THE YEAR IN PENNSYLVANIA WORKERS’ COMPENSATION: 2017 AT A GLANCE

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ADMISSION

- A statement that was made on the record by Claimant’s counsel during hearing in support of claimant’s Petition for Reinstatement was binding upon the claimant although Claimant was not present at the hearing. In this instance counsel appeared at the hearing on her behalf and within the scope of his authority.

An admission of an attorney during the course of a trial is binding upon his client. This is because a client may be bound by the acts or statements of his attorney, when made within the scope of his authority.

The statement made by claimant’s counsel in this matter that was binding is distinguished from the scenario where counsel’s statement was made out of court and not in the presence of the client and without affirmative proof that the client gave his counsel authority to make the admission, knew the admission would be made, or assented to the admission. Under this latter fact pattern the Court has held that counsel had no authority to bind his client through a statement.

*McNeil v. WCAB (Department of Corrections) No. 2022 C.D. 2016 (Decision by JUDGE McCullough, September 1, 2017) 9/17*

ANSWER

- The defendant was not barred by the filing of a late answer to the claimant’s Claim Petition from raising the defense that the claimant was not an employee but rather an independent contractor.

This is because conclusions of law are not deemed admitted by a late answer to the claim petition. It is well settled that the existence of an employer-employee relationship is a question of law based on the facts presented in each case.
Accordingly, although Claimant filed a claim petition identifying defendant as his employer, defendants failure to file a timely answer to the petition did not constitute an admission on this point and did not obviate Claimant’s burden of establishing an employer/employee relationship.

The question of whether the claimant was an employee or an independent contractor was a question of law that is to be decided by a tribunal.

_Hawbaker v. WCAB(Kriner’s Quality Roofing, Services and Uninsured Employer Guaranty Fund), No. 224 C.D. 2016 (Decided by Judge Leavitt, Filed February 13, 2017, Ordered reported May 10, 2017) 5/17

APPEAL

- The WCAB has broad discretionary authority under section 419 of the Act to remand a matter to a WCJ. The language of section 419 imposes no requirement that the Board remand a matter to the same WCJ who issued the underlying decision.

More succinctly, Section 419 is neither a statutory mandate that a case be remanded to an original WCJ, nor is it a statutory prohibition on remanding the matter to a new WCJ.

Therefore the WCAB did not exceed its authority by recommending that this matter being remanded for a third time go to a new Judge for a de novo hearing where the original WCJ failed to conduct a complete review of all the evidence submitted by the parties when rendering her original decision.

_McDaniel v. WCAB (Maramont Corporation), No. 797 C.D. 2016 (Decision by JUDGE McCullough, December 20, 2016) 3/17

ATTORNEY FEES

- The employer presented an unreasonable contest against the claimant’s Petition for Penalties where it refused to pay physical therapy bills and then failed to provide any evidence that established the alleged illegality of a joint venture between a billing entity and provider or a billing entities status as a health care provider.
This is because Pursuant to Section 440(a) of the Act, in any contested case where an insurer contests liability in whole or in part, a WCJ shall award counsel fees to an employee in whose favor the matter has been finally adjudicated unless the employer provides a reasonable basis for the contest. Section 440 is intended to deter unreasonable contests of workers’ claims and to ensure that successful claimants receive compensation undiminished by costs of litigation. The reasonableness of an employer’s contest depends on whether the contest was prompted to resolve a genuinely disputed issue or merely to harass the claimant. Id.


- The employer improperly denied medical bills resulting in the imposition of penalties and unreasonable contest attorney fees where its denial was premised upon its belief that the entity billing for the physical therapy was different that the entity performing the physical therapy and it failed to submit any evidence contrary to billing entities position that the treatment was rendered by that entity in connection with a joint venture that was entered into between it and another physical therapy group, which was the basis for the Employer denying the bills.

In this matter PTI, who was the billing entity, leased space and employees from pt Group for PTI’s Workers’ Compensation business and PTI then paid a flat rate to the pt Group for use of the facility and use of their employees. The leased employees were employees of the pt Group but were independent contractors with respect to PTI under a staffing lease agreement.

There was no information from CMS, the Bureau or any state or federal law enforcement agency indicating that the arrangement between PTI and the pt Group was unlawful or fraudulent.

- Pursuant to Section 440(a) of the Act in any contested case where an insurer contests liability in whole or in part, a WCJ shall award counsel fees to an employee in whose favor the matter has been finally adjudicated unless the employer provides a reasonable basis for the contest. Section 440 is intended to deter unreasonable contests of workers’ compensation claims and to ensure that successful claimants receive compensation undiminished by costs of litigation.

The issue of whether an employer’s contest is reasonable is a legal conclusion based on the WCJ’s findings of fact is a legal conclusion based on the WCJ’s findings of fact.

In this matter Employer’s failure to provide any evidence that establishes the alleged illegality of the joint venture or PTI’s status as a health care provider,
supported the WCJ’s finding that Employer engaged in an unreasonable contest and the award of attorney’s fees was proper.

*Derry Township Supervisors and Selective Insurance Company of America v. WCAB (Reed)*, No. 751 C.D.

- The Pa. Supreme Court grants Petition for Allowance of Appeal and asserts it will address the following issues:
  (a.) Whether the Commonwealth Court erred when it held, without legal precedent, that a workers’ compensation claimant’s attorney must disgorge and return unreasonable contest attorney’s fees if the employer ultimately prevails?

  (b.) Whether the disgorgement and return of unreasonable contest attorney’s fees when the employer ultimately prevails is better left to the legislature rather than the courts?

- It will be recalled that the Commonwealth Court had held that an employer was 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.

The Commonwealth Court had reasoned that 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.

*County of Allegheny v. WCAB (Parker)* No. 31 WAL 2017 (PER CURIAM, June 6, 2017) 6/17

- Pa.R.A.P. 2744 provides that an appellate court may award reasonable counsel fees and damages for delay at the rate of six percent if the court determines that the appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate, or vexatious.
A frivolous appeal implies that no justiciable question has been presented and that the appeal is readily recognizable as devoid of merit in that there is little prospect of success.

In this matter the court declined to assess attorney fees for frivolous appeal against the employer because although Employer’s arguments were ultimately unsuccessful, the court could not that the same were frivolous or meant solely for delay.

- The Fund is not considered an insurer and is not subject to penalties or unreasonable contest attorney fees.

\textit{CMR Construction of Texas v. WCAB (Begly), No. 693 C.D. 2016 (Decision by Judge McCullough, June 26, 2017) 6/17}

**AVERAGE WEEKLY WAGE**

- The focus upon determining whether a claimant was a seasonal employee for the purpose of determined his pre-injury average weekly wage is on the nature of the work and whether it can be carried on throughout the year rather than on the period during which the business operates.

This is consistent with the language of Section 309(e) of the Act, which provides, as in pertinent part:

\begin{quote}
(e) Except as provided in clause (d.1) or (d.2), in occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth of the total wages which the employe has earned from all occupations during the twelve calendar months immediately preceding the injury, unless it be shown that during such year, by reason of exceptional causes, such method of computation does not ascertain fairly the earnings of the employe, in which case the period for calculation shall be extended so far as to give a basis for the fair ascertainment of his average weekly earnings.
\end{quote}

Therefore the claimant was not a seasonal employee because although he was hired as a tractor driver to move bins during apple picking season from September-November 13, 2013 his proper job titled was itinerant agricultural laborer and, though his employment was intended to be temporary claimant’s position as a temporary tractor driver for the apple harvest was not seasonal employment under Section 309(e) of the Act.
This is because itinerant farm laborers travel from state to state to harvest crops or engage in other work related thereto, and although one season may end, laborers’ work can still be carried on for pay throughout the year.

It was also relevant that the claimant did not have a contract prohibiting him from finding work as a laborer somewhere else.

- Where claimant was not intended to be a long term employee and he did not have a set number of hours he was expected to work per week the WCAB properly calculated the claimant’s pre-injury average weekly wage by dividing his total earnings by 5 of the 9 weeks he worked for the employer.

This is because Section 309(d.1) of the Act did not apply because that subsection was intended to govern long-term employment relationships, and Section 309(d.2) did not reflect economic reality because the claimant did not have an expected number of weekly hours to work.

This alternative calculation fairly assessed the claimant’s earnings when he was actually working and advanced the humanitarian purpose of the Act, as well as the purpose of Section 309 to accurately capture economic reality when calculating a claimant’s AWW.

