THE YEAR IN PENNSYLVANIA WORKERS’ COMPENSATION:
2016 AT A GLANCE

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APPEAL

- An order by a WCJ denying a Joinder Petition is a final order and not interlocutory. This is because the order disposes entirely of the issues set forth in the Joinder Petition. Therefore, it is subject to an immediate appeal.

However, a party may take an appeal nunc pro tunc where there has been a breakdown in the administrative process. A breakdown in the administrative process occurs when the party seeking to appeal an order in an untimely manner establishes that its delay in taking action was caused by extraordinary circumstances involving fraud, a breakdown in the administrative process, or non-negligent circumstances related to the claimant, his counsel, or a third party.

When an adjudicator erroneously includes prohibitory language in a decision and order by labeling the order interlocutory and the order not only fails to advise a litigant of the right to appeal, which is the custom in workers’ compensation matters, but rather affirmatively directs the litigant that he or she may not appeal an order, the may have grounds to seek nunc pro tunc review.

In this matter the Court directed that the UEGF be given an opportunity to establish that a breakdown in the administrative process occurred such that the Board should have considered its appeal nunc pro tunc where the WCJ dismissed the Joinder of a carrier and erroneously labeled its order an interlocutory and not subject to appeal rather than a final order.

_Uninsured Employers Guaranty Fund v. WCAB (Gerretz, Reliable Wagon and Auto Body, Inc., and Somerset Casualty Insurance Company), No. 445 C.D. (Decision by Judge Brobson, June 14, 2016) 6/16_

- An award of attorney’s fees and litigation costs to a prevailing claimant is not automatic. Therefore, even if the absence of an award of attorney’s fees was inadvertent, the mistake goes to the merits of the case rather than to the satisfaction of the award, and it cannot be corrected by way of a Petition to Review under Section 413 of the Act.
The claimant would need to remedy the failure to receive attorney fees and litigation costs by filing an appeal, even if the claimant prevailed on the merits of the case.

- It is true that generally, a party who prevailed in a proceeding below is not an aggrieved party and, consequently, has no standing to appeal. However, courts allow a party to appeal where the remedy awarded is claimed to be insufficient.

In this matter, although Claimant prevailed before the WCAB in his appeal of the suspension order, he only prevailed in part; because the Board did not address his request for costs and attorney’s fees. As a result, and because an award of attorney’s fees is not automatic, Claimant was adversely affected by the WCAB’s decision, and thus, he was aggrieved. Claimant’s proper remedy was to request reconsideration by the Board or file an appeal to the Commonwealth Court.

Claimant failed to do either. Since the WCAB’s order that failed to award litigation costs and attorney fees was final the claimant was not permitted to collaterally attacked by a the WCAB’s final order by filing a Petition to Review that sought reimbursement of attorney fees and litigation costs.

*Byfield v. WCAB (Philadelphia Housing Authority), No. 2002 C.D. 2015(Decision by Judge Wojcik, July 26, 2016) 7/16*

- The claimant did not waive the issue of challenging the validity of the IRE statute due to his failure to challenge its validity before the WCJ and the WCAB pursuant to Section 703 of the Administrative Agency Law and under Pa. R.A.P. 1551(a), which allows a party to challenge the validity of a statute for the first time on appeal.

(Section Pa. R.A.P. 1551(a) provides, in pertinent part:

... *No question shall be heard or considered by the court which was not raised before the government unit except:*

(1) *Questions involving the validity of a statute*

Section 703(a) of the Administrative Agency Law, 2 Pa.C.S. § 703(a), provides in pertinent part that:

*A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal...*
Therefore, because the Commonwealth Court Decision of Protz v. Workers’ Compensation Appeal Board (Derry Area School District), 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (en banc), which held that Section 306(a.2) of the Act was an unconstitutional delegation of legislative authority because the General Assembly “proactively approved versions of the AMA Guides beyond the Fourth Edition without review”, challenged the validity of the statute and was decided after the WCJ decision but before the WCAB issued their decision the claimant was permitted to challenge the validity of the IRE provision for the first time on appeal before the Commonwealth Court.

Beasley v. WCAB (Peco Energy Company) No. 634 C.D. 2016 (Decision by Judge Pellegrini, December 22, 2016) 12/16

ATTORNEY FEES

- Under Section 440(a) of the Act, claimants who successfully litigate a contested case are entitled to an award of reasonable attorney’s fees unless an employer presents a reasonable basis for the contest

Claimant was entitled to award unreasonable contest attorney fees solely with regards to his successfully litigated Petition Seeking Review of a UR Determination where the Employer did not file an answer to Claimant’s Petition or present any evidence challenging Claimant’s UR Petition. While it was Employer’s right under the Act to invoke the initial UR process without any medical evidence, Employer’s decision to continue the contest in the absence of any medical evidence was unreasonable.

Lindemuth v. WCAB (Strishock Coal Co.), No. 812 C.D. 2015 (Decision by Judge Cohn Jubelirer, February 24, 2016) 2/16

- The WCJ did not err in denying claimant’s counsel a 20% attorney fee chargeable to the claimant’s medical bills where the WCJ concluded that the Claimant failed to establish that any particular work performed specifically advanced the payment of medical bills to warrant a 20% attorney fee of the medical bill payments and where the WCJ found that testimony did not establish that the Agreement provided Counsel with 20 percent of the medical bills paid.

This is because the Agreement did not explicitly provide for a 20 percent attorney fee on Claimant’s medical benefits and Counsel did not demonstrate to the WCJ why such a fee was justified in light of the time and effort expended on obtaining medical benefits for Claimant. The WCJ was also correct in finding that Counsel’s requested fee was unreasonable in light of the work performed.
Upon determining whether medical bill payments should be included in a contingent fee agreement, the WCJ must assess: (1) whether the claimant and counsel intended for counsel to receive a percentage of the medical bill payments; and (2) whether the fee is reasonable.

In addition, a reasonableness inquiry in this context should address the amount and degree of difficulty of the work performed by the attorney upon obtaining payment of medical benefits. This requires a quantum meruit analysis.

Thus, counsel seeking a contingent fee on medical bill payments in addition to the per se reasonable 20 percent contingent fee on indemnity benefits must demonstrate to the WCJ why such a fee is justified in light of the time and effort expended on obtaining medical benefits for the claimant.

Although the provider would be prohibited from going after the claimant for the difference between the amount billed and the Medicare-based reimbursement rates, the Act would not prohibit the provider from seeking reimbursement from the claimant for the balance resulting payment of an amount less than the Medicare-based reimbursement rates resulting from counsel’s 20% attorney fee chargeable to the medical bill.

The court voiced its concern that a claimant may not be aware that her counsel’s interest in receiving attorney’s fees based on medical benefit payments can be in conflict with the claimant’s own financial interests. As expressed by Judge Pellegrini in a prior decision, “at the minimum,” a claimant should be informed “of the potential conflict and informed that he may wish to employ an attorney to advise him of the reasonableness of the fees sought by his counsel.”

Righter v. WCAB (Righter Parking), No. 1356 C.D. 2015 No. 1356 C.D. 2015 (Judge Cohn Jubelirer, June 14, 2016) 6/16

An award of attorney’s fees and litigation costs to a prevailing claimant is not automatic. Therefore, even if the absence of an award of attorney’s fees was inadvertent, the mistake goes to the merits of the case rather than to the satisfaction of the award, and it cannot be corrected by way of a Petition to Review under Section 413 of the Act.

The claimant would need to remedy the failure to receive attorney fees and litigation costs by filing an appeal, even if the claimant prevailed on the merits of the case.

It is true that generally, a party who prevailed in a proceeding below is not an aggrieved party and, consequently, has no standing to appeal. However, courts allow a party to appeal where the remedy awarded is claimed to be insufficient.
In this matter, although Claimant prevailed before the WCAB in his appeal of the suspension order, he only prevailed in part; because the Board did not address his request for costs and attorney’s fees. As a result, and because an award of attorney’s fees is not automatic, Claimant was adversely affected by the WCAB’s decision, and thus, he was aggrieved. Claimant’s proper remedy was to request reconsideration by the Board or file an appeal to the Commonwealth Court.

Claimant failed to do either. Since the WCAB’s order that failed to award litigation costs and attorney fees was final the claimant was not permitted to collaterally attacked by a the WCAB’s final order by filing a Petition to Review that sought reimbursement of attorney fees and litigation costs.

*Byfield v. WCAB (Philadelphia Housing Authority), No. 2002 C.D. 2015(Decision by Judge Wojcik, July 26, 2016)*

- An employer is entitled to recover from claimant’s Counsel the invalid unreasonable contest attorney fees award that it was required to pay to counsel. This is because the employer would not be entitled to reimbursement for such costs from the Supersedeas Fund.

An order to refund unreasonable contest attorney fees involves no repayment of compensation benefits and denying a refund order would result in unjust enrichment by allowing an unsuccessful claimant’s counsel to keep funds that may only be awarded where the claimant is the prevailing party.

The Commonwealth Court therefore ordered Counsel to refund to Employer the $14,750 in unreasonable contest attorney fees that Employer paid to Counsel following reversal of the WCJ’s decision that has assessed unreasonable contest attorney fees against the employer.

- Supersedeas Fund reimbursement is limited to “payments of compensation,” and only disability and medical payments can be recovered. By contrast, unreasonable contest attorney fees and other litigation costs are payment “in addition to the award for compensation,” not payment of compensation benefits.

Therefore, an employer following a successful appeal of the award of unreasonable contest attorney fees has no recourse from the Supersedeas Fund for either unreasonable contest attorney fees or other litigation costs.

- This holding follows the reasoning of the court decision of *Barrett v. Workers’ Compensation Appeal Board (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010)* that held that where litigation costs are awarded and are paid by the employer as a result of denial of a stay and the award of costs is later reversed on appeal, the employer is entitled to an order requiring the claimant’s counsel to repay the erroneously awarded costs because to do otherwise would result in an unjust
enrichment and would deprive the employer of any meaningful appeal from an erroneous costs award because litigation costs cannot be recovered from the Supersedeas Fund.

*County of Allegheny v. WCAB (Parker)* No. 82 C.D. 2016 (Decision by Judge Collins, December 20, 2016) 12/16

**CAPRICIOUS DISREGARD**

- A review for capricious disregard of material, competent evidence is an appropriate component of appellate review in any case in which the question is properly raised before a court. A capricious disregard of evidence occurs where the WCJ’s findings reflect a deliberate disregard of competent evidence that logically could not have been avoided in reaching the decision. Where substantial evidence supports the findings, and those findings in turn support the conclusions, it should remain a rare instance where an appellate court disturbs an adjudication based on capricious disregard.

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*Edwards v. WCAB (Epicure Home Care, Inc.)* No. 1106 C.D. 2015 (Decision by Judge Simpson, March 10, 2016) 3/16

**CHANGE IN DECISIONAL CASE LAW**

- The Commonwealth Court decision of *Stermel v. Workers’ Compensation Appeal Board (City of Philadelphia)*, 103 A.3d 876 (Pa. Cmwlth. 2014) applied to the parties stipulation even though the Stipulation was executed and approved by the WCJ after Stermel was decided.

The *Stermel* Court held that a city employer was not entitled to recover a portion of the Heart and Lung Act benefits it paid a police officer from the officer’s third-party tort claim settlement. Therefore, there would be no subrogation right resulting from payment of those benefits.

- Changes in decisional law which occur during litigation will be applied to cases pending on appeal. Further, where decisional law relies on a statutory
interpretation which was not wholly without precedent, such decisions are treated as relating back to the original statute because they are nothing more than interpretations of existing legislation

*Pennsylvania State Police v. WCAB (Bushta), No. 2426 C.D. 2015, (Decision by Judge Covey, October 26, 2016) 10/26*

**CLAIM PETITION**

- Under Section 301(c)(1), a claimant has the burden of proving by unequivocal evidence that the injury arose in the course of the employment and that the injury was related to that employment.

Accordingly, it is a well-established rule that unless there is an obvious causal connection between a worker’s death and the work injury, the claimant must present unequivocal medical evidence establishing the connection.

