Pennsylvania
Department of Labor & Industry
Bureau of Workers' Compensation

NEWS & NOTES

"Serving All Pennsylvanians"

Issue 30 Volume 1 | Winter 24-25

Josh Shapiro, Governor
Nancy A. Walker, Secretary

Labor & Industry
Bureau of Workers' Compensation
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In This Issue

Workers' Compensation Office of Adjudication Welcomes New Director

On December 20, 2024, Labor & Industry Secretary Nancy A. Walker, appointed Holly San Angelo as the new Director for the Workers' Compensation Office of Adjudication. Director San Angelo became a workers' compensation judge in May 2012 and the judge manager of the Southeastern District in March 2018. Prior to becoming a workers' compensation judge, she had practiced at William J. Ferren & Associates, in-house counsel for Travelers Insurance Company, solely in the field of workers' compensation for 18 years.

Holly graduated from Pennsylvania State University with a B.A. in Foreign Service and earned her J.D. from the California Western School of Law where she was a member of the Law Review.

Holly brings a wealth of experience, knowledge, and forward-thinking; especially with the transition to a hybrid virtual and in-person practice. She is particularly proud of her contribution to the mediation program for WCOA statewide and will continue to perform this service for the stakeholders. Holly is also committed to continuing and building upon the impeccable leadership of her predecessor, Joseph DeRita, who has returned to be a workers' compensation judge in the Malvern office.

Holly has been married to Vinson San Angelo, an IT Manager for the Vanguard Group, for almost 25 years. They have three children: Morgan - 23 who works as a biomedical engineer, Ryan - 20 who is a junior at the University of Florida, and Jonathan - 16 who is a junior at La Salle College High School. They also have three dogs: Archie (Goldendoodle), Reggie (Labradoodle), and Ozzie (Bernadoodle).

2025 PA Workers' Compensation Conference

Join us for the 24th Annual PA Workers' Compensation Conference on May 29-30, 2025 at the Hershey Lodge & Convention Center in Hershey, PA.

Just a few of this year's topics include:

- Private Eyes are Watching You!
- Prosthetics – Upper Extremities
- Prosthetics – Lower Extremities
- WCAIS: Something Old Something New
- Navigating the 4P's of Workers' Compensation
- State of Confusion: Which Laws Applies?

View the Agenda

Nearly 1,300 people attended last year's conference sharing practical, useful, and timely information to members of the workers' compensation community.

It's a conference you don't want to miss!

Questions?
(800) 482-2383 (toll-free inside PA)
(717) 772-4447 (local & out-of-state)
PA Relay 7-1-1 (hearing impaired)
Email: RA-LI-BWC-HelpLine@pa.gov

2024 Breakout Session
Top row left to right, Dara DeRoiste and Eric Hoffman, BWC Health & Safety Division
Bottom row left to right, Vison Leong and Scott Gerberich, Viocity Group - 2023 Governor's Award For Safety Excellence Winners

WCAIS

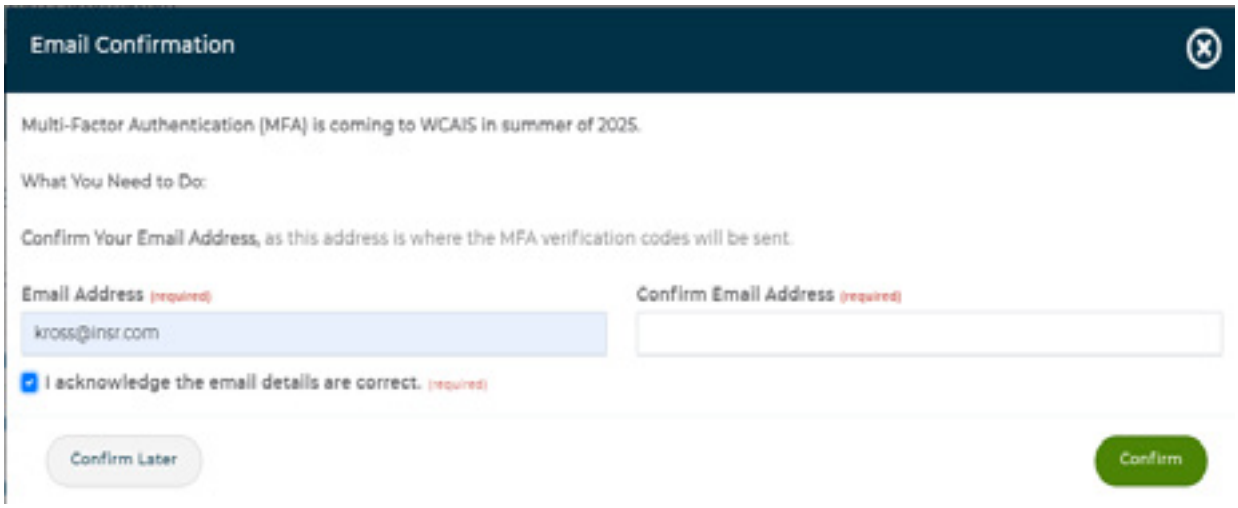
Workers' Compensation Automation and Integration System

Risk-Based Multifactor Authentication (RBMFA) arrives in WCAIS Summer 2025!

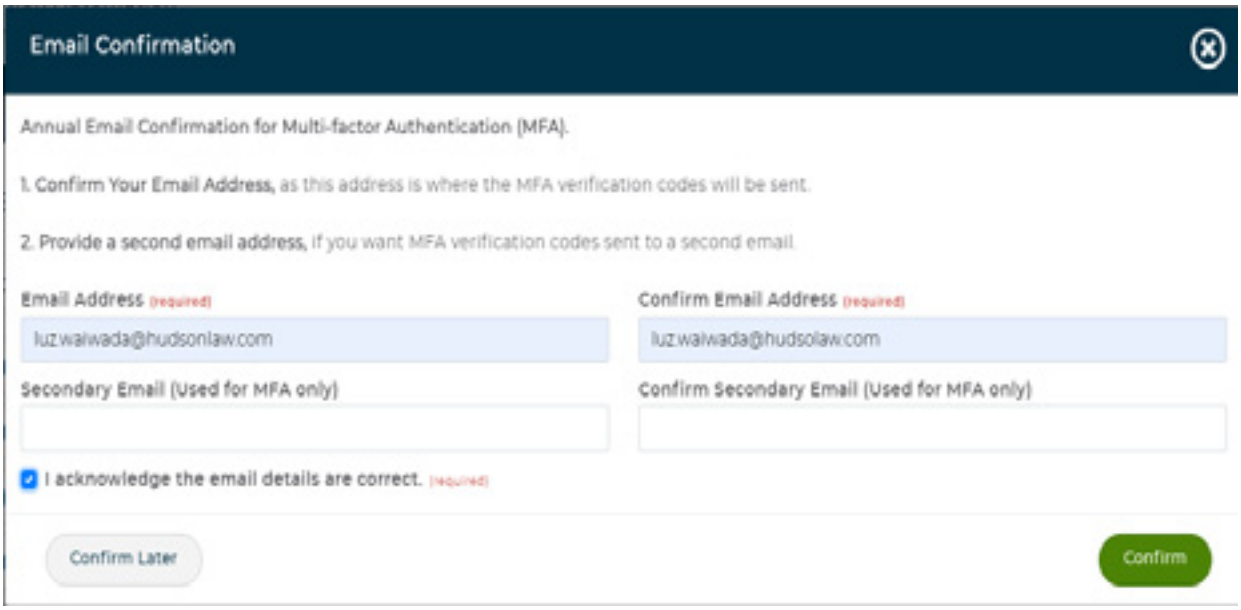
What is RBMFA?

Its Purpose … Risk-Based Multifactor Authentication (RBMFA) system adds an extra layer of protection to protect your account from unauthorized access.

In February all WCAIS users will need to confirm their email address.



Attorneys may have a secondary email for MFA purposes only.



