the PA Event table for additional information on this filing requirement.

Maintaining Accurate Claims Status
EDI transactions drive WCAIS statuses. The submission of these transactions ensures you meet required timelines and that all parties of a claim have accurate claim details available to them. You must report changes to a claim with the appropriate EDI transaction, including the conclusion of litigation, a signed agreement, or a unilateral suspension of a claim. Please see the EDI Implementation guide available on the Bureau's website for additional details. It is important to note; the following do not update a claim's status in WCAIS:

- Issued Decisions
- Required uploaded Agreement forms (LIBC-336, LIBC-337, LIBC-338, LIBC-339, LIBC-340)
- Required uploaded Notification of Suspension or Modification (LIBC-751)

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Claims Corner

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Uploading Bureau Documents
Please file your bureau document by uploading it to WCAIS rather than mailing it. This upload ensures expedited processing, and it's visible to all parties of the claims instantly. Uploading for fundamental bureau forms can be done by selecting the correct document type on the Actions tab of the claim. If you cannot locate the document type you wish to upload in the list on the Actions tab, the document should then be uploaded using the Upload Documents link on the Documents and Correspondence tab of the claim instead.

If you have any questions about uploading a document to a claim, staff are available to help. You may submit a WCAIS/Generating/Uploading Documents Customer Service ticket or call our Helpline at 1.800.482.2383.

Please note that for any event, other than litigation, that modifies or suspends a claim, you must also send any required form to the claimant and the bureau.

Requesting Records Online
The Records Request Dashboard, accessible via a quick link from your WCAIS dashboard, should be used to submit any records requests except those utilizing a non-WCJ issued subpoena. Requesting records online does not affect what you receive in your response. Any and all records can be returned online, just like by mail, with a claimant-signed authorization or an authorizing subpoena. Utilizing this simple, three-step process allows you a timelier turnaround, tracking of your requests, and access to the response for 90 days. More details are available here.

YouthRules!

The *YouthRules!* initiative promotes positive and safe work experiences for teens by providing information about protections for young workers to youth, parents, employers, and educators. Through the YouthRules! initiative, the U.S. Department of Labor and its partners promote positive and safe work experiences that help prepare young workers in the 21st-century workforce.

From the YouthRules! website you can quickly access information about federal and state labor laws that apply to young workers. The website educates teens on the rules, and provides information for parents, educators, and employers.

As part of the *YouthRules!* initiative, the U.S. Department of Labor and its partners develop and distribute informational materials, provide training on federal and state rules governing young workers, increase awareness through public service announcements, and develop other tools designed to increase compliance with federal and state laws. The Wage and Hour Division (WHD) is committed to providing employers with the tools they need to operate in compliance with the variety of labor laws enforced by the division. WHD offers a number of useful compliance resources intended to provide employers with readily accessible, easy-to-understand information relevant to both their rights and to their responsibilities under the law. From our interactive E-laws advisor to a complete library of free, downloadable workplace posters, this site offers employers critical information to guide them toward operating their businesses in full compliance with federal labor regulations. View available resources for employers.

A View from the Bench

SEPTA v. WCAB (Hansell), No. 464 C.D. 2020, 2021 WL 2064907 (Pa. Commw. Ct. May 24, 2021)

Suicide is acknowledged as a work injury

This case initially presents a common situation where an employee sustained a work injury to his low back on June 17, 2016. The injury was acknowledged by the employer via a Notice of Compensation Payable (NCP). The employee attempted a return to light-duty work but was unable to continue doing so. The unusual issue is presented on March 19, 2017 when the employee committed suicide and, thereafter, the widow (claimant) filed a fatal claim petition alleging that

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the decedent/employee's work injury caused mental stress which led to his suicide. The testimony of decedent's widow and a forensic psychiatrist established that decedent/employee was a fun-loving, caring, wonderful father, and good husband before the work injury.

Because of the work injury, he became depressed, obsessed, paranoid, delusional, illogical, and irrational. The Commonwealth Court affirmed the decision that claimant's suicide was a work-related injury and widow's benefits were payable. They rejected employer's arguments that decedent's suicide was intentional and therefore, not compensable under the act, and that because decedent's mental condition was the result of a mental stimulus, claimant had to demonstrate abnormal working conditions. Rather, they agreed that claimant established that decedent suffered a work injury, which caused decedent to become dominated by "a disturbance of mind of such severity as to override normal rational judgment" and that this "disturbance of the mind" resulted in decedent's suicide." They also found that the pain, disability, and impairment which led to the suicide all had their genesis in a physical injury, thus a mental analysis was unnecessary.