*Justus v. WCAB (Bay Valley Foods), No. 1556 C.D. 2015 (Decision by Judge Colins, August 10, 2016) 11/16*

**COLLATERAL ESTOPPEL**

- An award of attorney’s fees and litigation costs to a prevailing claimant is not automatic. Therefore, even if the absence of an award of attorney’s fees was inadvertent, the mistake goes to the merits of the case rather than to the satisfaction of the award, and it cannot be corrected by way of a Petition to Review under Section 413 of the Act.

The claimant would need to remedy the failure to receive attorney fees and litigation costs by filing an appeal, even if the claimant prevailed on the merits of the case.

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In this matter, although Claimant prevailed before the WCAB in his appeal of the suspension order, he only prevailed in part; because the Board did not address his request for costs and attorney’s fees. As a result, and because an award of attorney’s fees is not automatic, Claimant was adversely affected by the WCAB’s decision, and thus, he was aggrieved. Claimant’s proper remedy was to request reconsideration by the Board or file an appeal to the Commonwealth Court.
Claimant failed to do either. Since the WCAB’s order that failed to award litigation costs and attorney fees was final the claimant was not permitted to collaterally attacked by a the WCAB’s final order by filing a Petition to Review that sought reimbursement of attorney fees and litigation costs.

_Byfield v. WCAB (Philadelphia Housing Authority), No. 2002 C.D. 2015(Decision by Judge Wojcik, July 26, 2016) 7/16_

**COMPROMISE AND RELEASE AGREEMENT**

- The WCJ did not err by dismissing the Penalty Petition filed by the Medical Provider for non-payment of his bills where the provider treated the claimant for an alleged work injury that was resolved by no admission of liability C&R that provided for no payment of medical bills.

This is because pursuant to Section 449(b) of the Act the proposed C&R that must be explicit with regard to the payment, if any, of reasonable, necessary and related medical expenses. In this case Employer and Claimant entered into a C&R agreement that was approved by the WCJ. The C&R agreement stated that it was not an admission of liability by Employer and did not require the employer to pay past or future medical.

The Employer denied that Claimant suffered a work injury and never admitted liability by issuing a document such as a NCP. Further, there was no finding or adjudication that Claimant’s injury was work-related. Thus, Employer was not obligated at any time to pay Claimant’s medical bills.

_Schatzberg, DC and Philadelphia Pain Management v. WCAB No. 1914 C.D. 2015 (Decision by Judge Friedman, March 30, 2016) 3/16_

**COURSE AND SCOPE**

- The Supreme Court grants Petition for Allowance of Appeal limited to addressing the following issue

> Did the Commonwealth Court err because § 601(a)(10), unambiguously provides that the employee must be within the course and scope of his employment at the time he provides aid and is injured, not merely be in the course and scope of his employment at the time of the emergency arose as the Commonwealth Court held?
Section 601(a) (ii) provides that an employee who, while in the course and scope of his employment, goes to the aid of a person and suffers injury or death as a direct result of any of the following:

ii) Rendering emergency care, first aid or rescue at the scene of an emergency.

It will be recalled that the Commonwealth Court held under subsection 601(a)(10), an employee who “goes to” the aid of another by performing specifically identified acts enumerated in this section, cannot be said to have abandoned the course of employment or to have engaged in something wholly foreign thereto.

Therefore, the claimant who was hired by the employer to install pipeline and was on duty suffered a compensable injury in the course and scope of employment where he injured himself trying to rescue a worker who had a different employer from a concrete hole that was 30 feet from where he worked.

The Commonwealth Court had reasoned that Subsection 601(a) (10) is focused on specific acts performed by an employee at a specific time. The Commonwealth Court stated that Subsection 601(a) (10) does not bring injuries incurred by an individual who aids another within the ambit of the Act simply because the individual is an employee. Rather, they held that subsection 601(a)(10), by its plain language, requires that the individual is functioning as an employee at the time the emergency arises and the employee goes to the aid of another.

Put another way, the Commonwealth Court held that Employees are not covered under subsection 601(a) (10) because they went to the aid of another person, but because they did so while otherwise within the course and scope of their employment. This specific reasoning that requires the worker offering the aid be within course and scope is what will be reviewed by the Supreme Court.

*Pipeline Systems, Inc. V. WCAB (Pounds) No. 384 WAL 2015 (PER CURIAM, March 8, 2016)* 3/16

The claimant, who injured his knee in employer’s parking lot because he fell running on employer’s parking lot to get to his car to attend to a personal emergency involving his family, did not suffer an injury in the course and scope of his employment because he was not furthering the business or affairs of his employer at the time of his injury and his injury was not caused by the condition of the premises.

Generally, an injury suffered while traveling to or from work is not considered to have occurred in the course and scope of employment. However, if the injury is
suffered on the employer’s ‘premises’ at a reasonable time before or after the work period, the claimant is entitled to benefits.

An employee who is not furthering the business or affairs of his employer must prove he or she is within the course of his or her employment by satisfying the following three conditions: (1) the injury must have occurred on the employer’s premises; (2) the employee’s presence thereon was required by the nature of his employment; and (3) the injury was caused by the condition of the premises or by the operation of the employer’s business thereon.

In this matter although the claimant satisfied the first two prongs of the test he did not satisfy the third prong because his injury was not caused by a condition of the employer’s parking lot. The claimant fractured his kneecap while running across Employer’s parking lot to his car at which time the claimant heard a popping noise and felt excruciating pain. Claimant’s foot then made contact with the parking lot and he collapsed, unable to bear any weight on his leg. The parking lot did not cause or contribute to the causative chain to Claimant’s injury.

**Quality Bicycle Products, Inc., v. WCAB (Shaw) No. 1570 C.D. 2015 (Decision by Senior Judge Friedman, April 25, 2016) 4/16**

- The claimant who injured himself unloading his own lockers at work that he voluntarily brought to work unbeknownst to his employer to replace their lockers that were defective suffered an injury in the course of employment because he was furthering his employer’s business interests notwithstanding the fact his employer did not ask him to bring his own lockers and had no awareness that he was bringing them to work and unloading them.

The fact the claimant was not performing his typical job duties and did not receive express permission from Employer to install the locker did not alone take him outside the scope of his employment. To be outside the course and scope of employment the employer needed to prove that the claimant abandoned his employment or was engaged in an activity that was wholly foreign to his employment.

While the general rule is that all on-premises injuries are in the course of employment, an employer may show abandonment or wholly foreign activity “when the employer can credibly argue that the employee was on the premises but in essentially a non-employee or trespasser status.”

The operative phrase ‘actually engaged in the furtherance of the business or affairs of the employer,’ which is usually expressed as ‘in the course of employment,’ must be given a liberal construction. Here by replacing a deteriorating locker the Claimant was on Employer’s premises and was acting in
furtherance of his Employer’s interest, and had undertaken an activity solely to benefit Employer.

- The phrase, “actually engaged in the furtherance of the business or affairs of the employer,” section 301(c) of the Act as it is used in the Act, applies to every detail necessary for the advancement of the business of the employer and in which the employee was engaged at the time of the accident. It is therefore immaterial whether an employee is acting as a volunteer assisting another employee and/or beyond the scope of his original employment duties when undertaking a task that furthers the employer’s interest.

In this matter there was no evidence to demonstrate that Claimant engaged in an activity prohibited by Employer, violated a company policy, or otherwise imposed a detriment upon Employer.

- Section 301(c) (1) of Act provides that an injury must occur in the course and scope of employment and be causally related thereto in order for the injury to be compensable.

The courts have developed two tests that are used to determine whether an injury was sustained in the course of employment.

Under the first test, the question is whether the employee was actually engaged in the furtherance of the employer’s business or affairs, regardless of whether the employee was upon the employer’s premises.

Under the second test, the employee need not be engaged in the furtherance of the employer’s business or affairs, however, the employee: (1) must be on the premises occupied or under the control of the employer, or upon which the employer’s business or affairs are being carried on; (2) must be required by the nature of his employment to be present on the premises; and (3) must sustain injuries caused by the condition of the premises or by operation of the employer’s business or affairs thereon.

*Grill v. WCAB (U.S. Airways), No. 1490 C.D. 2015 (Decision by Judge McCullough, September 21, 2016) 12/16*

**COVERAGE**

- The WCJ’s finding that the employer was uninsured was not supported by the record because the employer, an Ohio Company, complied with Section 305.2 of the Act by submitting certification form that met the requirements of section 305.2(c) of the Act.

Under section 305.2(c) of the Act an out of state employer who had insurance out of state may file a certification form that states the out of state employer had
workers’ compensation insurance at the time of the accident and that Claimant was entitled to benefits under that state law.

The purpose of section 305.2(c) is to insure that the responsible employer, and not the UEGF, is liable for the payment of compensation benefits.

In this matter the Ohio employer complied with Section 305.2(c) because it filed a certification form with the Pennsylvania Bureau of Workers’ Compensation in order to access its Ohio coverage for payments.

The employer’s certification form stated that: 1) Employer had workers’ compensation insurance coverage in Ohio on the date of Claimant’s work injury; 2) that Claimant was covered under this policy; and 3) that Claimant was entitled to benefits under Ohio’s workers’ compensation law.

The certification form identified the Ohio Bureau of Workers’ Compensation as the insurer responsible for the claim and proceeds to set forth an insurance policy number, effective December 19, 2008, which policy remained active as of January 6, 2014, the date the form was signed.

This means that Section 305.2 (C) permits an out of state employer to file a certification with the Pa. Bureau of Workers’ Compensation in order to access its Ohio coverage for payments.

*Salvadori v. WCAB (Uninsured Employers Guaranty Fund and Farmers Propane, Inc.) No. 2166 C.D. 2015 (Decision by Judge McCullough, December 5, 2016) 12/16*

**DISMISSAL**

- The WCJ erred in dismissing claimant’s Claim Petition with prejudice rather than without prejudice where the Claimant’s delay in obtaining an expert opinion consistent with the WCJ’s deadline for presenting medical evidence was due to circumstances beyond his control.

- The WCJ’s dismissal of the Claim Petition with prejudice rather than without prejudice was also not warranted despite the fact that due to claimant’s delay the employer no longer had available two fact witnesses who had since left the employ of the employer.

This is because since whatever prejudice Employer faced due to Claimant withdrawing the Petition in was not the result of Claimant’s disregard of a WCJ’s deadlines or orders. Upon reaching this result the court noted in a footnote that notwithstanding the fact that the witnesses had left Employer’s employ, Employer could request the WCJ to subpoena them to testify.
**EQUITABLE ESTOPPEL**

- The fact that the employer did not assert its credit against the ongoing medical for 13 years did not equitably estop it from having the right to do so.

The two essential elements of equitable estoppel are an inducement, and a justifiable reliance on the inducement. The party asserting the estoppel bears the burden of proving it by clear and convincing evidence.

In this matter the WCJ determined that the parties had never agreed to release Employer’s right to future credit. Thus, there was no admission upon which Claimant can rely.

More importantly, in **Thompson v. Workers’ Compensation Appeal Board (USF&G Company), 781 A.2d 1146 (Pa. 2001)**, the Supreme Court analyzed an employer’s right to subrogation in light of equitable principles. The court stated that Section 319 is clear and unambiguous. It is written in mandatory terms and, by its terms, admits of no express exceptions, equitable or otherwise. Furthermore, it does more than confer a ‘right’ of subrogation upon the employer; rather, subrogation is automatic.

The Supreme Court in **Thompson** concluded an employer’s right to subrogation is generally absolute, unless the employer engages in deliberate, bad faith conduct, which did not occur in this matter.

**FATAL CLAIM**

- Under Section 301(c)(1), a claimant has the burden of proving by unequivocal evidence that the injury arose in the course of the employment and that the injury was related to that employment.

Accordingly, it is a well-established rule that unless there is an obvious causal connection between a worker’s death and the work injury, the claimant must present unequivocal medical evidence establishing the connection.

- Claimant was not entitled to the granting of her Fatal Claim Petition where medical evidence presented was not sufficient to establish within a reasonable degree of medical certainty that a delay in providing the claimant medical treatment for a subarachnoid hemorrhage due to the erroneous diagnosis due to
the presence of chemicals and assumption there was chemical exposure therein contributed substantially to Decedent’s death.

In this matter claimant’s medical expert offered no opinion as to what treatment would have been provided or that the delays caused a worsening of the subarachnoid hemorrhage.

