Workers' Compensation Law Section Newsletter

David B. Torrey, Editor

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Four Variations on PBI's Amazing Anatomy Courses

Medical School for Lawyers: Into the Anatomy Lab features the dynamic duo Professor Sam Hodge and anatomist Hector Lopez, MD. Participants spend the morning brushing up on anatomy in a fast-paced, entertaining multi-media lecture by Sam Hodge, and the afternoon in the anatomy lab at Philadelphia's Jefferson Medical College to learn anatomy the way med students do, viewing prosected cadavers.

Sam and Hector have also made the course a "**road show**."

PBI has scheduled Into the Anatomy Lab for a choice of three dates in Philadelphia: Nov. 16, 2011, Jan. 25, 2012, or May 16, 2012.

The Anatomy Lab Road Show has special engagements in Pittsburgh on Dec. 2 and Mechanicsburg on Nov. 2.

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Full details/registration on PBI website & on the enclosed flyers.

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Pittsburgh Fri. May 4 morning | Camp Hill Mon. May 14 afternoon
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More details/registration on PBI website & on the enclosed flyer.

Also coming from PBI next spring

WC Issues Involving the Larger Employer

This brand new course is coming in March.

More details/registration on the enclosed flyer.

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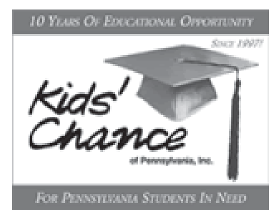

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Make a tax-deductible donation today. Go online to www.kidschanceofpa.org, or send your check to Kids' Chance of PA, Inc., P.O. Box 543, Pottstown, PA 19464.

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Ross Perlin, INTERN NATION:
HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY (Verso 2011). (p.23)

Beth Linker, WAR'S WASTE: REHABILITATION IN WORLD WAR I (UNIV. OF CHICAGO PRESS 2011). (p.26)

Lester Brickman, LAWYER BARONS:
WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (Columbia Univ. Press 2011). (p.29)

~ *Recent Articles* ~

David L. Gushue et al., *Effective Use of Biomedical Engineers*, FOR THE DEFENSE, p. 18 (July 2011). (p.30)

Howard W. Cummins, *From Conflict to Conflict Resolution: Establishing ALJ Driven Mediation Programs in Workers' Compensation Cases*, 30 NAALJ JOURNAL 391 (2010). (p.31)

Terry Carter, *Insult to Injury: Texas Workers' Comp System Denies, Delays Medical Help*, ABA JOURNAL (October 1, 2011). (p.32)

DEPARTMENT OF LABOR & INDUSTRY
WCJ RULES COMMITTEE
RECONVENES, WITH ATTORNEY McTIERNAN PRESIDING AS NEW CHAIR

The L&I WCJ Rules Committee reconvened recently under the leadership of attorney John W. McTiernan of the Pittsburgh law firm Caroselli Beachler. **Mr. McTiernan solicits from you any recommendation for changes or additions to the WCJ Rules of Practice.** The next meeting will be held on Friday, November 18, 2011. **Contact him at:** jmctiernan@cbmclaw.com.

ABA WORKERS' COMPENSATION SECTIONS
ANNOUNCE MIDWINTER SEMINAR & CONFERENCE
March 8-10, 2012, Westin Riverwalk, San Antonio, Texas

The ABA WC Sections have scheduled their exciting Midwinter meeting! The event will be held at the Westin Riverwalk in San Antonio. The agenda includes presentations on undocumented workers, veterans' benefits, social networking, the personal comfort doctrine (featuring the dynamic speaker Judge Todd Seelig of Philadelphia), the recent Illinois Act reforms, and a review of teaching workers' compensation in the nation's law schools. For more information, see http://apps.americanbar.org/dch/committee.cfm?com=LL122000.

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All statements and comments are purely those of the author, and are not to be attributed to the Department of Labor & Industry and/or the Workers' Compensation Office of Adjudication. The author has avoided in this text any manifestation of bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

INFORMATION ON KIDS' CHANCE

Kids' Chance is a certified § 501(c)(3) non-profit corporation which provides scholarships to children of workers who have been catastrophically or fatally injured, or who have been disabled as a result of a work-related injury.

Scholarships are funded solely by TAX DEDUCTIBLE donations from individuals, insurance companies, employers, attorneys, physicians, labor organizations, vocational organizations, professional associations, and other workers' compensation related organizations.

Kids' Chance is extremely grateful for the support it has received from the Workers' Compensation Section of the Pennsylvania Bar Association, from individual law firms, and from individual attorneys. That support has greatly aided applicants as they pursue their academic careers. Any support members of the Workers' Compensation Section can give is greatly appreciated by Kids' Chance and the students who receive the scholarships. ***Your tax-deductible contributions to Kids' Chance of PA may be mailed to: Kids' Chance, P.O. Box 543, Pottstown, PA 19464 – phone: (484) 945-2104. See also www.kidschanceofpa.org.***

UNREPORTED OPINIONS COMMITTEE

The Workers' Compensation Section has established an Unpublished Opinions Committee that reviews and seeks publication of significant memorandum Commonwealth Court Opinions. The Committee is comprised of two defense attorneys, two claimant's attorneys, and a Workers' Compensation Judge. Anyone seeking consideration of an opinion for publication should contact the Chairman of the Committee, Michael Routch, Esquire, at (814) 283-2000, or by email at mproutch@mqblaw.com.

SUPREME COURT, AFFIRMING COMMONWEALTH COURT, HOLDS THAT, IN CONSIDERING SUPERSEDEAS FUND REIMBURSEMENT FOR ERRANTLY PAID MEDICAL TREATMENT BILLS, DATE OF PROPER PRESENTATION OF BILL BY PROVIDER, NOT DATE OF UNDERLYING SERVICE, CONTROLS THE ANALYSIS

Department of Labor & Industry v. WCAB (Crawford & Co.), 23 A.3d 511 (Pa. 2011) (filed July 19, 2011), *affirming*, 965 A.2d 332 (Pa. Commw. 2009).

An essential rule of Supersedeas Fund reimbursement is that an employer is only entitled to potential repayment of benefits it paid after the supersedeas request was denied. After all, section 443(a) provides that where "supersedeas has been requested and denied … [and] payments of compensation are made as a result thereof," Fund reimbursement will follow when, "upon the final outcome of the proceedings, it is determined that such compensation was not, in fact payable …"

Another essential rule, having its genesis in this language, is that "reimbursement … is appropriate only for the period following the date on which the request for a Supersedeas was filed …." *Robb, Leonard & Mulvihill v. WCAB (Hooper)*, 746 A.2d 1175 (Pa. Commw. 2000).

In a new case, the Supreme Court addressed an unsettled issue surrounding these essential rules. Is an employer entitled to Fund reimbursement for a medical bill payment it has made, after supersedeas request and denial, where the procedure that generated the bill was undertaken prior to the supersedeas request? The Commonwealth Court, in its 2009 decision in the case, ratified the reasoning of a WCJ who ruled that Fund reimbursement *does* follow. The court adopted the WCJ's view that "[i]t is not the date of services that causes the compensation to be due. It is the date when the bill is properly presented."

The Supreme Court has affirmed in its 2011 consideration of the case.

The claimant, Ressler, was injured in 1995, and he was paid benefits voluntarily. Nine years later, in March 2004, employer had an IME. This evaluation yielded an opinion of full recovery. Employer did not, however, immediately place a termination petition in the mail. Claimant, meanwhile, had surgery for a condition presumably connected to the accepted work injury. The procedure took place on June 1, 2004.

Employer, shortly thereafter, on July 19, 2004, filed for termination and requested supersedeas. After a hearing on or about August 30, 2004, the WCJ denied the supersedeas request. It was only six weeks later that claimant's provider finally presented to the employer's carrier the June 1, 2004 procedure bill. That invoice was in the significant amount of $35,405.45. Employer paid the bill, but a few months later the WCJ ruled that claimant had, indeed, fully recovered as of March 16, 2004 – three months before the surgical procedure for which employer had paid. The Appeal Board affirmed.

The employer then sought Supersedeas Fund reimbursement. The Fund (*i.e.*, the Bureau) opposed the request. The WCJ and Board, however, granted recovery. The WCJ insisted: "[i]t is not the date of services that causes the compensation to be due. It is the date when the bill is properly presented." The Board, meanwhile, stated: "[a]s the obligation for payment of the medical bill, and the payment thereof, occurred after the request for supersedeas was made and denied, it was not error" to grant Fund reimbursement. In Commonwealth Court, the Bureau invoked *Hooper*, *supra*, and asserted that "reimbursement … can only be granted for those payments made by the insurer that are attributable to the period of disability after the date that the request for supersedeas was filed. Thus, the Bureau contends that because the medical service in question was rendered before Insurer requested supersedeas, it is not permitted to be reimbursed …"

The Commonwealth Court, and now the Supreme Court, disagreed. A more recent case had allowed Fund reimbursement when, after Appeal Board denial, employer paid on an *original claim*. The court, in that case, held that reimbursement "may be had for all payments actually made after supersedeas denial, including payment of benefits awarded retroactively for earlier periods of disability." *Mark v. WCAB (McCurdy)*, 894 A.2d 229 (Pa. Commw. 2006). In the Commonwealth Court's view, Fund recovery could similarly be had in the present situation.

As far as the Supreme Court was concerned, all of the elements necessary to secure Fund reimbursement were present in this scenario:

> As a result of the August supersedeas denial, the insurer had no choice but to pay the October bill, despite the fact that Mr. Ressler's surgery corrected no work-related injury. That ultimate obligation to pay was undetermined when the bill was due, but the duty to pay it in the meantime fell to the insurer as supersedeas had been denied. Ultimately, it was not an obligation of the insurer; the insurer's payment cannot be the result of the surgery, for in the end, it had no responsibility for that bill at all. What the insurer did have the obligation to do was cover the bill pending the final determination, and that obligation was the direct and singular result of the denial of supersedeas.
>
> To make reimbursement dependent on the date of the event giving rise to the bill is to insert an additional element into the statute.

23 A.3d at 515.

Editor's Note: The court went on to suggest that the WCJ actually has some power to grant supersedeas on medical. This statement certainly seems counterintuitive. Prior to Act 44, of course, section 306(f) provided that the filing of a petition with a referee did not act as a supersedeas on medical. That rule is burned upon the memories of old timers. *See Wertz v. WCAB (Dept. of Corrections)*, 683 A.2d 1287 (Pa. Commw. 1996). That's gone now, of course, but Act 44 directs that disputes over medical be resolved by seeking administrative remedies first, to wit, Utilization Review (reasonableness and necessity of treatment) and Fee Review (amount and timeliness of bills). As to medical treatment thought not to be causally related to the injury, the received wisdom is that the employer simply denies payment on the same basis – hoping that the WCJ will concur in any later petition. *Listino v. WCAB (INA Life Ins. Co.),* 659 A.2d 45 (Pa. Commw. 1995). Thus, it is submitted that the following language should be considered dicta:

> The legislature has expressly conferred broad suspension authority on WCJs during the litigation of termination, suspension, or modification petitions, 77 P.S. §774(2), and *we cannot find a WCJ lacks the authority to suspend insurer-provided compensation payments relative to treatment rendered before the date of a supersedeas request*. One can fathom a host of situations where justice might require a supersedeas relative to payment for past medical services, such as where the treatment is unrelated to a work injury, the employer had no notice or opportunity to challenge the treatment prior to its execution, or where the insurer has no precertification or prior approval of the treatment. To tie the WCJ's hands in light of the plain language of the statute and the clear authority provided by the legislature would go against our duty to effectuate the legislature's intentions, 1 Pa.C.S. § 1921(a), and we decline to do so.
>
> *The insurer challenged its obligation via the supersedeas — when that was denied, the insurer lost the right to delay payment until the issue of responsibility*

> *was resolved.* The insurer continued meeting its responsibility until the WCJ found Mr. Ressler was not suffering from a work-related injury at the time of the surgery. *Had supersedeas been granted*, payment would not have been made, but supersedeas was not granted and payment necessarily followed. It is the bill, post-denial, that caused money to leave the coffers of the insurer. Ergo, payment resulted from the denial….

23 A.3d at 515-516.

SUPREME COURT, REVERSING COMMONWEALTH COURT, DECLINES TO STRICTLY APPLY SECTION 312 ("QUALITY" OF NOTICE)

Gentex Corp. v. WCAB (Morack), 23 A.3d 528 (Pa. 2011) (filed July 20, 2011), *reversing*, 975 A.2d 1214 (Pa. Commw. 2009).

The Supreme Court, reversing Commonwealth Court, has reinstated a WCJ's decision finding that a claimant had provided sufficient notice of injury under Sections 311 and 312 of the Act, 77 P.S. §§ 631, 632. The Commonwealth Court determined that the claimant had not explained the nature of her injury with sufficient specificity, as arguably required by section 312. The Supreme Court has rejected this analysis of the facts.

Claimant, Morack, was a long-time employee of employer, a manufacturer. The claimant experienced the gradual onset of problems with her hands. She had problems of a material nature in 2003 and 2005. She took some time off, and she also applied for short term disability (STD). In her STD application of February 2, 2005, she stated that her condition was not work-related. She also placed on the application, in addition to problems with arms and hands, ailments with her knees and ankles due to fibromyalgia, and high blood pressure.

Later that month, claimant learned from Dr. Grady "that her hand and wrist complaints were attributable to her employment." At that point, according to claimant, "she attempted to call … Employer's human resources benefits manager, on several occasions to alert her of this fact. She left a voice mail for her indicating she had 'work-related problems.'" Claimant never worked after January 2005.

The employer opposed the claimant's petition both on lack of causation and lack of notice grounds. The WCJ and the Board, however, credited claimant with regard to her report of injury via voice mails to the HR representative, and also credited the claimant's medical expert as to causation.

Commonwealth Court reversed. The court *disagreed* with the employer's argument "that claimant failed to establish when she left her voice mail and that it could have been after the allotted time period [120 days] provided for in the" Act. In this regard, it was true that claimant's testimony was "devoid of any information concerning the exact date she left a voice mail for [the HR representative]. Thus, it is not entirely clear that Claimant provided notice of a work-related injury within 120 days of Dr. Grady's diagnosis …." However, claimant, "as the

party prevailing below, is entitled to all reasonable inferences that can be drawn from the evidence."

As noted above, however, the court *did agree* with employer when it challenged "the sufficiency of the injury description purportedly given …." The court found persuasive, in this regard, employer's argument that claimant's account of merely saying that she had "work-related problems" was not sufficient. "[T]his vague statement," the court declared, "is insufficient to satisfy the Act's notice requirement." In this regard, no "reasonable inferences" were available to aid claimant on appeal. The court pointed out that claimant had previously filled out an STD application referencing "areas not affected by her repetitive work activities; i.e., her knees and ankles. Moreover, she attributed all of her complaints [previously] to her fibromyalgia and high blood pressure, conditions that Claimant still experiences. As such, this Court has no choice but to find that Claimant failed to provide Employer with a reasonable description of her work-related injuries when providing notice under the Act." As to the sufficiency of the notice required, the court cited Section 312 of the Act, 77 P.S. § 632.

In reversing, the Supreme Court noted that it had previously liberally construed Section 312, which states that notice must "inform the employer that a certain employee received an injury, described in ordinary language, in the course of his employment on or about a specific time, at or near a place specified." Citing its only precedent, the court stated, "[E]ven imperfect notice can satisfy Section 312…. [A]n exact diagnosis is not necessary in order for an employee to provide adequate notice of a work-related injury to an employer. Rather, only a reasonably precise description of the injury is required …." (Citing *Katz v. Evening Bulletin*, 403 A.2d 518 (Pa. 1979)). In the present case, claimant had satisfied the requirements of the law.

Editor's Note: The court was expansive on the law on this issue, and hence I will reproduce the following pertinent comments:

> [T]he context of the communications between the employee and the employer concerning the work-related injury is relevant in considering whether adequate notice has been provided to the employer….
>
> [N]otably, Section 312 does not require that notice be given in a single communication or that conversations between the employee and the employer be considered in isolation. Such an approach would too narrowly focus on individual conversations and events, while ignoring the context in which they occurred and the cumulative effect of such conversations. Indeed, the Commonwealth Court has upheld awards of workers' compensation benefits in other cases where the claimant was found to have complied with Section 312's notification requirements based upon a series of communications with his or her employer…. Thus, multiple communications between an injured employee and an employer may be considered in determining whether an injured employee has provided notice to his or her employer sufficient to satisfy Section 312.
>
> In sum, we conclude that what constitutes adequate notice pursuant to Section 312 is a fact-intensive inquiry, taking into consideration the totality of the

> circumstances. Although Section 312 requires a claimant to inform his or her employer that the claimant received a work-related injury at a specified time and place, the notice only need be conveyed in ordinary language, can take into consideration the context and setting of the injury, and may be provided over a period of time or a series of communications, if the exact nature of the injury and its work-relatedness is not immediately known by the claimant.

23 A.3d at 536-37 (multiple citations omitted).

SUPREME COURT, REVERSING COMMONWEALTH COURT, HOLDS THAT REBUTTAL EXPERT IN HEPATITIS C CASE PROVIDED LEGALLY INCOMPETENT OPINION

City of Philadelphia v. WCAB (Kriebel), ___ A.3d ___ (Pa. 2011) (*reversing an unreported Pa. Commw. case*, *City of Phila. v. Workers' Comp. Appeal Bd.*, 2009 Pa. Commw. Unpub. LEXIS 849 (2009)).

Section 108(m.1) of the Act establishes hepatitis C in firefighters as an occupational disease, to which a rebuttable presumption of work causation may apply. In a new case, the WCJ and Commonwealth Court held that the municipality had rebutted the presumption, but the Supreme Court reversed, holding that the defendant's expert had provided a legally incompetent opinion refuting causation.

A City of Philadelphia firefighter, Kriebel, was employed by the City as a firefighter for 29 years, from 1974 until 2003. He died in October 2004, at age 52, from liver disease caused by hepatitis C. Prior to his death, he had filed a claim petition seeking workers' compensation, and his widow continued prosecution of the case via a fatal claim petition. During the litigation, the claimants argued for application of the presumption, and buttressed the same with the causation opinion of the treating internist/gastroenterologist. The claimants also presented the testimony of a co-worker to establish exposure.

The City, meanwhile, retained an infectious disease expert. He opined that the worker had indeed died of hepatitis-induced liver cancer, but opined that work exposures were not the cause. According to the defense expert, the worker acquired hepatitis C from drug use, not occupational exposure. In support, "he cited a note from Decedent's [1971] military records indicating that he contracted 'serum hepatitis [hepatitis B] from drug usage in 1969." According to the doctor, while hepatitis B and C are distinct diseases, they are transmitted in a similar manner, most commonly through needle-related drug use." The defense expert stated that the worker "got his hepatitis C from his drug use that was dated in 1969 and that was also a time where he … acquired the hepatitis B …." No other evidence existed, however, that claimant had been an intravenous drug user.

A WCJ credited the defense expert, and dismissed the claim, but the Board reversed. Commonwealth Court, in an unreported decision, reinstated the WCJ's dismissal.

As noted above, the Supreme Court reversed and allowed the claim. The court reviewed the defense expert's testimony and found that it was legally incompetent. The court agreed with claimant's argument that since the defense expert "admits that serum hepatitis refers to hepatitis B, not hepatitis C, and that hepatitis B has more than one cause, his extrapolation that Decedent was an intravenous drug user, shared needles and contracted hepatitis C from a contaminated needle is improperly based on a series of assumptions."

The court recognized that an expert may render an opinion based on information contained in a record compiled by another physician as long as the expert customarily relies upon those types of records in his profession. *See* Pa. Rule of Evidence 703 (codifying *Commonwealth v. Thomas*, 282 A.2d 693 (Pa. 1971)). Here, however, the physician went beyond the type of adopting contemplated by this familiar rule:

> Even though there was no independent evidence to corroborate the premise for Dr. Gluckman's opinion, he "extrapolated" from his finding of injectable drug use and concluded that Decedent used contaminated needles and concurrently contracted hepatitis B and hepatitis C, a separate disease that is not referenced in the treatment note at issue.
>
> While an expert may base his opinion on facts of which he has no personal knowledge, those facts must be supported by record evidence…. In the instant case, there is no evidence in the over thirty years of subsequent medical records to support or corroborate a finding of drug use, let alone intravenous drug use…. Thus, there were no competent facts supporting Dr. Gluckman's expert opinion regarding how and when Decedent acquired the hepatitis C that ultimately caused his death. Stated simply, Dr. Gluckman based his opinion upon facts which were not warranted by the record. The law prohibits such action. … This Court has stated that reliance on a "presumption on a presumption," as Employer's expert has done herein, must be condemned as the height of "irresponsible speculation." …. Accordingly, we find that Dr. Gluckman's opinion, which lacks an adequate factual foundation, constitutes nothing but conjecture and speculation.