Berkebile Towing & Recovery v. WCAB, No. 220 C.D. 2020, 2021 WL 1846095 (Pa. Commw. Ct. May 10, 2021)

Significant control demonstrates employment relationship

Berkebile Towing appealed from the order that found deceased tow truck driver was an employee rather than an independent contractor and, therefore, awarded fatal claim benefits to driver's surviving minor children. The WCJ found the facts largely analogous to those that established an employment relationship in Sarver Towing v. W.C.A.B. (Bowser), 736 A.2d 61 (Pa. Commw. Ct. 1999). There was a written agreement between business and driver stating that no employment relationship existed, the driver had the ability to decline jobs, the driver was paid per job, and the driver was responsible for his own income taxes, however, the business had the ability to exercise significant control over the driver's work, the business owned the truck bearing business' name, the driver was not allowed to use or lend the truck

for work not with the business, the business set rates and collection of payment for jobs performed, the driver was on call on 24/7 basis, and the business could stop assigning driver calls and reclaim truck at any time. The Pennsylvania Commonwealth Court affirmed and held that, under the facts as found by the workers' compensation judge, the company's ownership and control over the availability and use of its tow trucks favored finding an employer-employee relationship.

Gillen v. WCAB (Penna. Turnpike Commission), No. 1681 C.D. 2019, 2021 WL 1897685 (Pa. Commw. Ct. May 12, 2021)

Multiple state employers included in calculation of Section 204(a) offset

In this case, claimant did not challenge the actuarial methodology used to determine the amount of the state employer's contribution to his pension. Claimant argues that Section 204(a) of the Workers' Compensation Act does not authorize the Turnpike Commission to take an offset against his workers' compensation benefits for the part of the pension claimant earned while working for his former employer, the Delaware River Port Authority. The WCJ found that claimant worked for the Delaware Port Authority for 18 years and worked for the Turnpike Commission for five years. Crediting all witnesses' testimony, the WCJ found that claimant's 18-year employment with the Port Authority was "irrelevant in [the Turnpike Commission's] actuarial analysis" because "all participating employers contribute an apportioned amount to fund the pension of all SERS retirees regardless of which employers they worked for." WCJ Decision, 8/14/2018, at 10; R.R. 287a. The WCJ said the Supreme Court has expressly approved the actuarial analysis used by SERS in Department of Public Welfare v. Workers' Compensation Appeal Board (Harvey), 605 Pa. 636, 993 A.2d 270 (2010).

The Commonwealth Court analyzed relevant case law and then affirmed the decision of workers' compensation judge and WCAB finding that the Turnpike Commission, as claimant's Commonwealth employer, is entitled to an offset for claimant's pension benefits from SERS, which is the amount set forth in the Notice of Workers' Compensation Benefit Offset which included contributions from all commonwealth employers.

The Commonwealth Court has held that an employer, prosecuting a termination petition, was collaterally estopped from asserting that claimant was fully recovered from his injury, when it had (1)

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amended its earlier termination petition to seek approval of a disability-only C&R, (2) sought withdrawal of said termination petition, and (3) agreed to either seek approval of/fund an MSA, or endure with its liability for medical.

Claimant injured his hand and benefits were voluntarily paid. After a termination petition was filed, the parties reached a wage-only C&R. The parties agreed in the C&R that the defendant would either seek approval of an MSA or continue to be liable for payment of reasonable and necessary medical expenses caused by the work injury. The WCJ approved the C&R and marked the termination petition withdrawn. Only five days later the defendant again filed the termination petition and the WCJ denied the petition citing res judicata; the Appeal Board affirmed.

The Commonwealth Court affirmed, though invoking collateral estoppel, not res judicata. They rejected defendant's argument that the C&R did not provide a waiver of defendant's right to file for termination of medical benefits. The court stated, among other things, "Here it is impermissible for employer, which accepted liability for claimant's injury and agreed to resolve and pay claimant's wage and specific loss benefits, to reverse course after a final decision on the merits, and to assert that claimant is not entitled to those benefits because he has fully recovered. The issue was already decided in the C&R." "If the employer did not want to be responsible for claimant's reasonable and necessary medical benefits, it should not have agreed to liability in the C&R agreement, or at minimum should have expressly preserved its right to challenge claimant's entitlement at a later date."