Claims

New Customer Service Sub-Category in WCAIS

The Bureau of Workers' Compensation is pleased to announce the creation of a new Customer Service sub-category in WCAIS as part of our ongoing Annual Claim Status Report (ACSR) efforts. Please use EDI/ACSR for any Pre-ACSR/ACSR questions.

We added this new sub-category as part of the bureau's preparations for the return and automation of the ACSR in late 2025. We have sent all insurers and third-party administrators their Pre-ACSR stakeholder lists to give filers extra time to review and bring their list of claims current in WCAIS. Please reach out to us via the new Customer Service sub-category if you have any questions about your list or any claims included.

EDI Tips & Tricks- Filing an Agreement for Compensation for Death

When there is a fatal claim and you file an Agreement for Compensation for Death (LIBC-338) or a Supplemental Agreement for Compensation for Death (LIBC-339) you must file EDI to update the claim status and details. The EDI transaction must include the Date of Death and the Death Result of Injury Code to ensure proper coding for a fatal claim.

Records Request Responses

The bureau includes all claim documents submitted to us for claims when responding to records requests where the requesting party is a party to the claim or there is a signed authorization or a subpoena. We have been receiving an increased number of inquiries regarding medical records. These are not part of the bureau's record, except when submitted on a claim as part of a Medical Fee Review. Responses also do not include Exhibits, which are not public records, nor transcripts, which must be purchased from the court reporting companies.

Special Funds

Supersedeas Fund Reimbursement Payments

Supersedeas Fund Reimbursement (SFR) payments will be paid via direct deposit beginning in 2025. In preparation, the team has been working with Vendor Data Management Unit (VDMU) and Office of the Budget (OOB) to create guidance for our stakeholders regarding the registration process. Special Funds will begin distributing these instructions with Discrepancy letters and will make them available in WCAIS customer service. We have also been working with our WCAIS development team to create new communications to SFR payees and their counsel to facilitate file handling and provide a "heads-up" when payments are anticipated. We expect implementation of direct deposit to occur in January 2025. Questions regarding this change can be directed to the team via email at RA-LIBWC-SFR-SUB-QUE@PA.GOV.

Compliance

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. The bureau's Compliance Section is responsible for investigating potential 305 violations and referring cases for potential prosecution. Violations may be classified as either a third-degree misdemeanor or, if intentional, a third-degree felony. Each day the employer violates Section 305 and is charged as a separate offense.

Defendants who are first-time offenders may be eligible to enter the Accelerated Rehabilitative Disposition (ARD) program. Those who enter the ARD program waive their right to a speedy trial and statute of limitations challenges during the period of their 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 for the past three months are as follows:

Montgomery County:

On December 17, 2024, Preferred Medical Transport entered into a Rule 586 agreement with the Commonwealth and paid $100,000 to the Uninsured Employers' Guaranty Fund in restitution in lieu of prosecution.

Administrative Penalties

Section 1610 of the Workers' Compensation Act authorizes the Department of Labor & Industry to assess an employer $200 a day for up to 30 days for failing to respond to the Department's request for information regarding workers' compensation coverage (LIBC 661 Employers' Certificate of Insurance Request)

Beginning in February 2024, Compliance initiated the use of an electronic payment option for the 1610 administrative penalties streamlining the process for staff and Employers. To date, Compliance has received over $97,500 in electronic 1610 payments.

Once a decision has been made regarding the 1610 assessment, if the employer has not paid the assessment promptly or entered into a payment agreement, the case will be referred to BWC legal for a petition to enforce. A hearing will be held before the Commonwealth Court, and if a favorable decision is reached, a lien will be filed against the business.

On June 14, 2024, the petition to enforce was granted by the Commonwealth Court upholding the bureaus' determination that Outer Limits Adventure Park LLC was responsible for the 1610 assessed administrative penalty.

Self-Insurance

Assessment Notices

Starting in 2025, insurers and self-insured employers will electronically receive assessment notices via WCAIS. Please review the contact information for your assessment contact in WCAIS and confirm that it includes a valid email address. Failure to provide accurate contact information, including a valid email address, will delay the receipt of your assessment notice.

HEALTHCARE

Impairment Rating Evaluation (IRE) Withdrawal Capabilities

The person submitting a Request for Designation (RFD) can withdraw the request if it is in Pending Examination or Pending Assignment status.

To withdraw the RFD, navigate to the Designation Information tab of the RFD and click on the new hyperlink:

After successfully withdrawing the RFD, the status will change to Withdrawn.

If you have any questions about this new feature, please contact us at RA-LI-BWC-HCSRD@pa.gov.

In Case You Haven't Heard

Did you know that when you file an electronic medical fee review application in WCAIS, we can do the entry for you? WCAIS has an option for you to choose for BWC staff to enter all service lines from a bill. The option to enter your service lines remains if you prefer to enter the information yourself.

If you would like us to show you how to use this feature or need a refresher, please contact us at RA-LI-BWC-HCSRD@pa.gov.

Coming in September 2025

Starting September 2, 2025, you will be required to file all medical fee review applications electronically in WCAIS. Any applications submitted on paper after this date will be returned.

If you are not a registered user in WCAIS or need assistance logging into an existing account, please act now and contact the bureau's Helpline at 1-800-482-2383 or RA-LI-BWC-HELPLINE@pa.gov.

Healthcare (Cont'd.)

One-on-One Personal Training

The Healthcare Services Review Division offers one-on-one personal training to help individuals file electronic medical fee review applications in WCAIS for healthcare professionals, healthcare providers, and their attorneys or billers.

These trainings provide step-by-step instructions on:

- How to file a new application for medical fee review
- How to resume a draft application for medical fee review
- Completing all sections of the medical fee review
- What happens after the medical fee review has been submitted

If interested, please contact us at RA-LI-BWC-HCSRD@pa.gov.

WCAIS Training Comes to TEAMS in May 2025

Learn how to file a utilization review request and receive tips on how to avoid your request from being returned. More information, including the training date and time, will be coming soon.

BWC Blood Drive a Success

On January 8, 2025, the Bureau of Workers' Compensation and the American Red Cross sponsored a blood drive. The event was held in the cafeteria of the Labor & Industry building and was staffed by volunteers from the bureau's Self-Insurance Division.

As a result of the combined efforts of the bureau's staff and the blood donors from L& I, we were able to collect 27 pints of blood. In fact, 32 percent of the blood donors were first-time donors.

The willingness of Labor & Industry staff to commit their time to make this event successful shows their generosity, selflessness, and dedication to helping others. Of course, the real winners are the patients in need of blood. As you may know, the American Red Cross has recently declared an emergency blood shortage, and each blood donation can help save up to three lives.

Health & Safety

IT'S TIME TO APPLY!
Governor's Award for Safety Excellence Nominations due May 1st

The Governor's Award for Safety Excellence (GASE) Review Committee is accepting nominations!

View a Message from Deputy Secretary Gerald Mullery

This award aims to recognize outstanding workplace health and safety programs and the superior efforts that make these programs so successful. Pennsylvania employers may nominate themselves or may be nominated by a third party.

- Use the **Request for GASE Nomination Form** to receive a link to the GASE Nomination Form and Worksheet.
- Use the worksheet to gather your information and prepare your responses.
- Copy and paste many of your collected responses from the worksheet to the nomination form.

The GASE Review Committee looks forward to learning about your exemplary safety program and the unique efforts you use to keep your employees healthy and safe.

Questions?
Contact the GASE Program Coordinator
RA-LIBWC-GASE@pa.gov or (717) 772-1917

2024 GASE Winners
Gettysburg Foundation
Chapman Corporation

Health & Safety (Cont'd.)

PATHS

PA Training for Health and Safety

Incident Prevention Through Education

PATHS will offer more than 50 training sessions in February to raise awareness of dealing with burn awareness and heart health. Click on the links below to view the training objectives and to register.