Slip op. at 16 (court citing, for the impermissible "presumption on presumption," *Collins v. Hand*, 246 A.2d 398 (Pa. 1968)).

This type of opinion, the court concluded, was not the "substantial competent evidence" adequate to rebut the presumption of causation. The court remarked, "The only evidence proffered in this regard – Dr. Gluckman's opinion – does not meet this standard. His opinion was based on the barest scintilla of evidence: an uncorroborated forty-year-old notation in a medical record. Supposition and speculation founded upon a small sliver of proof does not constitute substantial competent evidence. Since Employer failed to meet its burden of proof, Appellant is entitled to the presumption in section 301(e) of the Act."

Editor's Note: Rule 703 provides, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in

forming opinion or inference upon the subject, the facts or data need not be admissible in evidence."

SUPREME COURT, REVERSING COMMONWEALTH COURT, HOLDS THAT AUTO INSURANCE POLICIES MAY NOT EXCLUDE FROM COVERAGE CLAIMS BY INDIVIDUALS WHO ARE ALSO ELIGIBLE FOR WORKERS' COMPENSATION BENEFITS

Heller v. Pennsylvania League of Cities & Municipalities, ___ A.2d ___ (Pa. 2011) [No. 16 WAP 2009, filed October 19, 2011, Orie Melvin, J.], *reversing*, 950 A.2d 362 (Pa. Commw. 2008).

In a 2008 case, the Commonwealth Court held that an employer's auto fleet policy exclusion precluding benefits to an insured employee who was also entitled to workers' compensation for the injury was not violative of public policy and was enforceable. The court reasoned that neither the MVFRL nor the Workers' Compensation Act contained provisions that specifically prohibit the feature of an *exclusion* of UIM coverage based upon the receipt of workers' compensation benefits. Further, legal precedent did not warrant a conclusion that such exclusion violated public policy.

The Supreme Court has reversed. The court summarized its holding as follows: "In summation, we find that while the exclusionary provision does not facially violate the cost containment policy of the MVFRL, its inclusion in an employer-sponsored policy operates to foreclose the majority of expected claims. Thus, the exclusion renders the coverage illusory, and the insurer receives a windfall by charging a premium for the coverage. Moreover, where a third-party tortfeasor causes a work-related injury, Act 44 dictates that the ultimate burden for the payment of benefits must rest upon the tortfeasor or the UM/UIM carrier. Penn PRIME's [*i.e.*, the carrier's] exclusion reverses this legislative priority by frustrating the right of subrogation, thereby ensuring that the burden for the payment of benefits remains on the employer and its workers' compensation carrier. Since the workers' compensation exclusion operates to render the instant UIM coverage illusory and runs counter to the intended compensatory scheme established by the General Assembly, we find it void as against public policy."

SUPREME ACCEPTS ON APPEAL SECTION 302(a) STATUTORY EMPLOYER CASE

Six L's Packing Co. v. WCAB (Williamson), 24 A.3d 859 (Pa. 2011) (order of July 14, 2011).

The typical case involving an alleged statutory employer involves a construction worker whose employer, a subcontractor on a big job, has failed to secure workers' compensation insurance. The issue then becomes whether the general contractor is in a position to be an employer for workers' compensation purposes. The controlling law is Section 302(b) of the Act, as interpreted by the seminal case *McDonald v.*

Levinson Steel Co., 153 A. 424 (Pa. 1930). One requirement of that case is that the general contractor must be in control of the premises.

In a 2010 case, the less well-known Section 302(a) of the Act, also a statutory employer section, was implicated. In that case, the claimant was not a construction worker, but rather a truck driver. He was employed by a trucking company which was under contract, among other things, to transport tomatoes from a processing center to another location. This tomato processing center/farm was alleged to be the statutory employer. The claimant made out his case as a statutory employee of the tomato farm.

The significant difference in this situation was that the claimant could not, as a truck driver suffering a motor vehicle accident, possibly show that the alleged statutory employer was in control of the premises. The court pointed out, however, that this is *not a requirement* of Section 302(a).

The Supreme Court accepted this case on appeal in a *per curiam* order dated July 14, 2011. The court stated that it would review two issues ("as framed by petitioners"): (1) "Whether a claimant must meet the five part test articulated by the Supreme Court in the seminal case of McDonald v. Levinson Steel Co., … 153 A. 424 (Pa. 1930) to establish 'statutory employer' status[?]"; and (2) "Whether an owner of property can be a 'statutory employer,' under the Pennsylvania Workers' Compensation Act and existing case law, in the face of 80 years of precedent finding the contrary[?]."

ATTORNEY'S FEE LIMITATION IN C&R STATUTE HELD CONSTITUTIONAL

Seitzinger v. Department of Labor & Industry, 25 A.3d 1299 (Pa. Commw. 2011).

The Commonwealth Court, hearing a case in its original jurisdiction, has rejected an assertion that the 20% maximum attorney's fee, in the C&R context, is illegitimate. A lawyer, Seitzinger, had sued the Department of Labor & Industry in a declaratory judgment action, asking that the court impose an injunction against the department, precluding it from enforcing the 20% fee limit.

The suit was based, in critical part, on the theory that only the Supreme Court, and not the legislature, can regulate the practice of law. In rejecting this argument, the court cited *Samuel v. WCAB (Container Corp. of America)*, 814 A.2d 274 (Pa. Commw. 2002) (appeal denied). There, the court had previously pointed out that while Rule 1.5 of the Rules of Professional Conduct provides that a "fee may be contingent on the outcome of the matter for which the service is rendered," the Supreme Court's Explanatory Comment states that "applicable law may impose limitations on contingent fees, such as a ceiling on the percentage." The court declared, "Rule 1.5 reflects the Supreme Court's determination that the laws that the General Assembly adopts may set ceilings on the percentage of a worker's settlement or award that an attorney may obtain in performing legal services for a claimant."

LEGISLATIVE REPORT:
A LITTLE NEWS FROM HARRISBURG,
A LITTLE FROM WASHINGTON,
A LITTLE FROM 2006

by C. Robert Keenan III, Esquire*

I. Medicare Reforms Introduced in the Senate

On October 17, 2011, U.S. Senators Rob Portman (R-Ohio) and Ron Wyden (D-Oregon) introduced S.1718, the companion to the House Bill previously introduced as H.R.1063 (discussed in this Newsletter in the March, 2011, issue, pages 15-16).

S.1718 is consistent with legislation supported by the Pennsylvania Bar Association in a prior session of Congress, with a general intent of enhancing the transparency frequently lacking with the Center for Medicare Services as it enforces the MSPA.

II. New House Bills in Harrisburg

House Bill 1225, introduced by Representative Buxton (D-Dauphin), intends to establish a statewide OSHA for public employees, similar to last session's House Bill 1200. House Bill 1225 remains before the Labor & Industry Committee.

House Bill 1452, introduced by Representative Ross (R-Chester), would add specified emergency personnel to be volunteers covered under Sections 601 and 602 of the Act. The bill originally was sent to the Local Government Committee but has been referred to the Labor & Industry Committee. The bill is similar to last session's House Bill 664, which passed the House, but died in the Senate.

House Bill 1469, introduced by Representative Denlinger (R-Lancaster), would establish an appeal process for SWIF subscribers, as did last session's House Bill 900. House Bill 1469 remains before the Labor and Industry Committee.

House Bill 1531, introduced by Representative Pyle (R-Armstrong), would add an offence of "criminal surveillance" to the Crimes Code in the event of "surveillance while trespassing in a private place." The bill is before the Judiciary Committee.

III. New Senate Bills in Harrisburg

Senate Bill 833, introduced by Senator Robbins (R-Crawford), is the same as House Bill 1452, above. It remains before the Labor & Industry Committee.

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Senate Bill 1069, introduced by Senator Browne (R-Lehigh), is a lengthy effort to regulate professional employee organizations. It is before the Labor & Industry Committee.

Senate Bill 1070, introduced by Senator Scarnati (R-Jefferson), appears to cover the same territory as Act 20 of 2011 (encouraging workers' compensation coverage for sole proprietors and small business). It remains in the Department of Labor & Industry Committee.

Senate Bill 1077, introduced by Senator Mensch (R-Montgomery), would amend Section 104 of the Act to proscribe workers' compensation benefits for illegal aliens. As part of its overall stance on immigration matters, the PBA already opposes this bill presently before the Labor & Industry Committee.

IV. Revision to Act Not Yet Covered in this Newsletter

Act 68 of 2006 revised Section 307 of the Workers' Compensation Act, 77 P.S. § 542, regarding the compensation rights of the offspring of a deceased employee.

Sections 307(1) and (2) were unchanged by Act 68.

New Section 307(3) provides that if there is a widow or widower who is the guardian of all of the deceased employee's children, the weekly death benefits are payable to that widow or widower.

New Section 307(4) covers the situation where there is a widow or widower who is not the guardian of all of the deceased employee's children. In that case, the weekly death benefit is to be made to the widow or widower and the guardians as follows:

- If there is one child, a total of 60% of the wages, but not in excess of the Statewide average weekly wage, divided equally between the widow or widower and the child; or

- If there are two or more children, a total of 66-2/3% of the wages, but not in excess of the Statewide average weekly wage, divided 33-1/3% to the widow or widower and the remainder divided equally among the children.

V. Conclusion

I am grateful for the insights, analysis, and good thinking of our colleagues, including Deputy Secretary Elizabeth Crum, Brian Steiner, Larry Chaban, Anita Reno, Judge David Torrey, and PBA Legislative Counsel Steve Loux.

ILLINOIS CASE:
OVERUSE-OF-"BLACKBERRY" DEVICE CLAIM
FAILS ON EXAGGERATED COMPLAINTS, UNDERMINED EXPERT TESTIMONY

Goltz v. Research in Motion, Case #02WC011600 (Arbitrator Decision, Illinois Workers' Compensation Comm'n, filed March 18, 2011, Arbitrator Anthony C. Erbacci) [no Commission review].

Can the repetitive use of the thumbs involved in operating hand-held computer devices give rise to a work injury? To this writer's knowledge, we do not yet have a publicly-available Pennsylvania case from any level on this issue. However, a trusted correspondent and bar leader from Chicago has reported on such a case. (He was fortunate to represent the prevailing party; the decision is also notable in that it is well crafted and reasoned.)

The claimant, Goltz, had a preexisting condition of rheumatoid and psoriatic arthritis which had in the past afflicted her hands. She was employed by "Research in Motion," the manufacturer of the familiar "BlackBerry" communication device. Her occupation was regional sales manager, and she was so employed from April 1, 2000 until her termination (no cause stated) in late September of that year. As part of her job, she used the device frequently. After about three weeks of work, she developed symptoms in her hands; she visited her rheumatologist, who gave her injections. Only in November 2002, however, did she advise the doctor that she was assigning, as a cause her hand problems, "digitally inputting messages into her beeper…." After her termination from work, she did work on and off at various jobs.

In the course of her subsequent claim for benefits, Goltz testified that she had to use the BlackBerry "for all of her work related communications and that, as a result, she was using [the device] from 5:30 in the morning until 10:30 at night, sending over 300 e-mail communications per day…." As for supportive medical testimony, her treating physician "refused to provide her with a causation opinion, as he could not be certain of the same." In this regard, "while trauma can exacerbate psoriatic arthritis, he was not certain that her flare up was not simply due to her psoriatic arthritis." As a result, claimant submitted the testimony of an attorney-referred physician. He relied upon claimant's account to him of heavy usage, and testified that her hand problems came on from "the intense period of repetitive and prolonged use of the device."

Employer, meanwhile, presented testimony that claimant's use of the device was not so constant. For example, she would often be using her conventional computer as well (as claimant ultimately admitted.) A co-worker also testified that "fewer than 100 messages would be sent per day …." Employer's medical expert, meanwhile, rejected the proposition that a causal connection existed. The doctor opined that "although her reported use was fairly intense, she worked for [employer] for a short period of time, and the medical records reflected only intermittent discomfort. [The doctor] opined that the Petitioner's psoriatic arthritis did not reflect a pattern consistent with intense daily exposure. The lightweight device would not cause any discomfort. He would expect any temporary discomfort would have resolved within one-week after her work with [employer] ceased."

The arbitrator discredited claimant and her physician. In his view, claimant had exaggerated her use of the device. Part of his credibility determination was based on evidence that claimant had similarly overstated her inability to work after her termination from the employer. In this regard, she had been confronted with inconsistencies at hearings and admitted that, with regard to one resume, she had "fudged" on some details – though she also "testified that 'everyone fudges applications when applying for a job.'" In addition, however, the arbitrator found more reliable the employer's lay witness that the BlackBerry use would not have been as intense as Goltz claimed.

The arbitrator further rejected the opinion of claimant's expert, as he had relied upon claimant's account of exaggerated work duties; such reliance "undermines his causal connection opinion." He also found employer's expert more persuasive, and found particularly notable the treating doctor's opinion that the "flare-up of the psoriatic arthritis was likely due simply to her [preexisting condition] rather than her beeper/page work."

~ Thanks to Michael Schiff, Esquire
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IOWA CASE:
PROPER VENUE FOR EMPLOYER'S RESTITUTION ACTION

The Cincinnati Ins. Cos. v. Kirk, 2011 Iowa App. LEXIS 355 (Ct. Appeals Iowa 2011, filed May 25, 2011).

A recent, well-considered case from Iowa addresses an issue that seems not well decided (as far as I know) in Pennsylvania. However, the manner in which the case was decided does not seem inconsistent with Pennsylvania law.

The Iowa Court of Appeals held that the *civil court* did have jurisdiction to hear an employer's restitution/punitive damages case, based upon the claimant's alleged fraudulent conduct in purposefully reinjuring himself so as to extend his disability, treatment, and claim in general. While the Workers' Compensation Commission would usually have exclusive jurisdiction over compensation cases, this case centered on a worker's "extrinsic" fraud, in which the alleged fraud did not go to the injury itself (which was admitted), but rather to the worker's purported later intentional acts to injure himself. Thus, civil court, not the Commission, had jurisdiction.

The claimant, Kirk, was employed by L.L. Pelling, an insured of Cincinnati Insurance Company. He suffered an injury to his arm on September 5, 2007, arising out of and in the course of his employment. He was paid benefits voluntarily. Roughly a year later, Cincinnati became concerned that the claimant's "recovery did not progress as anticipated." As a result, it commenced surveillance, at which time the detectives "filmed [claimant] striking his left arm in his vehicle immediately prior to an appointment with his workers' compensation physician."

Cincinnati showed the films to claimant's doctors who thereupon "opined that a portion of Kirk's medical care and recovery time was not related to the work injury, but was instead related to Kirk's own actions."

Cincinnati thereafter sued Kirk in civil court, seeking restitution in the form of all benefits that had been paid, as well as punitive damages and administrative expenses incurred to uncover the fraud. The trial court, however, dismissed the case for lack of jurisdiction, holding that the Workers' Compensation Commission had jurisdiction over such claims.

The Appeals Court, however, reversed, and it reinstated the suit. Not every dispute over workers' compensation benefits, the court explained, is in the usual exclusive jurisdiction of the administrative agency. When the Commissioner cannot yield an "adequate remedy" as a matter of law, a civil action should lie. For example, the court had long before held that when a claimant asserts bad faith against a workers' compensation carrier, such a claim lies in civil court. (Pennsylvania does not recognize this cause of action.[1]) *See Tallman v. Hanssen*, 427 N.W.2d 868 (Iowa 1988).

In the present situation, no adequate remedy existed under the Act. The Iowa law does allow an employer and an employee to *voluntarily agree* that claimant may re-pay an overpayment, but that section "does not authorize the commissioner to order the worker to repay the benefits wrongfully paid …. If the worker does not want to repay the benefits, neither the commissioner nor the insurance carrier can force the worker to pay." Thus, "this remedy is inadequate in a case of alleged fraudulent conduct.. Unless another remedy is found, a worker who perpetrates a fraud on an employer and insurance carrier can profit with no penalty…. [W]e find it unlikely that the legislature intended the credit provision … to be the sole remedy … where a claimant fraudulently obtains benefits…."

The court also held that the type of fraud alleged in the present case was "extrinsic" and "collateral" to the workers' compensation case itself, and, for this reason too, the trial court would have jurisdiction. (As an example of "extrinsic fraud," the court cited a case where the claimant had received a lump sum in a compromise settlement, with the employer assuming that claimant had, as alleged, suffered an injury in the course of employment. When it later became apparent that the injury occurred in an act of presumably-noncompensable horseplay, the employer was allowed to sue "to set aside [the] settlement agreement and [secure] the repayment of funds already paid based on the claimant's fraudulent conduct." (Citing *Ford v. Barcus*, 155 N.W.2d 507 (Iowa 1968)).

This type of actionable fraud must, the court noted, be distinguished from other acts that have a direct connection with the claim: "We are mindful that where a claim is predicated on the same facts as the work injury itself, simply labeling it as fraud is not sufficient to avoid the exclusivity of the Workers' Compensation Act…. But where the employee's fraudulent conduct occurs independent of and subsequent to the work injury, we find the district court, not the commissioner, has the subject matter jurisdiction to hear the case."

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[1] *See* TORREY-GREENBERG, PA WORKERS' COMPENSATION: LAW & PRACTICE, § 10:28 (West 3rd ed. 2008).

True, the potential for jurisdictional conflicts may exist in such situations, as "both the commissioner and the district court would need to hear evidence and reach factual findings regarding Kirk's fraudulent conduct." This potential is best addressed, however, not by denying jurisdiction in the civil court, but by having the trial judge *stay* the proceeding during the pendency of any related administrative proceeding – and then applying (if appropriate), the doctrine of issue preclusion. *Compare Gardner v. Hartford Ins. Accident & Indemn. Co.,* 659 N.W.2d 198 (Iowa 2003) (applying issue preclusion in a bad-faith claim against a workers' compensation carrier).

COMPROMISE SETTLEMENT WATCH

1. *"Collateral Promise" Questioning.* The C&R interrogation of the claimant properly includes an inquiry with regard to whether anything other than the lump sum discussed has been promised in an effort to persuade the claimant to hand over the release. Ancient cases, of the horror-story variety, may be found where the claimant settles his case, takes the lump sum, but then, having been fired, seeks to reinstate benefits, asserting that employer made the alleged collateral promise of lifetime employment, if he will only settle and drop his claim. Such horror stories (not really an issue in the modern day, when most employers demand resignations!) can be avoided by insisting that the claimant state under oath that no collateral promises of any kind have been made.

A news story from Illinois, admittedly a bit of unverified lawsuit allegation, supports this position. The story suggests in general that the Pennsylvania feature of the C&R hearing is a good idea. *See* http://www.madisonrecord.com/news/239071-work-comp-claimant-sues-lawyer-over-settlement.

There, the claimant, Mason, alleged a work injury of March 2008. He hired an attorney Bement to pursue his workers' compensation claim. According to the complaint, the employer, in October 2009, "made a settlement offer of nearly $25,000 and included payments of long-term disability for five years." As near as can be told, claimant accepted this offer, signing a Settlement Contract (same as a C&R in Pennsylvania). Unlike in Pennsylvania, no hearing is normally held under Illinois practice for agency review of a proposed Settlement Contract.

Thereafter, Mason approached Bement and asked how the LTD payments would be received. He thereupon learned that the promise to pay LTD in addition to the workers' compensation lump sum was never included in the settlement contract. Mason alleged that his lawyer "told him [that] he never put the acceptance of the company's offer in writing, thus it wasn't included in the settlement." As a result, Mason never did receive the LTD payments and, aided by new counsel, he has sued his workers' compensation attorney in negligence.

Assuming all this is true, one may see how a hearing to review the C&R in Pennsylvania would have provided an opportunity for questioning on the purported promise to pay five years of LTD – a classic case of the "collateral promise."

2. ***C&R and Collateral Estoppel Effect: An Illinois Case***. Can admissions made in a Pennsylvania C&R, as approved by the WCJ, thereafter collaterally estop the employer from denying certain facts? For example, assume that a correctional officer alleges that he has been injured by the act of an inmate, a fact that the employer admits in a NTCP, thereafter in a Medical-Only NCP, and ultimately in a C&R Agreement. In the officer's ensuing demand that he be paid Act 632 benefits (salary continuance), will the employer be collaterally estopped from denying that claimant was injured by an inmate attack?