Neither a poor outcome, the lessening of the likelihood of achieving a more improved result, nor a reduction in his chances for survival rose to the level of medical evidence required to establish that Decedent would not have died as a result of the non-work related SAH but for the delay in diagnosis and proper treatment caused by Decedent’s work conditions.

Accordingly, it was not improper for the WCJ to dismiss Claimant’s Fatal Claim Petition for failure to provide prima facie evidence that decedent’s death was work related and thus a compensable fatal claim.

Justus v. WCAB (Bay Valley Foods), No. 1556 C.D. 2015 (Decision by Judge Colins, August 10, 2016) 11/16

IMPAIRMENT RATING EVALUATION

- Pennsylvania Supreme Court grants claimant’s Petition for Allowance of Appeal to address the issue:

  Did the Commonwealth Court err in concluding that an Impairment Rating Evaluation (IRE), which is designed to rate the percentage of disability two years out from a work injury, was valid where the IRE only considered the injuries listed on the notice of compensation payable issued at the time of injury, and did not consider additional injuries that subsequently arose and were known at the time of the IRE but not yet formally added to the description of injury?

- The Commonwealth decision, that was the subject matter of the granted Petition for Allowance of Appeal, had held that an IRE only considered the claimant’s work injury as it was defined and existed at the time the IRE was performed was valid notwithstanding an after-the-fact expansion of the scope of a claimant’s work-related injury.

  This meant, pursuant to the underlying Commonwealth decision, that the claim of new injuries and/or the granting of a Petition to Review that added new injuries following the performance of an IRE would not invalidate the results of an IRE that was premised upon the injuries that were accepted at the time that it was performed.
The Commonwealth Court had reasoned its holding was based upon the statutory language of Section 306(a.2), that requires the focus upon determining the validity of an IRE is on the state of the claimant and the compensable injury, as described in the NCP, at the time the IRE was performed.

_Duffey v. (Trola-Dyne, Inc.), No. 568 MAL 2015 (PER CURIAM, February 3, 2016) 2/16_

- The Pennsylvania Supreme Court grants the Petition for Allowance of Appeal filed by the claimant and the employer.

The employer’s granted Petition for Allowance of Appeal will address the following issue:

_Do Section 306(a.2) of the Pennsylvania Workers’ Compensation Act unconstitutionally delegate the State Legislature’s lawmaking authority in violation of Article II, Section 1 of the Pennsylvania Constitution by incorporating the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment?_

The claimant’s granted Petition for Allowance of Appeal will address the following issue:

_Whether the Commonwealth Court - after properly determining that Section 306(a.2) of the Workers’ Compensation Act was unconstitutional - erred in remanding the case to the Workers’ Compensation Judge with instructions to apply the Fourth Edition of the American Medical Association’s Guides to the Evaluation of Permanent Impairment when neither Section 306(a.2) nor any other section of the Act ever references the Fourth Edition and its usage was not sanctioned by the Pennsylvania Legislature?_

- It will be recalled that in Protz the Commonwealth Court had held that Section 306(a.2) of the Act was an unconstitutional delegation of legislative authority insofar as it proactively approved versions of the AMA Guides beyond the Fourth Edition, which was the edition of the AMA Guides in existence at the time the Pa. Legislature enacted Section 306(a.2) regarding IRE’s.

The Commonwealth Court proceeded to vacate the WCJ’s granting of Employer’s Petition for Modification premised upon the IRE based upon the Sixth of the AMA Guides and remanded this matter to the WCJ with instructions to apply the Fourth Edition of the AMA Guides in adjudicating the same.

_Protz v. WCAB(Derry Area School District), No. 412 WAL 2015 (Per Curiam March 22, 2016) 3/16_
The Pennsylvania Supreme Court reverses the Commonwealth Court and holds that a WCJ may validly reject the uncontradicted opinion of an IRE expert chosen by the Bureau regarding the degree of impairment and the WCJ is not required to identify substantial contrary evidence in the record to support such rejection.

This is because a physicians’ impairment rating opinions pertaining to IREs conducted under Section 306(a.2) (6) are subject to vetting through the “traditional administrative process.”

Therefore, it was not improper for the WCJ to reject the opinion of the physician who performed the IRE that was a “an underdeveloped, out-of-specialty opinion.”

The Commonwealth Court, upon reversing the WCJ, erred in its conclusions that a workers’ compensation judge lacks the authority to reject uncontradicted testimony by an IRE physician and that, in the present case, the WCJ was required to identify substantial contrary evidence in the record to support such rejection.

The Supreme Court stated that it disapproved of the Commonwealth Court decision, to the degree that the Commonwealth Court had fashioned, essentially, an uncontradicted medical evidence rule for IRE’s.

The employer bears the burden to establish grounds for modification based upon an IRE requested in excess of 60 days from the 104th week of total disability. Even when the medical testimony of an IRE physician chosen by the Bureau the WCJ is free to accept or reject Employer’s evidence. The fact that the Bureau (and not employers) selects IRE physicians, is insufficient to justify a judicial policymaking decision to implement a specialized approach to IREs conducted under Section 306(a.2)(6).

In the context of assessing an IRE opinion it is improper for the WCJ to harkened back to the full range of Claimant’s initial work-related injuries since this in with the nature of an IRE, which assesses the examinee’s present condition. In this regard, medical improvements occurring between the time of the initial injury and the examination may resolve impairments.

It is also improper to “lumping” medical conditions since the AMA Guides themselves establish broad categories of impairments tied to functional sub-units of a whole person, such as the nervous system.

*IA Construction Corporation v, WCAB (RHODES) No. 18 WAP 2015 (Decision by Chief Justice Saylor) 5/16*

The claimant did not waive the issue of challenging the validity of the IRE statute due to his failure to challenge its validity before the WCJ and the WCAB pursuant
to Section 703 of the Administrative Agency Law and under Pa. R.A.P. 1551(a), which allows a party to challenge the validity of a statute for the first time on appeal.

(Section Pa. R.A.P. 1551(a) provides, in pertinent part:

\[\ldots\text{No question shall be heard or considered by the court which was not raised before the government unit except:}\]

\[\text{(1) Questions involving the validity of a statute}\]

Section 703(a) of the Administrative Agency Law, 2 Pa.C.S. § 703(a), provides in pertinent part that:

\[\text{A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal}\ldots\]

Therefore, because the Commonwealth Court Decision of Protz v. Workers’ Compensation Appeal Board (Derry Area School District), 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (en banc), which held that Section 306(a.2) of the Act was an unconstitutional delegation of legislative authority because the General Assembly “proactively approved versions of the AMA Guides beyond the Fourth Edition without review”, challenged the validity of the statute and was decided after the WCJ decision but before the WCAB issued their decision the claimant was permitted to challenge the validity of the IRE provision for the first time on appeal before the Commonwealth Court.

\[\text{Beasley v. WCAB (Peco Energy Company) No. 634 C.D. 2016 (Decision by Judge Pellegrini, December 22, 2016) 12/16}\]

**INDEPENDENT CONTRACTOR**

- A claimant’s employment status is a critical threshold determination for liability under the Act. This is because independent contractors cannot recover benefits under the Act. The existence of an employer-employee relationship is a question of law based on the facts presented in each case.

While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration. The court will consider many factors including:

\[\checkmark\text{control of manner the work is done;}\]
responsible for result only;
• terms of agreement between the parties;
• nature of the work/occupation;
• skill required for performance;
• whether one is engaged in a distinct occupation or business;
• which party supplies the tools/equipment;
• whether payment is by time or by the job;
• whether work is part of the regular business of employer; and,
• The right to terminate employment.

Although no one factor is dispositive, control over the work to be completed and
the manner in which it is to be performed are the primary factors in determining
employee status.

Control exists where the alleged employer: “possesses the right to select the
employee; the right and power to discharge the employee; the power to direct the
manner of performance; and, the power to control the employee.”

Moreover, payment of wages and payroll deductions are significant factors, as is
provision of workers’ compensation coverage. However, payment is not
determinative.

In addition, a tax filing denoting self-employment, while a relevant factor, is not
dispositive on the issue.

Similarly, the existence of an employment or independent contractor agreement is
another factor to consider, but it is not, by itself, dispositive.

In the matter the Commonwealth Court affirmed the WCAB who reversed the
WCJ by finding claimant, who worked as a Personal Caretaker assigned to
defendants clients was an independent contractor, where: a) the defendants
clients paid Claimant directly and determined the rate of pay; b) Claimant also
signed a document titled “Independent Contractor Agreement; c) Claimant
deducted her own taxes from the payments; d) Claimant identified herself as self-
employed on her tax returns; e) defendant did not provide its caretakers with any
sick time, vacation or holiday pay; f) Claimant signed an employment agreement,
which provided: (i) caretakers are not employees of Defendant; (ii) caretakers are
paid directly by the client; and, (iii) caretakers are responsible for deducting their
own taxes; g) Claimant was free to work for other agencies; h) client and not the
defendant prescribed actual tasks to be completed or the manner in which work
was to be performed; i) Claimant did not check in with Defendant on a daily basis
and claimant could take time off at her discretion; j) Defendant did not supply the
uniform or other implements of work; and, k) although Defendant matched clients
to caretakers, the clients possessed the ultimate power to maintain or discharge
the caretakers, and set the final rate of pay.
The was despite the fact Defendant provided guidelines, which included instructions on personal services provided and directed Claimant to wear scrubs, maintained records on arrival and departure times, not to leave client unattended, maintain confidentiality, and not to use cell phones and Defendant established Claimant’s hours and wages, and had the ability to terminate her employment.

*Edwards v. WCAB (Epicure Home Care, Inc.)* No. 1106 C.D. 2015 *(Decision by Judge Simpson, March 10, 2016)* 3/16

**INTERLOCUTORY ORDER**

- An order by a WCJ denying a Joinder Petition is a final order and not interlocutory. This is because the order disposes entirely of the issues set forth in the Joinder Petition. Therefore, it is subject to an immediate appeal.

However, a party may take an appeal nunc pro tunc where there has been a breakdown in the administrative process. A breakdown in the administrative process occurs when the party seeking to appeal an order in an untimely manner establishes that its delay in taking action was caused by extraordinary circumstances involving fraud, a breakdown in the administrative process, or non-negligent circumstances related to the claimant, his counsel, or a third party.

When an adjudicator erroneously includes prohibitory language in a decision and order by labeling the order interlocutory and the order not only fails to advise a litigant of the right to appeal, which is the custom in workers’ compensation matters, but rather affirmatively directs the litigant that he or she may not appeal an order, the may have grounds to seek nunc pro tunc review.

In this matter the Court directed that the UEGF be given an opportunity to establish that a breakdown in the administrative process occurred such that the Board should have considered its appeal nunc pro tunc where the WCJ dismissed the Joinder of a carrier and erroneously labeled its order an interlocutory and not subject to appeal rather than a final order.

*Uninsured Employers Guaranty Fund v. WCAB (Gerretz, Reliable Wagon and Auto Body, Inc., and Somerset Casualty Insurance Company),* No. 445 C.D. *(Decision by Judge Brobson, June 14, 2016)* 6/16

**JOINDER PETITION**

- Pursuant to Regulation §131.36 a Joinder Petition must be filed no later than 20 days after the first hearing at which evidence regarding the reason for joinder is sought and that a WCJ can extend the time to file a joinder petition for good cause shown.
The 20-day time period begins when evidence is presented regarding the reason for which joinder is sought, not evidence establishing a reason for requesting joinder.

In this matter the WCJ abused her discretion where she granted the employer’s joinder as timely where the claimant’s testimony established a reason for the filing of the joinder when he testified credibly on May 6, 2013 but the Joinder was not filed until 20 days after the claimant’s medical expert testified on October 2, 2013.

- The Commonwealth Court notes in a footnote that the regulation does afford a WCJ discretion to extend the filing deadline for good cause shown, but the employer in this matter did not assert good cause or request an extension of time to file the joinder petition.