Perillo v. WCAB (Extended Healthcare Services, Inc./SWIF, No. 649 C.D. 2020, filed March 3, 2021 (unreported, Pa. Commw. Ct. 2021).

Extended Healthcare Services, Inc. v. WCAB (Perillo), No. 620 C.D. 2020, filed March 3, 2021 (unreported, Pa. Commw. Ct. 2021).

In these two decisions, relating to cross-appeals filed in the same case under separate docket numbers, the Commonwealth Court applied the binding precedent established in Whitfield v. WCAB (Tenet Health Sys. Hahnemann LLC), 188 A.3d 599 (Pa. Commw. 2018) holding that in post-Protz reinstatement petitions, claimant's total disability status is properly reinstated as of the date of the reinstatement petition and not the date of a prior non-appealed IRE. The court rejected claimant's argument Whitfield was distinguishable because, unlike the claimant in Whitfield whose 500 weeks of partial disability benefits had been exhausted, she was still receiving benefits when Protz was decided. The court held this was a distinction without a difference. In the companion decision, the court rejected employer's argument that claimant's partial disability status under the prior IRE should be maintained because it was conducted under the Sixth Edition (second printing) of the AMA Guides yielding an impairment rating of less than 35 percent. The court followed its prior holding in Rose Corporation v. WCAB (Espada), 238 A.3d 551 (Pa. Commw. 2020). Act 111, establishing the IRE process to be used effective Oct. 24, 2018, contains no provision which specifically or implicitly provides for an IRE performed prior to Act 111 to be validated afterward. It does not allow a retroactive modification as of the date of a prior constitutionally invalid IRE.

City of Pittsburgh v. WCAB (Donovan), ___ A.3d ___, filed April 22, 2021 (Commw. Ct. 2021).

In City of Pittsburgh v. WCAB (Donovan), ___ A.3d ___, filed April 22, 2021 (Pa. Commw. 2021), the Commonwealth Court applied the binding precedent established in Whitfield v. WCAB (Tenet Health Sys. Hahnemann LLC), 188 A.3d 599 (Pa. Commw. 2018) holding that in post-Protz reinstatement petitions, claimant's total disability status is properly reinstated as of the date of the reinstatement petition and not the date of a prior non-appealed IRE. The court reaffirmed its Whitfield holding that the claimant could satisfy his burden to establish disability with his own testimony, without medical evidence, or evidence of earning power. The court further held that the employer was not entitled to present vocational evidence relating to the claimant's earning power to rebut his assertion of total disability. The court reasoned that the previous change in claimant's disability status from total to partial disability status was based upon the impairment rating ascertained through the prior IRE, without regard to any change in his earning power at that time.

Vanston v. Marian Community Hosp. (WCAB), No. 933 & 944 C.D. 2020, filed May 12, 2021 (unreported, Commw. Ct. 2021).

Ruggiero v. Commw. Of Penna. (WCAB), No. 934 C.D. 2020, filed May 12, 2021 (unreported, Pa. Commw. Ct. 2021).

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A View from the Bench

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Fronheiser v. WCAB (Caterpillar Logistics Services), No. 483 C.D. 2020, filed May 12, 2021 (unreported, Pa. Commw. Ct. 2021).

In these three decisions filed on the same day, the Commonwealth Court applied the binding precedent established in Whitfield v. WCAB (Tenet Health Sys. Hahnemann LLC), 188 A.3d 599 (Pa. Commw. 2018) holding that in post-Protz reinstatement petitions, claimant's total disability status is properly reinstated as of the date of the reinstatement petition and not the date of a prior non-appealed IRE. In all three cases, the claimants' benefits were modified from total to partial disability status prior to the Supreme Court's decision in Protz v. WCAB (Derry Sch. Dist.), 161 A.3d 827 (Pa. 2017), striking Section 306(a.2) from the Act as unconstitutional. The prior determinations were not appealed; all three claimants had filed reinstatement petitions within months after the Protz decision.