A recent Illinois case is informative on this issue. The conclusion of the Illinois court would likely be that reached by a Pennsylvania court as well. The answer was, and is, that collateral estoppel will apply. *See Richter v. Village of Oak Brook,* 2011 Ill. App. LEXIS 1037 (App. Ct. Illinois, Second Dist., filed September 23, 2011).

The claimant, Richter, was a municipal firefighter. He alleged disabling pulmonary and orthopedic injuries. His claims were contested, but the arbitrator, and then the Industrial Commission (December 23, 2003) awarded benefits. At or about this time, the municipality's pension board also granted him a "line-of-duty pension."

The parties then apparently reached a compromise settlement agreement, with the municipality agreeing to pay the claimant a lump sum in the amount of $105,060.16. The Commission in 2004 "entered an order memorializing the settlement agreement," which itself contained specific admissions of the "dates of accidents"; a recounting of "how did the accident occur"; "what part of the body was affected"; and "what is the nature of the injury." The pulmonary and orthopedic injuries, and their circumstances, were listed.

The municipality thereafter indicated that it was not going to pay Richter's ongoing health insurance premiums. This was an entitlement to which he was entitled, as a firefighter who had suffered a line-of-duty injury under yet another law, the PSEBA. The purpose of that law "is to ensure the health benefits of public safety employees who have suffered career-ending injuries…." In response, Richter sued the municipality in a declaratory judgment action. The trial court ruled against Richter, but the appeals court reversed. The court agreed with Richter that the admissions made by the municipality in the workers' compensation settlement collaterally estopped it from denying that Richter had suffered the injuries requisite to receipt of PSEBA medical benefits.

The court rejected the employer's argument that the C&R approval, while final, was not an all-important "judgment on the merits." Many decades of Illinois precedent had, according to the court, held that "a settlement or award entered by the Commission is a final adjudication on all matters in dispute up to the time of the agreement …." The court further explained, "a judgment is on the merits … to preclude relitigation of an issue in a subsequent action when the judgment 'amounts to a decision as to the respective rights and liabilities of parties based on the ultimate facts or the state of facts disclosed by pleadings or evidence, or both, and on which the right of recovery depends.'"

Here, the Commission's order "set the parties' rights and liabilities based upon the undisputed facts stated in the order, and it thus qualified as a judgment on the merits. That the order rested on the parties' agreement rather than an independent determination of the facts and issues is of no legal significance in analyzing whether it was 'on the merits': a settlement order entered by the Commission has the same preclusive effect as an award based on the Commission's own fact-finding …."

3. ***Claim of GHI Carrier was one of a Subrogee, not a Creditor.*** Our Act's Section 319, second paragraph, has long established (that is, since 1956), the right of a group health insurer (GHI) to claim subrogation when it has paid medical expenses and the claimant later establishes that the workers' compensation carrier is liable. *See* 77 P.S. § 671. Not all state workers' compensation laws have such a feature, however, and a new Idaho case illustrates the point. The case is also of interest as it illustrates yet another attempt by a settling party to escape the claims of others who "have their hands out" asking for a piece of the C&R lump sum fund. *See Williams v. Blue Cross of Idaho*, 2011 Ida. LEXIS 126 (S. Ct. Idaho 2011, filed September 2, 2011.

In *Williams*, the claimant had injured his shoulder in a series of work accidents. The compensation carrier at first paid voluntarily, but in the wake of surgeries it refused further payments, taking the position that the medical care for the shoulder was not for the accidents but because of the effects of a pre-existing shoulder condition. When the carrier took this position, claimant had his surgeons send their bills to his group health insurer, Blue Cross of Idaho. Blue Cross promptly placed claimant's counsel on notice of its reimbursement claim. In this regard, the GHI contract under which claimant was covered provided for such subrogation.

Thereafter, the parties settled for $70,000.00, with claimant tendering a release for both disability and medical. At that point, the Blue Cross attorney demanded of claimant's counsel that he withhold money from the settlement and repay the Blue Cross lien. Counsel refused, instead filing a declaratory judgment action with the Industrial Commission, asking it to "enter an order directing Blue Cross to take no further action against [claimant] to collect any portion of the workers' compensation proceeds." Claimant asserted that the Blue Cross claim was not one for subrogation, but instead one of a *creditor*. And, under the Idaho Act, "the lump sum proceeds paid to an injured worker are exempt from the claims of all creditors …."

The Commission first found that it had jurisdiction to resolve the dispute, and it then held that Blue Cross was indeed a subrogee and not a creditor. The Supreme Court affirmed. It was true, the court recognized, that the Idaho Act provides, "No claims for compensation …shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors … [except for certain support obligations.] I.C. § 72-802." Blue Cross, however, was not a creditor at all but a subrogee, as well established by the insurance contract.

The court thereupon emphasized the distinction between a creditor and a subrogee. A "subrogee insurer stands in the shoes of the injured worker, and is only entitled to payment if compensation is received from a third party, while a creditor is a third party to whom the injured worker owes money, regardless of whether payment is obtained from a third party." (Citing

Kenneth F. White, Chtd. v. St. Alphonsus Reg. Med. Center, 31 P.3d 926 (Idaho Ct. Appeals 2011)). This being the law, "If Blue Cross were simply a creditor, Williams would owe Blue Cross money regardless of whether any compensation was received by a third party." The court then added, importantly, "Additionally, if Blue Cross were a creditor, it would not have the same rights Williams possesses because a creditor does not stand in the shoes of the worker as a subrogee does. Consequently, because the plain language of the statute only prohibits creditors from asserting a claim against workers' compensation proceeds, Blue Cross, as a subrogee, is not barred from exercising its contractual right of subrogation against the settlement proceeds."

Editor's Note: The court also cited cases collected in the ALR Annotation, *Validity, Construction, and Effect of Statutory Exemptions of Proceeds of Workers' Compensation Awards*, 48 A.L.R.5th 473 (1997) (noting that subrogation has, as a policy objective, the prevention of double recoveries, and positing that "Workers' compensation awards are intended not to make the worker rich, but to keep an injured worker and the worker's family from becoming destitute because the breadwinner has been injured and cannot work. In order to protect this award and further this policy, workers' compensation statutes typically provide that these awards cannot be attached by creditors. Moreover, they provide that the worker cannot voluntarily assign the proceeds, primarily in order to ensure that injured workers who may have a valid claim but have not yet recovered the first payment and are desperate for cash do not sell their rights at fire sale prices.").

Under the Pennsylvania practice, the rule that workers' compensation proceeds are immune from claims of creditors is not found in the Act. Instead, it is found in the Judicial Code. *See Blake v. Commonwealth*, 439 A.2d 1262 (Pa. Commw. 1981). The court explained that an exemption similar to that of the Idaho statute had been found in Section 318 of the Act, but a "1978 technical revision resulted in the retention of the non-assignability portion of the statute as Section 318, with the exemption provision moving to Section 8124(c)(2) of the Judicial Code, as amended, 42 Pa. C.S. § 8124(c)(2). That Judicial Code section now reads: 'The following property or other rights of the judgment debtor shall be exempt from attachment or execution on a judgment: . . . (2) claims and compensation payments under . . . The Pennsylvania Workmen's Compensation Law. . . .'" As to the non-assignment issue, Section 318 of the Act provides, as it always has, and as it did in 1981, "Claims for payments due under this article of this act and compensation payments made by virtue thereof shall not be assignable." (Section 318 of the Act is 77 P.S. § 621.)

BOOK NOTE

INTERN NATION:
HOW TO EARN NOTHING AND LEARN LITTLE
IN THE BRAVE NEW ECONOMY
by Ross Perlin. 258 pp. (Verso 2011).

This new book is a thorough treatment and critique of internships, the work/education experience that is now routinely undertaken by what may be the majority of college students. The author, journalist Ross Perlin, explains that things like apprenticeships (think Benjamin Franklin at his print shop) and internships (think Sylvia Plath at *Mademoiselle*) have always been around, and have been valuable to provide an individual new to a field hands-on training, while not imposing unreasonable costs on employers.

In the era of the contingent workforce, however, things have gotten out of hand. The internship, which at one time was supposed to benefit the student, has now turned into a device of exploitation. Many employers, including architecture firms, at-home tech start-ups, 501(c)(3) groups, and even law firms, have been retaining and utilizing student "interns" in thinly veiled efforts to acquire cheap or even free labor. Such practices not only exploit students – while often not returning any meaningful training – but take away jobs from non-student members of the community, causing unemployment and erosion of the tax base.

Perhaps the most appalling practice Perlin reveals is that of colleges requiring an internship for graduation, assessing the student handsomely for the credit hours, and then placing the student at the internship employer – to essentially work for free. Not surprisingly, entities desirous of the *gratis* labor of interns often come calling at university placement offices.

Workers' compensation is mentioned only once in this excellent (though sometimes shrill) muckraker of a book. With regard to the law, it is really employers' routine violations of the federal Fair Labor Standards Act (FLSA) that interests Perlin.[1] The workers' compensation reference is encountered as the author details and criticizes the massive internship program at Disneyworld, where between 7,000 and 8,000 students "work full-time, minimum wage menial internships … without sick days or time off … [and] without guarantees of workers' compensation …." The Disney internship program sounds like a racket, but it is actually unclear why this unsubstantiated charge about lack of insurance would be true. As in Pennsylvania, workers' compensation in Florida is obligatory for employers of Disney's size, and if an intern is to be paid, he or she is likely to be deemed an employee. An employer like Disney, meanwhile, will know to have its appropriate insurance coverages in place.

Still, the ambiguous status of the intern can obviously raise issues in the workers' compensation context. It is easy, for example, to imagine an employer faced with a workers' compensation claim from an *unpaid* intern seeking to portray the individual as a mere *volunteer*.

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[1] Chapter Four, "A Lawsuit Waiting to Happen," is must-reading for the employment lawyer. Perlin believes that there are likely thousands of wage and hour claims that have been, and are, generated because of employer violations of the FLSA, relative to the retention of student interns.

And, indeed, earnings will not have been reported to the carrier as a part of its payroll. It is likewise easy to image an employer trying to portray a *paid* intern as an independent contractor, and certainly so if the employer has demanded that before the injury the student sign an independent contractor agreement. Perlin, in fact, identifies this practice (*see* pp. 70-71).

Of course, under the Pennsylvania Act if control can be established, and "consideration" of any type identified, a master-servant relationship – and hence workers' compensation coverage – can be found.

As noted some years ago in this newsletter, a comprehensive discussion of the employment rights of interns is found in an article, *The Employment Law Rights of Student Interns*,[2] authored by law professor David Yamada. The author posits, persuasively, "Where an intern is paid by an employer, that individual is likely to be deemed an employee for workers' compensation purposes. In [such a case], workers' compensation may be the exclusive remedy for work-related injuries, precluding common law tort claims. Where an intern is not paid, the situation becomes even more unclear. Although employers may elect to provide workers' compensation coverage for volunteers, as a general rule they are not required to provide such coverage."

Yamada further posits that a student intern who sustains a work-related injury during an internship that is *not* affiliated with an educational institution may well have no workers' compensation rights: "In that situation, unless the internship employer has voluntarily secured workers' compensation coverage for its interns, then presumably the injured student has only common law tort claims at her disposal." (This sounds correct, if the state in question has no uninsured employer fund or similar entity.)

Yamada identifies a short, but well-considered, New York precedent (1993) that raises the predictable type of issue that is implicated by the student laboring as an intern.[3] The case is intriguing as the result would likely be the same under Pennsylvania law.

There, the claimant, Olsson, was an occupational therapy student. She was working towards her B.S. degree in a program at Boston University (BU). BU required that she "acquire a minimum of six months of field work experience." To satisfy this requirement, she was directed to Nyack Hospital, which maintained an internship program relationship with the school. Under that agreement, the hospital was to provide "supervised learning experiences for the affiliating students." The hospital could "approve the selection of interns and, if necessary, dismiss them." The agreement further stated that "students participating in the intern program shall not be deemed employees." BU specifically insured Olsson for workers' compensation.

Olsson injured her back while lifting a patient, and she sued Nyack Hospital as if it were

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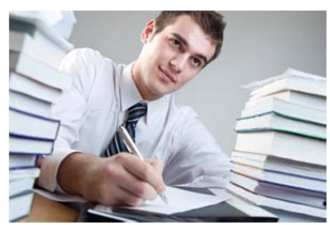
[2] David C. Yamada, *The Employment Rights of Student Interns*, 35 CONNECTICUT LAW REVIEW 215 (2002) (citing New York and Colorado cases). The cases cited by Yamada, from 1993 and 1998, respectively, seem to be the only cases (I could find none later) that address the issue.

[3] *Olsson v. Nyack Hospital*, 193 A.D.2d 1006 (S. Ct. N.Y. App. Div., filed May 20, 1993).

a third party. The hospital raised the exclusive remedy, asserting that Olsson was its employee, but the trial court denied the motion, ruling that the agreement noted above was dispositive. The appellate court, however, reversed and dismissed the case. "Plaintiff's relationship with defendant" the court held, "fulfilled all the criteria of an employer-employee relationship in that the defendant selected the interns, retained the power to dismiss them, and controlled and supervised their work …." The court also added: "Though financial remuneration was not paid to plaintiff, it has been held that where, as here, necessary training and experience gained at the hospital is required for graduation and licensure, training is a thing of value and the equivalent of wages …." Workers' compensation was, accordingly, the exclusive remedy.

Regarding the agreement's proviso that Olsson was not the hospital's employee, the court found that this was a "gratuitous statement … that … cannot overcome the strong public policy declared" in the workers' compensation law that employees are to be protected against workplace injuries. Similarly, "the contracting parties to the agreement … [cannot] contractually abrogate plaintiff's statutory entitlements …." Finally, "Neither can plaintiff elect to waive her Workers' Compensation Law benefits and proceed on a tort cause of action."



Perlin has penned an expose of internship practices allegedly run amuck. He concludes his book with advocacy – the Labor Department should vigorously enforce the FLSA so that employers know they must pay most interns; universities should not take windfalls by demanding credit dollars for internship experiences; and students should resist and refuse exploitation. Perlin calls for an end to "the subtle, relentless pressure to do an internship" that has now become, pathologically, "simply part of being young."

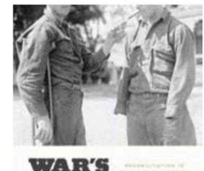
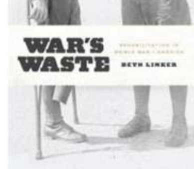
Appendix: Further authorities cited by Perlin.

1. ***Critique***: Steven Greenhouse, *The Unpaid Intern, Legal or Not, New York Times*, April 2, 2010, available at:
http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=print.

2. ***U.S. Department of Labor, Wage & Hour Divisions, Guidance***: "The latest word on … the [FLSA] criteria to establish a legitimate, unpaid internship …. 'Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act …. (2010):
See http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

3. ***General Information***: The website, "Intern Bridge": http://www.internbridge.com/, which includes access to the research paper, "The Debate over Unpaid College Internships," by Philip Gardner.

BOOK NOTE

WAR'S WASTE:
REHABILITATION IN WORLD WAR I AMERICA
by Beth Linker. 291 pp. (Univ. Chicago Press 2011).

Long before Congress created Social Security in the 1930's, it had initiated a massive regime of support, in the form of lifetime pensions, for Union veterans of the Civil War. This system became highly political in the ensuing decades, with politicians, mostly Republicans, promising to extend and enhance entitlements so as to appease and attract voters from powerful veteran interest groups like the Grand Army of the Republic (G.A.R.). The government also established a system of expensive retirement homes for veterans who had no other means of support.

By the beginning of the 20th century, this scheme was viewed by politicians and policymakers alike as a massive burden on government, with total costs of pensions now exceeding the total cost of the war itself. Progressives and other reformers came to view aging Civil War veterans as indolent "parasites" (this pejorative term was used with frequency) who had become intolerable burdens on society and bad examples to all.

As World War I loomed, the Wilson Administration, highly informed and animated by these pension critics, became obsessed with the idea that these financial and social burdens of war, that is, the support of wounded or otherwise disabled soldiers, had to be avoided. The idea was taken to heart by virtually everyone, as the British casualty rates of the World War I battlefield promised just as many disabled American soldiers as the Civil War had produced. Towards this end, the administration and Congress decided to promulgate a new law, the War Risk Insurance Act (WRIA). This law would create an entirely new model of taking care of injured veterans, featuring aggressive medical care and rehabilitation services, along with limited, scheduled benefits based on "severity of disability" (as opposed to loss of wage-earning capacity). All of this was in dramatic contrast to the prior model of providing lifetime pensions and Old Soldiers' Homes.

If this type of regime sounds like workers' compensation, you are correct. According to Professor Beth Linker in her new book, *War's Waste*, the WRIA was modeled on the then-new workers' compensation laws that had been enacted in many states. "War insurance," paid in part by premium deductions out of soldiers' pay, was to "protect soldiers and their families against the risks of battle and the loss of their civilian income." Advocates of the plan wanted to "apply workmen's compensation at a federal level … [believ]ing that soldiers should have a contractual agreement with the government, just as industrial workers had with their employers." And, in fact, the original rating schedule of the compensation feature was prepared by none other than the same individual who authored the disability rating schedule for the California Industrial Accident Commission.

According to Linker, the desire for insurance and soldiers' return to the workplace was bolstered by the surging "rehabilitation ethic" of the day. This ethic taught that a worker of good character did not react to physical adversity by merely sitting around and collecting

compensation, but by rehabilitating himself via medical care, using a prosthetic if necessary, seeking re-training, and reentering the civilian workforce.

This ethic was pursued by, among others, the practitioners of the nascent specialty of orthopedic surgery. And, indeed, an important feature of Linker's book is her brief history of how World War I heralded the rise of the specialty. Linker explains that, prior to World War I, *general* surgeons principally took care of broken bones, and orthopedists were mainly concentrating on rehabilitation efforts. These efforts included treating patients with spinal or limb difficulties, and even mechanical problems like protruding hernias. She explains that, in an era when most workers had no insurance, and could not afford to take off of work because of medical conditions, orthopedists, with their focus on rehabilitation, were the practitioners of "medicine for the laboring class." As a result, it was orthopedic specialists who became the leaders in the effort to rehabilitate soldiers. One of these, notably, was a Pittsburgh orthopedic surgeon, Dr. David Silver, who became the first director of the renowned "Limb Lab" (for prosthetics) at Walter Reed Army Hospital.

The primacy of rehabilitation in the World War I era also gave rise to the occupation of physical therapist, most whom were women at the time. The government, indeed, solicited thousands to work with orthopedic surgeons at military hospitals in the treatment of soldiers who had lost limbs or suffered other serious injuries. Of interest is that the thinking of the day dictated that the woman recruited to these tasks had to be a motivational "cheerleader," as opposed to caring nurse (who might encourage too much bed rest and nurturing), and hence the government actively recruited trainees out of women's collegiate physical education programs.

Linker's fine and readable book is full of revelations about the influence of World War I on rehabilitation. It is an important item for the workers' compensation specialist who wants a complete picture of our early history. The book is surely mandatory reading for those in the field of military medicine and rehabilitation.

The biggest revelation for this reader was to learn that at the end of the War, the Office of the Surgeon General advocated *medical* services at its many hospitals not only for wounded veterans, but for *injured workers* as well. This issue is treated in Linker's chapter, "Rehabilitating the Industrial Army." The OSG advocacy was advanced as Congress began to consider passing of the "Civilian Vocational Rehabilitation Act," which was to provide federal monies for the retraining of the *non-military* severely disabled. The OSG asserted that the federal government should not merely provide vocational rehabilitation, but the predicate *medical care*, at veterans' hospitals, as well. This advocacy ultimately failed because of worries, among others, about costs and "that the United States would look like a socialist state …." This historical item was a revelation to this writer, but these points of fatal resistance are, and remain, only too familiar.

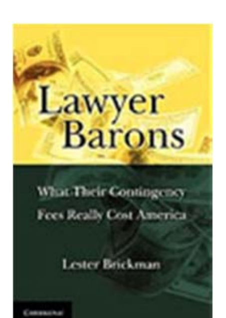
Linker's book ends with a postscript in which she compares the World War I thinking about rehabilitation of soldiers to that of the present day. Of course, one major effort of such rehabilitation has been to provide ever more high-tech, useful prosthetics to the many amputees

of the Iraq and Afghanistan conflicts. Indeed, she identifies one high-profile case where an officer received a prosthetic and was able to return to his unit in a command position.

Linker points out that, while everyone favors such efforts, and marvels at the can-do attitudes of many rehabilitated amputees, only a minority of soldiers will likely enjoy such outcomes. Just as in World War I, many wounded Middle East veterans have suffered catastrophic brain, mental, and systemic injuries that cannot be remedied with even the most high tech prosthetics. Further, just as in cases of severe industrial injury, heroism should not necessarily be the standard in assessing the adequacy of a soldier's recovery.