*Jackson, Jr. v. WCAB (Radnor School District and ACTS Retirement Community), No. 228 C.D. 2016 (Decision by Judge Wojcik, October 19, 2016) 10/16*

**LITIGATION COSTS**

- Where a claimant is only partially successful, before litigation costs are awarded, a determination must be made as to whether the costs were incurred on the winning issue or the losing issue. This is because a claimant must prevail on the contested issue in order to be awarded litigation costs

*Church v. WCAB (Landscaping and Fleming Termite and Pest Control), No. 1068 C.D. 2015 (Decision by Judge Colins, March 18, 2016) 3/16*

- An award of attorney’s fees and litigation costs to a prevailing claimant is not automatic. Therefore, even if the absence of an award of attorney’s fees was inadvertent, the mistake goes to the merits of the case rather than to the satisfaction of the award, and it cannot be corrected by way of a Petition to Review under Section 413 of the Act.

The claimant would need to remedy the failure to receive attorney fees and litigation costs by filing an appeal, even if the claimant prevailed on the merits of the case.

- It is true that generally, a party who prevailed in a proceeding below is not an aggrieved party and, consequently, has no standing to appeal. However, courts allow a party to appeal where the remedy awarded is claimed to be insufficient.

In this matter, although Claimant prevailed before the WCAB in his appeal of the suspension order, he only prevailed in part; because the Board did not address his
request for costs and attorney’s fees. As a result, and because an award of attorney’s fees is not automatic, Claimant was adversely affected by the WCAB’s decision, and thus, he was aggrieved. Claimant’s proper remedy was to request reconsideration by the Board or file an appeal to the Commonwealth Court.

Claimant failed to do either. Since the WCAB’s order that failed to award litigation costs and attorney fees was final the claimant was not permitted to collaterally attacked by a the WCAB’s final order by filing a Petition to Review that sought reimbursement of attorney fees and litigation costs.

*Byfield v. WCAB (Philadelphia Housing Authority), No. 2002 C.D. 2015(Decision by Judge Wojcik, July 26, 2016)* 7/16

- An employer is entitled to recover from claimant’s Counsel the invalid unreasonable contest attorney fees award that it was required to pay to counsel. This is because the employer would not be entitled to reimbursement for such costs from the Supersedeas Fund.

An order to refund unreasonable contest attorney fees involves no repayment of compensation benefits and denying a refund order would result in unjust enrichment by allowing an unsuccessful claimant’s counsel to keep funds that may only be awarded where the claimant is the prevailing party.

The Commonwealth Court therefore ordered Counsel to refund to Employer the $14,750 in unreasonable contest attorney fees that Employer paid to Counsel following reversal of the WCJ’s decision that has assessed unreasonable contest attorney fees against the employer.

- This holding follows the reasoning of the court decision of Barrett v. Workers’ Compensation Appeal Board (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010) that held that where litigation costs are awarded and are paid by the employer as a result of denial of a stay and the award of costs is later reversed on appeal, the employer is entitled to an order requiring the claimant’s counsel to repay the erroneously awarded costs because to do otherwise would result in an unjust enrichment and would deprive the employer of any meaningful appeal from an erroneous costs award because litigation costs cannot be recovered from the Supersedeas Fund.

*County of Allegheny v. WCAB (Parker) No. 82 C.D. 2016 (Decision by Judge Colins, December 20, 2016)* 12/16
LONGSHORE ACT

- The WCJ did not err by holding that the Longshore Act had exclusive jurisdiction over the claimant’s injury where the ship on which Claimant was injured was located “on the water.” This is because the Longshore Act provides employees who are injured over navigable waters while performing traditionally maritime functions remain exclusively in the jurisdiction of the Longshore Act.

- An employee is entitled to benefits under the Workers’ Compensation Act when he establishes that he suffered a work-related injury in Pennsylvania that occurred in the course of an employment relationship. Sections 101 and 301(c)(1) of the Workers’ Compensation Act. Alternatively, an employee is entitled to benefits under the Longshore Act if he establishes that his disability is the result of “an injury occurring upon the navigable waters of the United States.

Maritime employees who are injured over navigable waters while performing traditionally maritime functions remain exclusively in the jurisdiction of the Longshore Act.

*Savoy v. WCAB (Global Associates), No. 2613 C.D. 2015 (Decision by Judge Leavitt, August 25, 2016)* 8/16

LOSS OF USE

- Pursuant to 413(a) of the Act where the WCJ recognized a work-related injury, but suspends benefits based on a conclusion that such injury did not cause a loss of earning power, the WCJ maintained the authority to reinstate benefits or modify an award upon proof that an injury has worsened and resolved into a disability.

Although the WCJ was bound by a prior decision to accept that the Claimant suffered a trigeminal nerve injury that caused headaches as a result of his compensable injury the WCJ was not bound to find this constitutes an injury separate and apart from the claimant’s specific loss of the eye since the trigeminal nerve injury was non disabling it did not result in wage loss. As such, it did not constitute an injury separate and apart from the claimant’s specific loss to the eye.

This is because that the terms “injury” and “disability” are not synonymous in workers’ compensation law.

The term “injury” relates to a physical impairment.
Conversely, for purposes of receiving workers’ compensation, ‘disability’ is a term synonymous with loss of earning power; it does not refer to physical impairment.

The term “disability” in compensation law means loss of earning power.

For compensation for the specific losses enumerated under Section 306(c) the term, “disability,” means the specific loss of the member, or eyesight, or hearing, or . . . a permanent disfiguring scar.

- A claimant who sustains a specific loss of a body part compensable under Section 306(c) of the Act, is not entitled to compensation beyond that specified in that section even though he may be totally disabled by the injury. This is because specific loss benefits are payable without regard to a claimant’s earning capacity.

Injuries, including those that result in a loss of earning power, that normally flow from the specific loss injuries are considered compensated under specific loss benefits. However, if a claimant suffers an injury that is separate and apart from a specific loss of a body part that results in a loss of earning power, the claimant may receive total disability under Section 306(a) of the Act or partial disability under Section 306(b) of the Act in addition to benefits for the specific loss of a body part.

Such is also the case when a claimant suffers a specific loss injury and another disability arising from a single incident.

A claimant seeking concurrent specific loss and disability benefits bears the burden to prove that he has a disability separate and apart from that which normally follows the specific loss injury. If a claimant fails to satisfy this burden, other disability benefits are suspended and disability benefits previously received by a claimant related to the specific loss injury are credited to employer.

*Lindemuth v. WCAB(Strishock Coal Co.), No. 812 C.D. 2015 (Decision by Judge Cohn Jubelirer, February 24, 2016) 2/16*

**SPECIFIC LOSS**

- The WCJ did not err by failing to grant Claimant’s Penalty Petition because Employer failed to begin to pay awarded disfigurement benefits after Claimant’s temporary total disability benefits had been suspended July 25, 2011 through August 2, 2011 where by WCJ order dated September 7, 2011 total disability benefits were reinstated beginning August 3, 2011.

Section 306(d) of the Act, which provides that when a claimant has a specific loss but is receiving total disability other injuries in addition to the specific loss the
benefits for the specific loss will not begin until the period of temporary total disability has ended, is a timing provision established to make sure claimants do not receive both temporary total disability and disfigurement benefits simultaneously.

In this matter the original suspension was only a temporary suspension of Claimant’s WC benefits on account of Claimant returning to work, and did not mandate Employer to begin Claimant’s disfigurement benefits. Claimant’s temporary total disability benefits were not terminated until the WCJ’s January 9, 2013 order granting Employer’s Suspension Petition as of July 25, 2011. Therefore, Employer was not required to begin Claimant’s disfigurement benefits until that date.

*Dixon v. WCAB (Medrad, Inc.), No. 1700 C.D. 2014 (Decision by Judge Covey, March 30, 2016) 3/16*

- Notice to a co-worker of an injury does not constitute notice to the employer where there is no evidence that the co-worker was authorized as Employer’s “representative, to receive a report or notice” of Claimant’s injury.

Per Section 313 of the Act notice may be given to the immediate or other superior of the employee, to the employer, or any agent of the employer regularly employed at the place of employment of the injured employee.

*Any agent of the employer* does not mean that information of an accident may be given to any other employee. Rather, “agent of the employer” means “a person whose position justifies the inference that authority has been delegated to him by the employer, as his representative, to receive a report or notice of such accidental injury.’

In this matter the WCJ committed an error of law by finding claimant’s notice was timely since he gave notice to his co-employee. A title is not dispositive of who a claimant should inform of a work injury. Giving notice to simply “any other employee” is not sufficient to meet the Act’s notice requirement. Regardless of whether the co-worker was an “acting supervisor” Claimant presented no evidence that the co-worker was authorized as Employer’s “representative, to receive a report or notice” of Claimant’s injury.

- Sliding an injury report under the locked door of the manager’s office does not satisfy the notice requirement. The claimant must prove that his employer actually received notice of a work injury.

- Section 311 of the Act requires the claimant to inform his employer of a work injury within 120 days of its occurrence. If he fails to do so, he is ineligible for
compensation. This deadline cannot be extended where the claimant asserts that he told a fellow employee of the injury.

The claimant was not entitled to disfigurement benefits where the Court concluded that the claimant did not provide timely notice.

- Where there is no obvious causal connection between an injury and the alleged work-related cause, the claimant must offer competent medical evidence to prove that connection. The medical expert must opine that “in his professional opinion, the injury came from the related incident.

A physician’s assumption that an injury is caused by a recent event because of the temporal proximity is not a sufficiently competent opinion to establish a causal relationship.

Claimant’s medical experts’ testimony was not competent where he opined that Claimant must have been injured in the February 2011 fall because he later experienced symptoms. But neither he nor Claimant testified about the inception of those symptoms.

*Penske Logistics v. WCAB (Troxel) No. 713 C.D. 2014 (Decision by Judge Leavitt, June 17, 2015) 2/16*

**MEDICAL BENEFITS**

- The term “compensation” used under Article XVI of the Act is defined by Section 1601 of the Act as including both disability and medical benefits. Therefore, pursuant to 1603(b) of the Act, a claimant who fails to give notice of a claim to the UEGF within 45 days of the date it learned the employer is uninsured is not entitled to compensation and medical until the date if gives notice.

Notwithstanding the fact failure to give notice to the UEGF within 45 days, the claimant was not responsible to his providers for past due medicals. This is because Employees injured while working for uninsured employers do not assume the costs of medical treatment provided to them prior to notice being given to the UEGF. Medical providers are prohibited from requiring injured employees to pay for work-related treatment by Section 306(f.1)(7) of the Act, which states “A provider shall not hold an employe liable for costs related to care or service rendered in connection with a compensable injury under this act”.

Medical providers, however, maintain their right to pursue a remedy outside the workers’ compensation system against uninsured employers to cover the expenses incurred in the treatment of injured employees.
The WCJ did not err in denying claimant’s counsel a 20% attorney fee chargeable to the claimant’s medical bills where the WCJ concluded that the Claimant failed to establish that any particular work performed specifically advanced the payment of medical bills to warrant a 20% attorney fee of the medical bill payments and where the WCJ found that testimony did not establish that the Agreement provided Counsel with 20 percent of the medical bills paid.

This is because the Agreement did not explicitly provide for a 20 percent attorney fee on Claimant’s medical benefits and Counsel did not demonstrate to the WCJ why such a fee was justified in light of the time and effort expended on obtaining medical benefits for Claimant. The WCJ was also correct in finding that Counsel’s requested fee was unreasonable in light of the work performed.

Upon determining whether medical bill payments should be included in a contingent fee agreement, the WCJ must assess: (1) whether the claimant and counsel intended for counsel to receive a percentage of the medical bill payments; and (2) whether the fee is reasonable.

In addition, a reasonableness inquiry in this context should address the amount and degree of difficulty of the work performed by the attorney upon obtaining payment of medical benefits. This requires a quantum meruit analysis.

Thus, counsel seeking a contingent fee on medical bill payments in addition to the per se reasonable 20 percent contingent fee on indemnity benefits must demonstrate to the WCJ why such a fee is justified in light of the time and effort expended on obtaining medical benefits for the claimant.

Although the provider would be prohibited from going after the claimant for the difference between the amount billed and the Medicare-based reimbursement rates, the Act would not prohibit the provider from seeking reimbursement from the claimant for the balance resulting payment of an amount less than the Medicare-based reimbursement rates resulting from counsel’s 20% attorney fee chargeable to the medical bill.