West Penn Allegheny Health System, Inc. v. WCAB (Cochenour), __A.3d__, 2021 WL 1432272, filed April 16, 2021 (Commw. Ct. 2021).

In West Penn Allegheny Health System, Inc. v. WCAB (Cochenour), the Commonwealth Court affirmed the worker' compensation judge's (WCJ) grant of an original claim and held that when an employer seeks a credit for non-occupational disability benefits paid, said credit is in the gross amount, not the net after taxes.

Claimant alleged an unwitnessed injury when she was jostled on the shuttle bus between employer's parking lot and the hospital entrance. She did not initially have symptoms but reported developing symptoms two days later. The employer denied the claim. During the pendency of the dispute, employer paid claimant short-term disability benefits with taxes deducted. In the decision, the WCJ granted the claim petition and awarded the closed period of benefits. He granted the employer a credit for the short-term disability, but only in the net amount. The Appeal Board affirmed.

The Commonwealth Court affirmed the award of the claim but reversed on the net credit. The governing proviso of the law was Section 319, second paragraph. See 77 P.S. § 671. That section allows for subrogation by an employer or third-party payor which makes payments of disability or medical on the premise that the injury was not/is not work-related. The statute states that reimbursement is to be made in the "amount so paid," making no reference to a net. The WCJ and board had erred in treating the second paragraph subrogation claim as a pension under Section 204(a), 77 P.S. §71(a) (providing for net credits).

Wilson v. WCAB (Sch. Dist. of Phila.), 834 C.D. 2019, filed March 19, 2021, 2021 WL 1053898 (unreported, Commw. Ct. 2021).

The Commonwealth Court has held that, while the WCJ properly denied claimant's disability claim as time-barred (filed more than three years after the injury and the later Medical-Only NCP), he committed error in not awarding the claimed medical expenses. In this regard, the treatment that gave rise to the bills were obviously connected to the injury and employer failed to rebut the presumption that the claimant enjoys in such situations.

Claimant, Wilson, was employed as a substitute teacher for the school district. She was struck in the head with a student's knapsack. She immediately had treatment at the E.R. and later had visits with an eye doctor. The district's TPA issued a Medical-Only NCP which stated, "head injury/contusion," and set forth a note, "hit with backpack above left eye." Yet, seemingly, the TPA declined to pay any of claimant's medical treatment bills, even for the E.R. visit.

More than three years later, claimant filed a claim petition. Claimant sought disability and medical bills, particularly co-pays she bore for the follow-up visits. The WCJ dismissed the disability claim as time-barred and the otherwise-cognizable medical bill claims because of lack of medical evidence proving causal connection. The WCAB affirmed. Commonwealth Court held that the disability claim was, indeed, time-barred. However, this was not the case with the medical claim, as (of course) the Medical-Only NCP was still open and, more pertinently, claimant need not have supported her medical bill claim with expert evidence. The bills were, in this regard, for head and eye maladies, and hence obviously connected to the accepted injury. The court stated, "an untrained layperson would not have a problem in making the connection …." Claimant enjoyed a presumption of causation in such a case. Employer, meanwhile, had not rebutted the presumption.

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Hoss v. WCAB (Select Staffing), Commw. Ct. No. 241 C.D. 2020, filed Feb. 25, 2021, 2021 WL 738110 (unreported, Commw. Ct. 2021).

The Commonwealth Court, affirming the board, has held that the WCJ correctly refused to set aside a Third-Party Settlement Agreement (TPSA), concluded in 2014, in the wake of the 2018 Whitmoyer decision of the Supreme Court. That landmark case, of course, held that employer has no anticipated subrogation out of continuing payments of medical treatment for which it is liable, post third-party recovery; anticipated subrogation is only enjoyed by the employer as to ongoing installments of disability payments.

The court refused to declare that Whitmoyer was not retroactive but held instead that that dramatic 2018 precedent was simply irrelevant to the situation between the parties. In Whitmoyer, the claimant's third-party recovery far exceeded the employer's lien, and the TPSA provided for anticipated subrogation for ongoing payments of medical treatment – a right which Whitmoyer so famously nullified. In the present case, the claimant's third-party recovery was dwarfed by the employer's lien, and the anticipated subrogation credit which employer was taking was the result of a negotiated, partial waiver by employer of the bulk of its lien. The court rejected the idea that the Supreme Court, with Whitmoyer, intended to disannul such agreements. After all, at time of the TPSA, the employer could have demanded that its accrued lien of disability and medical be paid, and the supposedly forbidden credit would never have been implicated in the first place.