*Toigo Orchards, LLC* * Nationwide Insurance Company v. WCAB (Gaffney), No. 722 C.D. 2016 (Decision by Judge Cohn Jubelirer, March 13, 2017) 3/17

- Where the claimant’s wages are fixed by the week Section 309(a) of the Act must be used to perform the wage calculation. Section 309(a) of the Act states in pertinent part:

  *(a) If at the time of the injury the wages are fixed by the week, the amount so fixed shall be the AWW;*

Section 309(d) of the Act should only be utilized to calculate the average weekly wage of claimants who are paid by the hour. Section 309 states in pertinent part:

*(d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the [AWW] shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods.*
Therefore, where claimant’s wages were fixed by the week at $2,000.00 on the date of his injury Section 309(a) was the section to be used to calculate his wages and $2,000.00 was his pre-injury average weekly wage. It was irrelevant that Claimant was continuously employed by Employer for the fifty-two weeks prior to his August 4, 2013 work-related injury at a lower wage in 2012 or that he was not paid by Employer during the winter months, because Claimant’s AWW must be calculated based on how he earned his wages on the date of his injury, not at some other point during his employment with Employer.

*Archie Lidey III v. WCAB(Tropical Amusements, Inc.), No. 726 C.D. 2016 (Decision by Judge Brobson, March 17, 2017) 3/17*

**CAPRICIOUS DISREGARD**

- Expert medical testimony is not rendered incompetent merely because it is premised upon the expert’s assumption of the truthfulness of information, unless that information is not proven by competent evidence or is rejected by the WCJ.

In this matter the WCJ did not capriciously disregard claimant’s medical expert, though her was the only medical expert to testify, where she rejected the claimant as not credible.

*Green v. WCAB No. 383 C.D. 2016 (US Airways) (Decision by James Gardner Colins, Decided February 24, 2017) 2/17*

**CAUSATION**

- If a claimant receives medical treatment for new symptoms that allegedly arise from the compensated injury, and the employer refuses to pay the associated bills, the burden of establishing that the symptoms and treatments are related to the compensable injury turns on whether the connection is obvious.

An obvious connection involves a nexus that is so clear that an untrained lay person would not have a problem making the connection between the new symptoms and the compensated injury; the new symptoms would be a natural and probable result of the injury. If the new symptoms and the compensable injury are obviously related, and benefits have not been terminated, then the claimant will benefit from the presumption that the new symptoms are related to the compensable injury and, thus, his employment, and it will be the burden of the employer to prove that the new symptoms complained of are unrelated to the compensable injury.
In this matter where the employer recognized the injury of fractured feet the employer was responsible for treatment for pain to the fractured feet, which in this case manifested itself as RSD/Complex Regional Pain Syndrome. For Employer to avoid responsibility for the medical expenses resulting from treatment of the pain in Claimant’s feet, Employer was required to prove that the treatment was for an injury that was distinct from the acknowledged injury, which the employer did not do.

Employer merely argued that RSD/CRPS was not specifically acknowledged in the C&R Agreement. This argument, without supporting medical evidence, was insufficient to show that the RSD/CRPS was a distinct injury beyond the scope of the Medical Only C&R Agreement that acknowledged claimant’s injuries as “various injuries and bodily parts including but not necessarily limited to fractured right and left feet.”

Haslam v. (London Grove Communication), No. 1655 C.D. 2016 (Decision by Judge Hearthway, September 1, 2017) 9/17

COLLATERAL ESTOPPEL

- An arbitrator’s award of Heart and Lung benefits did not collaterally estop the WCJ from making her own determination as to Claimant’s disability because Employer did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

- To employ the precept of collateral estoppel in a workers’ compensation proceeding following a Heart and Lung determination, there must be a two-part inquiry into the amount at risk and the governing procedure.

The amount at risk – The amount at risk in a Heart and Lung claims differs from what is at risk in a workers’ compensation claim. This is because Heart and Lung benefits cease when the claimant’s disability is determined to be permanent. The absence of a specified time limit does not transform the temporary nature of Heart and Lung benefits into lifetime benefits. This means benefits under the Heart and Lung Act are temporary, i.e., until the claimant returns to work or is found to be permanently disabled, but benefits under the Workers’ Compensation Act may last a claimant’s lifetime.

The temporary nature of Heart and Lung benefits, as opposed to potential lifetime benefits under the Workers’ Compensation Act, renders the amount in controversy between the two schemes incomparable.
Governing procedure - The governing procedure in a Heart and Lung case differs from the governing procedure in a Workers’ Compensation Case. The Heart and Lung Act requires an arbitration proceeding that is more ad hoc and informal when compared to a proceeding governed by the Workers’ Compensation Act. This is most notable with regard to the standards for the admission of medical evidence and the level of detail required in a WCJ’s decision.

- Collateral estoppel, also known as issue preclusion, prevents relitigation of questions of law or issues of fact that have already been litigated in a court of competent jurisdiction. The doctrine of collateral estoppel is based on the policy that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise.

Collateral estoppel will foreclose relitigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication is identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination

*Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections)*
No. 493 C.D. 2016 (Decision by Judge Leavitt, April 3, 2017) 4/17

- WCJ properly dismissed claimant’s Petition for Reinstatement premised upon worsening of left shoulder following rotator cuff surgery based upon the doctrine of collateral estoppel where a WCJ previously, upon granting employer’s Petition for Termination, denied claimant’s prior Petition to Review finding the left shoulder was not injured in the work injury and the WCJ’s decision denying the Petition to Review was not appealed by the claimant beyond the WCAB, hence making it a final decision.

In this matter, the question of whether the left rotator cuff tear was a result of the work-related injury was previously determined in the context of the termination petition. Therefore, Claimant is collaterally estopped from re-litigating that fact in this proceeding.

*McNeil v. WCAB (Department of Corrections)* No. 2022 C.D. 2016 (Decision by JUDGE McCullough, September 1, 2017) 9/17
CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT (CWMA)

- For an employee to be covered by the Construction Workplace Misclassification Act (CWMA) the construction activity must be analyzed and considered in the context of the putative employer’s industry or business.

The claimant was not covered by the CWMA and was not an employee of the defendant where the defendant was a restaurant business and not a construction business.

- The CWMA applies to individuals who performed services in the construction industry and affects the determination of who is an independent contractor versus an employee under the WC Act.

The dispositive question to determining if one falls within the purview of the CWMA is whether the individual is performing services for remuneration “in the construction industry.”

The CWMA was intended to limit those who would be deemed independent contractors, as opposed to employees, and was intended to address concerns that some employers were misclassifying workers as independent contractors, rather than employees, in order to avoid things such as payment of unemployment taxes and workers’ compensation premiums.

The CWMA did not apply in this matter because the employer was not engages in the construction industry but was rather a restaurant that hired the clamant to engage in remodeling.

*Department of Labor and Industry, Uninsured Employers Guaranty v. WCAB(Lin and Eastern Taste), No. 627 C.D. 2016 (Decision by Judge Hearthway, February 17, 2017) 2/17*

**BUT SEE**

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

  * Whether the Commonwealth Court’s decision interpreting the language of the Construction Workplace Misclassification Act (CWMA) to mean that the CWMA only applies to circumstances where the putative employer’s industry or business is construction was in error?*
Department of Labor and Industry, Uninsured Employers Guaranty v. WCAB(Lin and Eastern Taste) No. 124 EAL 2017 (PER CURIAM, August 23, 2017) 8/17

- The WCJ did not commit an error of law by determining that the claimant was an Independent Contractor consistent with the Misclassification Act that sets forth the criteria for determining whether a construction worker is an independent contractor or an employee for purposes of workers’ compensation and unemployment compensation:

  (1) The individual has a written contract to perform such services.

  (2) The individual is free from control or direction over performance of such services both under the contract of service and in fact.

  (3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

In this matter the defendant satisfied all three elements where the evidence reflected:

- First, there was a written contract between the claimant and defendant to perform work as a roofer. It was not that the contract was of indefinite duration. The Misclassification Act does not require a contract of specified duration; it requires only a written contract.

  The court further disagreed that it is impossible for contracts of indefinite duration to have a defined scope of work, as required by Section 3(b) (2), of the Misclassification Act.

  The court also disagreed that is “impossible” to maintain liability insurance during the term of a contract with indefinite duration, as required by Section 3(b) (6). The court pointed out the absence of a fixed contract period is irrelevant to maintenance of a liability insurance policy. Insurance is governed by a totally separate contract and may change from time to time for reasons having nothing to do with the agreement between construction contractors.