The court voiced its concern that a claimant may not be aware that her counsel’s interest in receiving attorney’s fees based on medical benefit payments can be in conflict with the claimant’s own financial interests. As expressed by Judge Pellegrini in a prior decision, “at the minimum,” a claimant should be informed “of the potential conflict and informed that he may wish to employ an attorney to advise him of the reasonableness of the fees sought by his counsel.”
MEDICAL TESTIMONY

- The WCJ did not commit an error of law by finding a doctor credible who did not perform a complete physical examination of Claimant’s face. Assessing the credibility of a medical expert that did not conduct a physical examination is within the exclusive providence of the WCJ.

Lindemuth v. WCAB (Strishock Coal Co.), No. 812 C.D. 2015 (Decision by Judge Cohn Jubelirer, February 24, 2016) 2/16

- Where there is no obvious causal connection between an injury and the alleged work-related cause, the claimant must offer competent medical evidence to prove that connection. The medical expert must opine that “in his professional opinion, the injury came from the related incident.

A physician’s assumption that an injury is caused by a recent event because of the temporal proximity is not a sufficiently competent opinion to establish a causal relationship.

Claimant’s medical experts’ testimony was not competent where he opined that Claimant must have been injured in the February 2011 fall because he later experienced symptoms. But neither he nor Claimant testified about the inception of those symptoms.

Penske Logistics v. WCAB (Troxel) No. 713 C.D. 2014 (Decision by Judge Leavitt, June 17, 2015) 2/16

- Upon remanding this matter the Commonwealth Court directed the WCAB to determine whether the Act requires a medical expert to satisfy Pennsylvania Rule of Evidence 702, i.e., the Frye standard. This section provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;

(b) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and

(c) the expert’s methodology is generally accepted in the relevant field.
City of Philadelphia Fire Department v. WCAB (Sladek), No. 579 C.D. 2015
(Decision by Judge Leavitt, August 12, 2016) 8/16

- Claimant was not entitled to the granting of her Fatal Claim Petition where medical evidence presented was not sufficient to establish within a reasonable degree of medical certainty that a delay in providing the claimant medical treatment for a subarachnoid hemorrhage due to the erroneous diagnosis due to the presence of chemicals and assumption there was chemical exposure therein contributed substantially to Decedent’s death.

In this matter claimant’s medical expert offered no opinion as to what treatment would have been provided or that the delays caused a worsening of the subarachnoid hemorrhage.

Neither a poor outcome, the lessening of the likelihood of achieving a more improved result, nor a reduction in his chances for survival rose to the level of medical evidence required to establish that Decedent would not have died as a result of the non-work related SAH but for the delay in diagnosis and proper treatment caused by Decedent’s work conditions.

Accordingly, it was not improper for the WCJ to dismiss Claimant’s Fatal Claim Petition for failure to provide prima facie evidence that decedent’s death was work related and thus a compensable fatal claim.

Justus v. WCAB (Bay Valley Foods), No. 1556 C.D. 2015 (Decision by Judge Colins, August 10, 2016) 11/16

NOTICE

- Notice to a co-worker of an injury does not constitute notice to the employer where there is no evidence that the co-worker was authorized as Employer’s “representative, to receive a report or notice” of Claimant’s injury.

Per Section 313 of the Act notice may be given to the immediate or other superior of the employee, to the employer, or any agent of the employer regularly employed at the place of employment of the injured employee.

Any agent of the employer does not mean that information of an accident may be given to any other employee. Rather, “agent of the employer” means “a person whose position justifies the inference that authority has been delegated to him by the employer, as his representative, to receive a report or notice of such accidental injury.’
In this matter the WCJ committed an error of law by finding claimant’s notice was timely since he gave notice to his co-employee. A title is not dispositive of who a claimant should inform of a work injury. Giving notice to simply “any other employee” is not sufficient to meet the Act’s notice requirement. Regardless of whether the co-worker was an “acting supervisor” Claimant presented no evidence that the co-worker was authorized as Employer’s “representative, to receive a report or notice” of Claimant’s injury.

- Sliding an injury report under the locked door of the manager’s office does not satisfy the notice requirement. The claimant must prove that his employer actually received notice of a work injury.

- Section 311 of the Act requires the claimant to inform his employer of a work injury within 120 days of its occurrence. If he fails to do so, he is ineligible for compensation. This deadline cannot be extended where the claimant asserts that he told a fellow employee of the injury.

The claimant was not entitled to disfigurement benefits where the Court concluded that the claimant did not provide timely notice.

_Penske Logistics v. WCAB(Troxel) No. 713 C.D. 2014 (Decision by Judge Leavitt, June 17, 2015) 2/16_

**NOTICE OF DENIAL**

- The WCJ, with the WCAB’s affirmation, did not improperly find that the Box 4 Notice of Denial was akin to a Medical Only Notice of Compensation Payable and therefore the claimant was not time barred for failure to file a Claim Petition within 3 years of the date of injury and the for a Petition for Reinstatement filed more than 3 years after the injury was not time barred.

_Church v. WCAB (Landscaping and Fleming Termite and Pest Control), No. 1068 C.D. 2015 (Decision by Judge Collins, March 18, 2016) 3/16_

**NOTICE OF SUSPENSION**

- The employer violated the Act resulting in the assessment of Penalties where Claimant’s Challenge Petition in response to employer’s Notice of Suspension where the employer did not reinstate the claimant’s compensation within 21 days of the filing of the Challenge where the WCJ did not schedule a hearing within 21 days, though was one scheduled outside of the 21 day period.

This is consistent with Section 413(c)(1) of the Act that provides in pertinent part:
The special supersedeas hearing shall be held within twenty-one days of the employe’s filing of the notification of challenge.

The assessment of penalties was also consistent with Section 131.50a of the WC Regulations that provides in relevant part:

(a) This section governs the disposition of an employee’s request for a special supersedeas hearing made in connection with a challenge to the suspension or modification of WC benefits under Sections 413(c) and 413(d) of the ACT

(b) A special supersedeas hearing will be held within 21 days of the employee’s filing of the notice of challenge.

(f) If the WCJ fails to hold a hearing within 21 days or fails to issue a written order approving the suspension or modification of benefits within 14 days of the hearing, the insurer shall reinstate the employee’s WC benefits at the weekly rate the employee received prior to the insurer’s suspension or modification of benefits under Sections 413(c) or 413(d) of the Act

In this matter because the WCJ failed to hold a hearing within 21 days the Employer was required to reinstate Claimant’s benefits. Accordingly, Employer violated the Act when it did not reinstate Claimant’s benefits when a hearing was not held within 21 days of the date Claimant filed his Challenge Petition.

Dixon v. WCAB( Medrad, Inc.), No. 1700 C.D. 2014 (Decision by Judge Covey, March 30, 2016) 3/16

OCCUPATIONAL DISEASE

- Section 108(r) recognizes the occupational disease of cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

Section 301(f) provides, in pertinent part, that:

Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and have successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer.
The WCJ’s granting of the claimant’s Fatal Claim Petition was not supported by competent and substantial evidence where the decision was premised upon the finding that decedent, who was a fire fighter, contracted cancer due to exposure to a known carcinogen, which is recognized as a Group 1 carcinogen by the International Agency, as required by Section 108(r) and 301(f) of the Act but the sole evidence before the WCJ regarding Decedent’s fire department exposure was Claimant’s testimony that Decedent came home from fires on more than 15 occasions smelling of smoke and with an ashy appearance.

While such testimony would be sufficient to show that Decedent was exposed to smoke and ash while working for Employer, by itself it was insufficient to show exposure to asbestos or any other specific Group 1 carcinogens within the smoke.

Moreover, claimant’s medical expert’s testimony was not competent where his testimony that Decedent was exposed to Group 1 carcinogens was not competent and lacked a proper foundation upon which that conclusion could be based because he solely relied upon counsel’s hypothetical and information contained in counsel’s letter. To be competent, an expert must base his testimony on facts warranted by the record or reasonable inferences drawn therefrom.

It is true that that the question of whether a worker has been exposed to hazardous material in the workplace for the purpose of Section 108 of the Act is a question of fact for the WCJ and the claimant may rely on lay testimony, rather than that of an expert, to show the existence of, and exposure to, a hazard.

Nevertheless, the testimony of exposure to a workplace hazard must be competent and a WCJ must ensure that the evidence presented complies with the rules of evidence related to lay and expert testimony. To be competent, an expert must base his testimony on facts warranted by the record or reasonable inferences drawn therefrom.

In this matter, claimant’s expert professed to have an awareness of the working conditions of municipal firefighters, but he had no knowledge of the facts of Decedent’s career or the fires fought in the City of Williamsport. Consequently, the WCJ erred in relying on such testimony to show exposure to a workplace hazard that would support an occupational disease presumption under the Act.

Claimant’s medical expert’s testimony that Decedent was exposed to Group 1 carcinogens was not competent and lacked a proper foundation upon which that conclusion could be based because he solely relied upon counsel’s hypothetical and information contained in counsel’s letter.

*City of Williamsport v. WCAB (Cole (Deceased), No. 620 C.D. 2015 (Decision by Judge Colins, July 18, 2016) 10/16*
To establish that a firefighter’s cancer is an occupational disease, pursuant to 108(r) of the Act, the firefighter must show that he has been diagnosed with a type of cancer “caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen.” By using the words “caused by” it is incumbent upon Claimant to prove that his cancer is a type of cancer caused by the Group 1 carcinogens to which he was exposed in the workplace to establish an occupational disease.

Only then do the presumptions in Section 301(e) and (f) of the Act come into play.

Section 301 (e) provides:

*If it be shown that the employee, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employee’s occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.*

Section 301 (f) provides in pertinent part:

*Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and have successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer. The presumption of this subsection may be rebutted by substantial competent evidence that shows that the firefighter’s cancer was not caused by the occupation of firefighting.*

This presumption relieves the firefighter of the need to prove that his cancer was caused by his workplace exposure and not another cause. So long as the firefighter can show four years of continuous service and the absence of cancer prior to that service, he is entitled to compensation under Section 301(f) of the Act.

The WCAB’s affirmation of the WCJ’s granting of claimant’s Claim Petition was vacated and this matter was remanded because the WCAB erred in concluding that if claimant had cancer generally and was exposed to any Group 1 carcinogens, he had met his initial burden. The WCAB failed to give effect to the words “caused by” between “cancer suffered by a firefighter” and “exposure to a known [Group 1] carcinogen” as used in Section 108(r) of the Act.
Upon remand, the claimant had to establish that melanoma is caused by a Group 1 carcinogen, thus rendering it an occupational disease under Section 108(r). Only at that point would the presumption in Section 301(e) come into play and assist Claimant, who is relieved of having to rule out other causes for his melanoma, such as his outdoor lifestyle.

The WCJ must then determine whether Claimant had “four or more years in continuous firefighting duties, can establish direct exposure to a carcinogen referred to in section 108(r) and successfully passed a physical examination prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer

City of Philadelphia Fire Department v. WCAB (Sladek), No. 579 C.D. 2015 (Decision by Judge Leavitt, August 12, 2016) 8/16

- Act 46, amended Section 108 to include: (r) Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

Section 301(f) is read in conjunction with claims filed under 108(r). This section requires:

- A firefighter have at least four years of continuous firefighting duties
- A firefighter successfully pass a physical examination prior to asserting a claim under 301(f) or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer.
- The firefighter must be able to establish direct exposure to a Group 1 carcinogen.
- Claims filed under Section 108(r) must be made within 600 weeks of the last date of employment in which a claimant was exposed to the hazards of the disease.
- The presumption of compensability afforded firefighters with work-related cancer applies only to claims made within 300 weeks of the last date of employment with exposure to the hazard.

In this matter the claimant was not entitled to the presumption that his prostate cancer was related to his work as a firefighter because the Claimant’s filed his Claim Petition outside of the 300-week period entitling him to the rebuttable presumption of compensability in Section 301(f) of the Act.

He was still able to pursue his Claim Petition by proving causation since it was filed within 600 weeks of the last date of employment in which a claimant was exposed to the hazards of the disease.
Regardless of the date a firefighter files a Claim Petition seeking compensation for cancer under Section 108(r), the firefighter must establish that his disease is a type of cancer caused by exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC.

Only if the claimant can establish his cancer is the type of cancer caused by the Group 1 carcinogens under Section 108(r), will the rebuttable presumptions in Sections 301(e) and (f) come into play. If Section 301(e)’s presumption of causation comes into play and the claimant is relieved of having to rule out other possible causes for his cancer.