Beaver Valley Slag, Inc. v. Marchionda (WCAB), 247 A.3d 1212, filed March 10, 2021, 2021 WL 900664 (Commw. Ct. 2021).

The Commonwealth Court, affirming, has held that a claimant who had entered into a Third-Party Settlement Agreement (TPSA) with employer, in the wake of his third-party recovery, could review, and have set aside, in part, the same in light of the Supreme Court's disannulment of the rule that the employer was entitled to anticipatory subrogation not only as to ongoing disability checks but medical payments as well. In so ruling, the court allowed claimant relief only as of the time of the Whitmoyer ruling (2018) and not, as he demanded, back to the date of the TPSA (2016).

Claimant, Marchionda, sustained catastrophic injuries on April 15, 2014 while employed by Beaver Valley Slag. He was paid benefits voluntarily. He also sued an enterprise, Reco, the manufacturer of the machine on which he was laboring at the time of the accident. In 2016, claimant settled with Reco in an amount far in excess of the lien. The trial court approved a Special Needs Trust and directed employer and employee (via a guardian) to enter into a TPSA (a procedure, notably, required by the act). The parties did so after exchanging various items of correspondence agreeing on the mechanics of employer's ongoing duty to pay, in part, claimant's medical expenses.

Two years passed. Then, in June 2018, the Supreme Court held that Section 319 does not support the traditional rule that an employer enjoys anticipatory subrogation as to its ongoing liability for claimant's medical expenses. Instead, it has the advantage of anticipatory subrogation only as to instalments of disability. Whitmoyer v. WCA (Mountain Country Meats), 186 A.3d 947 (Pa. 2018). Claimant at once filed a review petition seeking to disannul the TPSA.

The WCJ, Appeal Board, and court all granted relief, in part. The court allowed claimant relief only as of the time of the Whitmoyer ruling (2018) and not, as he demanded, back to the date of the TPSA (2016).

In so ruling, the court also rejected several employer arguments. Employer argued most importantly that Whitmoyer was not applicable because the 2016 TPSA "was final (given that no appeal was taken therefrom), and no litigation or appeals were pending at the time Whitmoyer was decided …." Thus, claimant was "not entitled to the benefit of the change in the law." The court responded that Section 413(a) allows review of agreements and the "TPSA was not a final resolution of the claim.

Employer also argued that Whitmoyer should not be applied retroactively. After a discussion of the law and recent developments in this analysis, the court, noting again that the TPSA was not final and could be reviewed stated, "Given that our Supreme Court interpreted that portion of Section 319 of the Act for the first time in Whitmoyer, such that the TPSA's terms were not known to be materially incorrect until Whitmoyer was decided, and guardian preserved the issue of Whitmoyer's application to the TPSA by raising it at the earliest point, guardian is entitled to the benefit of the ruling as of the date Whitmoyer was decided."

Lorino v. WCAB (Commonwealth of PA), Commw. Ct. No. 1217 C.D 2019, filed Aug. 19, 2020, 2020 WL 4810717 (unreported, Commw. Ct. 2020), appeal granted, 249 A.3d 500 (Pa. 2021).

The Commonwealth Court, in August 2019, upheld the rule that attorney's fees under Section 440 are only

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A View from the Bench

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assessable against employers in the face of an unreasonable contest. The claimant had unsuccessfully argued that, at least when medical bills only are claimed, and claimant prevails, employer should always bear his or her fees. The claimant petitioned for review to the Supreme Court.

In February 2021, the court granted the petition. The issue for appeal is as follows: "The issue, as stated by petitioner, is whether Commonwealth Court's decision on this question of first impression should be reversed for violating the separation of powers doctrine, since it improperly exercised legislative power by replacing the word 'may' with the word 'shall' in Section 440 of the Workers' Compensation Act; its [o]pinion even states, '. . . despite the General Assembly's use of the word 'may,' this [c]ourt has always . . .' required an unreasonable contest before assessing attorney's fees against an insurer."

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