



# News & Notes

## “PATHS” Your No-Fee Safety Training Resource

The Pennsylvania Bureau of Workers’ Compensation, Health and Safety Division’s PATHS (PA Training for Health and Safety) continues to grow in popularity, as more and more companies and individuals realize the value and effectiveness of this FREE workplace safety resource.

PATHS offers 208 topics including Active Shooter, Dealing with Angry People, Opioid Addiction and the National Safety Councils’ Defensive Driving Course. Employers and employees from 48 states and nine countries have taken advantage of this program. In 2017, we conducted 429 training sessions for 35,920 employees.

You too can take advantage of this FREE resource by visiting PATHS at [www.dli.pa.gov/PATHS](http://www.dli.pa.gov/PATHS) or by contacting the Health and Safety Division by phone at 717-772-1635. You can also reach us via email at [RA-LI-BWC-PATHS@pa.gov](mailto:RA-LI-BWC-PATHS@pa.gov).

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### Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving five percent workers’ compensation premium discounts as of Dec. 22, 2017:

**11,883 committees covering 1,524,894 employees**

Cumulative grand total of employer savings:  
**\$681,545,514**

## A Message From the Directors

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

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

- Scott G. Weiant, Director – Bureau of Workers’ Compensation
- Elizabeth A. Crum, Director – Workers’ Compensation Office of Adjudication

<i>Employer Information Services</i> 717-772-3702	<i>Claims Information Services</i> toll free inside PA: 800-482-2383 local & outside PA: 717-772-4447	<i>Only People with Hearing Loss</i> toll free inside PA TTY: 800-362-4228 local & outside PA TTY: 717-772-4991	<i>Email</i> ra-li-bwc-helpline@pa.gov
<i>Auxiliary aids and services are available upon request to individuals with disabilities. Equal Opportunity Employer/Program</i>			

## Meet the New Acting Secretary of L&I



On Sept. 5, 2017, W. Gerard "Jerry" Oleksiak became the acting secretary of the Pennsylvania Department of Labor & Industry.

Before joining L&I, Jerry most recently served as president of the Pennsylvania State Education Association (PSEA) – the largest professional association in the commonwealth. Prior to becoming president in 2015, he served as PSEA vice president, treasurer, and as a member of the board of directors.

Jerry is especially proud of the more than three decades he spent as a classroom teacher, most of that time as a special education teacher at the Upper Merion Area School District in King of Prussia.

He also served as president of the Upper Merion Area Education Association (UMAEA).

Throughout his career, Jerry has collaborated with employers, employees, and community groups to create partnerships that benefit all stakeholders.

Born and raised in Philadelphia, Jerry graduated from Saint Joseph's University in Philadelphia, where he earned a bachelor's degree in international relations and a teaching certificate in social studies in 1974. Several years later, Jerry earned a master's degree in education from Saint Joseph's, and worked to earn his special education certification through LaSalle University.

Jerry lives in Glenside, Pa. with his wife. They have been married for more than 40 years and have three children and two grandchildren.

## 2017 Governor's Award for Safety Excellence Winners



Governor Tom Wolf recently announced the three employers who were honored last year with a Governor's Award for Safety Excellence. The Governor's Award for Safety Excellence recognizes employers that have achieved the highest standards in workplace safety. Any Pennsylvania employer is eligible for the Governor's Award for Safety Excellence. Information and criteria used to determine finalists include workplace injuries/illnesses vs. industry standards, as well as innovation and strategic development of safety policy and approaches.

The application process for the Governor's Award for Safety Excellence is highly competitive. The award recognizes successful employer-employee safety programs that produce tangible safety improvements.

The three 2017 Governor's Award for Safety Excellence winners are:

- Advanced Cast Products, Inc.
- Environmental Waste Minimization, Inc.
- RETTEW

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

Paying for college is hard. Paying for college when one or both of your parents have been seriously or fatally injured in a workplace accident seems nearly impossible. For more than 20 years, Kids' Chance of Pennsylvania, Inc. (Kids' Chance of PA) has helped to lessen the impact of these high costs by providing scholarships to the children of these families.

Since its inception in 1997 Kids' Chance of PA has awarded scholarships amounting to over \$1.7 million, and that number continues to grow. During the 2017-2018 academic year, 53 scholarships were awarded to students, totaling \$175,000. These scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, and donors.

In addition to monetary assistance, the Kids' Chance national organization has a Planning for College program that helps eligible students connect to the

right state organization. Students of any age can register, and when the time is right to apply for college, they will be connected to their state organizations to submit a scholarship application. In 2015, the inaugural year of the program, there were 105 submissions. In 2016, the program received 313 submissions. We want to see more of these submissions come from Pennsylvania this year!