- Second, the WCJ did not err where she concluded the claimant was free from control or direction over performance of the roofing services. Control exists where the putative employer possesses the right to select the employee; the right and power to discharge the employee.

  Here, though the defendant expected the claimant to be present to do his work, they did not direct the manner in which Claimant did the work. This is a critical feature of the master-servant relationship.
Per the court, “Expecting an independent contractor to meet quality standards as a condition of being compensated is the mark of prudence by any person who engages a contractor to do construction work.”

➢ Third, the WCJ did not err by determining claimant was customarily engaged in an independently established trade.

The fact defendant allowed Claimant to use his tools did not negate the fact that Claimant brought necessary tools to the job. Claimant also had to fix any mistakes in his work at his own expense pursuant to the January 2012 contract, which stated that “Kriner’s Quality Roofing Services shall not pay for mistakes made by hired Contractors. Contractors will fix mistakes at own expense and recover materials or property if necessary.”

The record also established that Claimant performed the same or similar services for two other roofing companies. Moreover, Claimant’s Facebook page stated that he was an independent roofing contractor.

_Hawbaker v. WCAB(Kriner’s Quality Roofing, Services and Uninsured Employer Guaranty Fund), No. 224 C.D. 2016 (Decided by Judge Leavitt, Filed February 13, 2017, Ordered reported May 10, 2017) 5/17_

- Since the Construction Workplace Misclassification Act (CWMA) affects substantive rights it cannot be applied retroactively in workers’ compensation matters to determine whether an individual is an employee or an independent contractor. Therefore the CWMA could not be applied to an analysis of whether the claimant was an independent contractor where the Claimant’s injury occurred on August 28, 2010, which was prior to the enactment of the CWMA on October 13, 2010. Additionally, the CWMA stated it was effective in 120 days, or February 10, 2011.

- The CWMA sets forth criteria which must be established in order for an individual in the construction industry to be deemed an independent contractor and not an employee for purposes of workers’ compensation. The absence of a single criterion will negate the independent contractor status, and the individual will be deemed an employee.

- CWMA can only be applied to the construction industry. An application to any other industry would be well beyond the Legislature’s intention that the CWMA apply only to the construction industry.
The CWMA may not be used as guidance for the common law analysis of whether a claimant is an independent contractor or an employee. This is because the distinctions between the CWMA and the traditional factors are significant and reflect legislative activity beyond mere clarification of pre-existing common law. Additionally, using the WWMA as guidance to applying traditional common law would have the effect of the CWMA replacing the common law traditional factors, which would result in the CWMA being applied to industries and professions other than the construction industry. Such application would be well beyond the Legislature’s intention that the CWMA apply only to the construction industry.

Under traditional common law the Pa. Supreme Court has held that the main factors to be analyzed upon determining whether a claimant was an independent contractor is a review of the Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.

Whether some or all of these factors exist in any given situation is not controlling. Although each factor is relevant, 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.

Thus, in sum, under the common law, there are no mandatory factors, but rather, there is a weighing of factors, with control being a primary factor.

_D & R Construction v. WCAB (Suarez, Travelers Insurance Company, Uninsured Employers Guaranty Fund, and T & L Development), Nos. 1558 C.D. 2016 and 1578 C.D. 2016 (Decision by Judge Hearthway, August 1, 2017) 8/1_

**COURSE AND SCOPE**

Claimant suffered an injury in the course and scope of employment pursuant to the special circumstances exception of the going and coming rule where he was on call and was home sick but nevertheless drove to work to respond to an emergency at the request of his employer and during his drive to work he was involved in a motor vehicle accident resulting in injuries.
This is because when Claimant was on call, Employer did not treat it as part of Claimant’s shift or some extension of his regular shift; rather, Claimant received “comp time” and but for the emergency, Claimant would not have made the trip to work. The fact that Claimant was sick and would not otherwise have come to work brought his accident within the special circumstances exception. Further, the fact that the employer paid the claimant “door to door,” and he was on the clock from the moment he left his house, was alone sufficient to support application of the exception to the “coming and going rule.”

- Generally, for an injury sustained in a commute to or from work, disability is not compensable, with four recognized exceptions: (1) the employment contract includes transportation to and/or from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special assignment or mission for the employer; or, (4) special circumstances are such that the claimant was furthering the business of the employer.

“Special circumstances” have rendered compensable an injury sustained during a commute where: (1) the employee is requested by the employer to come in; (2) the request is for the convenience of the employer or in furtherance of its business; and (3) the trip is not simply for the convenience of the employee.

Further, the request by the employer can be direct or express, on the one hand, or implied, on the other, to qualify as a special request by the employer.

In this matter the Claimant acted in accordance with his “on call “responsibilities in attempting to make his way to work to address an emergency at Employer’s request

Lutheran Senior Services Management Company v. WCAB (Miller), No. 1074 C.D. 2016 (Decision by Judge McCullough, February 15, 2017) 2/17

- Course of employment embraces intervals of leisure within regular hours of the working day and that momentary departures from the work routine do not remove an employee from the course of his employment .Breaks which allow the employee to administer to his personal comfort better enable him to perform his job and are therefore considered to be in furtherance of the employer’s business.

Therefore, the claimant’s injury was compensable under the personal comfort doctrine where her injury occurred while driving on a tug, which was done with Employer’s express permission to obtain certain personal items, such as feminine care products.

An authorized break to retrieve prescription medicines or certain personal items, such as feminine care products, that someone else delivers to the workplace for the employee does fall within the personal comfort doctrine.
It was immaterial whether a reasonable person in Claimant’s shoes would have made other arrangements to meet her personal needs; indeed, any perceived fault in Claimant’s decision to call and make arrangements with her mother is no defense to liability under the Act.

- The common thread in cases applying the personal comfort doctrine is that the employee, upon request and permission, is administering to his or her own health and comfort, taking measures that are reasonably necessary to alleviate a condition that could potentially interfere with an employee’s ability to work and make the employee more effective in resuming and/or completing work duties.

In this matter the WCJ found that Claimant’s job performance would be affected by her menstrual cycle and would be adversely affected if she did not have feminine products to address the situation. The WCJ further found that at the time of the injury, Claimant was attending to her personal comfort so that she could continue to serve Employer’s interest.

- It is well established that an employee is considered to have sustained an injury while actually engaged in the furtherance of an employer’s business interests and affairs, where the injury occurred during inconsequential or innocent departure from work within the regular working hours.

_Starr Aviation v. WCAB (Colquitt)_ No. 659 C.D. 2016 (Decision by Judge McCullough, March 7, 2017) 3/17

- The claimant, who was a roofer and a traveling employee, suffered an injury in the course and scope of his employment where he injured himself after he jumped off a roof because a ladder had been removed and where he first waited one-half hour for help and he tried calling two employees for help before he jumped but got their voicemail.

Whether a claimant is a traveling or stationary employee is relevant for determining whether an injury sustained while on a departure from work duties is compensable. Injuries sustained by traveling employees are given more latitude when considered if compensable. In this matter claimant was a traveling employee and, as such, he was entitled to a presumption that he was furthering Employer’s business when he was injured.

To rebut this presumption, the employer bears the burden of proving that the claimant’s actions were so foreign to and removed from his or her usual employment as to constitute job abandonment thereof.

While Claimant’s decision to jump was not advisable, may not have been a smart move, and may have been misguided, the court could not say that it was so unreasonable as to make the action so foreign to and removed from Claimant’s
job as to constitute an abandonment of that job. Rather, here, Claimant was a traveling employee who had reasonably used the ladder of other trades people at that job site to enter and exit the working area, and who unexpectedly found his means of egress removed when his job was over.

- Although jumping off a roof was not one of Claimant’s job duties, exiting a work site was a necessary component of any job and so advanced Employer’s business and affairs.

*Wilgro Services, Inc. v. WCAB (Mentusky), No. 1932 C.D. 2016 (Decision by Judge McCullough: June 28, 2017) 6/17*

- The decedent, who was employed as a Manager-In-Training by his employer, that owned three Dunkin’ Donuts, suffered a fatality in the course and scope of employment where he was killed traveling a store from home that he normally did not work out of because he was traveling from home at the behest of his manager due to the illness of another employee, The fatality occurred in the course and scope of employment pursuant to the no fixed place of work and/ or special assignment and or furthering the business of the employer exceptions to the going and coming rule and or .

- The no fixed place of work exception applied because although the employer owned three Dunkin’ Donuts the clamant generally worked out of one location and on the date of the fatality he was traveling to a second Dunkin’ Donuts store that he rarely if ever travelled to. The claimant was therefore a traveling employee with regards to the other two stores that the employer owned that he did not normally work out of.