Many, safe in their offices, will hold their manhoods cheap when encountering soldiers wounded, rehabilitated – and returned to the breach. Linker, however, is surely correct when she asserts that such outcomes are not likely going to be the norm. War will continue to have immeasurable costs, despite efforts to reduce the same via rehabilitation and prosthetics.

BOOK NOTE



LAWYER BARONS:
WHAT THEIR CONTINGENCY FEES
REALLY COST AMERICA
by Lester Brickman. 556 pp. (Columbia Univ. Press 2011).

Cardozo Law School Professor Lester Brickman is the leading scholarly academic critic of what are, in his opinion, out-of-control contingent fees charged by trial lawyers. He is the Dr. Nortin Hadler (who savages his fellow physicians for contrived diagnoses, obtuseness to science, and overtreatment of patients) of the legal world. In this new and important book, Brickman summarizes – and supplements – his several law review articles and other writings about the issue. He is writing, however, for the sophisticated lay public, trying to convince all that laws need to be passed to limit the amount that can be earned by lawyers via contingent fees.

As mentioned in the last newsletter, workers' compensation is, for the most part, not mentioned in this history and harsh new critique of such fees.[*] Nor, notably, is motor vehicle

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[*] The observations he does make are scattered. He asserts, for example, that the typical estimates of how much money is received by lawyers in contingent fees each year are understated, as they exclude fees taken in workers' compensation litigation. In discussing the history of the contingent fee, meanwhile, he observes that fees in tort cases began to increase in the late 19th and early 20th centuries. In response, legislators who created workers' compensation enacted caps to restrict the permissible percentage. Both these developments – the creation of workers' compensation to displace tort law, and the concurrent limit on fees – made trial lawyers wary. According to the author, "To combat the double threat of limited damages and fees," tort lawyers thereafter, and in the wake of other social insurance developments of the 1930's, "lobbied against the further encroachment of expanding bureaucracy.…"

In addition, Brickman compares the pursuit of occupational hearing loss claims under the LHWCA to filings undertaken by personal injury lawyers in mass tort cases, an effort of which he is critical. "Lawyers," he states, "go from plant to plant, sign up current and former workers and provide them with a medical examination that virtually always shows hearing loss. They then file hearing loss claims on their behalf…. Because it is virtually impossible to determine the source of hearing loss and because, under the law, the employer is liable for workers'

accident litigation. In fact, his colleague Professor Richard Epstein (of law and economics fame), twice states in his expansive preface that in the "automobile cases … the system seems to work fairly well."

The real objects of the Brickman critique are contingent fees in products liability and class actions. As to the first, he charges that since the 1970's, lawyers (on both sides), along with courts, have pressed and permitted the expansion of tort remedies not to vindicate enhanced safety – but to satisfy the rapacious desires of the lawyer class for money, and the craving of the judicial branch for increased societal power. With regard to the second, he asserts that class actions were originally a good idea, but that they have been hijacked by lawyers who have turned them into crass money-making ventures. In this discussion, predictably, Dickie Scruggs and Pitt Law graduate Bill Lerach are held up as poster-boys illustrating the alleged corruption of the modern class action industry.

Brickman does not argue for the abolition of contingent fees, but asserts that they should only be permitted to the extent the lawyer adds value to the settlement. In other words, if the insurance carrier recognized that it has or likely will have liability, and will pay a certain amount anyway, a contingent fee should not be chargeable out of that base amount, but only out of the increase the lawyer secures. This he refers to as the "Early Offer Proposal."

Brickman would be uninterested in the argument that taking a fee out of the whole amount is fair because for every contingent fee taken, counsel has taken on a client with a marginal case from whom *no fee* will likely be taken. He dismisses this argument as a myth, charging that lawyers, particularly high-volume personal injury firms that advertise heavily, in fact screen claimants to ensure that considerable work is not expended on weak cases. Here one encounters one of Brickman's most shrilly-titled subchapters: "The Modern Form of Ambulance Chasing: Litigation Screenings."

Lawyer Barons is, regardless of one's views, the "go-to" text to learn in one place about the tort reform movement's views on contingent fees, and for reference to the commentary pro and con that has been exchanged on the issue. It is also easy to read – indeed, it's written like the tort reform movement's master brief, with short pithy chapters, typically featuring rebuttals to the other side's arguments. The book, however churlish, is a memorable *tour de force* of the entire contingent fee controversy.

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total hearing loss even if part of it is caused by presbycusis …, simply filing these claims en masse assures payment."

1. **David L. Gushue et al., *Effective Use of Biomedical Engineers*, FOR THE DEFENSE, p. 18 (July 2011).** [*]

"Attorneys and Judges must understand," the authors of this article insist, "that medical doctors are trained to diagnose and treat injuries; *they are not qualified or trained to evaluate causation*." This is news to most of us in the workers' compensation community at every level. Indeed, we have always been told that physicians are the "gatekeepers" to the system.

And this is not merely on issues of diagnosis and care but on causation (in non-obvious cases) as well.

The authors who so posit are biomedical engineers who offer themselves as experts in accident cases. The assert that they can (1) study the circumstances of a given accident, (2) take into account the claimant's pre-accident condition, (3) assume that the diagnosis accorded the victim is correct, and (4) thereupon render a scientific opinion with regard to whether the accident circumstances could or could not have caused the condition.

In this article, notably, the authors are talking about motor vehicle accidents and what they refer to as the "collision environment." However, the engineering analysis that they discuss is presumably applicable in other injury contexts as well.

How do biomedical engineers purport to determine causation? The authors describe the process in several ways in their article, but the best summary seems to be as follows: "[T]reating physicians … lack information, expertise, and sufficient technical basis to evaluate the nature of the collision environment which is necessary to provide an opinion regarding injury causation. Evaluations of incident severity, as well as the associated kinematics (*i.e.*, motions) of the occupant are required to properly assess injury mechanisms, associated force magnitude and the potential for injury causation."

In other words, these experts seek to employ the principles of physics to purport to establish injury causation – or lack thereof. Dare we say that this is one more claim at having located the Lost Dutchman's Mine of workers' compensation – the objective test that will once and for all eliminate subjectivity from the injury causation analysis?

It seems to this writer that such is the case. On the other hand, the underlying common sense that attends the authors' assertions is fairly compelling; a minor accident should not, at least in most cases, give rise to extraordinary injury and disability.

[*] One of the authors' business partners presented the substance of this paper at the National Workers' Compensation Judiciary College, Orlando, FL (August 2011). Consistent with the College principles, he did not pitch the services of their engineering consultancy services. On the other hand, to read more about the services that his firm (ARCCA) provides, see http://www.arcca.com. As with many websites, a wealth of information is presented, including an extensive bibliography of the papers published and presented by members of the firm.

Still, this type of common-sense and principles-of-physics thinking does in fact underlie the reasoning of most doctors who testify in workers' compensation cases. Such physicians, particularly surgeons, would likely disparage the notion that they cannot, for example, rely on a hypothetical that describes a limited-force injury and opine that an injury could not have occurred – or that if it did, the effects would be *de minimis*. Indeed, one Pittsburgh-area IME physician has long used the term "low velocity," which certainly evokes physics, in his descriptions of limited-impact injuries. This is precisely the subject the authors are talking about.

In sum, to posit that physicians are *unqualified* to render such opinions is an extraordinary proposition. Lack of formalized training in biomedical principles sounds more like fodder for a robust cross-examination.

2. **Howard W. Cummins, *From Conflict to Conflict Resolution: Establishing ALJ Driven Mediation Programs in Workers' Compensation Cases*, 30 NAALJ JOURNAL 391 (2010).**

"Mediation," the author of this article declares, "is as old as the Code of Hammurabi." Fear not, however – this new article is not some stolid treatise on the history of mediation but instead a primer on its theory and practice. As he states in his introduction, his intent is to explain "the role of mediation ..., the 'how' of mediation, and the components necessary for a mediation program to be effective …." He does so by studying what he has determined are effective and recently "revitalized" mediation programs in workers' compensation systems – those of Oregon, Maryland, and Virginia. (He also discusses the Arkansas program, which he describes as one where the state oversees all aspects of mediation practice, including "formal education requirements, certification, continuing education, and other practice requirements as minimums.")

This article is valuable, from a practical point of view, for the adjuster or lawyer new to the practice. He notes at the outset, for example, the difference between "facilitative" and "evaluative" programs: "In a facilitative system, the ALJ acts as an intermediator between parties, conveying information, but not offering opinion, reasoning or solutions to the conflict. In the evaluative system, the mediator takes an active role – evaluating each party's case and offering solutions to the problem being mediated." He also sets forth in specific, meticulous detail the nuts-and-bolts procedure attendant to mediation in the states under study.

The author notes an irony attendant to mediation that will ring true to many veterans – in the context of the adjudicatory process, scheduling mediation can actually *extend* the proceedings because of postponement of critical adversarial hearings. "The challenge," the author correctly asserts, is to determine whether the benefits of mediation outweigh potential delay, and/or (presumably) to amend the process to limit or eliminate the delay. Also of note is his description of the mediation process in his own system (that of the District of Columbia). Among other things, he points out that the D.C. regulations, like those of the Pennsylvania program, provide that "the Hearing ALJ may not serve as the mediator in the same case." He also posits, in his conclusion, that the "cost and time savings" that mediation can deliver should

not be ends in themselves. Instead, it is the "less tangible benefits that arise in appropriate cases when people are empowered to resolve their own disputes productively ...."

3. **Terry Carter,** ***Insult to Injury: Texas Workers' Comp System Denies, Delays Medical Help*****, ABA JOURNAL (October 1, 2011), available at http://www.abajournal.com/magazine/article/insult_to_injury_texas_workers_comp_system_denies_delays_medical_help/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.**

The Texas workers' compensation laws were subject to a dramatic (and renowned) amendment in 1989 (applicable in 1991), which severely restricted lawyer involvement. In this fairly in-depth article, the author charges that the inability of injured workers to obtain representation has worked hardship and injustice on many injured workers. A central and repeated point of the article is that employer and carrier vigilance over perceived over-treatment has prevented many deserving workers from receiving medical care. The point is illustrated by the central character of the story, a Texas police officer who was shot in the chest at point-blank range.

Even his emergency helicopter ride to the hospital was at first denied by the carrier.

Carter seems persuaded that the legislature's attempt to drive lawyers out of the system makes deserving claimants such as the officer, with no easy place to turn for advice and representation, sitting ducks to become victims of frivolous insurance denials. He also seems persuaded that the Department of Insurance, which runs the program, is unduly influenced by the industry, and is not seriously interested in protecting claimants' rights. The legislature has created an ombudsman program and an Office of Injured Employee Counsel, but the author seems to doubt their effectiveness.

The author also notes the unusual adjudication structure of the Texas system, noting that after the administrative hearings are complete a jury trial (limited issues) is available for either side. One lawyer interviewed states, "Once juries hear the facts … it can be like shooting fish in a barrel. They hate the insurance companies." Still, difficulty remains for the claimant to get a lawyer for the jury trial. Thus, if claimant wins before the ALJ and Commission, and the employer appeals, he or she may well lose by default in the trial court "solely due to a lack of representation."

This is an important article that should be read by all in the community. As one might expect from a bar association magazine, it is none too pleased at the anti-lawyer posture of the reforms. Nor does the article look favorably on the Insurance Department's recent surreal lawsuit, in which it sued a lawyer for allegedly breaking the law by using the phrase "workers' compensation" on his blog. The article, unfortunately, lacks historical context, not explaining that many in the defense community in the 1980's viewed the Texas system, particularly the ability of the claimant to demand a jury trial *de novo*, to be not only expensive but completely dysfunctional. Readers would have benefited from a detailed account of what prompted these massively retractive reforms in the first place.

DIGEST OF REPORTED CASES

Case: *Sabol v. Allied Glove Corp. v. Carnegie Mellon University et al.,*
Court/Docket/Date Filed/Judge: Pa. Super. No. 171 WDA 2011, filed September 22, 2011, Strassburger, J.

Type of Case: Exclusive Remedy – Asbestos – Mesothelioma – Student versus Employee

Issue or Issues: Did the trial court commit error in granting an employer summary judgment, based upon the exclusive remedy?

A worker, Sabol, contracted mesothelioma, a cancer pathognomonic to asbestos exposure. He had been employed as an engineer for many years, and he had his Ph.D. from Carnegie Mellon University (CMU). He filed a negligence/strict liability lawsuit against numerous asbestos-related manufacturer/user defendants. During the course of the lawsuit, he filed an amended complaint to add CMU as a defendant. He took this action because he believed that he was exposed to asbestos in a CMU laboratory in the course of his Ph.D. research.

During the pendency of the case, Sabol passed away and his widow, as executrix, was substituted as the plaintiff. CMU filed for summary judgment on the grounds of the exclusive remedy, to wit, that when Sabol had his alleged asbestos exposure while at CMU, he was present not as a student, but as an employee.

The trial court granted summary judgment, but the Superior Court reversed and remanded. True, the record showed that "there is no doubt that at some times during his tenure, Dr. Sabol was an employee because he performed services for a valuable consideration." This had led the trial court to grant summary judgment. Still, this was error, as "the record also reveals that at some time during his tenure, Dr. Sabol was working in the laboratory, and being exposed to asbestos while acting in his capacity as a Ph.D. student." This being the case, the court reversed and remanded. As to the remand, "a fact-finder should resolve the issue of how much asbestos exposure occurred while Dr. Sabol was acting in his capacity as a student, rather than as an employee."

Case: *McClure v. WCAB (Cerro Fabricated Products)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 388 C.D. 2011, filed September 15, 2011, Pellegrini, J.

Type of Case: Act 1 of 1995 – Successor-in-Interest – Limitation of Action – Apportionment

Issue or Issues: Did the Board commit error in its apportionment of liability in a hearing loss case based upon a worker's long-term exposure to hazardous occupational noise?

Claimant, McClure, was employed in a labor job at a forge. He began working in that capacity in 1972, when the forge was called Accurate Forging Corp./Delta American. There he had exposure to loud noise. In 1997, he had an audiogram that yielded a binaural loss of 18.1%.

In 2000, Accurate sold the business to Cerro Fabricated Products. At the time, "there was no merger or consolidation. The Asset Purchase Agreement provide[d] that it was strictly a sale of assets between Accurate and Cerro and was not intended to be a sale of any liabilities…. The agreement further indicate[d] that *seller* had no intention of retaining any liabilities after the sale, specifically related to workers' compensation claims."

In 2003, Cerro laid the claimant off. Thereafter, in July 2004, he had an audiogram that yielded a loss of 24.69%. He filed a claim petition for workers' compensation in November 2004.

The WCJ, in her initial consideration of the case, considered Cerro the successor-in-interest and imposed all liability on Cerro. She dismissed Accurate as a party. The Board vacated and remanded, having held that Cerro was not a successor in interest. On remand, the WCJ, in her second consideration of the case, held that the claim against Accurate was time-barred, as claimant did not file his claim within three years of the last exposure. *See Slip op*. at 3-4, n.1 (citing *McIlnay v. WCAB Standard Steel)*, 870 A.2d 395 (Pa. Commw. 2005)). She ruled that Cerro was obliged to pay an apportioned 6.57% of the total hearing loss of 24.69%, but ordered Cerro to pay for 100% of the medical associated with the loss.

The Board, upon its second consideration of the case, affirmed, particularly the *pro rata* share of liability in the amount of 6.57%, but held that Cerro was only responsible for its *pro rata* share of the medical expenses. In this case, the employer's pro rata share was 26.61%.

Commonwealth Court affirmed. It first held that Cerro was not a successor in interest. In reaching its conclusion, it applied what it referred to as the "*Hayduk* factors." (Referring to *Hayduk v. WCAB (Bemis Co., Inc.)*, 906 A.2d 622 (Pa. Commw. 2006)). Under that analysis, a successor company may be a liable successor in interest in the event that five factors are met. Here, the *Hayduk* analysis yielded a conclusion that Cerro was not a successor in interest.

The court likewise rejected claimant's argument that Cerro should bear 100% liability for medical costs. According to the court, "the concept of joint and several liability for medical expenses involving hearing loss cases are [sic] not embodied in the Act…." Under Section 306(c)(8)(vi), "An employer shall be liable only for the hearing impairment caused by such employer. If previous occupational hearing impairment or hearing impairment from nonoccupational causes is established at or prior to the time of employment, the employer shall not be liable for the hearing impairment so established whether or not compensation has previously been paid or awarded." *Slip op*. at 13. With this statute in mind, the court stated that it agreed with employer in its argument that "there is no reason that this section should not apply … when it comes to paying Claimant's medical bills…."

The court concluded: "The statute specifies that in a hearing loss case, when there is more than one employer responsible for a claimant's hearing loss, each employer shall be liable only for the hearing impairment caused by each employer. If a claim petition against Accurate had been timely filed, Accurate would have been liable for its pro rata share of any medical expenses incurred by Claimant. Because Cerro is only responsible for the hearing loss incurred while Claimant was in its employ, the Board did not err in modifying the WCJ's order and determining

that Cerro was only responsible for 26.61% of Claimant's related medical expenses representing that portion of Claimant's hearing loss for which it was responsible." *Slip op.* at 15-16.

Case: *CVA, Inc. v. WCAB (Riley)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 2658 C.D. 2010, filed October 14, 2011, Leavitt, J.

Type of Case: Penalties – Unpaid Medical Expenses – Therapeutic Magnetic Resonance (TMR) Treatments – Law of Medical Disputes Summarized

Issue or Issues: Did the WCJ commit error in imposing penalties on an employer that neither paid the claimant's TMR medical treatment bills, nor sought Utilization Review or resort to "downcoding"?

Claimant, Riley, suffered an injury arising in the course of his employment on October 18, 2007. At the time, he fell to the ground while getting out of his truck, injuring his knee. He commenced a series of TMR treatments for pain control with Bristol Family Practice. Bristol submitted HCFA billing forms with accompanying medical reports starting in May 2008, and extending through June 2009. (The opinion suggests that each treatment was billed under a code where the reimbursement amount was in excess of $3000.00 per visit.) The employer's carrier at first denied the bills on the grounds that they were not for work-injury-related treatment or because "documentation does not support charges as billed." In February 2009, the employer's carrier started an inconsistent practice of downcoding the TMR treatments, which, under Fee Review regulations, suspended its obligation to pay during the pendency of any provider request for Fee Review. However, even after this date, employer on occasion would unilaterally deny the billing.

Claimant, in March 2009, filed a penalty petition, arguing that employer had illegally failed to pay what was now an outstanding gross medical bill of $140,876.00. As proof, claimant submitted the medical reports and the corresponding HCFA forms. The WCJ granted the petition, awarding a 50% penalty, and the Appeal Board affirmed.

Commonwealth Court also affirmed. The court rejected employer's argument that, by relying on signed medical reports, the WCJ had based his finding of unpaid causally connected medical bills on excludable hearsay. The court noted that under Section 422(c) of the Act, as interpreted by precedent, signed medical reports are legally competent evidence in medical-only cases. *See* 77 P.S. § 835; *Montgomery Tank Lines v. WCAB (Humphries)*, 792 A.2d 6 (Pa. Commw. 2002).

The court also denied employer's claims that claimant was obliged to prove reasonableness and necessity of the TMR treatment. If this was the focus of the resistance to paying, employer should have resorted to UR. Employer, in this regard, derided TMR as "novel," as "shaman oriented drivel," and of "outlandish cost," but these were issues for UR, not litigation in the first instance. Similarly, if employer really had a lack-of-causal-connection defense, it should have filed a review petition. *Slip op.* at 8. On this point, the court declared, "Claimant injured his left knee and the TMR treatment was for the left knee injury. Thus, a

causal relationship was established." (Citing *The Body Shop v. WCAB (Schanz)*, 720 A.2d 795 (Pa. Commw. 1998)).