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

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

## Workers' Compensation Advisory Council Recognizes Employees



Harold V. Fergus, Jr., Esq. retired in 2009 after serving as a Commissioner of the Pennsylvania Workers' Compensation Appeal Board for almost 30 years. Commissioner Fergus was a recognized expert in the field of workers' compensation law and pioneered many of the practices routinely used by the board today, particularly in the areas of guardianship, review of disfigurement awards and supersedeas practice. In recognition of his devotion to the betterment of workers' compensation practice in Pennsylvania, Commissioner Fergus received the Irvin R. Stander Award from the Pennsylvania Bar Association's Workers' Compensation Section. Commissioner Fergus passed away on August 28, 2016. His ceaseless efforts and invaluable contributions on behalf of the workers and employers of the Commonwealth of Pennsylvania were recognized by the Pennsylvania Workers' Compensation Advisory Council on Nov. 14, 2017. This resolution was accepted by his son, Matthew C. Fergus, Esq.



Donna McQuiggan retired from her position as the Administrative Officer of the Workers' Compensation Appeal Board after serving the people of the commonwealth for over 42 years. Ms. McQuiggan supervised the professional office staff, established policy and, in her own words, managed "everything from soup to nuts" to ensure that appeals were always processed, orders issued and opinions published. Her ceaseless efforts, innovative leadership and enduring dedication to the appeal board were recognized by the Pennsylvania Workers' Compensation Advisory Council on Sept. 26, 2017.

## Labor & Industry Employees Receive National Workers' Compensation Award

The Department of Labor & Industry announced that two workers' compensation employees have been awarded the 2017 NextGen Award by the International Association of Industrial Accident Board and Commissions (IAIABC).

Stevi Leech, management analyst for the Workers' Compensation Office of Adjudication (WCOA), and Harte Pricer, electronic data interchange (EDI) manager for the Bureau of Workers' Compensation, were among the award's 11 recipients.

"Labor & Industry is proud of Stevi and Harte and all of their accomplishments in Pennsylvania's workers' compensation community," said Acting L&I Secretary Jerry Oleksiak. "We are grateful for their hard work and innovative ideas, which continually improve and enhance the workers' compensation system for all of our customers. Congratulations to Stevi and Harte on this very well-deserved award."

The award is given to individuals under the age of 40 who are achieving success in the workers' compensation community, to recognize new talent and leadership within the industry.



Stevi Leech launched and manages the WCOA Resource Center, which provides support to internal staff and external stakeholders who have WCOA-related inquiries. The WCOA Resource Center is responsible for developing the education and training materials for staff, attorneys, and law firms on WCOA-related Workers' Compensation Automation and Integration System (WCAIS) use, and for designing and testing WCAIS enhancements. Leech has served on the Governor's Innovation Team, graduated from the Emerging Leaders Program, and continues to work closely with developers and stakeholders on WCAIS. She lives in Johnstown.

"It is quite a distinction to be recognized by the IAIABC, a prestigious association that is devoted to advancing the workers' compensation industry and community," Leech said. "At WCOA, we are proud of the work we do in serving the constituents of Pennsylvania. I am honored to accept this accolade on behalf of the Commonwealth of Pennsylvania, Labor & Industry, and our diligent team of judges and staff."



Harte Pricer is the manager of the EDI section of the Claims Management Division of the Bureau of Workers' Compensation. Pricer has been a major contributor to the development, testing, and implementation of program area requirements for WCAIS system improvements. She led the team that designed the EDI Forms Solution program that launched in September 2016, a one-of-a-kind system that automatically generates forms triggered by various EDI transactions, saving stakeholders time and money by eliminating approximately 300,000 paper forms submitted to the bureau annually. Pricer lives in Harrisburg.

"This award means a great deal to me because I am very proud of the service we are providing to the workers' compensation community in Pennsylvania," Pricer said. "This recognition will allow us to make a positive impact on the national workers' compensation scene, and grant us additional tools to enhance the Pennsylvania workers' compensation system to better serve the community."

The International Association of Industrial Accident Boards and Commissions is a not-for-profit association representing government agencies charged with the administration of workers' compensation systems as well as other workers' compensation professionals in the private sector.

## ▼ **17<sup>th</sup> Annual Pennsylvania Workers' Compensation Conference**

The 17th Annual Pennsylvania Workers' Compensation Conference will be held on **June 7-8, 2018**, at the Hershey Lodge and Convention Center, Hershey, Pennsylvania.

This year's event will feature a keynote address on medical marijuana. Come to this exceptional and popular conference for updates on significant and timely topics such as:

60 Tips in 60 Minutes  
Opioid Use: Where Are We Now?  
Workers' Compensation Medical Marijuana – Medical  
The Gig Economy: Workers' Compensation and Liability Consideration  
Workers' Compensation Medical Marijuana – Legal/HR  
Opioid Use: The Road to Recovery  
Workers' Compensation Jeopardy

Nearly 1,400 people registered to attend the 2017 conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor and others. Attendance to this event promises a sharing of practical, useful and timely information, and provides attendees with the unique opportunity to network with other workers' compensation professionals while renewing valuable contacts. Attendees will also have the opportunity to visit with 125 vendors and learn about their workers' compensation-related goods and services.