In this matter Claimant failed to establish a causal relationship between his prostate cancer and his occupational exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC. Thus, regardless of the date he filed his claim petition, the presumption of compensability in Section 301(f) of the Act was unavailable to Claimant.

The WCJ did not commit an error by dismissing the claimant’s Claim Petition where the Employer’s Expert did not offer an opinion specific to Claimant’s individual circumstance because the presumption of compensability in Section 301(f) did not come into play and the WCJ found that the claimant did not meet her burden of proving causation because the WCJ found Claimant’s Expert’s testimony failed to credibly or persuasively prove that Claimant’s exposure to Group I carcinogens constituted a significant contributing factor in the cause of his prostate cancer.

_Hutz v. WCAB (City of Philadelphia)_ No. 2140 C.D. 2015 (Decision by Judge Simpson, September 7, 2016) 9/16

The claimant’s Claim Petition was untimely under Section 301(f) where the claimant filed his Claim Petition in March 2014, which was more than 600 weeks after the claimant’s last date of employment on July 31, 2001 and the last date when the Claimant could have last been exposed to carcinogens in the workplace.

A firefighter who files a Claim Petition pursuant to Section 108(r) of the Act must show exposure to a Group 1 carcinogen by the International Agency for Research on Cancer.

For the firefighter to obtain the presumption of 301(e) that the occupational disease arose out of and in the course of his employment the disability or death resulting from an occupational disease must have occurred within 300 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, as required by Section 301(c) (2).
However, Section 301(f) requires that claim itself filed pursuant to section 108(r) be filed within 600 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The claimant is only entitled to the presumption sent forth by 301(e) if the Claim Petition is filed within three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The Claim Petition would still be timely per Section 301(f) if it is filed within six hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease; however, the claimant will not be entitled to the presumption if the Claim Petition was filed more than three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

• Put another way, Section 301(f) and Section 301(c) (2) set forth distinct limitations. By their plain text, the limitation period of Section 301(f) requires that claims be made or filed, within 600 weeks while Section 301(c)(2) requires that the disability or death that is the basis for the claim for compensation is “occurring,” or manifesting, within 300 weeks.

The key difference between these two provisions is not the date upon which the limitations periods start but rather what must take place before the periods end; in the case of Section 301(c) (2), disability or death resulting from the occupational disease must occur or manifest within 300 weeks, while in the case of Section 301(f), the claimant must file the claim within 600 weeks.

Thus, Section 301(f) sets forth a two-tiered limitations period for Section 108(r) claims distinct from the time limit in Section 301(c)(2).

  • First, a claimant must file the claim within 300 weeks of the last date of work with exposure to a known Group 1 carcinogen; if the claimant fails to do so, he is not foreclosed from bringing a claim by Section 301(f), but he loses the statutory presumption of Sections 301(e) and 301(f).

  • However, if the claimant does not file the claim until more than 600 weeks after the date of last workplace exposure, the claimant is foreclosed from bringing that claim in its entirety.

• It is true that the three-year statute of limitations of Section 315 of the Act7 for filing a claim for compensation does not begin to run in occupational disease cases until the claimant knows or should know that he is disabled as a result of an occupational disease, which is presumed to occur only when the claimant receives a competent medical diagnosis that his illness is work-related.
However, the 600-week limitations period of Section 301(f) acts as a statute of repose and is not subject to a discovery rule. These means that once 600 weeks elapse from the date of the last workplace exposure, the cause of action under Section 108(r) ceases to exist.

The discovery rule to Section 315 may still toll the three-year limitations period of Section 315 in Section 108(r) cases where the claimant was not aware of the nature of his occupational disease, provided that the claim is filed before the expiration of the 600-week period.

_Fargo v. WCAB (City of Philadelphia)_ No. 2239 C.D. 2015 (Decision by Judge Collins, October 11, 2016) 10/16

- Section 108(r) requires the firefighter to show that the Group 1 carcinogens to which he was exposed have been shown to cause the type of cancer for which the claimant has been diagnosed. Where the firefighter fails to show that his cancer is an occupational disease under Section 108(r) of the Act, he may not use the presumption in Section 301(f) and 301(e).

- The inability of the firefighter to prove that his cancer is an occupational disease under Section 108(r) of the Act does not mean that he cannot pursue a claim for compensation. The Act allows any employee to pursue compensation for any disease causally related to his industry or occupation.

- In this matter Claimant’s medical evidence did not establish a causal relationship between prostate cancer and Group 1 carcinogens, and this was necessary in order to establish that his prostate cancer is an occupational disease under Section 108(r) of the Act. As a result, the presumption of compensability in Section 301(f) of the Act was unavailable to Claimant.

Claimant’s medical evidence was also inadequate to prove his particular cancer was caused by workplace exposures to other carcinogens under Section 108(n) of the Act. As such, the presumption in Section 301(e) of the Act was not available to assist Claimant in making a case that his prostate cancer was a compensable occupational disease.

- Section 108(r) provides:

  _Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer._

_Demchenko v. WCAB (City of Philadelphia), No. 2164 C.D. 2015 (Decision by Judge Leavitt, October 26, 2016) 10/16_
PENALTY

- The WCJ did not err by dismissing the Penalty Petition filed by the Medical Provider for non-payment of his bills where the provider treated the claimant for an alleged work injury that was resolved by no admission of liability C&R that provided for no payment of medical bills.

This is because pursuant to Section 449(b) of the Act the proposed C&R that must be explicit with regard to the payment, if any, of reasonable, necessary and related medical expenses. In this case Employer and Claimant entered into a C&R agreement that was approved by the WCJ. The C&R agreement stated that it was not an admission of liability by Employer and did not require the employer to pay past or future medical.

The Employer denied that Claimant suffered a work injury and never admitted liability by issuing a document such as a NCP. Further, there was no finding or adjudication that Claimant’s injury was work-related. Thus, Employer was not obligated at any time to pay Claimant’s medical bills.

_Schatzberg, DC and Philadelphia Pain Management v. WCAB No. 1914 C.D. 2015 (Decision by Judge Friedman, March 30, 2016) 3/16_

- The employer violated the Act resulting in the assessment of Penalties where Claimant’s Challenge Petition in response to employer’s Notice of Suspension where the employer did not reinstate the claimant’s compensation within 21 days of the filing of the Challenge where the WCJ did not schedule a hearing within 21 days, though was one scheduled outside of the 21 day period.

This is consistent with Section 413(c)(1) of the Act that provides in pertinent part:

_The special supersedeas hearing shall be held within twenty-one days of the employe’s filing of the notification of challenge._

The assessment of penalties was also consistent with Section 131.50a of the WC Regulations that provides in relevant part:

(a) This section governs the disposition of an employee’s request for a special supersedeas hearing made in connection with a challenge to the suspension or modification of WC benefits under Sections 413(c) and 413(d) of the ACT
(b) A special supersedeas hearing will be held within 21 days of the employee's filing of the notice of challenge.

(f) If the WCJ fails to hold a hearing within 21 days or fails to issue a written order approving the suspension or modification of benefits within 14 days of the hearing, the insurer shall reinstate the employee’s WC benefits at the weekly rate the employee received prior to the insurer’s suspension or modification of benefits under Sections 413(c) or 413(d) of the Act.

In this matter because the WCJ failed to hold a hearing within 21 days the Employer was required to reinstate Claimant’s benefits. Accordingly, Employer violated the Act when it did not reinstate Claimant’s benefits when a hearing was not held within 21 days of the date Claimant filed his Challenge Petition.

- The WCJ did not err by failing to grant Claimant’s Penalty Petition because Employer failed to begin to pay awarded disfigurement benefits after Claimant’s temporary total disability benefits had been suspended July 25, 2011 through August 2, 2011 where by WCJ order dated September 7, 2011 total disability benefits were reinstated beginning August 3, 2011.

Section 306(d) of the Act, which provides that when a claimant has a specific loss but is receiving total disability other injuries in addition to the specific loss the benefits for the specific loss will not begin until the period of temporary total disability has ended, is a timing provision established to make sure claimants do not receive both temporary total disability and disfigurement benefits simultaneously.

In this matter the original suspension was only a temporary suspension of Claimant’s WC benefits on account of Claimant returning to work, and did not mandate Employer to begin Claimant’s disfigurement benefits. Claimant’s temporary total disability benefits were not terminated until the WCJ’s January 9, 2013 order granting Employer’s Suspension Petition as of July 25, 2011. Therefore, Employer was not required to begin Claimant’s disfigurement benefits until that date.

* Dixon v. WCAB( Medrad, Inc.), No. 1700 C.D. 2014 (Decision by Judge Covey, March 30, 2016) 3/16*

- Section 435(d) (i) of the Act authorizes WCJs to assess penalties against employers for violations of the Act. Moreover, a claimant who files a penalty petition bears the burden of proving a violation of the Act occurred. If the claimant meets his or her initial burden of proving a violation, the burden then shifts to the employer to prove it did not violate the Act.
The assessment of penalties, and the amount of penalties imposed are matters within the WCJ’s discretion. Thus, absent an abuse of discretion by the WCJ [a penalty award will not be overturned on appeal.

The WCJ did not abuse her discretion where she found the employer violated the Act by refusing to pay for Claimant’s surgery to be performed upon the shoulder, which was a recognized body part, but imposed a 0% penalty

_Baumann v. WCAB (Kellogg Company), No. 2603 C.D. 2015 (Decision by Judge Covey, September 23, 2016) 9/16_

STATUTE OF LIMITATIONS

- Act 46, amended Section 108 to include: (r) Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

Section 301(f) is read in conjunction with claims filed under 108(r). This section requires:

- A firefighter have at least four years of continuous firefighting duties
- A firefighter successfully pass a physical examination prior to asserting a claim under 301(f) or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer.
- The firefighter must be able to establish direct exposure to a Group 1 carcinogen.
- Claims filed under Section 108(r) must be made within 600 weeks of the last date of employment in which a claimant was exposed to the hazards of the disease.
- The presumption of compensability afforded firefighters with work-related cancer applies only to claims made within 300 weeks of the last date of employment with exposure to the hazard.

In this matter the claimant was not entitled to the presumption that his prostate cancer was related to his work as a firefighter because the Claimant’s filed his Claim Petition outside of the 300-week period entitling him to the rebuttable presumption of compensability in Section 301(f) of the Act.

He was still able to pursue his Claim Petition by proving causation since it was filed within 600 weeks of the last date of employment in which a claimant was exposed to the hazards of the disease.

_Hutz v. WCAB (City of Philadelphia) No. 2140 C.D. 2015 (Decision by Judge Simpson, September 7, 2016) 9/16_
The claimant’s Claim Petition was untimely under Section 301(f) where the claimant filed his Claim Petition in March 2014, which was more than 600 weeks after the claimant’s last date of employment on July 31, 2001 and the last date when the Claimant could have last been exposed to carcinogens in the workplace.

A firefighter who files a Claim Petition pursuant to Section 108(r) of the Act must show exposure to a Group 1 carcinogen by the International Agency for Research on Cancer.

For the firefighter to obtain the presumption of 301(e) that the occupational disease arose out of and in the course of his employment the disability or death resulting from an occupational disease must have occurred within 300 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, as required by Section 301(c)(2).

However, Section 301(f) requires that claim itself filed pursuant to section 108(r) be filed within 600 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The claimant is only entitled to the presumption sent forth by 301(e) if the Claim Petition is filed within three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The Claim Petition would still be timely per Section 301(f) if it is filed within six hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease; however, the claimant will not be entitled to the presumption if the Claim Petition was filed more than three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

Put another way, Section 301(f) and Section 301(c)(2) set forth distinct limitations. By their plain text, the limitation period of Section 301(f) requires that claims be made or filed, within 600 weeks while Section 301(c)(2) requires that the disability or death that is the basis for the claim for compensation is “occurring,” or manifesting, within 300 weeks.

The key difference between these two provisions is not the date upon which the limitations periods start but rather what must take place before the periods end; in the case of Section 301(c)(2), disability or death resulting from the occupational disease must occur or manifest within 300 weeks, while in the case of Section 301(f), the claimant must file the claim within 600 weeks.
Thus, Section 301(f) sets forth a two-tiered limitations period for Section 108(r) claims distinct from the time limit in Section 301(c)(2).