Editor's Note: This opinion turns didactic, with an efficient recitation of the law of medical disputes. Among these declarations are the following:

> An employer is obligated to pay for reasonable medical expenses that are causally related to the work injury. *Listino v. Workmen's Compensation Appeal Board (INA Life Insurance Company)*, 659 A.2d 45 … (Pa. Cmwlth. 1995). Under Section 306(f.1)(5) of the Act, 77 P.S. §531(5), the employer must pay the claimant's medical bills within 30 days of receiving them, unless the employer disputes the reasonableness and necessity of the treatment…. If the employer believes that the treatment is not reasonable and necessary, it must submit the bills for a utilization review or face the possibility of a penalty. *Hough v. Workers' Compensation Appeal Board (AC&T Companies)*, 928 A.2d 1173 … (Pa. Cmwlth. 2007). In addition, if the employer refuses to pay bills because it believes they are not causally related to the work injury, the employer runs the risk of being assessed a penalty if the WCJ determines that they are, in fact, causally related. *Listino*, 659 A.2d at 48….
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> …
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> If an employer questions the reasonableness and necessity of medical treatment, the employer can submit the bills for a utilization review. *Hough*, 928 A.2d at 1180. The utilization review process is the sole means for determining if treatment is reasonable and necessary. *Zuver v. Workers' Compensation Appeal Board (Browning Ferris Industries of PA, Inc.)*, 755 A.2d 112 … (Pa. Cmwlth. 2000). Unless bills have gone through utilization review, the WCJ has no jurisdiction to rule on their reasonableness and necessity. *Id.*
>
> …
>
> Employer's objections to the cost of the treatment are irrelevant. The codes and costs assigned to medical procedures must be decided in accordance with the fee review established in Section 306(f.1)(5) of the Act, 77 P.S. §531(5). … The Bureau of Workers' Compensation, not workers' compensation judges, oversees fee reviews. *Enterprise Rent-A-Car v. Workers' Compensation Appeal Board (Clabaugh)*, 934 A.2d 124 … (Pa. Cmwlth. 2007). Claimant did not have to show that the cost of his TMR treatments was reasonable to make out his case for penalties.

Slip op. at 4-8.

The court also rejected employer's argument that the WCJ had disallowed it the right of rebuttal. The court held that the WCJ had legitimately established a deadline (not subject to any objection from employer) for production of proofs, and he did not commit error in enforcing the same. *See* 34 Pa. Code § 131.52(b) (WCJ Rules). In any event, the proposed testimony went to the reasonableness and necessity of the treatment, which would not have been relevant in the penalty petition.

Finally, the court rejected the assertion that a 50% penalty was excessive. The employer had not so argued before the Board, and so the issue was properly deemed waived. *Myers v. WCAB (Family Heritage Rest.)*, 728 A.2d 1021 (Pa. Commw. 1999). However, employer had exhibited "excessive delay" (the language of Section 435), and the WCJ did not abuse her discretion in imposing such a penalty.

Editor's Note: The court remarked that no Bureau documents were included by the WCJ in the record to inform it how the case had been adjusted. *Slip op*. at 2, n.2.

Case: *Lenzi v. WCAB (Victor Paving)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 741 C.D. 2011, filed October 13, 2011, Kelley, S.J.

Type of Case: Average Weekly Wage (AWW) – Inclusions – Unemployment Compensation Benefits Received

Issue or Issues: Did the WCJ and Board commit error in rejecting claimant's assertion that unemployment compensation benefits received in the four quarters before an injury should be included in the average weekly wage calculation?

Claimant, Lenzi, was a truck driver for a paving company. He suffered an injury arising in the course of his employment on July 30, 2007. Claimant's claim was contested by employer. The WCJ granted benefits, but in the course of doing so declined to include, in the claimant's average weekly wage calculation, unemployment compensation benefits received in the four quarters before Mr. Lenzi's injury. (It is to be noted that it was stipulated that the claimant had an ongoing relationship with the employer for at least the critical four quarter period.)

On appeal, the Appeal Board affirmed, and claimant thereupon appealed to the court. He argued, specifically, "that the AWW calculation should include the unemployment compensation benefits received by claimant during periods of layoff from his job with employer during the year preceding the work injury at issue."

The court, however, affirmed the WCJ and Board. The court recognized claimant's argument that including these monies "would provide a truer measure of his actual earnings and reflect the true remedial nature of the Act," but the court pointed out that the issue had already been addressed by the Supreme Court in the precedent *Reifsnyder v. WCAB (Dana Corp.)*, 883 A.2d 537 (Pa. 2005). The court in *Reifsnyder* held that the AWW of long-term employees with whom the employer had a continuing employment relationship was to be calculated by including the periods of layoffs and averaging the weekly wages earned in the highest three or four immediately preceding work quarters.

In so doing, the court was interpreting Section 309(d) of the Act. The court specifically excluded unemployment compensation benefits from this calculation. The *Reifsnyder* court stated, among other things, "inclusion of unemployment compensation benefits paid out during a work layoff is not required in order to insure an accurate measure of a workers' earnings history and earning capacity."

As far as the court was concerned, claimant was requesting that it "revisit *Reifsnyder,*" but it responded that this argument must necessarily fail. Obedient to *stare decisis*, the court ratified the Supreme Court's conclusion that the workers' compensation "system operates to insure a worker against the economic effects of a workplace injury, not against the economic effects of variations in the business cycle." (Quoting *Reifsnyder*, *supra*).

Editor's Note: The court recognized that the Supreme Court had produced cases holding that "the economic reality of a claimant's recent pre-injury earning experience" should be taken into account when AWW calculations are formulated. These cases include *Colpetzer v. WCAB (Standard Steel)*, 870 A.2d 875 (Pa. 2005); and *Triangle Building Center v. WCAB (Linch)*, 746 A.2d 1108 (Pa. 2000). However, the 2005 *Reifsnyder* case considered that principle and nevertheless held that unemployment compensation benefits were not to be included.

Case: *GMS Mine Repair & Maintenance, Inc. v. WCAB (Way)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 92 C.D. 2011, filed October 7, 2011, Freidman, S.J.

Type of Case: Supersedeas Fund Reimbursement – Restitution

Issue or Issues: Did the WCJ commit error in declining to direct that the Supersedeas Fund reimburse an employer which, on appeal, was found not to have been liable for claimant's benefits?

Claimant, Way, who had been employed as a coal miner, filed a claim petition against employer, "GMS Mine Repair." He alleged that he had sustained an occupational disease or diseases. The petition was filed on December 1, 2004. Employer apparently filed a late answer but, in any event, sought to join prior mining concerns, in particular, R&R Mining.

At the end of the litigation, the WCJ granted the claim petition against GMS on the grounds that GMS "never" filed an answer to the claim petition. GMS appealed, and the Board denied supersedeas.

Fifteen months later, however, in December 2007, the Board reversed. The Board, among other things, held that R&R was the liable employer.

As far as can be told, no further proceedings on the case thereafter unfolded.

GMS thereupon filed an application for Supersedeas Fund reimbursement. The Fund opposed reimbursement "specifically averring that the overpayments were not the result of a final determination that benefits 'were not payable.'" The WCJ and Board agreed. The Board, in particular, stated that GMS' remedy "is to seek reimbursement from the entity and/or its carrier that was ultimately determined to be the correct employer."

Commonwealth Court affirmed. According to the court, the issue had been addressed previously. *See SWIF v. WCAB (Shaughnessy)*, 837 A.2d 697 (Pa. Cmwlth. 2003) (*aff'd per curiam*, 874 A.2d 1158 (Pa. 2005)). In *Shaughnessy*, the court directed that a party like GMS file a

review petition seeking reimbursement from the party properly responsible for benefits – which in the present case was R&R.

The court, in sustaining the reasoning of *Shaughnessy*, declared, "contrary to employer's assertion, the WCAB did not determine finally [in its consideration of the original underlying petition] that compensation was not payable to claimant; rather, it determined finally that GMS was not the liable employer. Despite employer's attempt to merge these concepts, they are not identical."

Editor's Note I: The court, in some odd *dicta*, suggested that this type of reimbursement, via review petition, is supported by Section 319 of the Act, 77 P.S. § 671.

However, Judge Flaherty in *Shaughnessy* specifically rejected the proposition that section 319 supported restitution as ordered in that case and similarly in this new decision. *See id.* at 702 ("the second paragraph of Section 319 only applies when, after payments have been made for an injury under a non-workers' compensation program, it is subsequently determined that payments were compensable under the Act. This is not what happened in this case. Rather, SWIF was found to be Employer's insurance carrier when it was not the insurance carrier because Employer had no insurance or was self-insured. Therefore, because subrogation under Section 319 does not apply to the factual situation in this case, this is not an appropriate reason to deny SWIF recovery from the Supersedeas Fund…. Having determined that subrogation is not appropriate, we must determine what method of reimbursement for SWIF is appropriate.").

And, indeed, Judge Flaherty in *Shaughnessy* was certainly correct. First, Section 319 involves seeking reimbursement from third parties. Second, the remedy in this case is not subrogation at all, but restitution.

Editor's Note II: It is likely that employer knew all about the *Shaughnessy* case and its holding that restitution, not Fund reimbursement, was its remedy. In this regard, employer argued that the review/restitution remedy "is insufficient because R&R is no longer in business and, in any event, it did not carry workers' compensation insurance during the period of claimant's employment …." To this complaint, the court responded that "these assertions are immaterial where the law is clear that 'the Supersedeas Fund … does not assume financial responsibility for injury caused by a third party.'" For this proposition, which, in general. is obviously true, the court inappositely cited a case where a true third party, not an employer, was involved.

Case: *Little v. WCAB (B&L Ford/Chevrolet)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1857 C.D. 2010, filed July 28, 2011, Brobson, J.

Type of Case: Court of Employment – Fatal Claim – Cardiac Death in Wake of Termination of Employment

Issue or Issues: Did the WCJ and Board commit error in dismissing a fatal claim petition, reasoning that the claimant, who had been terminated, did not suffer his fatal injury in an event arising out of the course of employment?

A worker, Little, sustained a work injury to his shoulders on October 1, 2005. Employer seemingly acknowledged this event, and thereafter, Little began to work at light duty. (As far as can be told, no NCP or NTCP was filed).

In any event, he worked light duty until January 2006, when employer directed him to regular duty. This labor continued briefly until he was sent home by one of his supervisors. The supervisor indicated to him that he was being sent home because his attorney had, by correspondence, stated that the worker "could not perform any type of manual labor." In response, the employer stated, "rather than risk further injury, I must insist that you receive a doctor's report advising us what type of work you are capable of performing."

Thereafter, Little obtained a note from his physician indicating that he could not work. According to the opinion, "decedent intended to produce the letter to employer, but before decedent brought the doctor's excuse to employer, [the supervisor] told decedent, in a telephone conversation, that decedent did not need to bring the letter to employer. Rather, [she] informed decedent that he would be receiving a letter from employer. Decedent received the letter from employer on Saturday, January 28, 2006. The letter terminated decedent's employment."

Mr. Little thereupon became highly distraught. Among other things, he and his wife "discussed the ramifications of the termination and its effect on their finances. During that time, decedent was unable to eat or sleep, and paced the floor reading the letter over and over again." Two days later, on January 30, 2006, he was still afflicted by anxiety about the termination. On that date, decedent ultimately "folded the letter, rose from the table, and collapsed to the floor." The EMT personnel and police "had to pry the letter from [his] hand." As foreshadowed above, Little died of a cardiac event the same day.

In the litigation which followed, the WCJ granted the lifetime claim for the shoulder injury, but denied the fatal claim. The WCJ, without directly addressing the medical, dismissed the petition on the grounds that the decedent was not in the course of his employment when he died. The Board affirmed, though on somewhat different grounds.

Commonwealth Court has also affirmed. True, a cardiac event need not necessarily manifest itself on the premises. This is the teaching of the renowned landmark case *Krawchuk v. Philadelphia Electric Company*, 439 A.2d 627 (Pa. 1981). In that case, a claimant who had extreme stress at work had a heart attack at home and, hence, off the premises, and after his regular work hours. In that case, the Supreme Court held that the heart attack did indeed arise from and was related to the employment. However, it is to be noted that, in that case, claimant was *still employed* when he suffered the fatal heart attack. The court pointed out, among other things, that the *present case* "involved an employee whose fatal injury was causally related to his *unemployment* and the disconnection of his employment relationship."

The court held, among other things, as follows:

> We conclude that where a work injury appears to bear no relationship to events associated with employment activities …, but rather relates to a final act that is only work related insofar as the event alters the employment relationship (such as

termination in this case), an injury associated with that final act does not arise in the course of employment. …

Slip opinion at 18-19.

Explaining its policy reasoning, the court further stated as follows:

> We do not read the Act as imposing on employers the risk of compensation for injuries that result from a decision to terminate an employee. Consequently, based upon the fact that decedent sustained his fatal heart attack two days after he was terminated, and based upon the lack of any expert medical evidence indicating that a causal connection exists between his actual employment and the onset of his heart attack, we agree with the Board's and the WCJ's ultimate legal conclusion that decedent did not sustain a work-related injury ….

Slip opinion at 20.

Editor's Note I: The Board had affirmed the dismissal of the case on the grounds that claimant did not show abnormal working conditions. However, as the court pointed out, the Supreme Court has held that a mental stress causing physical injury, as arguably involved in the present case, does not require abnormal working conditions. The precedent is *Panyko v. WCAB (US Airways)*, 888 A.2d 724 (Pa. 2005).

The court also distinguished the case *Erie Bolt Corp. v. WCAB (Elderkin)*, 777 A.2d 1169 (Pa. Cmwlth. 1998), *rev'd per curiam* 753 A.2d 1289 (Pa. 2000). In that case, the Commonwealth Court had affirmed the WCJ's determination that the stress of being fired was a significant contributing factor to a decedent's fatal heart attack. The heart attack had occurred about an hour after the termination. The Supreme Court reversed by *per curiam* order. According to Commonwealth Court, the new case was not truly controlled by *Erie Bolt*: "The primary issue that the employer raised in *Erie Bolt* was whether substantial evidence supported the [WCJ's] determination that a causal connection existed between the stress of being fired and the claimant's heart attack. The courts did not consider the question of whether the claimant was injured *in the course of employment* when his heart attack occurred essentially at the moment of termination. The distinct factual scenario in this case, where decedent received the termination letter on January 28, 2006, but did not suffer his heart attack until January 30, 2006, presents a different question for review."

Editor's Note II: Judge Friedman, in her dissent, stated that the record and fact findings supported the proposition that claimant was only fired as of January 30, 2006.

Editor's Note III: The court, along the way to making its decision, noted that "[a]lthough an injury that occurs in the workplace need not have a causal relationship to work activities …, when an injury occurs off-premises, the relationship between an injury and employment activities must be more clear …" As support for the first clause of this proposition the court cited *Ruhl v. WCAB (Mac-It Parts, Inc.)*, 611 A.2d 327 (Pa. Cmwlth. 1991) (appeal denied).

Case: *Westmoreland Regional Hospital v. WCAB (Pickford)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1188 C.D. 2009, filed September 23, 2011, Leavitt, J.

Type of Case: Act 57 of 1996 – IRE – *Gardner* Style Petition for Modification Based Upon IRE – Critical Point in Time For Impairment Rating

Issue or Issues: Did the WCJ commit error in rejecting the IRE rater's rating, in a *Gardner* style modification petition, because of persuasive evidence that, after the IRE appointment, claimant did exhibit objective evidence of problems which the IRE physician could not perceive?

Claimant, Pickford, was employed as a nurse. She suffered a serious injury arising in the course of her employment on July 4, 1997. At first, the NCP stated that the claimant had suffered cervical and lumbar strains. In the course of litigation in 1999, however, the NCP was expanded to include the injuries of cervical disk injuries, brachial plexus stretch, and RSD.

A number of years had passed when, in 2006, employer requested that the department appoint an IRE physician. The department appointed Dr. Klein. On the day of the exam, he could not perceive any objective findings of RSD. In addition, he did not find any objective symptoms of brachial plexus pathology. In the end, he accorded claimant a 22% whole body impairment rating. Dr. Klein specifically stated that he was not opining that claimant did not have the conditions; however, he stated, as foreshadowed above, that he found no objective findings of these two conditions. In the end, Dr. Klein "assigned claimant's RSD a zero impairment rating."

In the litigation which followed, Dr. Klein ratified his opinion. In rebuttal, claimant submitted the deposition testimony of Dr. Navarro. He was a pain management physician, and had been the treating physician. While Dr. Navarro established that claimant's condition of RSD did wax and wane, his notes from an appointment with claimant the day before the IRE recorded no objective symptoms. Dr. Navarro did say that he perceived "objective evidence of RSD five months after the IRE."

The WCJ denied the employer's modification petition. She did not reject as incredible Dr. Klein's testimony, but instead rejected his rating "because it did not include a rating for two of claimant's work injuries, i.e., the RSD and brachial plexus stretch." She also rejected the IRE rating because Dr. Navarro found claimant to exhibit objective evidence of RSD five months after the IRE.

Employer appealed, but the Board affirmed. Among other things, the Board concluded that "Dr. Klein's assignment of a zero impairment rating for claimant's RSD and brachial plexus stretch was the equivalent of rejecting these established work injuries. The Board further determined that Dr. Navarro's testimony that claimant exhibited symptoms of RSD several months after the RSD was fatal to Dr. Klein's IRE." Commonwealth Court, however, has reversed. In its view, the WCJ and Appeal Board had misconstrued the law with regard to how *Gardner*-style IRE petitions are to be adjudicated.

As a preliminary matter, the court rejected the Board's ruling "that an IRE physician must assign an impairment rating greater than zero to each work injury in order for the impairment rating to be valid." *See Barrett v. WCAB (Sunoco, Inc.)*, 987 A.2d 1280 (Pa. Commw. 2010) (appeal denied).

With regard to the critical issue, the court agreed with employer "that because an IRE takes place on one specific day, the only relevant consideration is the claimant's condition on that day." The court rejected claimant's argument as ratified by the WCJ and Board, "that an IRE will be rendered invalid by medical records showing objective signs of claimant's work injury before and after the IRE."

As far as the court was concerned, "both the Act and the *AMA Guides* anticipate and, indeed, require an impairment rating to be based on the claimant's condition on a particular date, i.e., the 'date of the IRE physician's evaluation.'" The court added: "the IRE produces a snapshot of the claimant's condition at the time of the IRE, not a survey of the claimant's work related injuries over a period of time."

The court concluded: "In sum, the IRE physician and claimant's own doctor agreed that claimant did not exhibit objective symptoms of RSD at the time of the IRE. As a result, the *AMA Guides* require a zero impairment rating for that condition …. Likewise, because there were no objective signs of a brachial plexus stretch injury at the time of the IRE, Dr. Klein was required to assign a zero impairment rating for that condition. There was no basis, then, for the Board to reject the IRE results. Because Dr. Klein's impairment rating was less than 50%, employer is entitled to a modification …."

Editor's Note I: The court, in a long footnote, essentially sets forth a practice note with regard to how an IRE may *properly* be rebutted. The court stated, among other things:

> A rebuttal IRE, proffering an impairment rating of above 50%, may be evidence most persuasive to counter the IRE done at the employer's request. However, the claimant's expert may also successfully challenge the reliability of the IRE by pinpointing errors of fact or errors in the IRE physician's application of the *AMA Guides*. This is not to say that a claimant must engage an expert to defend against an IRE; the claimant may limit his defense to cross examination of the IRE physician. The burden in an IRE proceeding rests with the employer. Here, claimant chose to present an expert, Dr. Navarro, who did not testify that claimant exhibited RSD symptoms at or near the time of Dr. Klein's IRE or that claimant was impaired by RSD, i.e., had a sensory or motor loss."

The court also reiterated the IRE precept that in such evaluations, "The issue [is] impairment, not disability."

Editor's Note II: The court sets forth some *dicta* perhaps inexactly characterizing the purpose of the *AMA Guides*. The court states as follows: "The impairment rating system was developed by the AMA to quantify the monetary loss caused by a personal injury in an objective way."

However, the authors of the *Guides* 5th Edition, state as follows:

> [T]he *Guides* is not to be used for direct financial awards nor as the sole measure of disability…
>
> Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability.

AMA Guides, 5th Ed., p. 12, 13.

Editor's Note III: Judge Leadbetter, joined by Judges McGinley and Cohn-Jubelirer, dissented. The dissent took the position that the majority had essentially usurped the fact finding process. The dissent insisted that the Supreme Court, in previously deciding the *Gardener* and *Diehl* cases, set forth a rule that in a *Gardner* style IRE petition, the IRE rating is just one aspect of the evidentiary record in the permanent impairment determination, and that other proofs can be considered by the WCJ. The dissent states, "The Majority disregards the *Diehl* holding by failing to treat the results of the IRE … as just one item of evidence subject to the WCJ's credibility determinations. The Majority instead finds employer's evidence as dispositive of the modification and review petitions, as if the IRE were requested within the 60 day period."

Case: *Mills v. WCAB (School District of Harrisburg)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1958 C.D. 2010, filed June 15, 2011, Simpson, J.

Type of Case: Appeal & Error – Appeal From WCJ to Board – Form 3817

Issue or Issues: Did the Board commit error in dismissing claimant's appeal from a WCJ decision on the grounds of untimeliness?