FEBRUARY

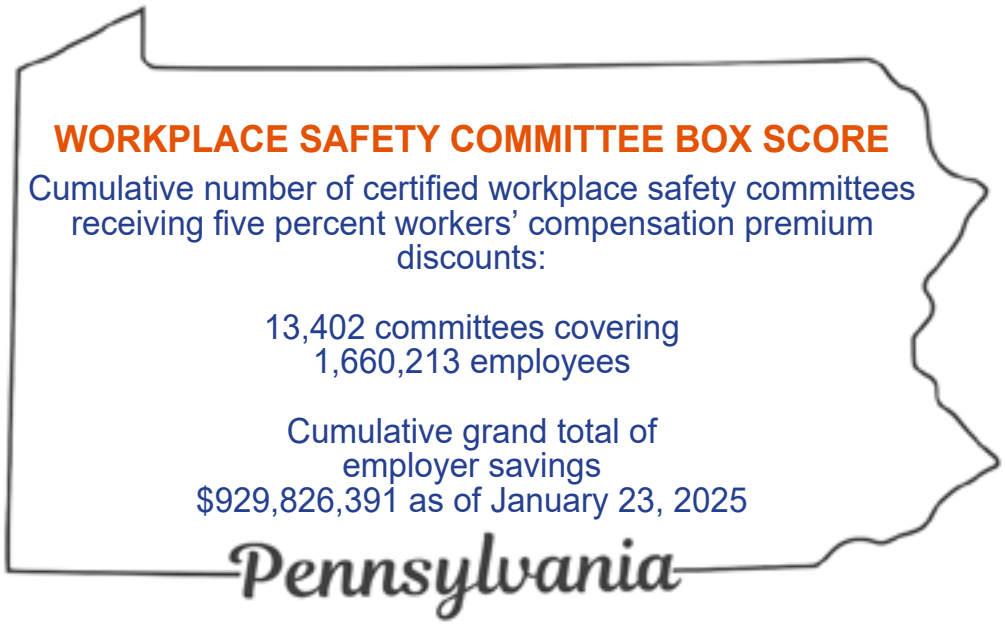
4	Kitchen Safety – Burn and Fire Prevention	11:00-11:30 a.m.
5	Bloodborne Pathogens	9:30-10:30 a.m.
7	Governor's Award for Safety Excellence (GASE)	9:30-10:30 a.m.
11	Managing Emergencies	1:30-3:00 p.m.
14	Occupational Skin Diseases	9:30-10:30 a.m.
18	Job Safety Analysis	11:00-11:30 a.m.
27	Pandemic Preparedness	1:30-2:30 p.m.

WORKPLACE SAFETY COMMITTEE (WSC) CERTIFICATION

4	WSC Certification Renewal	1:30-2:45 p.m.
11	WSC Certification Initial	9:30-11:00 a.m.
20	WSC Certification Renewal	9:30-10:45 a.m.
26	WSC Certification Initial	1:30-3:00 p.m.

PATHS is a statewide service providing employers and employees easy access to cost-effective health and safety resources. Services provided by PATHS will enable participants in the workers' compensation system to create safer, incident-free workplaces.

Training can be provided onsite by request, or you may register for online webinars on various topics through the PATHS Training Calendar. Visit our website Health & Safety Division | Department of Labor and Industry | Commonwealth of Pennsylvania for various safety-related resources.



KIDS' CHANCE OF PA

HOPE, OPPORTUNITY, AND SCHOLARSHIPS FOR KIDS OF INJURED WORKERS.

Kids' Chance of PA

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 seriously injured in a work-related accident. The hardships created by the death or disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams.

Since its inception in 1997, Kids' Chance of PA has awarded over 1,000 scholarship grants to eligible students of more than $2.6 million in tuition assistance. During the 2023-2024 academic year, we awarded $188,000 in scholarships to 40 students. Through our involvement with the PHEAA/PATH program, two thirds of our recipients are eligible and received additional funds to relieve their financial burden!

Kids' Chance of Pennsylvania scholarships are made possible by the generous contributions of our scholar sponsors, corporate and community partners, and donors. Donations can be made online, and by check, or through corporate donation programs like United Way or SECA. We are proud to announce the establishment of endowment funds to support our scholarship program now and well into the future! Information on how to send direct donations to the long-term endowment fund will be available on our website, WWW.KIDSCHANCEOFPA.ORG, by contacting us via email at INFO@KIDSCHANCEOFPA.ORG, or by telephone at (215) 302-3598.

In addition to the donation sources listed above, Kids' Chance of Pennsylvania holds several fundraising events throughout the year, such as our annual golf outings in Hershey and Plymouth Meeting and our 5K Run/1-Mile Fun Walk in Pittsburgh. We held a Silent Auction and a Classic and Exotic Car Show last fall.

New for 2024, we are developing a Student Engagement Committee to explore additional ways that we can support our recipients with their future career aspirations after they graduate.

We need your help in spreading the message of Kids' Chance of Pennsylvania! If the family has young children, we have a Planning for the Future database where we store this information and reach out to the family when the children are old enough. Our mission is about supporting as many students as possible, and we need you to do that. Please reach out and we will send you information to pass on, or you can direct the family to our website – HTTPS://KIDSCHANCEOFPA.ORG. Thank you for doing your part to help us give #moremoneyformorekids!

youthrules!

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.

A View From the Bench

City of Philadelphia v. Turner (WCAB), No. 1190 C.D. 2023, 2024 WL 4508800 (Pa. Cmwlth. Ct. Oct. 17, 2024)

In *Turner*, the Commonwealth Court affirmed the denial of a Modification Petition because the designated Impairment Rating Examination (IRE) physician did not make any determination as to causal relationship of conditions that could be reasonably related to the compensable work injury, even if these conditions may not have been formally acknowledged. In short, an IRE physician has broad discretion and must consider the whole person, not strictly the accepted injury, when performing an impairment rating.

On March 3, 2006, claimant sustained a compensable injury to various body parts. After several rounds of litigation, claimant's injury was eventually limited via May 20, 2021 decision in which the workers' compensation judge (WCJ) determined that claimant had fully recovered from the injuries to his left knee, left hip, and bilateral feet, but had not recovered from the injury to his low back.

In January 2022, Employer filed a Modification Petition seeking to change claimant's temporary total disability status to temporary partial by way of IRE performed by Dr. Guy Fried. Dr. Fried testified that he limited his examination to rate only the accepted low back injury. Although he did acknowledge that additional conditions including depression, anxiety, erectile dysfunction, and incontinence were conditions that could have been reasonably caused by the recognized low back injury, he did not address them in his rating. Therefore, his whole person impairment rating was based on the low back injury only. Ultimately, the judge deemed Dr. Fried not credible and denied the Modification Petition. In so doing, the judge cited *Sicilia*, finding that Dr. Fried "misapprehended" the discretion [afforded] an IRE physician-evaluator to "exercise professional judgment to render appropriate decisions concerning both causality and apportionment." Employer appealed to the board which affirmed the WCJ. Employer then appealed to the Commonwealth Court, which also affirmed.

After a comprehensive review of the relevant caselaw, the court held that an IRE physician is charged with determining the degree of impairment due to the compensable injury, even if that includes conditions that may not have been formally acknowledged but are still due to the compensable injury. More precisely, Dr. Fried should have rated not only the low back but the additional conditions that he testified could be "reasonably caused" by the accepted low back injury. By failing to consider the causation of these conditions, the IRE was insufficient as a basis to grant the Modification Petition.

Berks Area Regional Transportation Authority v. Bennett (W.C.A.B.), 323 A.3d 123 (Pa. Cmwlth. 2024)

In Berks Area Regional Transportation Authority v. Bennett, the Commonwealth Court held that a WCJ must make findings of specific medical diagnoses in order to meet the reasoned decision standard—a finding that the claimant suffered an "injury" and describing the injury in terms of symptomatology is insufficient. In so holding, the Commonwealth Court remanded the matter back to the WCJ for additional findings as to the description and extent of the work-related injuries.