[Click Here to View Complete Details](#)

**Questions?**

**800-482-2383 (Toll Free Inside PA)**  
**717-772-4447 (Local and Outside PA)**  
**Email: [RA-LI-BWC-Helpline@pa.gov](mailto:RA-LI-BWC-Helpline@pa.gov)**

## ▼ **SAVE THE DATE!!! Pennsylvania Governor's Occupational Safety and Health Conference**

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

The Pennsylvania Governor's Occupational Safety and Health Conference (GOSH) provides invaluable resources to cultivate safe workplaces

**October 29-30, 2018  
Hershey Lodge and Convention  
Center**

and encourage the use of best safety practices to prevent workplace injury and death.

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

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

## ▼ **Workers' Compensation Appeal Board Moves Office Location**

The Workers' Compensation Appeal Board (WCAB) Central Office has moved from their location at Capitol Associates Building, 901 N. 7th Street, 3rd Floor South, Harrisburg, PA 17102-1412 to their new office space located at the OLCAM Building, 1171 S. Cameron Street, Room 120A, Harrisburg, PA 17104-2501. Please make note of their new address.

## ▼ Prosecution Blotter

Section 305 of the Pennsylvania Workers' Compensation Act specifies that an employer's failure to insure its workers' compensation liability is a criminal offense and classifies each day's violation as a separate offense, either a third-degree misdemeanor or, if intentional, a third-degree felony.

First-time offenders may be eligible to enter the Accelerated Rehabilitative Disposition (ARD) program. Defendants who enter the ARD program waive their right to a speedy trial and statute of limitations challenges during the period of enrollment; they further agree to abide by the terms imposed by the presiding judge. Upon completion of the program, defendants may petition the court for the charges to be dismissed. Although acceptance into the program does not constitute a conviction, it may be construed as a conviction for purposes of computing sentences on subsequent convictions.

The violators and locations are as follows:

**Cumberland County** On Aug. 23, 2017, Shawn Kriner was approved by the Court of Common Pleas of Cumberland County to enter the ARD program for 24 months. Kriner was ordered to pay costs as directed by the district attorney's office and pay \$7,800 restitution which will be transmitted by the court to the Uninsured Employers Guaranty Fund.

**Fayette County** On Aug. 22, 2017, Mark Volk was found to be guilty of 15 misdemeanor counts of failure to procure workers' compensation insurance before Judge Gerald R. Solomon in the Court of Common Pleas of Fayette County. Mr. Volk entered the ARD program for 24 months and was ordered to restitution of \$50,000 to the Uninsured Employers Guaranty Fund.

**Lackawanna County** On Aug. 30, 2017, Herbert McKingley d/b/a Service Boss, Inc. pleaded guilty to one felony and one misdemeanor count of failure to procure workers' compensation insurance before Judge Geroulo. He was sentenced to three years of probation and ordered to pay restitution of \$11,742.55 to the Uninsured Employers Guaranty Fund. This prosecution was a joint effort of the Northeastern Pennsylvania Insurance Fraud Task Force, the Lackawanna District Attorney's office and the PA Department of Labor & Industry.

To report suspected workers' compensation fraud, or if you have workers' compensation fraud related questions, please contact the Bureau of Workers' Compensation office by email at [ra-liwc-compliance@pa.gov](mailto:ra-liwc-compliance@pa.gov) or by telephone at 717-787-3567.

## ▼ Impairment Rating Evaluations

**Protz Decision** - On June 20, 2017, the Pennsylvania Supreme Court issued its decision in *Protz v. WCAB (Derry Area School District)*, Nos 6 WAP 2016, 7 WAP 2017, holding that Section 306(a.2) of the Workers' Compensation Act (77 P.S. § 511.2) is an unconstitutional delegation of

legislative authority. The Court's opinion makes clear that the entirety of Section 306(a.2) is unconstitutional. The Bureau of Workers' Compensation will no longer designate physicians to perform Impairment Rating Evaluations.

## ▼ 2018 Statewide Average Weekly Wage

Based upon the statewide average weekly wage, as determined by the Department of Labor & Industry for the fiscal year ending June 30, 2017, the maximum compensation payable under the Workers' Compensation Act, under Article 1, subsections 105.1 and 105.2, shall be \$1,025.00

per week for injuries occurring on and after Jan. 1, 2018. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2018, the percentage increase in the statewide average weekly wage is 3 percent.

## ▼ 2018 Workers' Compensation Fee Schedule Will Soon be Available Online

## ▼ EDI Forms Solution Training Webinar

Implemented in September 2016, Forms Solution offers workers' compensation claim filers the ability to create forms directly from their EDI (Electronic Data Interchange) transactions. The four highest volume forms are now generated from the filer's accepted EDI transactions: The Notice of Compensation Payable, the Notice of Temporary Compensation Payable, the Notice of Compensation Denial and the Notice Stopping Temporary Compensation. If you need support with EDI transactions, there is a wealth of guidance on the EDI website: [www.dli.pa.gov/edi](http://www.dli.pa.gov/edi).

The Forms Solution training sessions are available for viewing in WCAIS. Watch these webinars to learn some tips to enhance your usage of the system and enjoy the highest level of benefit.

The presentation focused on offering suggestions to help avoid rejections as well as answers to commonly asked questions.