A claimant, Mills, sustained a work injury and was apparently paid compensation voluntarily. Some time later, she filed a review/penalty/reinstatement petition. The WCJ denied these petitions.

The WCJ denied the petitions on November 5, 2009. The Board received an envelope containing claimant's appeal on November 30, 2009. This was 25 days after the judge's decision. The employer filed a motion to quash the appeal as untimely, and the Board granted the motion. (The period in which to appeal is 20 days, and the appeal period has long been held jurisdictional. *See* Section 423 of the Act, 77 P.S. § 853.)

Claimant then appealed to Commonwealth Court, but the court affirmed. In the court's view, claimant had not demonstrated that she placed her petition in the mail within 20 days of the judge's decision. Claimant's evidence was an "envelope bearing a private postmark showing the date November 25, 2009." While this was within 20 days, it was not proof of mailing under Act,

Board rule, or precedent. The court stated, "under Section 111.3 of the Special Rules, an appeal is considered filed as of the United States Postal Service postmark on the envelope. When a party uses a private postmark, the appeal is deemed filed as of the date the Board receives the appeal." This prior ruling was announced in the precedent *Sellers v. WCAB (HMT Construction Services, Inc.)*, 713 A.2d 87 (Pa. 1998).

Claimant maintained that the outcome in her case should be different, as she allegedly possessed further proof of mailing, to wit, a U.S. Postal Service Form 3817, "Certificate of Mailing." The court rejected the proposition that Form 3817 constituted proof of mailing under the statute, rules, and precedents pertinent to workers' compensation practice.

In any event, in the present case, claimant did not use Form 3817 as it is authorized for use under the appellate rules. Under the appellate rules (specifically Rule 1514), "the form must identify the case to which it pertains …. Second, the party must include the form in the mailing, or mail it separately to the prothonotary." The reason for this is that these actions "enable the prothonotary to view the case docket number and the United States Postal Service postmark on the Form 3817 and to immediately determine whether a filing is timely."

The court concluded, "here, at the time the Board received claimant's appeal, the only evidence as to the date of mailing was the private postmark on the envelope. Claimant did not include a copy of the form in her appeal document mailed to the Board, nor did she mail it separately to the Board. Further, claimant did not identify on the Form 3817 the case to which it pertained. Under *Sellers*, the Board was required to consider the document filed on the date it was received. In this case, the Board received the document five days late. Given these circumstances, we agree with the Board's decision to quash the appeal."

Editor's Note: The court did note that it had become standard practice in compensation litigation to use Form 3817 (citing Torrey-Greenberg, PA WORKERS' COMPENSATION: LAW AND PRACTICE § 22:79 (Thomson-Reuters 3rd ed. 2008)).

Case: *O'Neill v. WCAB (News Corp. Limited)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 2203 C.D. 2010, filed June 15, 2011, Kelley, J. (ordered for publication, September 15, 2011)

Type of Case: Expert Testimony – Legal Competence of Testimony – Requirement That Expert Accept Recognized Injuries – Consideration of Testimony as a Whole – Litigation Costs

Issue or Issues: (1) Did the WCJ and Board commit error in considering employer's expert, in his opinion as to full recovery, unequivocal? (2) Did the referee err in denying reimbursement to claimant of one particular litigation cost – that is, the cost of its expert's deposition?

The claimant, O'Neill, injured her left wrist in 1993. She was paid benefits voluntarily under an NCP. The NCP reported left carpal tunnel syndrome as the injury. In later litigation, her injuries were expanded to include cumulative trauma disorder, bilateral carpal tunnel, thoracic outlet syndrome, scapholunate ligament injury, and depression. (Later, claimant stipulated that her depression had ended.)

Some years later, in 2007, employer filed for termination. Its expert was Dr. Cash. Claimant filed a cross petition for review seeking, among other things, travel expense reimbursement to secure medical treatment far from her home. (Claimant lived in north central Pennsylvania, and she would travel to the Philadelphia area for treatment with Dr. Fried.)

The WCJ granted the termination petition, having credited the opinion of Dr. Cash. The Appeal Board affirmed.

In Commonwealth Court, claimant asserted that Dr. Cash's opinion was legally incompetent, "in that he disbelieved claimant's recognized work injury diagnosis, which had been previously determined" in the first WCJ opinion referenced above. The claimant, for this proposition, cited, among others, the case *GA&FC Wagman, Inc. v. WCAB (Aucker)*, 785 A.2d 1087 (Pa. Commw. 2001).

The court, however, studied the testimony at length (reproducing blocks of the back and forth of cross examination), and rejected claimant's argument that Dr. Cash in fact disbelieved and rejected the proposition that claimant had sustained these various injuries. According to the court, "a review of Dr. Cash's testimony as a whole reveals that he did not reject, or expressly refuse to recognize, claimant's accepted thoracic outlet syndrome …." True, he exhibited some "skepticism," but "his testimony as a whole is akin to testimony this court has found [previously, in other cases] to be competent and legally sufficient to support a termination of benefits." The court, in this regard, thought the case was more like *To v. WCAB (Insaco, Inc.)*, 819 A.2d 1222 (Pa. Commw. 2003).

The court also rejected the proposition that Dr. Cash's opinion was "incompetent due to its equivocation." On the contrary, the court reviewed the testimony as a whole, and found him reasonably certain: "Our review of Dr. Cash's testimony as a whole reveals an unequivocal opinion of claimant's full recovery …."

Claimant had also appealed complaining that the WCJ should have awarded her "reimbursement for the expense of deposing Dr. Fried, in that Dr. Fried's testimony was pertinent to claimant's successful claim for mileage expenses accrued in attending her medical treatment."

However, the court rejected the proposition that the deposition truly related to the matter at issue on which claimant prevailed. *See Jones v. WCAB (Steris Corp.)*, 874 A.2d 717 (Pa. Commw. 2005). In this regard, the court pointed out that claimant prevailed on her travel expense claim "based solely upon [her] own testimony, and not that of Dr. Fried."

Case: *Sauer v. WCAB (Verizon Pennsylvania, Inc.)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1316 C.D. 2010, filed June 15, 2011, Leavitt, J.

Type of Case: Duration of Disability – Fault Discharge – Cases as Not Establishing "A Floor to Misconduct" – No Mention of *Bufford*

Issue or Issues: Did the WCJ and Board commit error in denying claimant's reinstatement petition?

A worker, Sauer, suffered an injury arising in the course of his employment on November 20, 2001. He injured his neck and shoulder while employed by Verizon as a cable splicing technician. He was paid benefits voluntarily under an NCP which accepted neck and right shoulder injuries.

During summer 2007, employer came into possession of surveillance evidence that claimant seemed to be self-employed. This was so notwithstanding the fact that claimant had returned forms indicating that he had no employment.

In August 2007, employer offered claimant light work. Claimant returned on August 16, 2007 to this modified duty with no wage loss, and employer sought suspension by filing, successfully, a notice of suspension under Section 413(c). Claimant did not challenge this action.

The next day, employer met with claimant and his union representative. At that time, he was fired on the grounds that he had misrepresented his restrictions which "violated Employer's code of business conduct."

In October 2007, claimant filed to reinstate TTD. He further sought to review the description of injury to add, among other things, depression and other physical injuries. During the pendency of the litigation, the claimant passed away. His petition was then prosecuted by his personal representative. (There was no fatal claim.)

The WCJ and Board denied the reinstatement petition. They also denied the review petition.

On appeal, claimant continued to argue that his loss of earnings "was due to his work injury, not his misconduct." Claimant pointed out that he had never returned to full duty, but only light work. In response, the court responded that it mattered not in this type of situation that the claimant had only returned to modified duty. The court stated, "claimant is entitled to a reinstatement upon his discharge, but only where the discharge is not based upon the conduct of the claimant." Here, the WCJ was persuaded that claimant was legitimately fired for misconduct.

The court also stated that it was not relevant that claimant allegedly did not know about the "code of business conduct." According to the court, "a claimant need not be aware of a work rule in order to have a discharge be considered his responsibility. Claimant was dismissed because he told the Bureau, employer, and medical professionals that he did not work and could not work because of his physical limitations. Lying about matters material to one's compensation eligibility does not require a specific work rule before a WCJ can find, as fact, that a discharge was the result of misconduct."

The claimant also argued that the conduct he engaged in, "did not rise to the level of misconduct that is needed to deny benefits." Claimant seemed to assert that the only type of disqualifying conduct (as illustrated by the precedents) was being terminated for failing a drug test, and for being fired because of being found guilty of criminal charges. The court, however, insisted, "these cases do not set a floor to misconduct; they simply provide other examples of misconduct." As far as the court was concerned, "not being candid but, rather, misrepresenting what a claimant

can do will lead an employer to pay total disability benefits to which the claimant is not entitled. It is a serious breach of trust. …[B]ecause employer proved that claimant misrepresented his abilities and the facts around his self-employment, he was not entitled to reinstatement of benefits."

Editor's Note I: As to the law, the court stated, "reinstatement will be denied if the employer can demonstrate that employment is available within the claimant's restrictions or 'would have been available but for the circumstances which merit allocation of the consequences of the discharge to the claimant such as the claimant's lack of good faith.'" The court for this proposition cited *Second Breath v. WCAB (Gurski)*, 799 A.2d 892 (Pa. Commw. 2002).

However, the controlling precedent on fault disqualification is *Bufford v. WCAB (North American Telecom)*, 2 A.3d 548 (Pa. 2010) [Pa. No. 2 MAP 2009, filed August 17, 2010, McAfferty, J.]. This case went unmentioned by the court.

The Supreme Court in that case modified its landmark *Pieper* case (1990), which was the leading precedent setting forth the basic rule of how a claimant proceeds when he or she seeks reinstatement after suspension. Under *Bufford*, the burden on claimant was seemingly lessened. Claimant still has the initial burden of moving forward. However, if employer believes that some "fault" is attendant to claimant's renewed loss of earnings, employer must prove the same. Importantly, "fault" does not include (a) discharge for unsatisfactory job performance; and (b) a voluntary quit of light duty, to accept better wages elsewhere, followed by later economic lay-off. The latter were the circumstances attendant to Mr. Bufford's case. Important also: the court has seemingly disapproved other decisional law from Commonwealth Court which created "fault" circumstances not tied to (1) the traditional principles of job availability (good faith/bad faith issues); and (2) the conduct-based affirmative defenses of the Act.

Editor's Note II: The surveillance at issue, which was found persuasive by the WCJ, consisted of reports and photographs showing claimant "doing pool and lawn maintenance, assembling a gazebo, and carrying and hauling numerous items including boxes." A further round of surveillance showed claimant "visiting private residences and performing activities consistent with a home repair business. The surveillance also documented that claimant's van had a sign on the rear doors advertising 'Worker Bee Home Improvement.'" It is to be noted, however, that claimant denied that he received any income from these activities and insisted "that he was merely helping other people."

Editor's Note III: The court also noted that the WCJ did not effectively rule on the claimant's review petition. Usually, a remand would be appropriate. Here, however, the claimant had passed away during the pendency of the litigation, and the worker's personal representative "has not explained why the decision on the review petition is still being appealed." Accordingly, no remand was necessary or appropriate.

Case: *Green v. WCAB (US Airways)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 2539 C.D. 2010, filed August 22, 2011, Butler, J.

Type of Case: Fact Finding – Erroneous Interpretation of Medical Evidence – Capricious Disregard

Issue or Issues: Did the WCJ commit error in his interpretation of the medical evidence *which he had credited*, in the course of granting an employer termination petition?

The claimant, Green, suffered an injury arising in the course of her employment on August 11, 1993. She was paid benefits voluntarily under an NCP which described the injury as a right meniscus tear. In 2000, the NCP description was amended to include a left knee injury as well.

She ultimately returned to work but, in 2008, filed for reinstatement alleging that her condition had worsened.

The WCJ denied the reinstatement petition, and the Board affirmed.

The WCJ had generally credited the testimony of claimant's expert, but she perceived the expert as stating merely that claimant's knee problems were now degenerative in condition, and not causally connected to the original, accepted work injuries.

In Commonwealth Court, claimant insisted that the judge had misinterpreted her expert's testimony. Claimant insisted that given this egregious misinterpretation, the decision was in fact not a reasoned decision as required by the law. The court, upon reviewing the WCJ reasoning, and comparing it to claimant's expert's testimony, agreed that error had been committed. However, this was not because the WCJ had failed to issue a reasoned decision. Instead, the court declared, "the fundamental problem with the WCJ's analysis below is the erroneous presumption that use of the term 'degenerative' automatically rules out a finding of causal connection to a prior work injury. Clearly, it does not."[*]

The court insisted that, "in failing to recognize the distinction between degenerative disability produced by work-related trauma and non-work-related degenerative disability, the WCJ erred by misreading Dr. Carson's testimony and misapplication of the law as a result." As foreshadowed above, the court studied the testimony in question, and concluded that no reasonable mind could have relied "upon this testimony to conclude that [Claimant's] degenerative changes were not attributable to [the] work injury."

Indeed, the judge had "capriciously disregarded" the testimony of claimant's expert. The court reiterated, "the WCJ's findings and conclusions did not have a rational basis in the evidence of record, and did not demonstrate correct application of underlying principles of substantive law. In that sense, the WCJ's mishandling of Dr. Carson's testimony did amount to a capricious disregard of competent evidence."

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[*] **Editor's Note**: The court at this point set forth a collection of cases which establish the principle that "mere reference to the 'degenerative nature' of a claimant's injury is insufficient in ruling out work-relatedness, as the Court has made the determination that a degenerative condition may be activated or accelerated by work-related trauma ….". Among other cases, the court cited, and relied upon, *City of Philadelphia v. Gaudreau*, 320 A.2d 424 (Pa. Commw. 1974) (Philadelphia Civil Service Commission case)).

In light of these failures, the court remanded for a new decision.

Editor's Note: The court pointed out a bit of inaccuracy in the claimant's appeal. In this regard, claimant argued that the Judge's decision was not "well-reasoned." The court, however, parsed this phraseology carefully, and stated, "to be clear …, there is no requirement in the law that the WCJ's decision be 'well-reasoned' in the sense that a reviewing court agrees with the reasoning offered; the requirement is that the decision be 'reasoned' within the meaning of Section 422(a) of the Act. An irony in the present case is that the judge provided reasons for her decisions, and hence the decision was reasoned in that sense. Still, the law requires that the decision be free from abuse of discretion and free from material legal error."

Case: *Lewis v. WCAB (Andy Frain Services, Inc.)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1501 C.D. 2010, filed September 22, 2011, Brobson, J.

Type of Case: Course of Employment – Abandonment of Job Duties – Violation of Positive Work Orders

Issue or Issues: Did the WCJ commit error in finding that claimant did not suffer an injury arising in the course of his employment?

Claimant, Lewis, was a new employee of a company providing services at the 2007 U.S. Golf Open. Employer, "Andy Frain Services," hired claimant to work at the event, specifically, on his first day, "to watch an open tent with a Lexus vehicle on display… His shift was 7:00 p.m. … to 7:00 a.m. …." The work started on June 9, 2007 and was to end at 7:00 a.m. on June 10, 2007.

It was during this first day of work that claimant suffered head and back injuries claimed to be work related. Although the factual presentation was ambiguous, claimant was ultimately to state that, in the very last hour or so before his shift ended in the morning, he saw lights and heard sounds at the U.S. Open grounds, but some distance away from the Lexus tent. Claimant was ultimately found by a passerby with alleged neck and back injuries, over near a stand of bleachers. Claimant could not recall how he hurt his head and back in what was apparently a fall.

In the litigation which followed, employer denied that claimant suffered an injury arising in the course of his employment. Employer witnesses stated that claimant was not authorized to be away from the tent.

Ultimately, the WCJ rejected the claimant's testimony that his job duties entailed checking out reported disturbances away from the Lexus tent. She thus concluded that claimant did not suffer an injury arising in the course of employment. Among other things, the judge stated, "I find that the claimant abandoned his position when he left his station."

In making this finding, and dismissing the claim, the judge also suggested that use of alcohol was somehow involved in the incident.

The Board affirmed, as has Commonwealth Court.

The court reviewed the testimony and findings at length, finding that the judge's findings were indeed supported by substantial evidence. With regard to the judge's legal conclusions, the court could perceive no error. Among other things, the court viewed as significant the judge's finding that the claimant had abandoned his position. In this regard, employer's witnesses had testified persuasively "that an event ambassador leaving his fixed-post would be detrimental to employer …." Similarly, the credible evidence was that "the structure on which claimant claims to have been ascending when he became injured is 'not in the area of the Lexus tent.' …. Based upon these findings of fact, the WCJ … did not err when [she] concluded that claimant failed to prove that he was in the course of his employment at the time of his injury."

Editor's Note I: It is to be noted that the judge had bifurcated the case on the agreement of the parties. The issue for bifurcation was, of course, whether the injury arose in the course of employment.

Editor's Note II: The court, in setting forth the procedural history, stated that the employer "raised the affirmative defense that Claimant's injuries were not compensable because claimant was outside the course of his employment …." Of course, this is not an "affirmative defense" at all; it is claimant's burden to show that he was in the course of employment when injured.

Editor's Note III: The WCJ also found as fact that claimant had violated a positive work order, which she stated was an additional reason for dismissing his case. The court, however, only confirmed the dismissal on the grounds that claimant had failed to prove he was in the course of his employment. According to the court, "we need not consider whether claimant violated a work rule and, if so, whether that violation justified forfeiture of benefits" under the violation of positive work order precedents. The court added a long footnote in this regard which summarized the past and contemporary precedents governing the violation of positive orders affirmative defense.

Editor's Note IV: As noted above, the judge made a miscellaneous finding in the context of discrediting the claimant's overall testimony. She stated: "On the first time he testified he stated that he did not know where he fell or where he was found. Despite a ten day admission to the hospital, he would not admit that he was treated for alcohol withdrawal." In reaction to this finding of fact, the claimant on appeal assailed the decision on the grounds, among others, that the judge's mention of alcohol use "demonstrates undue prejudice that improperly tainted the WCJ's determinations." The court rejected this analysis, replying that this was a legitimate statement that informed the court on appeal as to the basis of the WCJ's credibility determinations.

Case: *Grady v. WCAB (Lutz t/a Top of the Line Roofing & Uninsured Employers Guaranty Fund)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 16 C.D. 2011, filed August 5, 2011, Leadbetter, P.J.

Type of Case: Attorney's Fees – Violation of Act – Distinction – Employer's Non-Payment After Interim Order

Issue or Issues: Did the WCJ commit error in awarding a penalty against employer for non-payment of compensation, when it did not forthwith commence payments in response to an interim order?

The claimant, Grady, was employed as a roofer for Top of the Line Roofing. His alleged employer did not maintain a policy of workers' compensation insurance.

Claimant suffered catastrophic injuries on July 12, 2007 when he fell from a rooftop. Employer denied the claim, taking the position that the claimant was an independent contractor. In response, the claimant also named the Uninsured Employers Guaranty Fund, which became allied with Top of the Line in the defense that claimant was not an employee.

The WCJ bifurcated the issue to permit her first to decide the employee/independent contractor issue. In her July 9, 2008 interlocutory decision, she found as fact that claimant was an employee. A number of other issues remained for decision, as other matters were in dispute. These included the calculation of the claimant's average weekly wage.

In any event, six months later, on January 14, 2009, the judge issued her final decision. Among other things, the judge concluded that the employer did not present a reasonable contest after July 9, 2008, the date of the interim order noted above. Thus, she awarded attorney's fees. The Board, however, reversed. True, the employer after the interim order did not submit any evidence which would require claimant to prove his case. Indeed, both parties agreed that the claimant's medical condition was not at issue, and no medical would be submitted. With that thought in mind, the Board held that because employer "did not actually contest this matter but simply did not pay compensation benefits, we believe the WCJ erred in awarding" unreasonable contest fees.

The court affirmed the denial of fees. The judge had found as fact that, as there was no real issue left to be decided after the interim order, "the employer should have begun the payment of compensation benefits to the claimant" at that time.

In the court's view, the WCJ had committed error by "conflat[ing] with the concept of failure to pay benefits when due – a violation of the Act – with forcing the claimant to prove things which are not legitimately disputed – an unreasonable contest." The court explained, "when employer fails to pay benefits when they are due, it is subject to the imposition of penalties; when it unnecessary extends the litigation, it is subject to the payment of counsel fees. These are distinct sanctions provided by the Act for distinct types of improper behavior."

Here, employer had committed neither. The requirement to pay was not ripe until the final decision. Thus, no penalty was due. Further, "there was no basis to find that employer unnecessarily protracted the contest with a dispute that was not genuine or reasonable," as other issues remained, as noted above, for adjudication.