- First, a claimant must file the claim within 300 weeks of the last date of work with exposure to a known Group 1 carcinogen; if the claimant fails to do so, he is not foreclosed from bringing a claim by Section 301(f), but he loses the statutory presumption of Sections 301(e) and 301(f).

- However, if the claimant does not file the claim until more than 600 weeks after the date of last workplace exposure, the claimant is foreclosed from bringing that claim in its entirety.

- It is true that the three-year statute of limitations of Section 315 of the Act for filing a claim for compensation does not begin to run in occupational disease cases until the claimant knows or should know that he is disabled as a result of an occupational disease, which is presumed to occur only when the claimant receives a competent medical diagnosis that his illness is work-related.

However, the 600-week limitations period of Section 301(f) acts as a statute of repose and is not subject to a discovery rule. These means that once 600 weeks elapse from the date of the last workplace exposure, the cause of action under Section 108(r) ceases to exist.

The discovery rule to Section 315 may still toll the three-year limitations period of Section 315 in Section 108(r) cases where the claimant was not aware of the nature of his occupational disease, provided that the claim is filed before the expiration of the 600-week period.

Fargo v. WCAB (City of Philadelphia) No. 2239 C.D. 2015 (Decision by Judge Collins, October 11, 2016) 10/16

STATUTE OF REPOSE

- The claimant’s Claim Petition was untimely under Section 301(f) where the claimant filed his Claim Petition in March 2014, which was more than 600 weeks after the claimants last date of employment on July 31, 2001 and the last date when the Claimant could have last been exposed to carcinogens in the workplace.

- A firefighter who files a Claim Petition pursuant to Section 108(r) of the Act must show exposure to a Group 1 carcinogen by the International Agency for Research on Cancer.

For the firefighter to obtain the presumption of 301(e) that the occupational disease arose out of and in the course of his employment the disability or death resulting from an occupational disease must have occurred within 300 weeks after
the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, as required by Section 301(c)(2).

However, Section 301(f) requires that claim itself filed pursuant to section 108(r) be filed within 600 weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The claimant is only entitled to the presumption sent forth by 301(e) if the Claim Petition is filed within three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

The Claim Petition would still be timely per Section 301(f) if it is filed within six hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease; however, the claimant will not be entitled to the presumption if the Claim Petition was filed more than three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.

- Put another way, Section 301(f) and Section 301(c)(2) set forth distinct limitations. By their plain text, the limitation period of Section 301(f) requires that claims be made or filed, within 600 weeks while Section 301(c)(2) requires that the disability or death that is the basis for the claim for compensation is “occurring,” or manifesting, within 300 weeks.

The key difference between these two provisions is not the date upon which the limitations periods start but rather what must take place before the periods end; in the case of Section 301(c)(2), disability or death resulting from the occupational disease must occur or manifest within 300 weeks, while in the case of Section 301(f), the claimant must file the claim within 600 weeks.

Thus, Section 301(f) sets forth a two-tiered limitations period for Section 108(r) claims distinct from the time limit in Section 301(c)(2).

- First, a claimant must file the claim within 300 weeks of the last date of work with exposure to a known Group 1 carcinogen; if the claimant fails to do so, he is not foreclosed from bringing a claim by Section 301(f), but he loses the statutory presumption of Sections 301(e) and 301(f).

- However, if the claimant does not file the claim until more than 600 weeks after the date of last workplace exposure, the claimant is foreclosed from bringing that claim in its entirety.

- It is true that the three-year statute of limitations of Section 315 of the Act7 for filing a claim for compensation does not begin to run in occupational disease
cases until the claimant knows or should know that he is disabled as a result of an occupational disease, which is presumed to occur only when the claimant receives a competent medical diagnosis that his illness is work-related.

However, the 600-week limitations period of Section 301(f) acts as a statute of repose and is not subject to a discovery rule. These means that once 600 weeks elapse from the date of the last workplace exposure, the cause of action under Section 108(r) ceases to exist.

The discovery rule to Section 315 may still toll the three-year limitations period of Section 315 in Section 108(r) cases where the claimant was not aware of the nature of his occupational disease, provided that the claim is filed before the expiration of the 600-week period.

_Fargo v. WCAB (City of Philadelphia) No. 2239 C.D. 2015 (Decision by Judge Collins, October 11, 2016) 10/16_

**STATUTORY EMPLOYER**

- Pennsylvania Supreme Court grants employer’s Petition for Allowance of Appeal to address the issue of whether a franchisor may be subject to liability as a statutory employer under Section 302(a) of the Workers’ Compensation.

It will be recalled that the Commonwealth in the underlying decision written by Judge McGinley dated October 6, 2015 held that the Franchisor, Saladworks, LLC was not the statutory employee of the injured claimant pursuant to Section 302(a) where it’s uninsured franchisee, G21 LLC d/b/a Saladworks (G21), did not perform a regular or recurrent part of the business, occupation, profession, or trade of Saladworks.

The Commonwealth Court reasoned that Section 302(a) of the Act provides that an entity must subcontract to have work performed that is a regular or recurrent part of its business in order to be considered a statutory employer. The Court also noted that a portion of 302(a) provides:

_For purposes of this subsection, a person who contracts with another . . . (2) to have work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person shall be deemed a contractor, and such other person a subcontractor. (Emphasis added.)_

Based upon its reading of 302(a) the Commonwealth Court concluded that although Saladworks and G21 were connected through its Franchise Agreement, Saladworks, LLC was not in the restaurant business or the business of selling salads. Saladworks’ business was the sale of franchises to franchisees that desire
to use its name and “System” and marketing expertise. Therefore the franchisee did not perform a regular or recurrent part of the business, occupation, profession, or trade of Saladworks, meaning Saladworks could not be held to be the statutory employer.

_Saladworks, LLC v. WCAB (Gaudioso and Uninsured Employers Guaranty Fund), No. 971 MAL 2015 (PER CURIAM, May 3, 2016) 5/16_

**SUBROGATION**

- The employer was not entitled to subrogation against the claimant’s third party recovery resulting from a motor vehicle accident although the claimant stipulated to such right where Claimant was a public safety employee and his benefits fell under the Heart and Lung Act.

  This is because pursuant to Section 1722 of the MVFRL a claimant is precluded from recovering the amount of benefits paid under the Heart and Lung Act from the responsible tortfeasors. There can be no subrogation out of an award that does not include these benefits.

- The Commonwealth Court decision of _Stermel v. Workers’ Compensation Appeal Board (City of Philadelphia), 103 A.3d 876 (Pa. Cmwlth. 2014)_ applied to the parties stipulation even though the Stipulation was executed and approved by the WCJ after Stermel was decided.

  The Stermel Court held that a city employer was not entitled to recover a portion of the Heart and Lung Act benefits it paid a police officer from the officer’s third-party tort claim settlement. Therefore, there would be no subrogation right resulting from payment of those benefits.

- Changes in decisional law which occur during litigation will be applied to cases pending on appeal. Further, where decisional law relies on a statutory interpretation which was not wholly without precedent, such decisions are treated as relating back to the original statute because they are nothing more than interpretations of existing legislation.

  _Pennsylvania State Police v. WCAB (Bushta), No. 2426 C.D. 2015, (Decision by Judge Covey, October 26, 2016) 10/26_

- Section 508 of the Medicare Care Availability and Reduction of Error (MCARE) Act does not preclude an employer’s right to subrogation against future awards of future expenses and wage loss in medical malpractice actions after trial where the claimant received a recovery as the result of medical malpractice.
Section 508 MCARE only precludes the right to subrogation of the medical malpractice proceeds with regard to payments for past medical expenses and past lost earnings paid up to the time of trial in which Claimant sought benefits for the malpractice.

Therefore the employer was entitled to subrogate against the Claimant’s third party medical malpractice recovery with respect to the award for her future medical expenses and wage loss.

The employer was entitled to the subrogation right on the bases of the praecipe dated November 2012 to settle and discontinue the consolidated medical malpractice actions, and the settlement and distribution sheet prepared by Claimant’s counsel in the malpractice action, showing that all monies awarded were with regard to future medical expenses and lost wages, with none of the funds being set aside for the payment of past medical bills or past lost wages.

*Protz v. WCAB (Derry Area School District)*, No. 402 C.D. 2015 (Decision by Judge Pellegrini, January 6, 2016) 1/16

- The employer was not entitled to subrogation against the claimant’s third party recovery resulting from a motor vehicle accident although the claimant stipulated to such right where Claimant was a public safety employee and his benefits fell under the Heart and Lung Act.

This is because pursuant to Section 1722 of the MVFRL a claimant is precluded from recovering the amount of benefits paid under the Heart and Lung Act from the responsible tortfeasors. There can be no subrogation out of an award that does not include these benefits.

- The Commonwealth Court decision of *Stermel v. Workers’ Compensation Appeal Board (City of Philadelphia)*, 103 A.3d 876 (Pa. Cmwlth. 2014) applied to the parties stipulation even though the Stipulation was executed and approved by the WCJ after Stermel was decided.

The Stermel Court held that a city employer was not entitled to recover a portion of the Heart and Lung Act benefits it paid a police officer from the officer’s third-party tort claim settlement. Therefore, there would be no subrogation right resulting from payment of those benefits.

- Changes in decisional law which occur during litigation will be applied to cases pending on appeal. Further, where decisional law relies on a statutory interpretation which was not wholly without precedent, such decisions are treated as relating back to the original statute because they are nothing more than interpretations of existing legislation
The Commonwealth Court affirms that the term “installments of compensation” as used in Section 319 of the Act relating to subrogation of employer to rights of the claimant against third persons encompasses medical expenses in addition to indemnity benefits.

Therefore, the employers lien based upon which is can assert its subrogation right includes indemnity and medical paid and its credit against the balance of recovery includes a credit against future indemnity and medical, during which time the employer is obliged to pay its pro-rata share of attorney fees and cost.

Although an employer may waive such it right to subrogation or right to a future credit against the balance of recovery, the record must show the waiver was clear and supported by consideration.

In this matter the alleged waiver was not clear and not supported by consideration. There was also no clear waiver of Employer’s rights; rather, there was a request from Claimant’s counsel addressed to a person without authority to agree to the request.

The fact that the employer did not assert its credit against the ongoing medical for 13 years did not equitably estop it from having the right to do so.

The two essential elements of equitable estoppel are an inducement, and a justifiable reliance on the inducement. The party asserting the estoppel bears the burden of proving it by clear and convincing evidence.

In this matter the WCJ determined that the parties had never agreed to release Employer’s right to future credit. Thus, there was no admission upon which Claimant can rely.

More importantly, in Thompson v. Workers’ Compensation Appeal Board (USF&G Company), 781 A.2d 1146 (Pa. 2001), the Supreme Court analyzed an employer’s right to subrogation in light of equitable principles. The court stated that Section 319 is clear and unambiguous. It is written in mandatory terms and, by its terms, admits of no express exceptions, equitable or otherwise. Furthermore, it does more than confer a ‘right’ of subrogation upon the employer; rather, subrogation is automatic.

The Supreme Court in Thompson concluded an employer’s right to subrogation is generally absolute, unless the employer engages in deliberate, bad faith conduct, which did not occur in this matter.
An employer is entitled to recover from claimant’s Counsel the invalid unreasonable contest attorney fees award that it was required to pay to counsel. This is because the employer would not be entitled to reimbursement for such costs from the Supersedeas Fund.

An order to refund unreasonable contest attorney fees involves no repayment of compensation benefits and denying a refund order would result in unjust enrichment by allowing an unsuccessful claimant’s counsel to keep funds that may only be awarded where the claimant is the prevailing party.

The Commonwealth Court therefore ordered Counsel to refund to Employer the $14,750 in unreasonable contest attorney fees that Employer paid to Counsel following reversal of the WCJ’s decision that has assessed unreasonable contest attorney fees against the employer.

Supersedeas Fund reimbursement is limited to “payments of compensation,” and only disability and medical payments can be recovered. By contrast, unreasonable contest attorney fees and other litigation costs are payment “in addition to the award for compensation,” not payment of compensation benefits.

Therefore, an employer following a successful appeal of the award of unreasonable contest attorney fees has no recourse from the Supersedeas Fund for either unreasonable contest attorney fees or other litigation costs.