Since Decedent was a traveling employee, he was entitled to a presumption that he was working for Employer during the drive from his home to the other store location. To rebut this presumption, Employer had to establish Decedent’s actions at the time of the accident were “so foreign to and removed from” his usual employment that those actions constituted abandonment of employment. The record contained no such evidence. As a result, Decedent’s injuries were sustained in the scope and course of his employment and are compensable under the Act.

- Even if the claimant was deemed a stationary employee his fatality occurred in the course and scope of employment pursuant to the special assignment exception to the going and coming rule. In this matter decedent was on a special mission for the employer because, at his behest, he travelled from home to one of the employer’s stores to after receiving a call that an employee was ill, to investigate the situation on behalf of employer to determine whether additional action needed to be taken.
Section 301(c) of the Act permits compensation to claimants who are injured when “actually engaged in the furtherance of the business or affairs of the employer. This phrase must be liberally construed in accordance with the humanitarian purpose of the Act. A claimant must still show he was acting for the benefit and convenience of the employer and not simply commuting to or from his place of employment. A claimant qualifies for the special assignment exception when acting in accordance with responsibilities as an “on call” employee.

Under the going and coming rule, injuries sustained by an employee while traveling to or from his place of work do not occur in the course of employment and are therefore not compensable under the Act. There are four recognized exceptions to this rule. An injury sustained while commuting to work “may be compensable if:

1. The employee’s contract includes transportation to and from work;
2. The employee has no fixed place of work;
3. The claimant is on special assignment for the employer; or
4. Special circumstances are such that the claimant was furthering the business of the employer.

These exceptions are intended to cover situations in which an employee is traveling to or from work but, in doing so, continues to act in the course of employment.

*Rana v. WCAB (Asha Corporation), No. 1401 C.D. 2016 (Decision by Judge Cosgrove, September 29, 2017) 9/17*

**CREDIT**

- The pension benefit offset provision of Section 204(a) of the Act focuses on the extent to which benefits are funded by the employer.

Therefore, the employer was entitled to an offset to the extent it funded the claimant’s *maximum single life annuity* in a monthly amount equivalent to a life annuity payable to the claimant from the effective date of retirement with the provision that, if, at his death the unpaid balance would be payable to his beneficiary.
This was despite the fact that the claimant instead voluntarily chose a joint and survivor annuity, which required Employer to fund both his and his wife’s annuity benefits in an equivalent amount to claimant’s maximum single life annuity but resulted in a monthly lower payout to the claimant since it was actuarially presupposed a continuing pension would be paid to claimant’s spouse following his death.

Although Claimant was receiving a reduced payment under this option, Employer did not receive a corresponding reduction in the amount it must fund Claimant’s pension benefits. Rather, the reduction in Claimant’s payment was necessary to enable Employer to provide funding for a survivor benefit for Claimant’s wife. Thus, because Employer was partially funding both the annuity to Claimant and the survivor annuity for Claimant’s wife, Employer was entitled to an offset for Claimant’s maximum single life annuity regardless of the monthly amount paid solely to Claimant.

- The employer is not required to calculate the workers’ compensation offset based on the net maximum single life annuity after taxes

An employer may calculate the pension offset based on the gross amount of the other benefit received by the employee, subject to a correction once the employee notifies the insurer he has paid the required tax consistent with Specifically, 34 Pa. Code §123.4(f) that provides, in pertinent part:

\[\text{The insurer shall repay the employee for amounts previously offset, and paid in taxes, from workers’ compensation benefits, when the offset was calculated on the pretax amount of the benefit received.}\]

In this matter when Claimant initially retired, he chose to have taxes taken out. He was therefore entitled to reimbursement from Employer for taxes paid.

- Even though Claimant filed the offset review petition, Employer, as the party seeking the pension offset and a change in the status quo, bears the burden of proof regarding its entitlement.

\[\text{Harrison v. WCAB (Commonwealth of Pennsylvania), No. 658 C.D. 2016 (Decision by Judge Simpson, June 28, 2017) 6/17}\]

**DEATH CLAIM**

- A claimant can establish a right to benefits for an ‘injury’ in the nature of a work-related disease as an injury claim under Section 301(c)(1) of the Act. This would include a repetitive/cumulative death claim that alleges exposure to carcinogenic agents in the workplace over an extended period of time resulted in decedent’s bladder cancer and death.
This is consistent with the law that provides that for an injury to be compensable under the Act, it is not required that the injury resulted from any sudden occurrence or accident; it may be due to daily trauma.

In order for a fatal claim to be compensable under Section 301(c) (1) of the Act, an employee’s death must occur within three hundred weeks after the injury. For a fatal disease as injury claim to be compensable under Section 301(c) of the Act, the employee’s hazardous exposure is the injury from which the 300 week look-back period must be calculated.

A claimant who litigates a death claim resulting from exposure to chemicals as an injury claim under Section 301(c)(1) of the Act must prove the death of decent occurred within 300 weeks of the last date of injurious exposure to the agent causing the disease, whether or not such last exposure was disabling.

Therefore, where decedent died on June 23, 2006 the claimant had the burden to prove that decent was exposed to chemicals at work resulting in his bladder cancer up to 300 weeks prior to the date or up to September 22, 2000.

- In the case of a Fatal Claim Petition, the surviving family member has the burden to prove that the injury or disease was a substantial contributing cause in bringing about the death of the employee. If the causal connection is not obvious, the connection must be established by unequivocal medical testimony.

  Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a fact exists.”

- In this matter the WCJ issued a reasoned decision supported by substantial evidence where she found that the claimant fulfilled her burden of proof by presenting credible fact witnesses who worked in the same environment as the claimant and who testified credibly based on their first-hand knowledge of chemical and environmental hazards, gained from their experience working for the employer, that the decedent was exposed to within 300 weeks of his death.

  The claimant’s medical expert the proceeded to testify credibly that the environment in which the claimant worked played a substantial contributing factor toward development of the bladder cancer that resulted in his death.

Kimberly Clark Corporation v. WCAB (Bromley), No. 656 C.D. 2016 (Decision by Judge Covey, May 4, 2017) 5/17

DISCOVERY
The report of claimant’s medical expert that was attached to claimant’s brief but was never provided to counsel or entered into evidence before the WCJ was properly not considered by the WCAB pursuant to Regulation 131.61(b) of the Special Rules, which provides:

(b) The moving party shall provide the items and information referred to in subsection (a) to the responding party prior to the commencement of the first pretrial hearing or hearing actually held.

Merely attaching the experts report to a brief did not satisfy the requirement of section 131.61(b) that all items to be used in the prosecution of a case are to be provided to the responding party prior to the commencement of the first hearing actually held.

McNeil v. WCAB (Department of Corrections) No. 2022 C.D. 2016 (Decision by JUDGE McCullough, September 1, 2017) 9/17

EMPLOYER/EMPLOYEE

For an employee to be covered by the Construction Workplace Misclassification Act (CWMA) the construction activity must be analyzed and considered in the context of the putative employer’s industry or business.

The claimant was not covered by the CWMA and was not an employee of the defendant where the defendant was a restaurant business and not a construction business.

The CWMA applies to individuals who performed services in the construction industry and affects the determination of who is an independent contractor versus an employee under the WC Act.

The dispositive question to determining if one falls within the purview of the CWMA is whether the individual is performing services for remuneration “in the construction industry.”

The CWMA was intended to limit those who would be deemed independent contractors, as opposed to employees, and was intended to address concerns that some employers were misclassifying workers as independent contractors, rather than employees, in order to avoid things such as payment of unemployment taxes and workers’ compensation premiums.

The CWMA did not apply in this matter because the employer was not engages in the construction industry but was rather a restaurant that hired the claimant to engage in remodeling.
The most important factor to consider upon determining whether a claimant is an employee or independent contractor is 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. Moreover, it is the existence of the right to control that is significant, irrespective of whether the control is actually exercised. Where one reserves no control over the means of accomplishing a contract but merely reserves control as to the result, the employment is an independent one establishing the relation of contractee and contractor and not that of master and servant.

In this matter the claimant was not an employee where the defendant was a restaurant and not a construction business. The claimant was hired to perform remodeling. Claimant did not expect to work in the restaurant after the remodeling. Moreover, the restaurant owner had no construction or remodeling experience and credibly testified that he did not know anything about construction. A reasonable person could conclude that the owner was in charge of what needed to be done in a manner similar to that of property owners and specialists, such as painters, plumbers, etc.