The court noted miscellaneously that the Uninsured Employers Guaranty Fund was not subject to penalties or fees. *See* Section 1601 of the Act, 77 P.S. § 2701. The court also noted that one of the "tradeoffs for not initiating compensation benefits and choosing to delay them … is the potential for imposition of interest …."

Case: *Pennsylvania Liquor Control Board v. WCAB (Kochanowicz)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 760 C.D. 2010, filed September 20, 2011, Pellegrini, J.

Type of Case: Course of Employment – Casualties and Disablements Compensable – Mental Stress Causing Mental Disability – Robbery at Gunpoint – S.E. PA Liquor Store

Issue or Issues: Did the WCJ commit error in concluding that claimant had been exposed to abnormal working conditions?

Claimant, Kochanowicz, was employed as the general manager for a PLCB store in Morrisville, PA. He was working the evening shift on April 28, 2008 when the store was robbed by a masked man brandishing two guns. During the robbery, the perpetrator pointed both guns at claimant, and prodded the back of his head with a gun. The perpetrator stole money from the office and the cash register, tied claimant and his coworker to chairs with duct tape, and then fled. Neither claimant nor the coworker was physically injured. Thereafter, however, claimant developed emotional conditions and was diagnosed with PTSD. His claim was contested.

In the litigation which followed, claimant admitted, among other things, that the store "was not in a 'low risk' area, had a high volume of shoplifting and had customers on an almost daily basis who would be considered to be safety risks." Also, claimant had received workplace violence training in the past from the LCB, and had received a booklet, "Things You Need to Know About Armed Robbery."

Employer, meanwhile, presented the testimony of Mr. Keller, a training specialist and SEAP coordinator. Among other things, the witness testified that robberies and fights happened in the state's liquor stores and "all managers and employees were at risk; that is why employer provided its training. Specifically, Mr. Keller testified that since 2002, employer's retail stores located in Bucks, Montgomery, Chester, Delaware, and Philadelphia Counties had suffered a total of 99 armed robberies."

The WCJ, considering all this evidence, concluded that claimant's exposure to an armed robbery was an abnormal working condition. This was so despite the incidents described above, and despite the training he had received. The Board affirmed.

Commonwealth Court, however, reversed. In its view, evidence which had been accepted by the judge as credible demonstrated that the working conditions involved in the present case were foreseeable and could have been anticipated. *See, e.g., Pa. Department of Corrections v. WCAB (Cantarella)*, 835 A.2d 860 (Pa. Commw. 2003) (state prison food service instructor could have anticipated assault by inmates because all prison employees underwent training to be able to defend themselves.)

In this case, the testimony was similar to *Cantarella, supra* and others. Among other things, the court concluded, "when determining whether a working condition is abnormal, we consider the frequency of its occurrence in the specific industry. …Employer presented uncontested evidence that there had been 99 robberies in the southeastern Pennsylvania retail stores since 2002, which

equates to 15 robberies per year, or more than one per month. …Unfortunately, given the frequency employer's stores had been robbed and the proximity of the recent incidents, robberies of liquor stores are a normal condition of retail liquor store employment in today's society …."

Judge Cohn-Jubelirer, in a skillfully drafted opinion, dissented. She was joined by Judges McGinley and Butler.

As a preliminary matter, the dissent asserted that the majority had gone beyond reviewing the facts of the case for substantial evidence, and instead focused "on evidence in the record …, not all of which was credited by the WCJ, such as employer's training materials, pamphlets, and statistics on robberies in employer's stores …, and makes its own factual findings reaching a different conclusion than that reached by the WCJ." The dissent further charged that the teaching of the Supreme Court, in its most recent mental-mental case, indicates that "this Court must look to the totality of the circumstances" to determine whether abnormal working conditions existed; this is because "there is no talismanic number that transforms an abnormal work incident into a normal one …." (Citing *RAG Cypress Emerald Resources, LP, v. WCAB (Hopton)*, 912 A.2d 1278 (Pa. 2007)).

The dissent also stressed the belief that the majority "overemphasizes the role played by the forseeability of any given workplace event to transform it into a normal working condition." As far as the dissent was concerned, "foreseeability" and "normalcy" are not precisely the same: "The fact that almost anything is foreseeable, including a robbery, because robberies do occur, does not make that event 'normal.'" In Judge Cohn-Jubelirer's view, "I am unwilling to accept the premise that simply because robberies are known to occur, they are a 'normal' condition of the workplace. Moreover, because not all robberies are identical, we should not treat them categorically as if they were. It is well settled that these matters require a highly fact-sensitive inquiry into *exactly what happened* on a case by case basis."

Case: *Warner v. WCAB (Greenleaf Service Corp.)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 25 C.D. 2011, filed September 1, 2011, Brobson, J.

Type of Case: Course of Employment – Unexplained Death at Home Office – Course of Employment

Issue or Issues: Did the WCJ commit error in concluding that the deceased worker's surviving spouse did not demonstrate that the worker's death occurred arising in the course of employment?

A worker, Warner, was employed as the international sales manager for employer, Greenleaf Service Corporation. As a professional, he worked under a somewhat loose arrangement where he would work at his employer's facility in Saegertown, Pennsylvania; but also out of his home in Fort Lee, New Jersey. He would also frequently travel for work, including out of the country.

In early 2008, he was scheduled to go on a trip to Europe, but he suffered a personal accident to his hand at home which required stitches. He contacted his supervisors and indicated he

was delaying the trip. This occurred on or about March 4, 2007. On March 8, 2007, the claimant was at home, in the employer's view, still on some level of informal (this writer's terminology) sick leave, in light of the hand injury. However, on the morning of March 8, 2007, he did speak with his supervisor, and made a number of work-related e-mails from his home computer. These ended in the late morning.

At roughly 2:00 p.m. on the same day, some hours later, the deceased's wife found him injured and unresponsive sitting in his desk chair of the home office. As it turned out, claimant had suffered a head injury and died ten days later on March 18, 2007.

The widow's claim for workers' compensation benefits was denied. At hearings, claimant's proofs were as noted above, but claimant also established that there was blood on the sidewalk at the front entry to the house. The deceased's glasses were there as well. The claimant stated that the decedent would often smoke in that general area. According to the opinion, claimant suggested that decedent was working at home on the day in question, and that he had merely taken a personal comfort-type break to smoke out front, where he apparently had fallen and struck his head. It is to be noted that decedent, when found, had a nosebleed, and claimant found bloody tissues and blood not only out front on the sidewalk in the smoking area, but also on the floor of the first level bathroom as well.

The WCJ denied the claim, after bifurcating the case to decide the course of employment issue. The judge generally found all of the witnesses to be credible. Of note, however, she found credible the testimony of employer's witness that decedent was "actually on sick leave" on the day in question. True, according to the judge, decedent may have read some e-mails or made business phone calls on the day in question, but this "does not establish that he was in the course and scope of his employment at any time on May 8, 2007 let alone at the time he was injured and died."

The Appeal Board affirmed, as has Commonwealth Court.

Of course, in a fatal claim such as this, the claimant bore the burden of proof. The court was satisfied that the findings were based on substantial evidence, and that the WCJ had not disregarded the evidence.

Of course, the court acknowledged that an injury suffered at an at-home office can potentially be compensable. This was so held in the landmark telecommuter case *Verizon Pennsylvania, Inc. v. WCAB (Alston)*, 900 A.2d 1240 (Pa. Commw. 2006). In that case, an at-home worker who had suffered an injury in the midst of a personal comfort break was found to have suffered an injury arising in the course of employment. That case, however, was distinguishable. In this case, unlike the *Alston* case, the specific circumstances surrounding the injury were unknown, as described above. The court concluded: "The record is unclear as to how decedent was injured, where decedent was injured, and at what specific time decedent was injured. Perhaps more importantly, even if the cause, location and time of decedent's injury was established, there is nothing in the record demonstrating what decedent was doing when he was injured. Claimant's proffered explanation that decedent slipped and hit his head while outside smoking a cigarette – i.e., attending to his personal comfort – or retrieving business mail is speculative at best."

Editor's Note: The court, in describing the procedure in the case states that the "claimant argues that the WCJ and the Board capriciously disregarded the evidence of record …" Of course, the Board is not the fact finder. Thus, it would only be the WCJ who purportedly "capriciously disregarded the evidence."

Case: *Habib v. WCAB (John Roth Paving Pavemasters)*
Court/Docket/Date Filed/Judge: Pa. Commw. 2612 C.D. 2010, filed August 12, 2011, Cohn Jubelirer, J. (order to report, October 20, 2011).

Type of Case: Course of Employment – Affirmative Defense – Violation of Positive Orders – Bowling Ball

Issue or Issues: Did the WCAB commit error in concluding as a matter of law that claimant's injury did not arise in the course of his employment, as it resulted from a specifically forbidden act?

Claimant, Habib, was employed as a laborer for employer John Roth Paving. He suffered a serious injury to his eye while at a worksite on May 23, 2008. During a period of downtime, the workers found a discarded bowling ball. After tossing the ball around, a challenge arose to determine if anyone could break the bowling ball with a sledge hammer. Claimant struck the bowling ball, and his foreman objected to the activity, telling him, "knock it off, or stop"; and that "he would not take Claimant to the hospital if Claimant were injured." Claimant nevertheless continued, with the result that the ball chipped, and a piece of the ball struck him in the eye, causing a total loss.

A WCJ granted benefits, but the Board, and now Commonwealth Court, reversed. The WCJ recognized employer's argument that claimant had disobeyed an employer directive, but ruled that "it was not made sufficiently in advance to be considered a positive work order under the law." The Board and court rejected this analysis. As far as they were concerned, the employer had proved all of the elements of the violation of positive orders defense. *See Johnson v. WCAB (Union Camp Corp.),* 749 A.2d 1048 (Pa. Commw. 2000).

Editor's Note: The court also rejected the claimant's assertion that the Board had illicitly overthrown the WCJ's fact-findings. The Board examined the decision at length and held that the Board had legitimately applied the law to what it perceived (this writer's analysis) to be essentially uncontested facts.

Case: *Department of Public Welfare v. WCAB (Roberts)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1677 C.D. 2010, filed June 21, 2011, Cohn Jubelirer, J. (order to report, October 14, 2011)

Type of Case: Voluntary Withdrawal from Workforce – Finding of Fact or Conclusion of Law?

Issue or Issues: Did the WCJ commit error in concluding that the claimant had not, under the totality of circumstances, withdrawn from the workforce?

Claimant, Roberts, suffered injuries to his neck and back that culminated in his disability commencing September 3, 1998. He was paid benefits voluntarily under an NCP. At the time he had over twenty years with Commonwealth employment so, though only 51 years old, was entitled to, and started receiving, a retirement pension. In addition, he was awarded SSD.

Five years passed. Then, in 2003, an IME physician cleared claimant for full-time sedentary work. Employer tendered a Notice of Ability to Return to Work form. In June 2004, the employer filed for suspension, alleging that claimant had voluntarily left the labor market as of June 15, 1999. [**Editor's Note**: This may have been the date that claimant began drawing his pension].

The suspension petition was paired with an Earning-Power-Assessment-based modification petition. The WCJ credited the medical evidence that claimant was fit for full-time sedentary work. Still, the WCJ denied the petitions both on his initial review of the case, and upon a remand by the Board. With regard to the claimant's retirement, the WCJ "concluded that Claimant did not voluntarily withdraw from the workforce because Claimant's choice to take a retirement pension was an economic decision." On the Board's second consideration of the case, it affirmed.

Commonwealth Court reversed. In its view, claimant had indeed voluntarily withdrawn from the workforce. The court applied the "totality of the circumstances" test as articulated in the precedent *City of Pittsburgh v. WCAB (Robinson)*, 4 A.3d 1130 (Pa. Commw. 2010 (appeal granted). Under that case, contrary to employer's argument, the mere fact of pension receipt did not control the outcome. Still:

> The totality of the circumstances found by the WCJ in this case show that Claimant voluntarily withdrew from the workforce. Claimant has not worked since his last work-related injury of September 3, 1998…. Soon after he stopped working for Employer, Claimant applied for and received a retirement pension from Employer and a Social Security Disability pension…. Claimant's counsel agreed that Claimant cannot work and still receive his Social Security Disability pension….

Slip op. at 9. Employer, meanwhile, had tendered claimant Form 757 but he still did not look for work. True, he stated that he was unfit for any labor, but the WCJ had credited medical evidence to the contrary. Claimant, meanwhile, "did not rebut this conclusion by showing that he was still looking for work or that his work-related injury forced him from the entire workforce.…"

Editor's Note: This case raises the issue of whether the determination of whether a claimant has voluntarily withdrawn under the "totality of the circumstances" is a factual determination or a legal conclusion. The court in the present case does not purport to reassess credibility, but does state that the seemingly undisputed factual findings support a conclusion of voluntarily withdrawal, a conclusion opposite that of the WCJ. All of this suggests that the "totality of circumstances" is a legal conclusion.

Case: *Kennett Square Specialties v. WCAB (Cruz)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 636 C.D. 2011, filed October 19, 2011, Brobson, J.

Type of Case: Evidence – Invoking Right Against Self-Incrimination – Adverse Inference – Undocumented Worker

Issue or Issues: Did the WCJ commit error in, at once, granting a workers' claim, and then suspending the award, on the grounds that, when claimant was asked whether he was either a "naturalized citizen" or an "undocumented worker," he asserted his privilege against self-incrimination?

A worker, Cruz, was employed as a truck driver in employer Kennett Square's mushroom growing business. He injured his low back and, at first, he received compensation under a NTCP. However, employer thereafter timely pulled the NTCP by issuing a NSTCP. In response, claimant filed a claim petition. In the litigation which followed, claimant was asked whether he was a naturalized citizen, and then whether he was an undocumented worker. Claimant on each occasion refused to answer, citing his privilege against self-incrimination.

The WCJ ultimately credited claimant and his medical expert, and awarded benefits, but at once suspended disability benefits the day of the accident. In this regard, the WCJ "drew an adverse inference from Claimant's refusal to answer Employer's questions regarding his immigration status." Indeed, the WCJ found as fact, based on the refusal to answer, "Claimant is not a United States citizen, and … he is not authorized to work in this country."

The Board, however, reversed the suspension. It determined that substantial evidence did not support the finding that Claimant was an undocumented alien worker. The Board ruled as a matter of law that "an adverse inference, alone, is not sufficient to support a finding of fact."

Commonwealth Court agreed, and it affirmed. Under Supreme Court doctrine, a party cannot "satisfy its burden of proof in a civil cause solely through reliance on the defendant's failure to testify." *Harmon v. Mifflin County Sch. Dist.*, 713 A.2d 620 (Pa. 1998). And, according to the court, as employer sought suspension of benefits, the burden was on employer to demonstrate Claimant's undocumented status." *Slip op.* at 5, n.3.

The court further explained (quoting an unemployment compensation case), "The inference created when a party refuses to testify is not considered evidence established by the party with the burden of proof, and therefore does not count in calculating whether a party has met its burden in introducing substantial evidence. Rather, the inference is directed to the credibility of the evidence presented by the party with the burden." *Slip op.* at 6 (citing *Harring v. UCBR*, 452 A.2d 914 (Pa. Commw. 1982)). Given this analysis, "while the WCJ did not err in drawing an adverse inference from Claimant's refusal to testify regarding his immigration status, the WCJ did err in relying solely on that adverse inference in finding that Claimant is an undocumented alien."

Editor's Note: The court in this case also cites all the leading precedents governing the law surrounding the rights of undocumented workers to workers' compensation.

Case: *Miller v. WCAB (Peoplease Corp. et al.)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 204 C.D. 2011, filed October 11, 2011, Friedman, S.J.

Type of Case: Termination Petition – Legal Competence of Expert Medical Opinion – Treating Physician – Multiple Equivocations – Claimant without Rebuttal Medical Proofs

Issue or Issues: Did the WCJ and Board commit error in terminating claimant's benefits?

Claimant, Miller, a trucking company "yard jockey," suffered an injury arising in the course of his employment on December 29, 2007. His neck was crushed in an incident when the trailer of his truck swerved. Employer paid benefits voluntarily under an NCP. The form described claimant as having suffered a "cervical disc protrusion with radiculopathy." Miller had a January 24, 2008 surgery for the condition, which afflicted him at C5-C6 and C6-C7. On June 5, 2009, his surgeon, Dr. Wagener, released him to unrestricted work, and apparently advised employer that claimant had "fully recovered."

Employer thereupon filed for termination, and produced as its witness the treating surgeon. Claimant submitted no expert rebuttals, but did testify on his own behalf that he still had shaking in his right hand and right arm. He offered his "personal opinion that he had chronic nerve damage related to the work injury." The WCJ terminated benefits, finding claimant "generally credible," but found his testimony "unpersuasive in consideration of the uncontradicted testimony of his own treating surgeon." The Board affirmed.

Commonwealth Court, however, reversed. The court studied the doctor's trial testimony and concluded that it was equivocal on the opinion as to full recovery. For example, when queried whether Mr. Miller's spine would ever "return to its pre-existing state," the doctor responded, "not necessarily … It's hard to say…." Also, the doctor seemed to suggest that claimant may still have less function that he did prior to the injury. Also, as to claimant's complaints of pain, he stated that the pain "nearly completely resolved for the most part."

Editor's Note: In summarizing the controlling precepts as to legally competent medical proofs, the court stated, "The law is clear that an employer's expert need not say 'magic words' in providing his opinion that a claimant's work injury is fully resolved such that he can return to work…. However, medical testimony is equivocal if it is vague, leaves doubt, is less than positive or is based upon possibilities…." (Citations omitted).

With regard to the law of the termination petition, the court stated, "An employer seeking a termination of benefits bears the burden of proving either that the claimant's disability has ceased or that any current disability arises from a cause unrelated to the claimant's work injury. *Campbell v. WCAB (Antietam Valley Animal Hospital)*, 705 A.2d 503 … (Pa. Cmwlth. 1998). An employer meets this burden when its medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury." *Udvari v. WCAB (USAir, Inc.), …*705 A.2d 1290 … (Pa. 1997). Further, an employer's burden of proof in a termination

proceeding is considerable, and it never shifts to the claimant, whose disability is presumed to continue until proven otherwise. *Marks v. WCAB (Dana Corp.)*, 898 A.2d 689 (Pa. Cmwlth. 2006)).”

> **Editor’s Note**: The following case was originally reported on December 16, 2010, but then withdrawn when the court granted reconsideration. It was republished in basically the same form on July 26, 2011.

Case: *City of Philadelphia v. WCAB (Butler)*
Court/Docket/Date Filed/Judge: Pa. Commw. No. 1245 C.D. 2009, filed December 16, 2010, Leavitt, J., *opinion withdrawn*, republished, filed July 26, 2011.

Type of Case: Proceedings to Secure Compensation – Acceptance and Denial – Burden on Termination Petition – Appellate Procedure/Appellate Decision Making; Prior Unreported Panel Decision in Same Case Overthrown

Issue or Issues: Was an employer which filed to terminate a claimant’s benefits, based upon medical evidence which supported full recovery at a date and time *prior* to the issuance of the NCP, barred necessarily from such petitioning?

The claimant, Butler, was employed as a probation officer for employer, City of Philadelphia. She suffered a work injury on September 28, 1995. In this regard, claimant was in a car accident and had numerous sprains and bruises. She treated with Dr. Foster.

Roughly three weeks later, on October 19, 1995, Dr. Foster examined the claimant and found her to be fully recovered, and capable of going back to work full duty, full time.

After the accident, the employer did not issue an NCP immediately. Instead, it simply continued to pay claimant her salary under Philadelphia Civil Service Regulation 32, known elsewhere as salary continuation under the Heart & Lung Act.

Five weeks after the accident, employer issued an NCP noting that the work injury was bruises to the head, back and neck. Employer, in the “remarks” section of the NCP, stated that claimant was receiving salary continuation in lieu of comp.

In December 1995, employer filed to terminate. On two occasions, the WCJ was convinced that claimant was fully recovered and, crediting Dr. Foster’s opinion, granted termination. Ultimately, the case reached Commonwealth Court in 2005. Commonwealth Court, at *that time* reversed and remanded, holding that employer’s termination petition was non-cognizable, as “employer was required to prove that claimant’s work-related disability had resolved some time *after* the date the NCP was issued, *i.e.,* November 7, 1995.” As far as the Commonwealth Court was concerned, employer’s evidence, that is, the opinion of Dr. Foster, “that claimant’s work-related disability had resolved prior to the date of the NCP would not support a termination of benefits.”