This holding follows the reasoning of the court decision of Barrett v. Workers’ Compensation Appeal Board (Sunoco, Inc.), 987 A.2d 1280 (Pa. Cmwlth. 2010) that held that where litigation costs are awarded and are paid by the employer as a result of denial of a stay and the award of costs is later reversed on appeal, the employer is entitled to an order requiring the claimant’s counsel to repay the erroneously awarded costs because to do otherwise would result in an unjust enrichment and would deprive the employer of any meaningful appeal from an erroneous costs award because litigation costs cannot be recovered from the Supersedeas Fund.

County of Allegheny v. WCAB (Parker) No. 82 C.D. 2016 (Decision by Judge Colins, December 20, 2016) 12/16
TEMPORARY NOTICE OF COMPENSATION PAYABLE

- The employer did not violate the Act when it unilaterally issued a “Corrected” NTCP on August 10, 2004 that paid the claimant a lower compensation rate based upon a lower pre-injury average weekly wage than what was paid pursuant to a prior NTCP.

This means in contrast to the amendment of a NCP, which cannot be unilaterally “corrected” to reflect a lower rate, a TNCP may be unilaterally amended to reflect the lower rate during the 90 day period and the last TNCP in effect at the expiration of the 90 days will the document converted to become the NCP

- The modification of a TNCP is provided by Bureau Regulation 121.7a(c) and directs the employer who modifies the NTCP to file an amended NTCP form, to be clearly identified as “amended”. This amended form need only contain the insurer’s signature and does not require the signature of the employee.

When an amended NTCP is filed, the employer must also file a new Statement of Wages pursuant to 34 Pa. Code 121.7a(c) (1).

In this matter the first NTCP was properly amended and there was no conversion of NTCP to NCP. Accordingly, Claimant’s contention that the first NTCP converted to a NCP and therefore Employer was obligated to pay benefits at the higher rate for all periods of time where Claimant was not working was held to be without merit

Significantly, subsection 121.7a(c) (2) makes it clear that the subsection dealing with modification does not apply upon the conversion of a NTCP to a NCP.

- Nothing in the Act or the Bureau Regulations can be interpreted to have required Employer to file a NSTC or NCD at the time it properly amended the 1st NTCP and contrary to Claimant’s argument, the court found there is no conflict between Section 406.1 of the Act, and Bureau Regulation Section 121.71a.

- Bureau Regulation Section 121.17 addresses changes in compensation, and with respect to the stopping of temporary compensation under a NTCP, directs that an employer who ceases such temporary payments must file either: (i) a NSTC, together with a Notice of Workers’ Compensation Denial (NCD), within a prescribed time frame; or (ii) a NCP; or (iii) an Agreement for Compensation for Disability or Permanent Injury. 34 Pa. Code §121.17.

In this matter the employer did not violate the Act by issuing the amended TNCP because, up until the time Claimant returned to work, Employer did not cease making temporary compensation payments, but rather made a correction to the 1st NTCP and filed the 2nd NTCP, together with filing a replacement Wage
Statement, pursuant to the requirements set forth in Sections 121.7a(c) and 121.7a(c) (1), 34 Pa. Code §§121.7a(c) and 121.7a(c) (1).

Employer did not cease making temporary compensation payments until October 11, 2004 when, in accordance with Subsection 406.1(d) (5) (i) of the Act, it duly notified Claimant that payments were being stopped by filing a NSTC and a NCD as prescribed by the Department.

- By contrast, an amended NCP cannot be issued to reflect a lower compensation rate based upon a lower pre-injury average weekly wage pursuant to Bureau Regulation Section 121.7 that provides when such amendment results in a decrease in the employee’s wage or compensation, the employer is required to file a Supplemental Agreement.

Similarly, Bureau Regulation Section 121.12 specifically addresses the correction of errors in computing wages in a compensation agreement or NCP, and also directs that in instances where changes result in a decrease in the employee’s wage or compensation, the employer shall file the Supplemental Agreement.

*Church v. WCAB (Landscaping and Fleming Termite and Pest Control), No. 1068 C.D. 2015 (Decision by Judge Collins, March 18, 2016) 3/16*

**TERMINATION**

- To succeed in a termination petition, an employer bears the burden of proving by substantial evidence that a claimant’s disability ceased, or any remaining conditions are unrelated to the work injury. The burden is substantial since disability is presumed to continue unless and until proved otherwise.

In a case where the claimant complains of continued pain, this burden is met when an employer’s 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. If the WCJ credits this testimony, the termination of benefits is proper.

- In order to terminate benefits on the theory that a claimant’s disability has reduced or ceased due to an improvement of physical ability, it is first necessary that the employer’s petition be based upon medical proof of a change in the claimant’s physical condition. Only then can the WCJ determine whether the change in physical condition has effectuated a change in the claimant’s disability, i.e., the loss of his earning power.
Further, by natural extension it is necessary that, where there have been prior petitions to terminate benefits, the employer must demonstrate a change in physical condition since the last disability determination. The employer’s case must begin with the adjudicated facts found by the WCJ in his/her previous Petition for Termination denial and work forward in time to show the required change in condition.

The evidence necessary to prove a change since a prior adjudication will be different in each case. By accepting the employer’s medical evidence of full recovery as credible, a WCJ could properly make a finding that the employer has met the standard requiring that the employer show a change in Claimant’s condition.

Moreover, although the WCJ’s finding cannot be based solely upon evidence that pre-dates the previous adjudication, it may be based upon a review of such evidence plus a post-adjudication examination.

It is not necessary for the employer to demonstrate that a claimant’s diagnoses have changed since the last proceeding, but only that his symptoms have improved to the point where he is capable of gainful employment.

A finding that there is a lack of objective findings to substantiate a claimant’s continuing complaints is sufficient to satisfy the employer’s burden to show a change in claimant’s condition. Therefore, the WCJ’s granting up the employers Petition for Termination was upheld where the employer’s medical experts credited diagnosis and opinion of work ability was supported by other evidence of record, namely Claimant’s activities and the WCJ’s personal observation of Claimant which suggested that Claimant’s subjective complaints were either not accurate, not as severe as described or had improved since the last proceeding since these findings were sufficient to establish a change in Claimant’s condition.

The fact that employer’s medical expert rendered the same opinion after Claimant’s May 2010 IME as he did following Claimant’s January 2009 IME did not invalidate the latter opinion, particularly when the WCJ’s finding was based upon employer’s medical expert’s credited medical opinion and Claimant’s testimony of his activities since the 2009 Termination Petition was denied.

*Baumann v. WCAB (Kellogg Company), No. 2603 C.D. 2015 (Decision by Judge Covey, September 23, 2016) 9/16*
UNINSURED EMPLOYERS GUARANTY FUND

- The term “compensation” used under Article XVI of the Act is defined by Section 1601 of the Act as including both disability and medical benefits. Therefore, pursuant to 1603(b) of the Act, a claimant who fails to give notice of a claim to the UEGF within 45 days of the date it learned the employer is uninsured is not entitled to compensation and medical until the date if gives notice.

Notwithstanding the fact failure to give notice to the UEGF within 45 days, the claimant was not responsible to his providers for past due medicals. This is because Employees injured while working for uninsured employers do not assume the costs of medical treatment provided to them prior to notice being given to the UEGF. Medical providers are prohibited from requiring injured employees to pay for work-related treatment by Section 306(f.1)(7) of the Act, which states “A provider shall not hold an employe liable for costs related to care or service rendered in connection with a compensable injury under this act”.

Medical providers, however, maintain their right to pursue a remedy outside the workers’ compensation system against uninsured employers to cover the expenses incurred in the treatment of injured employees.

Commonwealth of Pennsylvania, Department of Labor and Industry, Uninsured Employers Guaranty Fund v. WCAB (Kendrick and Timberline : Tree & Landscaping LLC) No. 1849 C.D. 2014 (Decision by Judge Cohn Jubelirer FILED, May 9, 2016) 5/16

- The WCJ’s finding that the employer was uninsured was not supported by the record because the employer, an Ohio Company, complied with Section 305.2 of the Act by submitting certification form that met the requirements of section 305.2(c) of the Act.

Under section 305.2(c) of the Act an out of state employer who had insurance out of state may file a certification form that states the out of state employer had workers’ compensation insurance at the time of the accident and that Claimant was entitled to benefits under that state law.

The purpose of section 305.2(c) is to insure that the responsible employer, and not the UEGF, is liable for the payment of compensation benefits

In this matter the Ohio employer complied with Section 305.2(c) because it filed a certification form with the Pennsylvania Bureau of Workers’ Compensation in order to access its Ohio coverage for payments.

The employer’s certification form stated that: 1) Employer had workers’ compensation insurance coverage in Ohio on the date of Claimant’s work injury;
2) that Claimant was covered under this policy; and 3) that Claimant was entitled to benefits under Ohio’s workers’ compensation law.

The certification form identified the Ohio Bureau of Workers’ Compensation as the insurer responsible for the claim and proceeds to set forth an insurance policy number, effective December 19, 2008, which policy remained active as of January 6, 2014, the date the form was signed.

This means that Section 305.2 (C) permits an out of state employer to file a certification with the Pa. Bureau of Workers’ Compensation in order to access its Ohio coverage for payments.

**Salvadori v. WCAB (Uninsured Employers Guaranty Fund and Farmers Propane, Inc.) No. 2166 C.D. 2015 (Decision by Judge McCullough, December 5, 2016) 12/16**

**WCJ**

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds that a WCJ may validly reject the uncontradicted opinion of an IRE expert chosen by the Bureau regarding the degree of impairment and the WCJ is not required to identify substantial contrary evidence in the record to support such rejection.

- This is because a physicians’ impairment rating opinions pertaining to IREs conducted under Section 306(a.2) (6) are subject to vetting through the “traditional administrative process.”

Therefore, it was not improper for the WCJ to reject the opinion of the physician who performed the IRE that was a “an underdeveloped, out-of-specialty opinion.”

- The Commonwealth Court, upon reversing the WCJ, erred in its conclusions that a workers’ compensation judge lacks the authority to reject uncontradicted testimony by an IRE physician and that, in the present case, the WCJ was required to identify substantial contrary evidence in the record to support such rejection.

The Supreme Court stated that it disapproved of the Commonwealth Court decision, to the degree that the Commonwealth Court had fashioned, essentially, an uncontradicted medical evidence rule for IRE’s.

- The employer bears the burden to establish grounds for modification based upon an IRE requested in excess of 60 days from the 104th week of total disability. Even when the medical testimony if of an IRE physician chosen by the Bureau the WCJ is free to accept or reject Employer’s evidence. The fact that the Bureau the Bureau (and not employers) selects IRE physicians, is insufficient to justify a judicial policymaking decision to implement a specialized approach to IREs.
conducted under Section 306(a.2)(6).

- In the context of assessing an IRE opinion it is improper for the WCJ to harkened back to the full range of Claimant’s initial work-related injuries since this in with the nature of an IRE, which assesses the examinee’s present condition. In this regard, medical improvements occurring between the time of the initial injury and the examination may resolve impairments.

  It is also improper to “lumping” medical conditions since the AMA Guides themselves establish broad categories of impairments tied to functional sub-units of a whole person, such as the nervous system.

  *IA Construction Corporation v. WCAB (RHODES) No. 18 WAP 2015 (Decision by Chief Justice Saylor) 5/16*

- The WCJ erred in dismissing claimant’s Claim Petition with prejudice rather than without prejudice where the Claimant’s delay in obtaining an expert opinion consistent with the WCJ’s deadline for presenting medical evidence was due to circumstances beyond his control.

- The WCJ’s dismissal of the Claim Petition with prejudice rather than without prejudice was also not warranted despite the fact that due to claimant’s delay the employer no longer had available two fact witnesses who had since left the employ of the employer.

  This is because since whatever prejudice Employer faced due to Claimant withdrawing the Petition in was not the result of Claimant’s disregard of a WCJ’s deadlines or orders. Upon reaching this result the court noted in a footnote that notwithstanding the fact that the witnesses had left Employer’s employ, Employer could request the WCJ to subpoena them to testify.

  *Northtec v. WCAB (Skaria), No. 2488 C.D. 2015 (Decision by Judge Covey, September 14, 2016)9/16*