By way of background, claimant filed a Claim Petition alleging that he suffered injuries to his left knee, lower back, and right hip on June 12, 2021, while working as a bus driver. During the litigation, claimant relied on Dr. Volpe as his medical expert. Dr. Volpe diagnosed the claimant with low back pain, sprain of the lumbar spine, pain in the left knee, pain in the right hip, lumbago with sciatica, and lumbar radiculopathy. Dr. Volpe testified that he was unable to provide more specific diagnoses until he reviewed further diagnostic test results. Dr. Volpe's opinion was never clarified. The defendant relied upon Dr. Mendez, who opined that claimant sustained a meniscal tear of the left knee that "could be" related to the work injury, but that he suffered no other work-related injuries.

The WCJ granted the claimant's Claim Petition, crediting the claimant's testimony as well as the testimony of Dr. Volpe. Dr. Mendez's testimony was found to be less credible than Dr. Volpe—to the extent it conflicted with Dr. Volpe's testimony. The WCJ found that claimant "suffers from a left knee injury, a right hip injury, and a low back injury with radiculopathy as a result of the work injury." The WCJ concluded as a matter of law that the claimant sustained an injury "in the nature of a left knee injury, a right hip injury, and a low back injury with associated radiculopathy."

The defendant appealed to the WCAB arguing that the WCJ's decision was not supported by substantial evidence and that the findings as to the description of the claimant's injuries were general and not adequately reasoned. The WCAB reversed in part and affirmed in part. The WCAB reversed the WCJ regarding the right hip injury, concluding

the description was too general and that Dr. Volpe's testimony was not competent because it conflicted with claimant's testimony. The WCAB affirmed the WCJ as to the low back and left knee injuries finding that the same were supported by substantial evidence and were adequately reasoned.

The defendant appealed to the Commonwealth Court, raising the issue of whether the WCJ's decision was adequately reasoned regarding the description of the low back and left knee injuries.

The Commonwealth Court began its analysis by citing to Section 422(a) of the Act, which entitles the parties to a reasoned decision. The Court next cited *ICT Group v. W.C.A.B. (Churchray-Woytunick)* for the application of the reasoned decision standard to the description of a work-related injury. 995 A.2d 927 (Pa. Cmwlth. 2010). In *ICT Group,* the court held a WCJ has failed to issue a "reasoned decision" as required by Section 422(a) of the Act where the WCJ's decision lacks sufficient specificity of description, extent, and/or scope of the claimant's specific work injuries.

Analyzing the WCJ's decision within this framework, the court agreed with the defendant and reversed the WCAB. The court noted that the WCJ summarized and credited certain medical evidence; however, he made no reference to such testimony when describing the claimant's injuries. The court noted that as a result, the parties, future WCJs, and the court itself are left guessing as to the exact injury description that would frame the issues in any subsequent litigation. The court noted that the WCJ credited the medical testimony of Dr. Volpe, and Dr. Mendez—where it didn't conflict with Dr. Volpe—and such testimony included specific diagnoses. However, the WCJ ultimately described the claimant's left knee and low back injuries "in generic terms" and symptomatology rather than making findings of specific diagnoses. The court held that the WCJ's injury descriptions "are too general and lacking in particularity to constitute a reasoned decision, i.e. they will not permit effective review in this or any future proceeding without further elucidation." Consequently, the court ordered that the matter be remanded back to the WCAB with further instruction to remand the case to the WCJ for additional findings of fact and conclusions of law as to the description, extent, and/or scope of claimant's left knee and low back injuries.

***Borough of Hollidaysburg v. Detwiler*, No. 739 C.D. 2023, 2024 WL 4820552 (Pa. Cmwlth. Ct. Nov. 19, 2024)**

In *Borough of Hollidaysburg v. Detwiler (WCAB)*, the Commonwealth Court affirmed an award of benefits to a volunteer firefighter whose alleged exposure to carcinogens resulted in Chronic Myeloid Leukemia (CML). In so holding, the Commonwealth Court rejected the borough's arguments that claimant failed to give timely notice of his occupational disease and failed to file a timely Claim Petition. Further, the Commonwealth Court held that claimant had established the statutory presumption of entitlement to compensation afforded by Section 301(f), having satisfied the three-prong test.

On December 27, 2019, claimant filed a Claim Petition seeking benefits for occupational disease pursuant to Section 108(r), alleging that he developed CML while serving as a volunteer firefighter for the borough. Claimant testified that while serving with the Phoenix Volunteer Fire Department (Phoenix) within the borough from 2003 to 2016, claimant was exposed to diesel emissions from the trucks in the firehouse. He was also involved in the "attack, overhaul, and salvage phases of fires" during which he encountered smoke and soot. Claimant testified that sometimes he operated the firefighting apparatus, but other times he would enter the buildings. Claimant could only recall operating as an interior firefighter during one call in the 1990's, and he could not remember participating in any interior fires with Phoenix from 2010 to 2016.

Claimant was first diagnosed with CML in December 2014 but did not file a claim because he did not think his cancer was related to his fire service. In January 2019, claimant attended a training during which Act 46 was discussed, and shortly thereafter he retained counsel. Dr. Guidotti issued a report on December 18, 2019, relating claimant's cancer to his work-related benzene exposure, and on December 27, 2019, claimant filed a Claim Petition. Dr. Guidotti provided testimony that CML is a type of cancer that can be caused by benzene, which is a Group 1 carcinogen found in the firefighter work environment.

The borough presented the testimony of Assistant Chief Schmitt, who was a member of the Phoenix Fire Department since 2004. He reviewed the Response Reports for the fire calls claimant responded to from 2010 to 2016, which reflected approximately 40 hours of fighting dwelling fires over that period. He recalled claimant operating firefighting apparatus, which could

entail significant smoke exposure depending on the wind, but never observed claimant putting out a fire or engaging in overhaul. The borough also presented the testimony of Fire Chief DiBona. He recalled claimant attending calls with fire and smoke, but could not recall claimant working as an interior firefighter. He further testified that claimant was exposed to diesel fumes from the fire trucks.

The WCJ granted the Claim Petition, crediting the testimony of claimant and Dr. Guidotti. The WCJ also credited the testimony of the borough's witnesses, but determined that they did not establish that claimant never engaged in interior firefighting because they were not on every call that claimant attended. The WCJ also concluded that claimant gave timely notice of the injury. Further, the WCJ applied the causation presumption found in Section 301(f) as claimant established that he served four or more years in continuous firefighting duties, and had direct exposure to a Group I carcinogen. The WCAB affirmed, with a dissent from Chairman Frioni asserting that claimant failed to prove four or more years in active firefighting duties.

The borough appealed to the Commonwealth Court arguing that claimant failed to give timely notice of his occupational disease and failed to file a timely Claim Petition. Further, the borough argued that claimant was not entitled to the statutory presumption afforded by Section 301(f). The Commonwealth Court rejected each of the borough's arguments.

Initially, the borough argued that claimant should have known of the possible connection between his firefighting duties and his cancer when he received training on Act 46, and was charged with giving notice within 120 days of that event. However, the court emphasized that it had previously rejected the argument that knowledge of Act 46 triggered a notice requirement. Here, the WCJ credited claimant's account that he did not know of the relationship between his cancer and his firefighting duties when he received his diagnosis. In addition, claimant testified that he gave notice within a month of attending the Act 46 training, and the WCJ found that this was timely and acting with reasonable diligence.

The borough also maintained that claimant did not bring his claim within 300 weeks of his last day of exposure, so he could not avail himself of Act 46's presumption. The court noted that 300 weeks before the filing of the Claim Petition was March 28, 2014. Although the WCJ did not make a specific finding of the date of last exposure, he did credit claimant's testimony that he was exposed to fires from 2003 through 2016 while volunteering for Phoenix. Moreover, the Response Reports indicated that claimant attended at least 15 incidents that were coded "F" for fire after March 28, 2014. Consequently, claimant had filed his Claim Petition timely, entitling him to the presumptions set forth in Act 46.