Department of Labor and Industry, Uninsured Employers Guaranty v. WCAB (Lin and Eastern Taste), No. 627 C.D. 2016 (Decision by Judge Hearthway, February 17, 2017) 2/17

EVIDENCE

Independent Blue Cross sufficiently preserved its medical lien through its submission a single document titled “Consolidated Statement of Benefits” where the City on the record waived any hearsay objections to the document and time during the hearing did not raise any of the issues with respect to the exhibit. Under these circumstances, and in the absence of a Walker Rule challenge, it was both reasonable and lawful for the WCJ to rely on Exhibit I-1 as evidence of both the existence and amount of IBC’s subrogation lien.

The Walker rule allows an adjudicator to rely on hearsay evidence admitted without objection to support finding of fact so long as it is corroborated by other evidence of record, applies with equal force to workers’ compensation proceedings.

City of Philadelphia v. WCAB (Knudson), No. 675 C.D. 2016 (Decision Judge Brobson, July 3, 2017) 7/17

In this matter that was litigated by report, the doctor’s reports that the Claimant has lost the use of his finger for all intents and purposes was a legal conclusion that had
no evidentiary value and did not constitute substantial competent evidence on which to base a factual finding of permanency. An alleged loss of use must be permanent to be compensable.

The distinction must be made between factual medical evidence which can constitute substantial evidence to support the WCJ’s findings and legal conclusions which do not constitute such evidence

In this matter claimant’s medical evidence did not fulfill his burden in support of his petition seeking loss of use benefits for the loss of the right index finger where claimant’s medical experts records and reports described Claimant’s diagnoses, but did not detail whether these are expected to be permanent.

Claimant was asking WCJ to infer the worst from the diagnoses and then conclude that this supports a finding of permanency. Inferences must be made from the evidence and not from an assumption or speculation; sufficiency of evidence cannot be based on assumptions. Without evidence in the record concerning permanency, one can only speculate on this question, which neither the WCJ nor the Court may do.

It is Claimant’s responsibility as part of his burden of proof to elicit information about future functionality of his finger so that there is a factual underpinning from which one could conclude that his condition is permanent.

_Morocho v. WCAB (Home Equity Renovations, Inc.) No. 1393 C.D. 2016 (Decision by Judge Hearthway, August 3, 2017) 8/17_

**EXPERT TESTIMONY**

- Expert medical testimony is not rendered incompetent merely because it is premised upon the expert’s assumption of the truthfulness of information, unless that information is not proven by competent evidence or is rejected by the WCJ.

In this matter the WCJ did not capriciously disregard claimant’s medical expert, though her was the only medical expert to testify, where she rejected the claimant as not credible.


**HEART AND LUNG ACT**
An arbitrator’s award of Heart and Lung benefits did not collaterally estop the WCJ from making her own determination as to Claimant’s disability because Employer did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

To employ the precept of collateral estoppel in a workers’ compensation proceeding following a Heart and Lung determination, there must be a two-part inquiry into the amount at risk and the governing procedure.

The amount at risk – The amount at risk in a Heart and Lung claims differs from what is at risk in a workers’ compensation claim. This is because Heart and Lung benefits cease when the claimant’s disability is determined to be permanent. The absence of a specified time limit does not transform the temporary nature of Heart and Lung benefits into lifetime benefits. This means benefits under the Heart and Lung Act are temporary, i.e., until the claimant returns to work or is found to be permanently disabled, but benefits under the Workers’ Compensation Act may last a claimant’s lifetime.

The temporary nature of Heart and Lung benefits, as opposed to potential lifetime benefits under the Workers’ Compensation Act, renders the amount in controversy between the two schemes incomparable.

Governing procedure - The governing procedure in a Heart and Lung case differs from the governing procedure in a Workers’ Compensation Case. The Heart and Lung Act requires an arbitration proceeding that is more ad hoc and informal when compared to a proceeding governed by the Workers’ Compensation Act. This is most notable with regard to the standards for the admission of medical evidence and the level of detail required in a WCJ’s decision.

Collateral estoppel, also known as issue preclusion, prevents relitigation of questions of law or issues of fact that have already been litigated in a court of competent jurisdiction. The doctrine of collateral estoppel is based on the policy that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise.

Collateral estoppel will foreclose relitigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication is identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom collateral
estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination

Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections)
No. 493 C.D. 2016 (Decision by Judge Leavitt, April 3, 2017) 4/17

IMPAIRMENT RATING EVALUATION

- The Pennsylvania Supreme Court reverses the Commonwealth Court and holds the physician-evaluators who performs the IRE is not constrained by the specific nature of injury recognized by the Notice of Compensation Payable. A physician-evaluator has an obligation to address all work-related conditions at the time of the evaluation. Therefore, the physician-evaluator is required to determine the range of impairments which may be “due to” the work injury.

This is because the purposes of the AMA Guides, is assessed, in the first instance, by reference to an “event” rather than an “injury,” thus creating some potential tension with Section 306(a.2)’s focus on causal association with a compensable injury. The Physician-Evaluator is bound to take his guidance, not from Employer, but from Section 306(a.2) and the AMA Guides.

Section 306(a.2) explicitly invests in physician-evaluators the obligation to determine the degree of impairment due to the compensable injury. The statutorily prescribed duty set forth by Section 306(a.2) is simply to assess “the degree of impairment due to the compensable injury” on a “whole body” basis

Per such express terms, a physician-evaluator must consider and determine causality in terms of whether any particular impairment is due to the compensable injury. This means the required evaluation is of the percentage of permanent impairment of the whole body resulting from the compensable injury.

The physician-examiners must exercise independent professional judgment to make a whole-body assessment of the degree of impairment due to the compensable injury.

- In this matter the Physician-Evaluator did not apply professional judgment to assess the psychological conditions identified by Claimant during the IRE examination; nor did he determine whether such conditions as might have been diagnosed were fairly attributable to Claimant’s compensable injury. Instead of abiding by the directives of Section 306(a.2) and the AMA Guides in such regards, the Physician-Evaluator purported to take a different set of instructions from Employer.
• The Commonwealth Court was reversed because its holding that the Notice of Compensation payable should define the compensable injury to be examined by the IRE does not determine the range of impairments which may be “due to” such injury

• In dicta the court comments that if the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment does not permit the rating of mental and behavioral impairments it may well be that the statute should simply be deemed incapable of enforcement as applied, and no conversions to partial disability should occur for claimants who suffer from serious work-related psychological impairments.

  Duffey v. (Trola-Dyne, Inc.), No. 4 MAP 2016 (Decided by Chief Justice Saylor, January 19, 2017)1/17

• An Impairment Rating Evaluation (IRE) performed upon the claimant on April 28, 2003 that resulted in an IRE of less than 50% and was subject to a Petition to Review filed on August 28, 2012, which alleged the IRE Examiner failed to consider the full extent of her injuries, was not invalid although the IRE was based upon the Fifth Edition of the AMA Guides notwithstanding the Commonwealth Court decision in Protz v. WCAB(Derry Area School District), 124 A.3d 406 (Pa. Cmwlth. 2015), appeal granted by 133 A.3d 733 (Pa. 2016).

This is because a claimant has 60 days under Section 306(a.2) (2) of the Act to appeal a reduction in disability benefits following a Notice prior to the reduction becoming final. After the 60 day period has run that claimant may only challenge the IRE based upon the argument that his/her IRE is now 50% or greater and this must be done during the 500 week period that runs from the date the IRE was performed.

Here, Claimant did not appeal within that time period, thereby waiving the right to challenge the 2003 IRE determination and claimant did not produce evidence her IRE was 50% or greater. Protz does not give Claimant a second chance to appeal her 2003 IRE. Claimant failed to raise her claim within the parameters of section 306(a.2) (2) of the Act.

• This holding is consistent with the Commonwealth Court decision of Johnson v. WCAB (Sealy Components Group), 982 A.2d 1253 (Pa. Cmwlth. 2009) that held under Section 306(a.2)(4) an employee may appeal the IRE determination at any time during the 500 week period of partial disability, but after the 60 days that runs from the issuance of the Notice of the Modification, the appeal may only be based upon the allegation that the employee meets the threshold impairment rating that it is equal or greater than 50 percent.

The claimant was not able to argue the IRE was invalid because it was premised upon the 5th Edition of the AMA Guides because the plain language of Section
306(a.2) (4) mandates that the only bases for an appeal more than 60 days following the issuance of the Notice of Change is that the claimant’s impairment rating is 50 percent or greater.