On a third visitation of the case, the WCJ, following the remand order, merely *suspended* benefits, finding claimant could have returned to work full duty. The WCJ suspended benefits as of

September 25, 1997. (Presumably, job availability had been shown as of such date; the court added that this date was picked "apparently because it was a date that fell after the issuance of the NCP on November 7, 1995.").

The Board, however, reversed. In the Board's view, employer, even to secure suspension, "was required to show that claimant's physical condition improved after employer issued the NCP." The Board so reasoned even though "the effective date of the suspension post-dated issuance of the NCP."

Commonwealth Court, however, reversed.[1] It *disavowed* its prior 2005 ruling, and held that the employer could, indeed, secure termination with medical evidence which existed prior to the technical act of issuing the NCP. In so holding, the court fully acknowledged Supreme Court precedent to the effect "that an employer is bound by the contents of its own NCP." That Supreme Court principle also provides that, as a result, the "employer cannot seek a termination on the basis that the injury, described in the NCP, and for which the employer accepted liability, was not work-related." *Beissel v. WCAB (John Wannamaker, Inc.)*, 465 A.2d 969 (Pa. 1983).

The court, however, rejected the proposition that *Beissel* applied in the present case. In *Beissel*, the employer was trying to assert, in filing for termination, that claimant had never suffered a disabling work injury in the first place. Employer in that case was trying to "repudiate the contents of its NCP." Employer in the present case was trying to do no such thing: "Rather, it sought only to prove that claimant had fully recovered from the work injury described in the NCP."

According to the court, "the date of an NCP does not preclude an employer from obtaining a termination, suspension or modification by proving that the claimant's disability had resolved before the issuance of the NCP. …"

In the court's view, to accept the idea that an employer could never seek such relief when it had issued an NCP, based upon evidence which preexisted the technical filing date, would exalt form over substance. In the court's view: "It does not advance sound policy, or any provision of the Act, to have the date of an NCP's issuance stand as a barrier to a termination of benefits for a claimant who has fully recovered."

This was so for three reasons: (1) First, such a holding exalts form over substance. (2) Second, the penalty for a late NCP should not be refusal of relief from liability but a penalty, as provided by law, for such untimely filing. At no place in the Act, the court underscored, is there provision that "the failure to issue a timely NCP can result in a permanent award of disability benefits, notwithstanding a claimant's full recovery." (3) Third, good public policy would be defeated by the rule advanced by claimant: "Preventing an employer from proving a claimant's recovery prior to the date an NCP issued will discourage employers from issuing NCPs. There are times where a work injury will have such a short duration that it would be impossible to issue an NCP before the claimant has recovered. If the employer is punished for issuing an NCP in this circumstance, then the employer has no reason to issue one…" The result would be obliging more claimants to pursue benefits by initiating litigation.

[1] In its second visitation of the case, the court additionally ordered a remand.

Editor's Note I: In a wry comment, the court remarked: "Employer here has paid a heavy price for issuing its NCP, *i.e.*, paying claimant workers' compensation benefits for 15 years after she fully recovered."

Editor's Note II: As noted above, the court foreswore its 2005 panel holding. (The precedent here being summarized is a product of the court *en banc*.) According to the court, "This Court acting *en banc* has the power to reverse the holding of a panel .…"

Your Choice of Dates

Philadelphia —
Wed., Nov. 16, 2011
Wed., Jan. 25, 2012 or
Wed., May 16, 2012
The CLE Conference Center, Wanamaker Building
10th Floor, Ste. 1010, Juniper St. entrance
(between 13th & Broad Sts., opposite City Hall)
(with afternoon anatomy lab at Jefferson Medical College)

8:30 am to 4:00 pm; check-in begins at 8:00 am

Faculty

Professor Samuel D. Hodge, Jr.

Sam Hodge, a skilled litigator, is a professor at Temple University where he chairs the Legal Studies Department. Professor Hodge's second area of educational pursuits is anatomy which he teaches at Temple's Law School to both J.D. candidates and in the Masters Program in Trial Advocacy. He has received multiple teaching awards and his interactive teaching style has been the subject of stories in the New York Times, the Philadelphia Daily News, the Chronicle of Higher Education, National Public Radio and television. Professor Hodge's research focus is in medicine and the relationship of trauma to personal injury. His most recent book, Anatomy for Litigators, was published by ALI-ABA, the educational arm of the America Bar Association. This text was the 2008 recipient of the Award for Professional Excellence in the area of legal publications, from the international Association for Continuing Legal Education.

Hector Lopez, MD

Dr. Lopez is the Co-Director of the Human Form and Development course for first-year medical students at Jefferson Medical College. He is responsible for all aspects of the dissection room experience. An Assistant Professor in the Division of Anatomy, Department of Pathology, Anatomy and Cell Biology, Jefferson Medical College, his responsibilities include the anatomical sciences education of medical and health professions students; he provides courses in human pathology and supervises laboratories in neuroanatomy, gross anatomy and cross-sectional anatomy.

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10:30 – 10:45 *Break*

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8:30 - 10:00	Building Blocks of Human Anatomy and the Systems of the Body
10:00 - 10:30	The Spine (begun)
10:30 - 10:45	Break
10:45 - 12:15	The Spine (cont'd)
12:15 - 12:45	Lunch (included in tuition)
12:45 - 1:15	The Spine (concluded)
1:15 - 2:15	Diagnostic Tests
2:15 - 2:30	Break
2:30 - 3:30	The Upper Extremity

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Sam Hodge, a skilled litigator, is a professor at Temple University where he chairs the Legal Studies Department. Professor Hodge's second area of educational pursuits is anatomy which he teaches at Temple's Law School to both J.D. candidates and in the Masters Program in Trial Advocacy. He has received multiple teaching awards and his interactive teaching style has been the subject of stories in the *New York Times*, the *Philadelphia Daily News*, the *Chronicle of Higher Education*, National Public Radio and television. Professor Hodge's research focus is in medicine and the relationship of trauma to personal injury. His most recent book, *Anatomy for Litigators*, was published by ALI-ABA, the educational arm of the America Bar Association. This text was the 2008 recipient of the Award for Professional Excellence in the area of legal publications, from the international Association for Continuing Legal Education.

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David L. Lawrence Convention Center
1000 Ft. Duquesne Blvd.
8:30 am to 12:45 pm; check-in begins at 8:00 am

Philadelphia — You Choose
The CLE Conference Center, Wanamaker Building
10th Floor, Ste. 1010, Juniper St. entrance
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❒ **Thurs., May 17, 2012 — Afternoon**
12:30 pm to 4:45 pm; check-in begins at noon

or

❒ **Fri., May 18, 2012 — Morning**
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Reading
Berks County Bar Assn., 544 Court Street

Stroudsburg
Monroe Co. Bar Center, 913 Main St.

Uniontown
Penn State University Fayette Campus
Eberly Corporate Training Center, Route 119 North

Warren
Warren Library Assn., 205 Market St.

Washington
Washington Co. Bar Assn., 119 S. College St.

Wilkes-Barre
Kings College
Sheehy-Farmer Campus Center, Lane's Lane

York
York College of PA, Business Admin. Bldg.

Workers' Compensation Practice & Procedure 2012

Locations

❒ **Camp HIll • May 14** ❒ **Pittsburgh • May 4**
❒ **Philadelphia** ❒ **May 17** ❒ **May 18**❒
❒ **Simulcast • May 18**
Site ______________________________

Tuition *(includes course book)*

*Early**		*Standard*
$349 ❒	**Member — Pa., or any co. bar assn.**	❒ **$374**
$299 ❒	**Member admitted after 1/1/08**	❒ **$324**
$399 ❒	Nonmember	❒ $424
$199 ❒	Paralegals attending with an atty.	❒ $224
$249 ❒	Paralegals attending alone	❒ $274
$175 ❒	Judges and judicial law clerks (including WCJs, members & employees of the WCAB, the WC Bureau & Dept. of Labor & Industry)	❒ $200
$150 ❒	Judges and judicial law clerks (admitted after 1/1/08) (including WCJs, members & employees of the WCAB, the WC Bureau & Dept. of Labor & Industry)	❒ $175

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Mechanicsburg, PA
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Anatomy, Injuries and Surgeries

A plain-English seminar designed to improve your ability to evaluate, prosecute or defend back, knee, hip, shoulder and hand injury cases persuasively, and with confidence.

Knowing how to successfully present or refute claims of medical injuries can make an enormous difference in the size of an award or negotiated settlement.

Sam Hodge returns with a new, exciting program that pairs anatomy/legal professor with a skilled litigator to make practical, case-clarifying sense of the causes, trends, diagnosis and treatment of the most common disorders of the back, knee, hip, shoulder, elbow and wrist – the parts of the body most susceptible to injury.

This new course breaks down the body into neat, easy-to-understand segments: the spine, upper extremities, and lower extremities. Each segment will start with an anatomical orientation, followed by videos of actual surgeries, and will conclude with a discussion of injury issues, causation and recovery.

You will leave the program with a solid understanding of common diagnoses and treatment techniques, improving your ability to plan and manage cases involving injury claims.

Time	Session
8:00 - 8:25	*Registration*
8:25 - 8:30	*Welcome & Introduction*
8:30 - 9:30	The Spine Parts of the spine, spinal cord and nerve roots; which parts are more prone to injury; spinal surgeries; laminectomy, discectomy, fusion and more
9:30 - 9:45	Specific Spine Injury Questions Sam is questioned about injury issues, causation, recovery and more
9:45 - 10:00	*Break*
10:00 - 11:00	The Spine, continued
11:00 - 11:15	Specific Spine Injury Questions
11:15 - 12:00	Upper Extremities Causes, trends, diagnosis and treatment of the most common disorders and injuries to shoulder, elbow, hand and wrist, what are the most common surgeries and how are they done?
12:00 - 12:15	Specific Upper Extremities Questions Sam is questioned about injury issues, causation, recovery and more
12:15 - 1:00	*Lunch (included in your tuition)*
1:00 - 2:00	Upper Extremities, continued
2:00 - 2:15	Specific Upper Extremities Questions
2:15 - 2:30	*Break*
2:30 - 3:30	Lower Extremities The anatomy of the knee and why it's so frequently injured; the most common types of knee surgeries and how they're done
3:30 - 3:45	Specific Lower Extremities and General Questions Sam is questioned about injury issues, causation, recovery and more

Instructors

Prof. Samuel D. Hodge, Jr.
Sam Hodge, a skilled litigator, is a professor at Temple University where he chairs the Legal Studies Department. Professor Hodge's second area of educational pursuits is anatomy which he teaches at Temple's Law School to both J.D. candidates and in the Masters Program in Trial Advocacy. He has received multiple teaching awards and his interactive teaching style has been the subject of stories in newspapers and on TV. Professor Hodge's research focus is in medicine and the relationship of trauma to personal injury.

Lisa M. Benzie-Woodburn, Esq.
Ms. Woodburn handles workers' compensation and civil litigation matters for the firm, Angino & Rovner, in Harrisburg. A former counselor and legal advocate for victims of sexual assault and violent crimes, she now focuses her practice on premises liability, medical malpractice, professional negligence and nursing home negligence. She was named to the Million Dollar Advocates Forum and is a Pennsylvania Rising Star. *(speaking in Mechanicsburg)*

Harris T. Bock, Esq.
Mr. Bock is a respected and recognized leader in the ADR field. His practice is devoted exclusively to serving as arbitrator, mediator, factfinder or hearing officer. His areas of expertise include: business, personal injury, professional malpractice, employment, insurance, partnership, law firm and equitable distribution disputes. He is currently Special Hearing Officer for the Commonwealth Court of Pennsylvania. *(speaking in Philadelphia)*

Vincent J. Quatrini, Jr., Esq.
Mr. Quatrini is a founding partner at QuatriniRafferty in Greensburg. He represents injured workers, exclusively. Mr. Quatrini has been a co-author of PBI's Workers Compensation Practice and Procedure course since 1989. In 2001, Mr. Quatrini revived the Medicine for Lawyers series and has been a moderator for the programs in that series. *(speaking in Pittsburgh)*

Here is just some of what you'll learn:

- Why do injuries to the upper extremities account for the longest absences from work?
- Is all carpal tunnel syndrome work related, and if not, why is it so universally considered to be?
- Why is the shoulder so complicated?
- What is the anatomy of the knee and why is it so frequently injured?
- What are the most common knee and shoulder surgeries?
- What is the real extent to which degenerative disc disease must limit a person's ability to work and recreate?

And much more!

Medical School for Lawyers Certificate
Earn 24 CLE credits in three years from courses in our Medicine for Lawyers and Anatomy for Lawyers series, and we will send you a handsome certificate suitable for framing. Contact Stacey Thomas for more information (800-932-4637, ext. 2298 or email sthomas@pbi.org).

6 SUBSTANTIVE

Dates & Locations

8:25 am to 3:45 pm; check-in begins at 8:00 am

Philadelphia • Mon., Apr. 30, 2012

The CLE Conference Center, Wanamaker Building
10th Floor, Ste. 1010, Juniper St. entrance
(between 13th & Broad Sts., opposite City Hall)

Pittsburgh • Mon., Apr. 16, 2012

PBI Professional Development Conference Center
Heinz 57 Center, 339 Sixth Ave., 7th Fl.

Live Webcast • Mon., Apr. 23, 2012*

Go to webcasts.pbi.org to register.

Mechanicsburg • Mon., Apr. 23, 2012

PBI Conference Center
5080 Ritter Rd., Rossmoyne Exit, Rt. 15

*About Webcast credits

Because of the CLE board's 4-credit distance education limit, you will be able to use no more than 4 substantive CLE credits for Pennsylvania CLE purposes.

Simulcast • Mon., April 23, 2012

Allentown
Bar Assn. of Lehigh Co., 1114 Walnut St.

Easton
Colonial I.U. 20, 6 Danforth Drive

Erie
Erie County Bar Assn., 302 W. Ninth Street

Johnstown
Univ. of Pittsburgh - Johnstown
Living/Learning Ctr.
450 Schoolhouse Rd.

Lebanon
Lebanon Co. Municipal, Bldg., 400 S. 8th St.

Meadville
Economic Progress Alliance Conference Ctr.
William J. Douglass Jr. Corporate Conf. Ctr.
764 Bessemer St.

Mill Hall
Clinton Co. Cooperative Ext.
Resource/Education Ctr., 47 Cooperation Lane

New Castle
Penn State Coop. Ext. of Lawrence Co.
Lawrence Co. Cthse., 430 Court St., 3rd Fl.

Stroudsburg
Monroe Co. Bar Center, 913 Main St.

Uniontown
Penn State University Fayette Campus
Eberly Corporate Training Center
Route 119 North

Warren
Warren Library Assn., 205 Market St.

Wilkes-Barre
Kings College
Sheehy-Farmer Campus Center
Lane's Lane

York
York College of PA, Business Admin. Bldg.

PBI's Medicine for Lawyers classes earn top marks!

Should be required seminar for all plaintiffs' personal injury and defense/insurance lawyers.

Medicine for dummies (I love it)!

This is the best CLE I have ever attended in ten years of practicing law.

I am 22 years in practice and still learned a lot.

Clear, understandable, interesting and relevant.

Translates anatomy into English.

Great illustrations

Perfect for:

- ✓ Personal Injury Plaintiff's and Defense Counsel
- ✓ Workers' Comp Counsel
- ✓ Workers' Comp Judges
- ✓ Medical Malpractice Counsel
- ✓ Social Security ALJs
- ✓ Paralegals (special tuition fee!)
- ✓ Anyone who needs a better grasp of medical issues

Anatomy, Injuries and Surgeries

9267

Locations

❒ **Philadelphia** April 30 ❒ **Pittsburgh** April 16 ❒ **Mechanicburg** April 23

Simulcast • April 23, 2012

❒ Allentown ❒ Easton ❒ Erie ❒ Lebanon
❒ Meadville ❒ Mill Hall ❒ New Castle ❒ Stroudsburg
❒ Uniontown ❒ Warren ❒ Wilkes-Barre ❒ York

Tuition *(includes course book and lunch)*

*Early**			*Standard*
$279	❒	**Member — Pa., or any co. bar assn.**	❒ **$304**
$259	❒	**Member admitted after 1/1/08**	❒ **$284**
$299	❒	Nonmember	❒ $324
$99	❒	Paralegals attending with an atty.	❒ $124
$129	❒	Paralegals attending alone	❒ $154
$140	❒	Judges and judicial law clerks	❒ $165
$130	❒	Judges and judicial law clerks (admitted after 1/1/08)	❒ $155

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PENNSYLVANIA BAR INSTITUTE
Continuing Education Arm of the Pennsylvania Bar Association
BRINGING EXCELLENCE TO CLE

Workers' Compensation Issues Involving the Larger Employer

The course will provide valuable insight into the unique aspects of Workers' Compensation from the perspective of the large employer. The program will address the challenges involved with a multiple location, multiple jurisdiction employer with a large and diverse workforce, especially in a health care provider setting; as well as the considerations regarding identifying authority in a large employer setting. Panelists will debate the lack of medical insurance coverage for American workers, and its implication in providing adequate medical care to the injured worker.

PBI is pleased to cosponsor this program with the Philadelphia Bar Association Workers' Compensation Section.

Expert practitioners will also tackle the following issues, among others:

- Financial considerations, such as the self-insured or large deductible program,
- The changing workforce and issues involving violence in the workplace
- The obesity epidemic and an aging employee population
- The impact of social media and the 24-hour access to information to all employers
- Highlight recent case law regarding the use of social media in hiring and firing practices
- Offer advice on drafting and enforcing a social media policy in the workplace.

Dates & Locations

12:30 pm to 3:45 pm; check-in and lunch begin at 12:00 pm

Philadelphia • Thu., Mar. 1, 2012

The CLE Conference Center, Wanamaker Building
10th Floor, Ste. 1010, Juniper St. entrance
(between 13th & Broad Sts., opposite City Hall)

Pittsburgh • Wed., Mar. 9, 2012

PBI Professional Development Conference Center
Heinz 57 Center, 339 Sixth Avenue, Suite 760

Live Webcast • Thu., Mar. 1, 2012

Go to webcasts.pbi.org to register.

Simulcast • Thu., Mar. 1, 2012

Locations to be announced.

Course Planners

Grace A. Sweeney, Esquire
Berman Voss, P.C., Philadelphia
Ms. Sweeney received her Doctor of Jurisprudence from Villanova University School of Law in 2003. She received her Bachelor of Science in Nursing from West Chester University. Ms. Sweeney concentrates her practice in workers' compensation defense litigation. She is actively involved in the Philadelphia Bar Association and has served in various appointments, including Secretary of the Workers' Compensation Section in 2008, Section Representative to the Board of Governors in 2009 and Co-Chair for the Workers' Compensation Section for 2011.

Mary S. Kohnke-Wagner, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia
Ms. Wagner represents employers in workers' compensation litigation. She handles matters for trucking companies, nursing homes, hospitals, retailers, food service companies and multiple other employers. She concentrates on cases with complex medical issues. In addition to holding a Juris Doctorate, she also holds a Master of Science in Nursing and Bachelor of Science in Nursing. Ms. Wagner lectures on workers' compensation and medical-legal issues.

Faculty

Honorable Alfred Benedict[2]
Workers' Compensation Office of Adjudication, New Castle

Honorable Martin Burman[1]
Workers' Compensation Office of Adjudication, Malvern

Richard Graham[1, 2]
Corporate Director, Insurance & Risk Control
Crozer-Keystone Health System, North Campus, Chester

Mary S. Kohnke-Wagner, Esquire[1, 2]
Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia

Amit Shah, Esquire[1]
Martin Banks, Philadelphia

Glenn Sinko, Esquire[2]
Sinko Zimmerman LLC, Seven Fields

Additional faculty may be added.
Speaking in: [1]Philadelphia; [2]Pittsburgh

3 SUBSTANTIVE

Workers' Compensation Issues Involving the Larger Employer

9267

❒ **Philadelphia** • Thurs., March 1, 2012
❒ **Pittsburgh** • Wed., March 9, 2012

Tuition *(includes course book and lunch)*

*Early**		*Standard*
$229 ❒	**Member — Pa., or any co. bar assn.**	❒ **$254**
$209 ❒	**Member admitted after 1/1/08**	❒ **$234**
$249 ❒	Nonmember	❒ **$274**
$99 ❒	Paralegals attending with an atty.	❒ **$124**
$129 ❒	Paralegals attending alone	❒ **$154**
$115 ❒	Judges & judicial law clerks (including workers' compensation judges), and members or employees of the WCAB and the Workers' Compensation Bureau	❒ **$140**
$105 ❒	Judges & judicial law clerks (including workers' compensation judges), and members or employees of the WCAB and the Workers' Compensation Bureau (admitted after 1/1/08)	❒ **$130**
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