The webinar is posted in WCAIS under the Customer Service Center. Click on "Customer Service Center Home" and then "Previously Recorded Training."

## ▼ References for Using Forms Solution

EDI Quick Reference Guide for Attorneys (LIBC-145) – This handout was created specifically for attorneys as a cheat sheet for EDI and Forms Solution to assist with viewing and understanding the WCAIS Claim Summary. This guidance lists the basic EDI transactions with which all attorneys should be familiar and explains the purpose of each; provides key codes in EDI; explains what Forms Solution is; and lists useful facts about Forms Solution. The attorney reference guide is now available in the WCOA field offices.

Forms Solution Form to Transaction Guide (LIBC 146) – This handout was updated in February 2017 and is used by insurance adjusters when submitting an EDI transaction; it is a quick reference guide used to identify which bureau form will be generated based upon which transaction and code is submitted. A supply of this handout is also available for attorneys and other stakeholder groups in the WCOA field offices.

Both handouts can be downloaded from the EDI webpage at [www.dli.pa.gov/edi](http://www.dli.pa.gov/edi).

## ▼ WCAIS Enhancements

The following enhancements were incorporated into the Workers' Compensation Automation and Integration System (WCAIS) on Jan. 17, 2018:

### EDI Community

There was a coding change to the Zip File format and manifest for return of Forms Solution Forms.

The Flat File Zip File format shall be updated as follows:  
<StateCode>\_<FEIN>\_<Type>\_<Date>\_<Time>\_<Test/Production>\_<FORMS>\_<DateTimeCreated>.zip

Example:

PA\_123456789\_F\_20170908\_234501\_P\_FORMS\_20170909063112.zip

<State Code>- the jurisdiction's state code  
<FEIN>- FEIN of the submitting Direct-filing Trading Partners/EDI Transaction Partner

<Type>- will be either FROI (F) or SROI (S)

<Date>- date of the submission, format CCYYMMDD

<Time> - the time of the submission, in the military format HHMMSS

<Test or Production Indicator> - Will be either Test (T) or Production (P)

<DateTimeCreated> - date zip file created, format CCYYMMDDHHMMSS

.zip - default extension for zip files

Additional information may be found on pages 25-26 of the PA Implementation Guide at:

<http://www.dli.pa.gov/Businesses/Compensation/WC/claims/edi/Pages/Implementation-Guide--Supporting-Documents.aspx>

### Self-Insurers

WCAIS will prevent the entry of negative numbers for the Annual Report of Compensation Paid by calendar year. This information is requested, and you are required to provide it via WCAIS in March of every year. Each self-insured program is required to provide the Indemnity Dollars Paid and the Medical Dollars Paid for the calendar year requested. Only positive numbers can be entered into the data box on the screen provided by WCAIS.

### WCOA

Request a Hearing - a new request type titled "Request a Hearing" has been added for external users to request a hearing before the assigned judge.

## ▼ Notice to All Pennsylvania Workers' Compensation Self-Insurers

The Department of Labor & Industry, Bureau of Workers' Compensation (bureau) would like to provide this important reminder concerning the required timeframes related to the submission of renewal applications for self-insurance in Pennsylvania. The bureau is providing this reminder to encourage ongoing compliance and facilitate the timely submission and processing of renewal applications prior to the expiration of a current self-insurance permit.

Section 305 of the Pennsylvania Workers' Compensation Act, 77 P.S. § 501(a)(3), provides for the issuance of a self-insurance permit for a period of twelve (12) calendar months; all permits issued under this section expire and terminate on the last day of the 12-month period for which they are issued. Section 125.3(b) of the Workers' Compensation Self-Insurance Regulations, 34 Pa. Code § 125.3(b), provides that renewal applications shall be filed with the bureau no later than three months prior to the expiration of the current permit.

Compliance with the three-month requirement is necessary to ensure that all required information and documentation can be submitted and reviewed prior to the expiration date of the current permit. The bureau will not issue a decision on an application until the application, including any and all additional items that may be

requested by the bureau pursuant to Section 125.3, have been submitted. 34 Pa. Code § 125.3(e).

Where the bureau requests additional information or documentation from a renewal applicant, the applicant is generally required to submit those items within 21 days; if the renewal applicant does not provide the additional information within the prescribed time period, the application will be deemed withdrawn. 34 Pa. Code § 125.3(d). Further, even where the renewal applicant has or is in the process of submitting the required additional items, if the renewal applicant failed to timely file a renewal application under Section 125.3(b) they will not be entitled to an automatic extension of their current permit beyond its expiration date. 34 Pa. Code § 125.7(b).

Whether the renewal application is deemed withdrawn due to the applicant's failure to provide additional items under Section 125.3(d), or the bureau is simply unable to issue a decision on the renewal application before the expiration of the current permit following a late filing of that application, the self-insurer would be required to obtain workers' compensation insurance coverage effective as of the permit expiration date, and provide evidence of that coverage to the bureau, to avoid a lapse in coverage for its employees.