Finally, the borough argued that claimant failed to establish the requirements necessary to trigger the presumption of compensability under Section 301(f). The court referenced the three-prong test: four years of continuous service; direct exposure to a carcinogen as referenced in Section 108(r); and no pre-existing cancer. In this case, there was no dispute that claimant had no history of pre-existing cancer. However, the borough argued that claimant failed to satisfy the first and second prong of the test.

The first prong requires the firefighter to show that he has "served four or more years in continuous firefighting duties." 77 P.S. § 414 (emphasis added). The borough argued that claimant was not a traditional firefighter, that he overstated his fire service, and that there was no indication that he was exposed to smoke and carcinogens. However, the court noted that there was no dispute that claimant was a volunteer firefighter from 2003 through 2016, which included fighting fires and responding to emergencies. The court interpreted the first prong of Section 301(f) as focusing on "years of service," which related to the "time period served." The first prong did not implicate the type of firefighting duties or the frequency of the calls, although the court noted that this could be considered in the actual exposure analysis under the second prong. The court held that to satisfy this prong, the claimant must establish that they were "a firefighter for four or more continuous years." The prong does not require a claimant to establish that he was a "traditional firefighter" or engaged in particular kinds of firefighting duties in order to satisfy the continuous-service requirement.

The Commonwealth Court then addressed the second prong of the test, requiring a claimant to prove direct exposure to a carcinogen. In the case of volunteer firefighters, the court noted that the third sentence of Section 301(f) requires this proof to be "based on" PennFIRS reports. A report prepared internally by the fire company, if it "denotes [the claimant's] participation in incidents involving exposure to fire smoke likely to contain ... Group 1 carcinogens causally related to [his cancer],

... is sufficient to satisfy the PennFIRS reporting requirements in Section 301(f)." The claimant is not required to submit the PennFIRS reports. The court noted that the relevant carcinogen in claimant's case was benzene. While the borough's witnesses characterized claimant's actual fire exposure as minimal, they agreed that he was present at calls where fire and soot were present. Moreover, claimant's credited testimony demonstrated his exposure to various types of fires, including house fires. The Response Reports also showed incidents that claimant attended that likely contained Group 1 carcinogens, thus satisfying the PennFIRS reporting requirements. Therefore, the court held that there was substantial competent evidence to support the WCJ's conclusion that claimant had direct exposure to a Group 1 carcinogen.

As for making the causal connection between this exposure and claimant's cancer, the court noted that claimant has only a general causation requirement, and the burden is not a heavy one. Claimant was not charged with showing that his exposures actually caused his cancer, or that the direct exposure was to a particular Group 1 carcinogen. Here, Dr. Guidotti opined that benzene was present in fire smoke, and he detailed the claimant's firefighting exposures, as supported by the claimant's account and the Response Reports. This was sufficient to meet the claimant's low burden. The court noted that the borough did not attempt to rebut the presumption of causation afforded by Section 301(f). Instead, the borough only challenged whether claimant successfully invoked the burden afforded by Section 301(f). Having rejected the borough's arguments on appeal, the Commonwealth Court affirmed the order of the WCAB.

Senior Judge Leavitt authored a lengthy dissent, interpreting Section 301(f) as requiring continuous (i.e., uninterrupted) firefighting over a four-year period, which required more than occasionally reporting for fires, and required that the four years be more than mere membership in the fire department. In a footnote, the majority addressed the concerns raised by dissent, agreeing that a member of a volunteer fire department who only cooks the chili on Sundays should not be entitled to the 301(f) presumption on the basis of his membership in the department. However, the majority noted that those facts were not before the court. Further, the majority referenced the second prong of the 301(f) test requiring a claimant to establish direct exposure to a Section 108(r) carcinogen. If a claimant cannot show any direct exposure, the presumption does not apply.

Bradford County v. Pasko (WCAB), 2024 WL 3799636 (No. 926 C.D. 2022)

Commonwealth Court answered the question as to whether an employer was entitled to a pension credit/offset pursuant to Section 204(a) of the Act, 77 P.S. §71(a), when a claimant retired, began collecting his pension, subsequently returned to part-time employment with that same employer, and then suffered a work injury. The court held that the employer was not so entitled.

Section 204(a) provides that "benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the award made under sections 108 and 306, except for benefits under section 306(c)."

The claimant was a long-time employee with employer as a wastewater treatment plant operator. He retired and began to collect his employer-funded retirement pension. The employer brought him back to work part-time. In June 2020, claimant suffered a work injury. The claimant filed a Claim Petition alleging, in part, that he was owed wage loss benefits. The employer acknowledged its medical liability but disputed payment of wage loss benefits arguing that the claimant's receipt of his employer-funded retirement pension would wholly offset any potential wage loss benefits owed. The WCJ agreed with the employer and allowed the pension credit/offset based upon the plain language of Section 204(a). The WCJ reasoned that Section 204(a) did not differentiate between pension benefits received before an injury or after an injury and was therefore applicable. The WCAB reversed, holding that Section 204(a) was silent to this specific scenario and applied equitable principles. The board reasoned that this was essentially a completely new part-time employment that happened to be with the same employer from which the claimant had retired. The board noted that allowing such an outcome would belie the humanitarian purposes of the act in making claimants whole following an injury.

The Commonwealth Court undertook an extensive review of the Act and Section 204(a), including statutory analysis. The court determined Section 204(a) to be ambiguous. The court therefore looked to "the pension offset's neighboring credits in Section 204(a), each of which is predicated on making claimants whole." The credits/offsets in Section 204(a) prevent a claimant from receiving a double recovery. In this case, the WCJ's literal application

of Section 204(a) would instead result in no recovery to the claimant. In reviewing the other credits/offsets in 204(a), the court concluded that there was no legislative intent for a credit/offset to apply in such a way that a claimant would receive no compensation for a loss of earnings arising from a work injury.

The court further noted that claimant's retirement pension benefits neither accrued from nor were connected to his new part-time employment with the employer. Conceptually, the court treated the claimant's pre-retirement employment and post-retirement part-time employment with employer as two completely separate employments. The court further reasoned that because the employer hired the claimant back following his retirement, the employer should have always expected to pay the claimant his retirement pension benefits in addition to his new part-time earnings. The court reasoned that the employer should not be relieved from paying wage loss benefits following a work injury due to ongoing retirement pension payments when the employer had already been paying the claimant wages in addition to those pension benefits. In sum, the court held that the Section 204(a) pension credit/offset provision was not applicable to this claimant.

Dura-Bond Coating, Inc. v. Marshall and PI&I Motor Express (WCAB), No. 1123 C.D. 2023, 2024 WL 4807012 (Pa. Cmwlth. Ct. Nov. 18, 2024)

The Commonwealth Court issued an *en banc* opinion addressing the scenario where medical providers submit work-related bills to DHS instead of the workers' compensation insurer, thus incurring a DHS lien.

By way of background, the claimant suffered serious work injuries in 2014, resulting in amputations of both of his lower extremities and other injuries. Following extensive litigation, in 2016, the WCJ granted benefits, determined Dura-Bond and PI&I were the claimant's statutory employers, and ordered Dura-Bond to pay benefits with a right of indemnification from PI&I. Dura-Bond paid the DHS lien which had accrued during the initial litigation.

Despite the WCJ's decision and the statutory employers' request to claimant's counsel to have ongoing bills sent to them, some of the medical providers continued to submit bills to DHS. In 2021, DHS notified Dura-Bond of its lien totaling over $150,000.

The statutory employers filed a Review Petition, arguing that they should not be responsible for the bills that were the basis of the DHS lien until they were properly submitted under Section 306(f.1) of the Act. The WCJ agreed, reasoning that both DHS and the providers were or should have been aware that the bills were to be paid by the employers, but nevertheless they were submitted to and paid by DHS. Consequently, the WCJ ordered that the employers were not responsible for the billing "unless and until the bills in question are submitted to them for review, payment, denial, and/or utilization review in accordance with the Act."