*Riley v. WCAB (Commonwealth of Pennsylvania), No. 238 C.D. 2016 (Decision by Judge Hearthway, Decided December 8, 2016) 1/17*

- Pennsylvania Supreme Court finds unconstitutional in its entirety the IRE provision of Section 306(a.2) of the Workers’ Compensation Act that allows employers to demand that a claimant following the receipt of 104 weeks of total disability to undergo an IRE during which a physician must determine the "degree of impairment" that is due to the claimant's compensable injury and results in modification of the claimant’s compensation status from total to partial resulting in a limitation of 500 more weeks of benefits if the impairment is found to be less than 50%.

This is because Section 306(a.2) violates the non-delegation doctrine embodied by the Pa. constitution because it gives the AMA unfettered discretion over Pennsylvania’s' impairment-rating methodology.

*Protz v. WCAB(Derry Area School District), No.7 WAP 2016 (Decision by Justice Wecht, June 20, 2017)*

- The WCAB’s affirmance of the WCJ’s decision that granted employer’s Petition for Modification finding Employer was entitled to modify Claimant’s benefits from total disability to partial disability as of January 4, 2006 based upon an IRE performed on October 13, 2005 was reversed due to the Supreme court decision of Protz v. Workers’ Compensation Appeal Board (Derry Area School District), 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (Protz I), aff’d, in part, rev’d, in part, 161 A.3d 827 (Pa. 2017) (Protz II)

This is because the Pa. Supreme Court in Protz held that the IRE provision of Section 306(a.2) constituted an unconstitutional delegation of legislative authority and concluded that as a result of the unconstitutional delegation, the entirety of Section 306(a.2) of the Act must be stricken as unconstitutional.

By doing so, the Supreme Court struck the entire IRE process from the Act.

Accordingly, the WCAB’s affirmance of the WCJ’s Modification of Claimant’s benefits based upon the IRE was stricken because under the Supreme Court’s Protz decision Section 306(a.2) was stricken and no other provision of the Act allows for modification of benefits based on an IRE.
In an instructive footnote its decision Commonwealth Court rejects employer’s argument that Claimant failed to timely raise the issue of the constitutionality of Section 306(a.2) (1) of the Act due to the IRE examiners use of the 5th Edition of the AMA Guides, which was prescribed by Protz I because Claimant failed to notify the Attorney General of a constitutional challenge. Court reasons that because this matter began before Protz I and Protz II were decided and this appeal implicated the validity of Section 306(a.2)(1) of the Act, Claimant raised this issue at the first opportunity to do so. Thus, Claimant was not precluded from raising the issue of the improper use of the Fifth Edition of the AMA Guides on appeal.

Furthermore, the court reasoned that the Claimant was not required to notify the Attorney General of a constitutional challenge, because she was arguing that the Court should remand for the WCJ to apply their precedent in Protz I, which concluded that Section 306(a.2)(1) of the Act was unconstitutional as to the Fifth Edition of the AMA Guides. Claimant, herself, was not litigating the constitutionality of Section 306(a.2) (1) of the Act, which has just recently been decided by the Supreme Court.

*Thompson v. WCAB (Exelon Corporation), No. 1227 C.D. 2016 (Decision by Judge Brobson, August 16, 2017)* 8/17

**INDEPENDENT CONTRACTOR**

- Employment status is a critical threshold determination for liability. Independent contractors are not eligible for workers’ compensation. The nature of a working relationship “is a question of law based on the facts presented in each case. It is the claimant’s burden to prove the existence of an employer-employee relationship.

- The WCJ did not commit an error of law by determining that the claimant was an Independent Contractor consistent with the Misclassification Act that sets forth the criteria for determining whether a construction worker is an independent contractor or an employee for purposes of workers’ compensation and unemployment compensation:

  1. The individual has a written contract to perform such services.

  2. The individual is free from control or direction over performance of such services both under the contract of service and in fact.

  3. As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.
In this matter the defendant satisfied all three elements where the evidence reflected:

➢ First, there was a written contract between the claimant and defendant to perform work as a roofer. It was not that the contract was of indefinite duration. The Misclassification Act does not require a contract of specified duration; it requires only a written contract.

The court further disagreed that it is impossible for contracts of indefinite duration to have a defined scope of work, as required by Section 3(b) (2), of the Misclassification Act.

The court also disagreed that it is “impossible” to maintain liability insurance during the term of a contract with indefinite duration, as required by Section 3(b) (6). The court pointed out the absence of a fixed contract period is irrelevant to maintenance of a liability insurance policy. Insurance is governed by a totally separate contract and may change from time to time for reasons having nothing to do with the agreement between construction contractors.

➢ Second, the WCJ did not err where she concluded the claimant was free from control or direction over performance of the roofing services. Control exists where the putative employer possesses the right to select the employee; the right and power to discharge the employee.

Here, though the defendant expected the claimant to be present to do his work, they did not direct the manner in which Claimant did the work. This is a critical feature of the master-servant relationship.

Per the court, “Expecting an independent contractor to meet quality standards as a condition of being compensated is the mark of prudence by any person who engages a contractor to do construction work.”

➢ Third, the WCJ did not err by determining claimant was customarily engaged in an independently established trade.

The fact defendant allowed Claimant to use his tools did not negate the fact that Claimant brought necessary tools to the job. Claimant also had to fix any mistakes in his work at his own expense pursuant to the January 2012 contract, which stated that “Kriner’s Quality Roofing Services shall not pay for mistakes made by hired Contractors. Contractors will fix mistakes at own expense and recover materials or property if necessary.”

The record also established that Claimant performed the same or similar services for two other roofing companies. Moreover, Claimant’s Facebook page stated that he was an independent roofing contractor.
The defendant was not barred by the filing of a late answer to the claimant’s Claim Petition from raising the defense that the claimant was not an employee but rather an independent contractor.

This is because conclusions of law are not deemed admitted by a late answer to the claim petition. It is well settled that the existence of an employer-employee relationship is a question of law based on the facts presented in each case.

Accordingly, although Claimant filed a claim petition identifying defendant as his employer, defendants failure to file a timely answer to the petition did not constitute an admission on this point and did not obviate Claimant’s burden of establishing an employer/employee relationship.

The question of whether the claimant was an employee or an independent contractor was a question of law that is to be decided by a tribunal.

*Hawbaker v. WCAB(Kriner’s Quality Roofing, Services and Uninsured Employer Guaranty Fund), No. 224 C.D. 2016 (Decided by Judge Leavitt, Filed February 13, 2017, Ordered reported May 10, 2017) 5/17*

- Since the Construction Workplace Misclassification Act (CWMA) affects substantive rights it cannot be applied retroactively in workers’ compensation matters to determine whether an individual is an employee or an independent contractor. Therefore the CWMA could not be applied to an analysis of whether the claimant was an independent contractor where the Claimant’s injury occurred on August 28, 2010, which was prior to the enactment of the CWMA on October 13, 2010. Additionally, the CWMA stated it was effective in 120 days, or February 10, 2011.

- The CWMA sets forth criteria which must be established in order for an individual in the construction industry to be deemed an independent contractor and not an employee for purposes of workers’ compensation. The absence of a single criterion will negate the independent contractor status, and the individual will be deemed an employee.

- CWMA can only be applied to the construction industry. An application to any other industry would be well beyond the Legislature’s intention that the CWMA apply only to the construction industry.

- The CWMA may not be used as guidance for the common law analysis of whether a claimant is an independent contractor or an employee.
This is because the distinctions between the CWMA and the traditional factors are significant and reflect legislative activity beyond mere clarification of pre-existing common law. Additionally, using the WWMA as guidance to applying traditional common law would have the effect of the CWMA replacing the common law traditional factors, which would result in the CWMA being applied to industries and professions other than the construction industry. Such application would be well beyond the Legislature’s intention that the CWMA apply only to the construction industry.

- Under traditional common law the Pa. Supreme Court has held that the main factors to be analysis upon determining whether a claimant was an independent contractor is a review of the Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.

Whether some or all of these factors exist in any given situation is not controlling. Although each factor is relevant, 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.

Thus, in sum, under the common law, there are no mandatory factors, but rather, there is a weighing of factors, with control being a primary factor.

*D & R Construction v. WCAB (Suarez, Travelers Insurance Company, Uninsured Employers Guaranty Fund, and T & L Development), Nos. 1558 C.D. 2016 and1578 C.D. 2016 (Decision by Judge Hearthway, August 1, 2017) 8/17*

**LOSS OF USE**

- The claimant who was 70 and was a retiree collecting Old Age Social Security prior to and returned to retirement following his employment with the employee was not entitled to a healing period due to his specific loss of use of his eye.