## ▼ A View From the Bench

**Uninsured Employer is Subject to Penalties if it Fails to Pay Pursuant to a Judge's Order, Even if the UEGF Commences Payments; Financial Hardship is not a Defense for Uninsured Employer's Failure to Pay an Award; Fund was Created to Protect Injured Workers, Not to Shield Uninsured Employers**

In CMR Construction of Texas v. WCAB (Begly), No. 693 C.D. 2016, 2017 WL 2729629, (Pa. Cmwlth. Ct., filed June 26, 2017), 165 A.3d 69, the Commonwealth Court held that the employer violated the Act by not having insurance and violated it again by not paying the WCJ's award.

The claimant filed a claim petition after falling off a roof while working for employer. Employer's defense was to assert claimant was an independent contractor. During litigation it was discovered that employer was uninsured in PA, and a timely claim petition was filed against the UEGF. The WCJ found that the claimant was an employee under the Construction Workplace

Misclassification Act, and awarded a period of total disability benefits, and then ongoing partial disability benefits. The employer and the UEGF appealed, and supersedeas was denied. The UEGF began to pay the award a few months late. Claimant filed a penalty petition against the employer, asserting that employer violated the Act by not failing to commencement payments to him in accordance with the WCJ's order.

There was no dispute that the employer was not paying anything to the claimant, and that the fund had commenced making payments about five months after the WCJ's order. In litigating the penalty petition, testimony was offered from the employer regarding employer's financial hardship, and inability to comply with the WCJ's order due to its poor financial condition. It was noted that employer had begun to make monthly payments to reimburse the fund. It was further noted that the employer was still operating in Pennsylvania.

*Continued on Page 8*

## **A View From the Bench**

*Continued from Page 7*

The WCJ granted the penalty petition stating that employer's purported inability to pay was no justification for being in violation of the Act. The WCJ further stated that employer had an obligation to pay the award, and the fact that the fund did not start paying until several months after the award did not relieve employer of the general obligation to pay under the order. The WCJ ordered a 50% penalty against the employer on all past due compensation, which was affirmed by the WCAB.

On appeal to the Commonwealth Court, employer argued that that board erred in affirming the WCJ's decision, as the same ignores the legislative intent behind the creation of the fund and employer's financial inability to comply with the award. The Commonwealth Court disagreed with the employer stating that financial hardship was not an excuse for non-payment of an award. The court noted that although the amount of a penalty is discretionary by the WCJ, it will only be reversed when a WCJ has misapplied a law. The court noted that employer made the decision not to seek workers' compensation insurance coverage for its out-of-state employees, and its actions amounted to a refusal to pay the award. Regarding the employer's arguments about the purpose of the fund, the court noted that employer misconstrued the intent behind the creation of the fund, in that it was created to protect an injured worker and not to protect an uninsured employer or otherwise shield such an employer from its obligations under the Act. The court also noted that the employer attempted to shift the focus to the fund's delay in paying the awarded benefits, however the obligation to pay the award remained with the employer and the fact that the fund ultimately commenced the payments did not relieve the employer of its obligations.

Claimant requested attorney's fee for a frivolous appeal under Pa.R.A.P. 2744. The court declined to impose attorney's fees, stating that although the employer's arguments were ultimately unsuccessful, it did not find them to be frivolous or meant solely for delay.

### **County of Allegheny V. WCAB (Parker), Pa. Supreme Court Grants Petition for Allowance of Appeal**

The opinion of the Pa. Commonwealth Court in *County of Allegheny v. WCAB (Parker)*, 151 A.3d 1210, filed December 20, 2016, 169 A.3d 566 (Table) was subject to the following per curiam order of the Pa. Supreme Court: "And now, this 6<sup>th</sup> day of June, 2017, the petition for allowance of appeal is granted. The issues as stated by the petitioner are: (a) whether the Commonwealth Court erred when it held without legal precedent,

that a workers' compensation claimant's attorney must disgorge and return unreasonable contest attorney's fees if the employer ultimately prevails; (b) whether the disgorgement and return of unreasonable contest attorney's fees when the employer ultimately prevails is better left to the legislature rather than the courts."

### **Employer Is Entitled to Take §204(a) Pension Offset for Largest Pension Option Although Lower Pension Option, Which Provides for a Spousal Death Benefit, is Chosen and Being Received**

In *Harrison v. WCAB (Commonwealth of Pennsylvania)*, No. 658 C.D. 2016, 2017 WL2797458 (Pa. Cmwlth., filed June 28, 2017), 165 A.3d 1019, claimant was a commonwealth employee who suffered a totally disabling work injury in 2010. When he retired in 2011, employer asserted its entitlement to a §204(a) pension offset against his total disability benefits. Claimant had elected the pension option that paid a reduced monthly amount to him in order to provide a spousal death benefit. When calculating the offset, the State Employees' Retirement System (SERS) used the figures as if claimant had selected the highest paying pension, maximum single life annuity (MSLA), which did not provide a spousal benefit. This method resulted in a larger offset and resultant lower compensation benefits than if SERS had based the calculations on the pension option actually chosen, and being received, by claimant.