Claimant appealed to the WCAB, which reversed. It read the judge's decision as saying that the employers were not responsible for paying the DHS lien. Moreover, the act's cost-containment provisions only applied to providers, not DHS, and they could not supersede DHS's entitlement to reimbursement under the Fraud and Abuse Control Act ("FACA"), 62 P.S. §§1401-1418. In a footnote, the board recognized that because the bills were not properly submitted to the employers, it deprived them of the utilization review process.

The employers appealed to the Commonwealth Court, which reversed the board. The court undertook an exhaustive review of both the act's cost-containment provisions, as well as the federal and state laws directing that DHS seek reimbursement from third parties responsible for medical treatment for Medicaid recipients.

The court disagreed with the board's conclusion that the FACA superseded the act's cost-containment provisions such that the employers could no longer challenge the reasonableness or necessity of the treatment. Under the rules of statutory construction, the two statutes should both be given effect, if possible. The court opined that the two laws together could be read together. The act's cost-containment provisions do not bar DHS's liens, but simply set forth when an employer is responsible for payment of it. It read the FACA as having a predicate determination that an employer is responsible for treatment prior to paying a DHS lien, and DHS may only recoup a lien for which another entity is legally liable. The court noted that under Section 306(f.1) of the Act, "an employer's/insurer's legal liability to pay for a claimant's medical treatment is triggered only when the employer/insurer receives the proper billing forms and related medical records." Only after this happens does an employer's responsibility to pay any DHS lien

arise. To hold otherwise would deprive an employer of access to the utilization review process and allow providers to avoid "the paperwork and a potential disruptive utilization review process" by simply submitting the bills to Medicaid. Moreover, without the bills and records, an employer would be unable to confirm any DHS lien is for work-related treatment.

The court remanded the matter back to the WCJ, with the following guidance: Ideally, the parties would work with DHS to determine which payments underlying the DHS Lien are likely compensable, claimant would obtain the billing reports and related medical records from the providers or have providers send them to employers, employers would review, reprice, deny, and/or seek utilization review of those bills and, thereafter, reimburse the DHS Lien only for those treatments causally related to claimant's work injury and reasonable and necessary therefor. In the alternative, the parties could reach another mutually agreeable solution that satisfies both Section 306(f.1) of the Act and Section 1409 of the FACA. Accordingly, this court remands this matter to the board to remand to the WCJ for the WCJ and/or the parties to determine the best way to satisfy both Section 306(f.1) of the Act and Section 1409 of the FACA under the circumstances presented here and to undertake those measures.

England v. Merion Construction et al, 320 A. 3d 922 (Pa. Cmwlth. 2024)

Several petitions were decided in the underlying litigation in multiple decisions including employer Schnoll's petitions to modify based on a labor market survey, modify based upon receipt of pension benefits, and suspend based on voluntary withdrawal from the labor force, claimant's petition for joinder of Merion as the employer, and claimant's petitions to review pension offset and penalty. By way of background, at the time of injury, claimant was a union painter working for subcontractor Schnoll on a job with a general contractor, Merion. An NCP was issued for the August 11, 2010, work injury as a torn meniscus for wage loss and medical benefits. The WCJ concluded Schnoll was claimant's employer directly liable for the payment of compensation because it purchased WC insurance from SeaBright insurance, Merion was not liable for payment of compensation and should not be joined, Schnoll was entitled to a pension offset in the amount of $133.47 per week effective March 1, 2011, claimant had an earning power of $1346.00 per week effective November 12, 2016, and claimant voluntarily withdrew from the workforce effective January 9, 2018. All the listed conclusions were affirmed by the board and Commonwealth Court. The Commonwealth Court held substantial evidence was found in the record to support that Schnoll was the employer as Schnoll had purchased WC insurance through SeaBright as part of the contract with Merion the cost for which was deducted from the bid package. The court found nothing in the Act sections 204(a) and 302(a) prohibits this type of purchase of insurance from qualifying a subcontractor as an employer of the injured worker. Regarding the modification based on pension funding from Schnoll, the judge did not find the formula used by the actuary to be credible because comparisons between what Schnoll contributed and other employers contributed were not made. The WCJ then performed the calculations comparing Schnoll's contributions with those of other employers, with interest.

The Commonwealth Court again found the record contains substantial evidence to support the calculation of the WCJ and also found no error of law in the calculation or inclusion of the interest earned. Regarding the modification based on earning power, WCJ found no medical evidence showing total disability, found no evidence that returning to work would not jeopardize claimant's union benefits as long as the job did not compete with union business (based on witness testimony of same), and based on evidence that vacancies for Schnoll at the time of the labor market survey were for positions for which claimant has no qualifications including project manager and estimator. This evidence was considered sufficient substantial evidence to warrant the modification based on earning capacity. The Commonwealth Court agreed substantial evidence existed in the record to show claimant voluntarily removed himself from the workforce on January 9, 2018, when he testified during a deposition that was not planning on returning to work and would probably not accept any of the jobs on the labor market survey because his Social Security Disability and Pension benefits would be affected. The court noted the WCJ found claimant' to combative and evasive in his answers to questions from Schnoll's counsel. The court upheld the determinations of all petitions decided by the WCJ.

A View From the Bench (Cont'd.)

Griffis v. WCAB (Albert Einstein Healthcare Network), 272 C.D. 2019, 2020 WL 14021925 (Pa. Cmwlth. Ct. July 15, 2020) and Griffis v. WCAB (Albert Einstein Healthcare Network), No. 273 C.D. 2019, No. 280 C.D. 2019, 2020 WL 14021926 (Pa. Cmwlth. Ct. July 15, 2020)

The Commonwealth Court has reported the two previously unreported cases Griffis v. WCAB (Albert Einstein Healthcare Network), No. 272 C.D. 2019 and Albert Einstein Medical Center v. WCAB (Griffis), No. 273 C.D. 2019 and No. 280 C.D. 2019.

By way of background, claimant was a nurse at Albert Einstein Medical Center on April 28, 2009, when she fell down the steps, hit her neck on the handrail, and went to the hospital's emergency department. After observation, x-ray, and CT scan, she was discharged the next day, April 29, 2009. On April 30, 2009, she returned with increasing symptoms. During an MRI, she became paralyzed due to complete C6-7 spinal cord compression. The employer (whose identity became a separate issue) accepted C6-7 injuries and claimant began receiving total disability benefits. In 2010, the claimant filed a civil lawsuit against the doctors and others and was awarded over $2 million dollars in a high-low arbitration on or about April 8, 2013. Also in 2013, claimant and employer stipulated to an expanded injury description.

Employer filed a petition in 2013 asserting its subrogation rights regarding the medical malpractice award, which was dismissed. It filed another petition in 2014. Claimant filed a review to add adjacent levels C4-5 and C5-6, and a psychiatric injury. Employer did not dispute the psychiatric injury and only defended against the adjacent levels. The first issue was whether the malpractice award was against claimant's employer, not a third party, so it was not entitled to subrogation. The WCJ, affirmed by the WCAB and Commonwealth Court, found there were several different entities, that each maintained its own separate identity, and that subrogation was permitted because the award was against others. There was a discussion of res judicata and collateral estoppel because of prior bureau documents and a stipulation. It was held that the bureau documents were not binding on that issue and the stipulation was not an adversarial disposition that would invoke res judicata or collateral estoppel. The claimant also argued the doctrine of laches applied in that employer waited too long to assert its lien. The WCJ, WCAB, and Commonwealth Court found that laches did not apply. The last argument against subrogation was that the malpractice did not worsen her condition. The WCJ found credible medical evidence that if the MRI had properly been performed at the time she initially presented to the emergency department and she had been properly diagnosed at that time, she would have recovered. It was found that the delay in performing the correct test (the MRI) caused a catastrophic result. The WCJ found the claimant's witness not credible on the addition adjacent cervical injuries and denied the review petition. The WCJ did not award costs because the claimant did not prevail on any contested issues. The WCAB and Commonwealth Court affirmed on each issue.