This is because the entitlement to a healing period applies any period of *disability necessary* and required as a healing period shall be compensated in accordance with the provisions of this subsection. In this matter the claimant was admittedly retired. The claimant, who retired before his specific loss benefits began, was not
entitled to the payment of a healing period because he did not require a period for healing.

- A claimant’s entitlement to a healing period is not automatic, and it is the employer’s burden to present evidence to rebut the presumption of the claimant’s entitlement to a healing period. The employer rebutted the presumption that Claimant was entitled to the 10-week healing period because he was retired and collected Social Security retirement benefits both prior to and after his work with Employer, and he had no intention of returning to work after his injury.

  *Toigo Orchards, LLC Nationwide Insurance Company v. WCAB (Gaffney), No. 722 C.D. 2016 (Decision by Judge Cohn Jubelirer, March 13, 2017) 3/17*

- In this matter that was litigated by report, the doctor’s reports that the Claimant has lost the use of his finger for all intents and purposes was a legal conclusion that had no evidentiary value and did not constitute substantial competent evidence on which to base a factual finding of permanency. An alleged loss of use must be permanent to be compensable.

  The distinction must be made between factual medical evidence which can constitute substantial evidence to support the WCJ’s findings and legal conclusions which do not constitute such evidence.

  In this matter claimant’s medical evidence did not fulfill his burden in support of his petition seeking loss of use benefits for the loss of the right index finger where claimant’s medical experts records and reports described Claimant’s diagnoses, but did not detail whether these are expected to be permanent.

  Claimant was asking WCJ to infer the worst from the diagnoses and then conclude that this supports a finding of permanency. Inferences must be made from the evidence and not from an assumption or speculation; sufficiency of evidence cannot be based on assumptions. Without evidence in the record concerning permanency, one can only speculate on this question, which neither the WCJ nor the Court may do.

  It is Claimant’s responsibility as part of his burden of proof to elicit information about future functionality of his finger so that there is a factual underpinning from which one could conclude that his condition is permanent.

- When a claimant seeks specific loss benefits for an injury he has the burden of proving that he has permanently lost the use of his injured body part for all practical intents and purposes.
Whether a claimant has lost the use of a body part, and the extent of that loss of use, is a question of fact for the WCJ. Whether an injury has resulted in the permanent loss of the use of a member, such as a hand, is a question of fact.

Whether the loss is for all practical intents and purposes is a question of law.

While case law does not specify what evidence is required in order to prove a permanent loss of use for all practical intents and purposes it is clear that a claimant must present medical evidence in order to prove that his loss of use is permanent and for all practical intents and purposes. Further, competent medical evidence of permanent loss of use for all practical intents and purposes must be presented before further support in the form of a claimant’s testimony can be considered.

*Morocho v. WCAB (Home Equity Renovations, Inc.) No. 1393 C.D. 2016 (Decision by Judge Hearthway, August 3, 2017) 8/17*

**MEDICAL BILLS**

- The employer had no basis to deny payment of physical therapy bills solely based upon its contention that the provider/billing entity was not the provider that performed the physical therapy where the WCJ found that the agreement between billing entity and the provider who were a joint venture to perform the services, under which the billing entity leased space and staff from the provider and billed insurance carriers for the services provided to patients, was acceptable under the applicable law.

The WCJ relied on and found as entirely credible testimony that established that CMS and the Bureau are aware of the joint venture between the billing entity and the provider, and that the joint venture had been investigated by the Attorney General’s office with no finding of illegality. Moreover, the WCJ found that the evidence produced by Employer did not contradict the finding that the joint venture was lawful.

*New Alexandria Borough and Selective Insurance Company of America, v. WCAB(Tenerovich), No. 567 C.D. 2016 (Decision by Judge Pellegrini, January 5, 2017) 3/17*

- The employer improperly denied medical bills resulting in the imposition of penalties and unreasonable contest attorney fees where its denial was premised upon its belief that the entity billing for the physical therapy was different that the entity performing the physical therapy and it failed to submit any evidence contrary to billing entities position that the treatment was rendered by that entity
in connection with a joint venture that was entered into between it and another
physical therapy group, which was the basis for the Employer denying the bills.

In this matter PTI, who was the billing entity, leased space and employees from pt
Group for PTI’s Workers’ Compensation business and PTI then paid a flat rate to
the pt Group for use of the facility and use of their employees. The leased
employees were employees of the pt Group but were independent contractors with
respect to PTI under a staffing lease agreement.

There was no information from CMS, the Bureau or any state or federal law
enforcement agency indicating that the arrangement between PTI and the pt
Group was unlawful or fraudulent.

- Pursuant to Section 440(a) of the Act in any contested case where an insurer
contests liability in whole or in part, a WCJ shall award counsel fees to an
employee in whose favor the matter has been finally adjudicated unless the
employer provides a reasonable basis for the contest. Section 440 is intended to
deter unreasonable contests of workers’ compensation claims and to ensure that
successful claimants receive compensation undiminished by costs of litigation.

The issue of whether an employer’s contest is reasonable is a legal conclusion
based on the WCJ’s findings of fact is a legal conclusion based on the WCJ’s
findings of fact.

In this matter Employer’s failure to provide any evidence that establishes the
alleged illegality of the joint venture or PTI’s status as a health care provider,
supported the WCJ’s finding that Employer engaged in an unreasonable contest
and the award of attorney’s fees was proper.

- The WCJ did not err by awarding a penalty of 50%. This is because Section
435(d) (i) of the Act gives a WCJ discretion to impose a penalty which may be
increased to fifty per centum in cases of unreasonable or excessive delays.

Here, the WCJ did not abuse its discretion in imposing a 50 percent penalty where
Employer persisted in denying PTI’s bills and, as the WCJ found, then failed to
submit any evidence or credible testimony to refute PTI’s status as the provider or
demonstrate that there was anything illegal or improper about the leasing
arrangements between PTI and the pt Group.

_Derry Township Supervisors and Selective Insurance Company of America v. WCAB
(Reed), No. 751 C.D._

- In the case of a Fatal Claim Petition, the surviving family member has the burden
to prove that the injury or disease was a substantial contributing cause in bringing
about the death of the employee. If the causal connection is not obvious, the connection must be established by unequivocal medical testimony.

Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a fact exists.”

*Kimberly Clark Corporation v. WCAB (Bromley), No. 656 C.D. 2016 (Decision by Judge Covey, May 4, 2017) 5/17*

- Regardless of whether or not massage therapists are licensed, if they are supervised or have an employment or agency relationship with a licensed health care provider, an employer is liable for expenses related to the health care services rendered.

Therefore the treatment of a Message Therapist was compensable since he was providing those services for Claimant as claimant’s treating Chiropractor’s employee or agent

This is holding is consistent with Section 306(f.1)(1)(i) of the Act requires Employer to pay for reasonable services rendered by health care providers, which Section 109 of the Act defines to include chiropractors and their employees or agents acting in the course and scope of employment or agency related to health care services.

Accordingly, the WCJ did not err when she found message therapy compensable where documents, which included Claimant’s massage therapy receipts were printed on Chambersburg Chiropractic forms, reflected that claimant received treatment from a licensed massage therapist working under the direction and control of claimant’s treating chiropractor.

- It is true that under Section 109 of the Act, a health care provider and/or his employee or agent must be rendering “health care services”. However, the Act does not specifically define health care services. Section 109 and Section 306(f.1)(1)(i) of the Act do not expressly limit health care providers to medical treatment, to the exclusion of methodologies intended to enhance an injured worker’s health and well-being such as treatment afforded by a massage therapist.

- In order for medical to be compensable under Section 306(f)(1) of the Act, the health care service must be performed by a duly licensed practitioner or under the supervision of such a person.

In 2008, the General Assembly enacted the Massage Therapy Law, which became effective on October 12, 2010. Thereunder, the State Board of Massage Therapy
was created and authorized to establish qualifications for and approve massage therapists for Commonwealth licensing.

Notwithstanding, the General Assembly specifically declared in Section 17 of the Massage Therapy Law, in relevant part, that “licensure under the Massage Therapy Law shall not be construed as requiring new or additional third-party reimbursement or otherwise mandating coverage under the Act.

The fact that treatment of even a licensed Massage Therapist is not automatically compensable does not preclude reimbursement where the treatment is provided a Massage Therapist who is an employees or agent acting in the course and scope of employment on behalf of a duly licensed health care provider.