Claimant filed review, reinstatement, and penalty petitions, asserting that employer was taking an excessive offset as it was not based on claimant's actual monthly pension payment. The commonwealth's pension fund witness testified that SERS does not take into consideration the option chosen but always uses the MSLA figure, justifying it because it has to fund the surviving spouse's benefit in addition to the retired employee's benefit. The actuary witness explained how he used SERS' figures to calculate how much claimant contributed together with accrued interest (which is excluded from offset), the resultant state percentage and contribution, the amount needed to fund the pension based on the pension plan formula, the MSLA monthly amount, and the offset based on the MSLA figure. Claimant offered no evidence. The WCJ found employer's witness credible and granted an offset for the MSLA figure, not claimant's actual pension check amount. WCAB affirmed.

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## **A View From the Bench**

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In his appeal to Commonwealth Court, claimant argued that the regulatory language of §§123.8 and .9 – "net amount an employee receives" – requires the offset to be calculated on the amount put into claimant's pocket each month. The court, in its *en banc* decision, focused on the statutory language in §204(a) – "the extent to which benefits are funded by the employer" – and held that, because the amount required to be reserved by employer to pay claimant and then his spouse is the same as if he had chosen the MSLA option without a spousal component, they are actuarially equivalent. Thus, because employer's contribution required to fund either option's payouts was the same, SERS was entitled to use the MSLA figure for offset purposes. It affirmed the WCJ and WCAB.

There was a brief discussion of whether tax withholding affects the offset. Analogizing to the unemployment compensation offset situation, it held that the pension offset is for the net, not gross, pension amount. If the offset taken is based on the gross amount, and the claimant actually receives less each month due to tax withholding, the insurer must pay the claimant that difference.

There was a two-judge dissenting opinion. It cited the phrase in §204(a) of the statute – "which are received" – and §123.8(c) of the regulations which states that there is no offset if the claimant is entitled to, but is not receiving, the pension. By analogy to this situation, if claimant is not receiving the full amount each month now, because some is being saved for his spouse, an offset based on the full amount should not apply. Rather, the offset should be based on the actual payment received. It also referred to the humanitarian purposes of the Act when construing statutory language.

### **Employer Cannot Escape Liability for Partial Disability Benefits by Creating a Permanent Position Within a Claimant's Restrictions Which Claimant Accepts, But Experiences a Wage Loss Due to the Pay Rate in the Created Position.**

In Holy Redeemer Health System v. WCAB (Lux), No. 768 C.D. 2016, 2017 WL 2437182, (Pa. Cmwlth., filed June 6, 2017), 163 A.3d 498, the Commonwealth Court held that a claimant was entitled to partial disability benefits when she returned to work in a modified-duty position with her pre-injury employer and thereafter accepted a permanent position specifically created and offered to her by her pre-injury employer at a loss of wages.

Claimant sustained an injury on Oct. 11, 2011, while working for employer as a telemetry R.N. Employer accepted medical-only liability for the injury pursuant to a medical-only notice of compensation payable. Claimant did not miss any time from work following the injury, because she returned to employer in a modified duty position as a telemetry nurse with no loss in wages. Employer then created a position in a care management department and offered it to claimant. Claimant voluntarily accepted the position. The care management position resulted in a wage loss.

Claimant then filed a claim petition, asserting that she was partially disabled as a result of the injury. She initially asserted an entitlement to partial disability benefits from the date of injury, but amended her request to seek partial disability from the date on which she started working in a permanent care management position with employer, which is when she began to suffer a wage loss. Employer filed a termination petition, asserting claimant had fully recovered from the injury.

On Sept. 30, 2015, the WCJ issued a decision, granting claimant's claim petition and denying employer's termination petition. Employer appealed to the board, which affirmed the WCJ's decision. Employer then petitioned the Commonwealth Court for review.

On appeal to the Commonwealth Court, the employer argued that the WCJ erred in granting the claim petition. Employer argued that claimant could not have sustained her burden of proof, because her medical expert, who was found to be credible by the WCJ, opined that claimant was capable of performing the light duty position made available to her by the employer, and claimant never asserted that her ongoing limitations forced her to switch from the light duty telemetry R.N. position to the permanent position in the care management department. Employer relied on Shenango, Inc. v. WCAB (Weber), 646 A.2d 669 (Pa. Cmwlth. 1994), wherein the court held that a claimant's loss of wages was not the result of his work injury, but rather a voluntary decision to bid out of his pre-injury department where he had been working in a modified duty position with no loss of earnings.

The court distinguished this case from Shenango, because in that case the claimant made an affirmative decision to bid out of his pre-injury department on a position that resulted in a loss of his seniority and a loss of wages.

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## **A View From the Bench**

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In the instant case, claimant did not seek out and apply for the permanent care management position. Rather, the employer specifically created the position and offered it to claimant. The court acknowledged that there was no evidence to suggest that employer forced claimant to accept the permanent care management position, or that employer informed claimant that the modified telemetry R.N. position would no longer be available to her, but still found that employer remained liable to the claimant. The court stated that given the nature of the Act and its intended purposes it would not ignore that employer, on its own, created and offered to claimant a permanent light duty position within her restrictions at a loss of earnings, and then claimed no liability for wage loss. The court stated that it could not permit employers to evade the payment of partial disability benefit by creating and offering permanent, lower-paying positions to claimants that are within the restrictions imposed by their work injuries. Thus, it affirmed the board's order, affirming the WCJ's order that granted the claim petition.