Employer filed another Modification Petition to collect on the lien, and claimant filed a penalty because the carrier unilaterally stopped paying in November 2017 without an agreement or order. The court reiterated the facts from the prior decision. In the new litigation, it was learned that employer had sent claimant a third-party settlement agreement concerning the accrued lien and the continuing workers' compensation payments, but the claimant objected to portions and did not sign it. Employer, on advice of counsel, stopped paying benefits. The WCJ found that there was a technical violation of the act but did not award a penalty because of the windfall to the claimant. The WCJ further found that employer was entitled to immediate payment of the entire accrued lien for past benefits and to a continuing pro rata lien based on the third-party settlement calculations. Employer appealed the finding of a violation of the act, and claimant appealed the immediate reimbursement order and the failure to award a monetary penalty despite the finding of a violation. The WCAB amended the lien amount to exclude future medical benefits, which was affirmed by the Commonwealth Court. It was also found that subrogation was allowed as of the date of the medical malpractice award, not the date of the first WCJ's decision. It was also held that immediate repayment of the whole past due amount was appropriate, as well as continuing pro rata payments until exhausted. It was found that the employer clearly violated the act by unilaterally stopping compensation payments, but an award of a monetary penalty is not automatic, and it is within the WCJ's discretion not to award a penalty. The court affirmed the WCJ's analysis and decision.

A View From the Bench (Cont'd.)

Riehl v. Beiler Bros., LLC, No. 1563 C.D. 2023, 2024 WL 4806807 (Pa. Cmwlth. Ct. Nov. 18, 2024)

An *en banc* panel of the Commonwealth Court considered the ramifications to the widow of claimant's dying while his petition to convert temporary total disability benefits ("TTD") to specific loss benefits was pending on remand before a WCJ. In proposed conclusions of law for the Workers' Compensation Appeal Board ("WCAB"), the judge stated that claimant's death was due to his work injuries and that he was entitled to specific loss benefits based on his sustaining a permanent loss of use of both arms and both legs. Additionally, employer was not entitled to a credit for past-paid TTD because claimant's depression and anxiety from the work injury constituted a disability separate and apart from the physical injuries. Nonetheless, the judge held that Section 306(g) of the Act prevented the widow from posthumously receiving her husband's specific loss benefits because his death was caused by the work injury.

Adopting the judge's findings of fact, the WCAB stated that if claimant had not died while his petition was being litigated, it would "likely" have awarded the conversion of his TTD benefits. However, the WCAB held that claimant's petition became moot when he died and that Section 306(g) prevented an award of the specific loss benefits to the widow. In so doing, the WCAB acknowledged that its decision means the widow is likely left without any remedy because fatal claim benefits are not available to her either since her husband's work-related death occurred more than 300 weeks after the work injury under Section 307of the Act.

The Commonwealth Court vacated WCAB's decision. With respect to the WCAB's assertion that the husband's death caused his conversion petition to become moot, the court stated that Section 410 of the Act must be considered even though the widow failed to raise Section 410 as a basis for relief before the WCAB. That section states in pertinent part: "In case any claimant shall die before the final adjudication of his claim, the amount of compensation due such claim to the date of death shall be paid to the dependents entitled to compensation, or, if there be no dependents, then to the estate of the decedent." (emphasis added) In the court's view, the operation of Section 410 is mandatory and not waivable. Notable too is Section 410's not conditioning a surviving dependent's or estate's eligibility for benefits on the work-relatedness or not of the claimant's death. The court remanded the case back to the WCAB for a final adjudication of the merits of the conversion petition.

The court cautions that Section 410 applies only in "very narrow circumstances" where a claimant has a claim for compensation pending at the time of death that is ultimately successful. Applying Section 410 as done here "comports with the act's policy goals of ensuring that surviving dependents, like claimant's widow, are not left without a fair remedy when the worker they depend on dies, whether from work injuries or otherwise."

Stuart Brooks v. Trustees of the Univ. of Pennsylvania (WCAB), No. 936 C.D. 2023, 2024 WL 4530508 (Pa. Cmwlth. Ct. Oct. 21, 2024)

The Commonwealth Court affirmed the WCAB, which affirmed the WCJ's granting of employer's Modification Petition based on a labor market survey.

Claimant was injured while working for the employer as a nurse on December 7, 2018. The shoulder injury was accepted by the employer by way of issuance of an NCP, and employer began paying temporary total disability benefits.

On December 8, 2020, employer filed a Modification Petition asserting that claimant was capable of working and that jobs within his physical capabilities had been identified and provided to claimant through a labor market survey. In support of the Modification Petition, employer submitted the testimony of Dr. Andrew Sattel and Mr. Jeff Sund, the vocational expert who conducted the labor market survey. Of note, on cross-examination, Mr. Sund acknowledged that due to formatting changes made by clerical staff, the letterhead on two of his reports differed from those appearing on the copies sent to claimant. Further, Mr. Sund acknowledged that, while the initials CDMS (Certified Disability Management Specialist) appeared near his signature on his correspondence to claimant, his certification as a CDMS expired on December 31, 2019. Mr. Sund was not sure why the initials were included in the correspondence. Claimant did not present any expert medical or expert vocational testimony in opposition to the employer's evidence. Rather, claimant relied on his own testimony and technical legal arguments to challenge the testimony of Mr. Sund.

On October 26, 2022, the WCJ issued a decision granting Employer's Modification Petition. The WCJ found Mr. Sund credible and found that all of the positions identified by Mr. Sund were within claimant's

educational, vocational, and physical capabilities. The WCJ also found that the positions remained open to allow claimant a reasonable opportunity to apply. The WCJ also credited Dr. Sattel's testimony that claimant was capable of returning to work in a light duty capacity. The WCJ also addressed Mr. Sund's qualifications, and found that he was a qualified vocational counselor pursuant to 34 Pa. Code §123.202(a)(3) and (5). The WCJ explained that Mr. Sund has a master's degree in social work and has worked for five years or more as a vocational evaluator.

Claimant appealed to the WCAB, which affirmed the WCJ. Claimant then appealed to the Commonwealth Court. On appeal, claimant alleged that Mr. Sund failed to comply with the Code of Professional Ethics for Rehabilitation Counselors as required by Section 306(b)(2) of the Act, 77 P.S. § 512(2). Claimant further alleged that decision produced an absurd and unjust result, given that the act was not intended to reward employer's and Mr. Sund's non-compliance with its provisions. Finally, claimant alleged that the decision violated his substantive due process rights.

The Commonwealth Court rejected claimant's assertion that Mr. Sund failed to comply with the relevant requirements. Claimant asserts that Mr. Sund's inclusion of the initials CDMS following his name, even though the CDMS credentials had expired did not disqualify him pursuant to the Code of Professional Ethics for Rehabilitation Counselors. The Commonwealth Court also rejected claimant's argument that there were any due process concerns or violations, as Mr. Sund was properly found to be qualified by the WCJ under 34 Pa. Code §123.202(a). Accordingly, the Commonwealth Court affirmed the WCAB, which affirmed the WCJ's granting of employer's Modification Petition based on the earning power assessment.

Thomas v. Sysco Foods (WCAB), 2024 WL 4676755 (Pa. Nov. 5, 2024)

The Pennsylvania Supreme Court granted allocatur of this unreported opinion from the Commonwealth Court. The court will address whether an employer, who fails to notify claimant's counsel of an expert exam, should be barred from utilizing the examination to alter the workers' benefits. The following summary involves the Commonwealth Court's decision.

On April 26, 2024, the Commonwealth Court affirmed a Decision of a Workers' Compensation Judge, (WCJ), that granted a Termination Petition. On appeal, the claimant argued that the employer should have been barred from utilizing an Independent Medical Examination (IME) because the employer failed to notify the claimant's attorney in advance of the requested IME.

By way of background, the claimant sustained an injury in the nature of a left leg amputation and psychological injury in 2016. Some years later in April of 2020, the employer filed a Termination Petition, asserting the claimant was fully recovered from the psychological injury based on the IME report. During the litigation, the employer moved for the admission of the IME report, to which the claimant objected based on lack of notice of the IME to the claimant's attorney. Specifically, the claimant's workers' compensation attorney was not copied on the IME notice. The employer's attorney responded that they were also unaware of the IME since the notice was sent out by a third-party vendor. The employer argued that the claimant was not prejudiced since the claimant received notice of the IME, attended the IME, and could have asked his attorney about the notice if he had any questions. The WCJ ultimately allowed the employer to proceed with the Termination Petition based on the IME report over the claimant's attorney's objection. The matter was fully litigated and the WCJ ultimately granted the Termination Petition. The claimant appealed.

The Workers' Compensation Appeal Board (WCAB) affirmed the WCJ, concluding that failing to copy the claimant's attorney on the IME Notice was a violation of the Rules of Professional Conduct, but did not rise to the level of a remand given the conduct was "not relevant to the issues before the WCJ and on appeal." Thereafter, the claimant petitioned the Commonwealth Court for review.

The claimant argued that advance notice of a physical examination must be provided to the claimant's counsel so that the claimant could be advised of their rights. Claimant specifically relied on Section 131.11 of the Special Rules and Section 31.26 of the General Rules, as requiring notice be served on counsel. The claimant also relied on *Catalidi*, 738 A2d 1074, and *Maranc*, 628 A.2d 522, which purport that an employer must show notice of an exam before a WCJ may order the claimant to attend.

The employer responded that the claimant waived his argument about notice because he did not properly raise and preserve his arguments throughout the litigation. Specifically, the claimant's attorney failed to object to the IME physician's deposition and never

argued or preserved his objection in his post hearing submission.

Ultimately, Commonwealth Court affirmed the WCAB. The court first addressed their disagreement with the employer's argument that the claimant waived his objection as it was not properly preserved. The claimant did not waive his objection since he objected to the IME report from the outset of the underlying litigation, as made clear on the record at the first hearing. There was no need to object again since the WCJ overruled the claimant's objection and allowed the employer to proceed with the Termination Petition. The claimant did not need to continue preserving his objection at each stage of the litigation thereafter.

While there was no waiver of the objection, the court agreed that the objection was properly overruled. First, the court explained that there are already several safeguards in place to protect the claimant's interest regarding IMEs. For example, the claimant's attorney may depose the IME physician to address and attack the doctor's conclusions on cross-examination. The claimant is also entitled to produce his physician to rebut any conclusions set forth by the IME physician. Second, there was no prejudice or adverse impact on claimant from failing to notify his attorney of the IME. Here, the WCJ delayed proceedings for several months to allow the claimant's attorney ample time to confer and strategize with his client. In addition, the WCJ provided the claimant with additional time to have his doctor review the IME report and schedule his deposition to provide rebuttal medical testimony. "In other words, claimant received all of the safeguards under *Maranc* and did not establish any actual prejudice or adverse impact from lack of notice to claimant's WC counsel...", particularly given this was the claimant's third IME with this same doctor.

Ultimately, the Commonwealth Court could not conclude the WCJ committed an error of law or abused discretion in allowing the litigation of the Termination Petition to proceed.

VNA of St. Luke's Home Health/Hospice, Inc. v. Ortiz (WCAB), No. 1312 C.D. 2022, 2024 WL 3503978 (Pa. Cmwlth. Ct. July 23, 2024)

The Commonwealth Court reversed the WCAB's order denying the employer's request to set aside a stipulation of facts agreeing to expand the description of claimant's injury. The court also affirmed the WCAB's order granting the modification petitions of employer and denial of claimant's request for reimbursement of litigation costs.

By way of background, claimant filed a claim for a November 2017 work injury where they reported that they injured their left shoulder when they fell while attempting to sit on a chair. The employer subsequently issued a Notice of Temporary Compensation Payable in May 2018, accepting a left shoulder strain. In June 2019, claimant filed a Claim Petition seeking to expand the work injury to include a left rotator cuff tear and bicep tendon injury. The parties subsequently entered into a Stipulation of Fact that was approved by judicial decision in September 2019 whereby the parties agreed that claimant's work injury required left shoulder rotator cuff repair and biceps tenodesis. In October 2020 and January 2021, the employer filed two modification petitions based on modified duty job offers. During the litigation, medical records revealed that claimant's left rotator cuff tear and biceps injury pre-existed the work injury, and claimant repeatedly had denied having suffered from, and being treated for, such injuries prior to the work injury. Employer requested to set aside the Stipulation of Fact as a result.

The WCJ granted the Modification Petitions based upon the job offers, and reinstated claimant's benefits effective the date of claimant's left shoulder surgery. The WCJ denied the request to set aside the Stipulation of Fact. The WCJ also denied claimant's request for reimbursement of litigation costs. The WCJ found claimant's initial denial of pre-existing left shoulder problems to be false, based upon pre-injury treatment records. However, the WCJ determined there was not sufficient competent evidence to set aside the Stipulation of Fact. Both parties appealed to the WCAB, and the board affirmed the WCJ. The WCAB opined that there was no indication in the record that the employer did not have the opportunity to fully investigate before entering into the Stipulation, and the employer did not act promptly in seeking such relief to set aside the Stipulation thereafter. Both parties appealed to the Commonwealth Court.

The court first addressed employer's argument that the Stipulation should be set aside pursuant to Section 413(a) of the Act because it was materially incorrect. 77 P.S. §771. The court summarized the evidence presented during the 2019 claim petition litigation, at which time claimant testified under oath that they never had any prior left shoulder symptoms before the work injury. Claimant also denied prior left shoulder problems to their surgeon and the

independent medical evaluation physician. Then, during claimant's deposition testimony in the 2021 Modification Petition litigation, claimant admitted that they injured the left shoulder in February 2017 in a pedestrian motor vehicle accident. Three months later, the employer received medical documentation indicating that claimant had been treating for a left shoulder condition that included both a left full-thickness rotator cuff tear and biceps tendinosis.

The court, citing to various case law, addressed that there is no set time limitation for a party to seek to set aside a stipulation. The court emphasized that claimant is the one who misrepresented her pre-existing condition, but somehow the fault lies with employer. The issue here is the extent of what investigation is an employer expected to conduct, and within what timeframe, when a claimant misrepresents the existence of prior injuries. The court found that the relevant time measurement is from when the employer became aware that claimant had a medically significant pre-existing injury to the same area and acted on that knowledge. Given the time that passed between employer's receipt of the medical evidence in March 2021 and the employer's medical expert's second deposition in July 2021, the employer did not unduly delay in making its request to set aside the Stipulation. The court continued to emphasize that given claimant's own misrepresentations, and notwithstanding an arguable hint of a preexisting condition before March 2021, there were no circumstances that arose to trigger any greater investigation required by the employer. Thus, employer was not barred from seeking to set aside the Stipulation.

The court next addressed claimant's arguments. Claimant first argued that the WCJ erred in granting the Modification Petition based upon the job offers. The court disagreed, finding the WCJ's determinations were based on credibility determinations supported by the substantial evidence of record. Lastly, the court found the WCJ did not err in denying claimant's request for reimbursement of litigation costs, as all costs incurred pertained to the unsuccessful defense of the modification petitions.

News & Notes is a quarterly publication issued to the workers' compensation community by the Bureau of Workers' Compensation (BWC), the Workers' Compensation Office of Adjudication (WCOA), and the Workers' Compensation Appeal Board (WCAB). 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 workers' compensation system will find this publication interesting and informative. We invite your input regarding suggested topics for inclusion in future publications. Suggestions may be submitted to RA-LIBWC-News@pa.gov.

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