### **Notice Stopping NTCP to be Filed Within Five Days of Last Payment Unless There is Pre-payment of Wage Loss Benefits**

In Terri Jones v. WVAB (Villanova University), 1531 C.D. 2016, 2017 WL 1174924 (Pa. Cmwlth. Ct., filed, March 30, 2017 and reported June 9, 2017, 164 A.3d 542, the Commonwealth Court clarified the issue of whether or not a notice stopping temporary compensation (NSTC) was sent by the employer within five days after the last payment of temporary compensation. Claimant argued the five-day period begins on the last date for which comp is payable, not when the last check is sent. Furthermore, if the calculation was based on when the payment was sent an employer could extend the period during which a claim under a notice of temporary compensation payable merely by dating the last check to coincide with the date on which the notice stopping was issued.

Claimant sustained an injury to her knees on February 7, 2012 but continued working until May 15, 2012. Employer issued a notice of temporary compensation payable on June 6, 2012. Claimant filed a claim petition on June 8, 2012. On June 14, 2012 claimant received an indemnity check for the period from May 15, 2012 through June 6, 2012. On June 15, 2012 defendant issued a notice stopping and a notice of compensation denial. The court discusses section 406.1 and states the time is calculated from when comp is paid, not when the last payment period ends. Specifically, the court notes that the payment is due within twenty-one days of issuing an agreement, and must be made in accordance with

the Act, therefore as long as the defendant is making the payments in accordance with the Act, the five days will run from the date of the last payment, not the end of the payment period. The court also distinguishes Thomas Lindstrom v. WCAB (Braun), 992 A.2d 961 (Pa. Cmwlth. 2010) as fact specific. In Braun the payment was issued prior to the close of the payment period, thus employer pre-paid the compensation. In that instance the five days ran from the end of the payment period rather than the issue date of the payment check.

### **Employer's Subrogation Rights Exist Despite the Contest of the Claim Petition**

In Kalmanowicz v. WCAB (Eastern Industries, Inc.), 1970 C.D. 2016, 2017 WL 2882731, (Pa. Cmwlth. Ct. filed July 7, 2017), 166 A.3d 508, the court reaffirmed employer's section 319 subrogation rights even when the third party settlement occurs during the pendency of a claim petition. Claimant was injured in a motor vehicle accident in June 2009. He filed a claim petition in April 2010, which employer answered and defended. In April 2011, claimant settled his third-party claim against the other driver. In Oct. 2011, the WCJ awarded benefits. Employer appealed. In June 2012, while the case was still awaiting WCAB decision, employer filed petition to modify and/or suspend seeking to enforce its subrogation lien against the third-party settlement. In July, 2012 the WCAB affirmed the WCJ's initial award of benefits. Employer then appealed to Commonwealth Court, which affirmed the initial award in December 2012. In June 2013, the WCJ denied employer's petition to modify and/or suspend, finding that at the time of the third-party settlement, employer had not accepted the claim and had not made a subrogation claim. Employer appealed. In Sept. 2015, WCAB reversed, finding that subrogation is absolute and there was no waiver of it, and remanded for findings on enforcement of the lien. In May 2016, the parties stipulated to a credit against future benefits, but also stipulated that the decision could be re-appealed on the underlying entitlement issue (because the remand had prevented an earlier appeal to Commonwealth Court.) Claimant appealed. WCAB again affirmed employer's right to subrogation. Claimant appealed.

The Commonwealth Court held that employer was entitled to subrogation. Claimant failed to maintain his earlier argument that, when the settlement funds were distributed, employer had not yet accepted the injury. However, he now argued waiver of subrogation by contesting the claim petition.

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## **A View From the Bench**

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The court discussed the cases on waiver, including Serrano v. WCAB (Ametek, Inc.), 154 A.3d 445 (Pa. Cmwlth. 2017), Young v. WCAB (Chubb Corp.), 88 A.3d 295 (Pa. Cmwlth.), appeal denied, 97 A.3d 746 (Pa. 2014), Fortwangler v. WCAB (Quest Diagnostics), 113 A.3d 28 (Pa. Cmwlth. 2015), Independence Blue Cross v. WCAB (Frankford Hospital), 820 A.2d 868, (Pa. Cmwlth. 2003 and Glass v. WCAB (City of Philadelphia), 61 A.3d 318 (Pa. Cmwlth. 2013). The court in the present case concluded that an employer does not have to concede liability when an incident involves a potentially liable third-party in order to avoid losing its subrogation right. It can defend the claim, and then subrogate if it loses, even after the third-party claim is resolved so long as the employer exercises due diligence and does not act in bad faith.

There was a dissent, arguing for remand to gather evidence regarding the bad faith issue, and asserting that panel decisions should not be used to decide issues of this magnitude, but rather that en banc decisions are needed.

### **Subrogation Lien of Medical Insurer Retroactive for Treatment Received Prior to the Effective Date of Act 46**

In City of Philadelphia v. WCAB (Knudson), No. 675 C.D. 2016, 165 A.3d 1039, 2017 WL 2835495 (Pa. Cmwlth.Ct. filed July 3, 2017), the claimant was a Philadelphia firefighter diagnosed with renal cancer in October 2009, almost 2 years before Act 46 became law on July 7, 2011. He filed a claim petition under Act 46 on June 13, 2012. His private health insurer, Blue Cross, paid for his medical bills beginning in 2009 and continuing after July 2011. Blue Cross intervened in the claim petition through separate counsel to protect its subrogation lien offering a Consolidated Statement of Benefits authored by its collection arm, Healthcare Recoveries. The defendant/employer did not object to this exhibit. With the granting of this claim petition, the WCJ granted a portion of the lien, only for services rendered after July 7, 2011, the Act 46 effective date. Blue Cross and defendant/employer appealed. The WCAB reversed the WCJ only on the subrogation issue and enforced the lien for all medical services, including those rendered prior to the effective date of Act 46. The WCAB did not credit defendant/employer's arguments that the lien was not enforceable retroactively, pre-2011, and that Blue Cross offered insufficient evidence to enforce the lien. Defendant/employer appealed both issues.

The Commonwealth Court affirmed the WCAB. Regarding retroactivity, the court found that, since Act 46 said that it "shall apply to claims filed on or after the effective date," and claimant filed

his petition after July 11, 2011, the medical expense subrogation lien could go back to 2009. This was not considered a retroactive application of the Act. Regarding the evidentiary issue, defendant/employer claimed the document did not establish that Blue Cross had insured claimant; did not establish that it paid his bills; did not establish the relationship between Blue Cross and Healthcare Recoveries; and did not establish Healthcare Recoveries' subrogation right. The court found that defendant/employer waived the hearsay/Walker objections before the WCJ, so the document was admissible and could support the WCJ's findings. Moreover, defendant/employer had not raised any of these asserted issues before the WCJ, so they were also waived.

### **Given the Unusual Circumstances, a Worker Injured While Jumping From a Roof Was Found Entitled to Workers' Compensation Benefits**

In Wilgro Services, Inc. v. WCAB (Mentusky), No. 1932 C.D. 2016, 2017 WL 2797452, (Pa. Cmwlth., filed June 28, 2017), 165 A.3d 99, the Commonwealth Court held that the board did not err in affirming the WCJ's finding that claimant, who jumped off a roof at the end of his workday, was injured in the course of his employment.

Claimant, who was a HVAC mechanic, was working on a customer's roof-mounted HVAC system at the same time roofers were working at the site. Claimant used the roofers' ladder to get on and off the roof. When claimant finished his workday, he realized the roofers had left and removed the ladder without telling him. After considering his options, he decided to jump from the lowest part of the roof, about 16 to 20 feet from the ground. In so doing, he suffered disabling bilateral heel fractures and back injuries.

The employer denied the claim and argued that claimant's intentional, deliberate, and high-risk action in jumping from the roof constituted an abandonment of his employment. The WCJ granted the claim petition, finding claimant was a traveling employee furthering his employer's business, did not intentionally or deliberately attempt to injure himself, was not engaged in horseplay, and did not violate a positive work order. Employer appealed to the board, which affirmed the WCJ.

The Commonwealth Court affirmed as well. It analyzed and distinguished its holding in Penn State University v. WCAB (Smith), 15 A.3d 949 (Pa. Cmwlth. 2011), where the claimant jumped down a flight of stairs, was injured, and was denied benefits.

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Here, noted the court, (1) claimant was a traveling employee while the claimant in Penn State was not; (2) claimant was finishing his job on the roof while the claimant in Penn State was on his lunch break; (3) claimant's decision was made because the ladder which had been there was gone, in contrast to the claimant in Penn State jumping on a whim or a lark; and, (4) because departing from a job site is a necessary component of any job, claimant's actions were not so foreign to and removed from his usual employment as to constitute an abandonment of his employment. The court found it significant that claimant, as a traveling employee, was entitled to a presumption that he was furthering employer's business when he was

injured. To rebut this presumption, an employer bears the burden of proving that the injured worker's actions were so foreign to and removed from his usual employment as to constitute an abandonment thereof. The court observed that exiting a worksite is a necessary component of any job. Here, claimant assessed his situation, and, although not the smartest move, he considered his options and selected one that he thought reasonable. Because claimant was not engaged in horseplay, nor acting on a whim or a lark, and his action in jumping from the roof was not so unreasonable and removed from his job functions to constitute an abandonment, claimant was entitled to an award of benefits.



Please find the following words, or acronyms, used in this edition of News & Notes.

- ARD**
- EDI**
- GOSH**
- PATHS**
- PROTZ**
- SUPERSEDEAS**
- UNINSURED**
- WCAB**
- WCAIS**
- WCOA**



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