_Schrider v. WCAB (Commonwealth of Pennsylvania, Department of Transportation), No. 289 C.D. 2017 (Decision by Judge Covey, December 28, 2017) 12/17_

**MEDICAL TREATMENT**

- Regardless of whether or not massage therapists are licensed, if they are supervised or have an employment or agency relationship with a licensed health care provider, an employer is liable for expenses related to the health care services rendered.

Therefore the treatment of a Message Therapist was compensable since he was providing those services for Claimant as claimant’s treating Chiropractor’s employee or agent

This is holding is consistent with Section 306(f.1)(1)(i) of the Act requires Employer to pay for reasonable services rendered by health care providers, which Section 109 of the Act defines to include chiropractors and their employees or agents acting in the course and scope of employment or agency related to health care services.

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enhance an injured worker’s health and well-being such as treatment afforded by a message therapist.

- In order for medical to be compensable under Section 306(f)(1) of the Act, the health care service must be performed by a duly licensed practitioner or under the supervision of such a person.

In 2008, the General Assembly enacted the Massage Therapy Law, which became effective on October 12, 2010. Thereunder, the State Board of Massage Therapy was created and authorized to establish qualifications for and approve massage therapists for Commonwealth licensing.

Notwithstanding, the General Assembly specifically declared in Section 17 of the Massage Therapy Law, in relevant part, that “licensure under the Massage Therapy Law shall not be construed as requiring new or additional third-party reimbursement or otherwise mandating coverage under the Act.

The fact that treatment of even a licensed Massage Therapist is not automatically compensable does not preclude reimbursement where the treatment is provided a Massage Therapist who is an employee or agent acting in the course and scope of employment on behalf of a duly licensed health care provider.

Schriver v. WCAB (Commonwealth of Pennsylvania, Department of Transportation), No. 289 C.D. 2017 (Decision by Judge Covey, December 28, 2017)

NOTICE OF STOPPING TEMPORARY COMPENSATION

- The employer did not issue an untimely Notice of Stopping Temporary Compensation pursuant to the 5 day rule set forth by Section 406.1(d)(5)(i), of the Act where:

1) The employer issued the Notice of Temporary Compensation Payable (NTCP) on June 6, 2012;

2) The employer made payment for the closed period of May 15, 2012-June 6, 2012 on June 14, 2012; and

3) The employer did not issue the Notice of Stopping Temporary Compensation until June 15, 2012.

This is because the five days from which the employer has to issue the Notice of Stopping Temporary Compensation, pursuant to Section 406.1(d)(5)(i), is calculated from when compensation must be paid, which was by June 27, 2012 or 21 days from date NTCP was issued, and not from the last period for which compensation was payable ended.
This is consistent with the language of Section 406.1(a) that provides that “compensation shall be paid not later than the twenty-first day” after an agreement, NCP or NTCP, which means the five days is calculated from when compensation must be paid, not the last period for which compensation is payable ended.

This means the employer had 21 days from June 6, 2012 or until June 27, 2012 to make payment on the NTCP. The Notice of Stopping Temporary Compensation was timely because it was issued within 5 days of 21 day time period it was required to make payment.

Jones v. WCAB (Villanova University) No. 1531 C.D. 2016 (Decision by Judge Pellegrini, March 30, 2017) 6/17

OCCUPATIONAL DISEASE

- The presumption in Section 301(f) of the Act applies only where the firefighter has shown that his cancer is an occupational disease under Section 108(r) of the Act.

In this matter the WCJ did not err by denying the claimant’s Claim Petition because claimant’s medical evidence did not establish that squamous cell carcinoma was a type of cancer caused by Group 1 IARC carcinogens, and this was necessary in order to establish that his cancer was an occupational disease under Section 108(r) of the Act.

Accordingly, the presumption in Section 301(f) of the Act was unavailable to Claimant.

Nevertheless, Claimant was able to pursue compensation for his cancer as “causally related to his industry or occupation” under Section 108(n) of the Act. This required Claimant to prove all elements to a Claim Petition, including a causal connection between his work and his cancer, which the claimant did not do because his medical evidence was rejected...

- Section 108(R) of the Occupational Disease Section added cancer to the list of occupational diseases for firefighters by stating:

  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 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 suffered by the claimant. Only after a firefighter establishes that his cancer is an occupational
disease under Section 108(r) of the Act do the rebuttable presumptions in Sections 301(e) and (f) come into play.

Section 301(e) of the Act establishes a “presumption regarding occupational disease” that applies to any occupational disease sustained by any employee in any line of work. It states:

If it be shown that the employe, 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 employe’s occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.

However, there is a special presumption where the occupational disease is cancer and the employee is a firefighter. Act 46 added Section 301(f) to the Act related to compensation for cancer suffered by a firefighter. It states as follows:

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 ....Notwithstanding the limitation under subsection (c)(2) with respect to disability or death resulting from an occupational disease having to occur 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, claims filed pursuant to cancer suffered by the firefighter under section 108(r) may be made 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. The presumption provided for under this subsection shall only apply to claims made within the first three hundred weeks.

Capaldi v. WCAB (City of Philadelphia), No. 787 C.D. 2016 (Decision by Judge Leavitt, January 9, 2017) 1/17

- The Pennsylvania Supreme Court grants the claimant’s Petition for Allowance of Appeal and will address the following issues:

(1) Whether the Commonwealth Court, in a case of first impression, committed an error of law by misinterpreting Section 108(r) to require a firefighter diagnosed with cancer caused by an IARC Group I carcinogen to establish exposure to a specific carcinogen that causes his/her cancer in order to gain the rebuttable presumption provided by the law?
(2) Whether the Commonwealth Court committed an error of law by concluding that a legislatively-created presumption of compensability may be competently rebutted by a general causation opinion, based entirely upon epidemiology, without any opinion specific to the firefighter/claimant making the claim?

- It will be recalled that the Commonwealth had held that 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.” The court went on to hold that 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.

The Commonwealth court reasoned that only then do the presumptions in Section 301(e) and (f) of the Act come into play.

The Commonwealth Court had further held that the claimant had to establish that his melanoma was 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 Commonwealth Court reasoned that 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. 405 EAL 2016 (PER CURIAM, March 1, 2017) 3/17

- A Volunteer Fireman who files a Claim Petition pursuant to Section 108(r) of the Act has added requirement to show direct exposure to a carcinogen referred to in section 108(r) by submission of reports pursuant to [PennFIRS] that documents direct exposure to a carcinogen referred to in section 108(r).

The WCJ therefore erred by granting Claimants Fatal Claim Petition pursuant to 108(r) of the Act of the Act since claimant did not submit into evidence the statutorily mandated PennFIRS reports.

- The claimant’s failure to fulfill her burden under 108(r) to prove that decedents death from lung cancer was caused by exposure a direct exposure to a carcinogen referred to in section 108(r) does not necessarily mean her Fatal Claim Petition
should be dismissed because Sections 301(c)(1) and/or 108(o) might have provided a basis for recovery. Accordingly, this matter was remanded.

This is because a claimant can proceed under theories of compensability that were not previously pleaded. The form of the petition filed is not controlling where the facts warrant relief, and that if a claimant is entitled to relief under any section of the Act, his petition will be considered as filed under that section.

This is the case whether or not the claimant attempts to amend the petition.

_Cheryl Steele and Roy Steele (deceased), v. WCAB (Findlay Township), No. 875 C.D. 2016 (Decision by Judge Cohn Jubelirer, March 8, 2017) 3/17_

- The provision of 301(f) of the Act enacted part of Act 46 on July 7, 2011 that permits a claim to be filed under Section 108(r) within 600 weeks after the last date of exposure to the hazards of the disease is a statute of repose does not apply retroactively.

Therefore, the claimants Fatal Claim Petition was time barred because the decedent died on August 18, 2009, which was approximately 341 weeks after his retirement, and at the time of Decedent’s death Section 301(c) (2) of the Act governed the limitation for the submission of an occupational disease claim and this provision provided that the employee’s disability or death must occur within 300 weeks of his last date of employment for the occupational disease to be compensable.

- Act 46 created a new time limitation for a Section 108(r) claim by a firefighter that his cancer is an occupational disease and, thus, compensable. Instead of the limit of 300 weeks that applies to all other occupational diseases, a claim filed under Section 108(r) may be made within 600 weeks after the last date of exposure to the hazards of the disease. It is not necessary that the firefighter sustain disability or die within 600 weeks.

- 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. Only after a firefighter establishes that his cancer is an occupational disease under Section 108(r) of the Act do the rebuttable presumptions in Sections 301(e) 8 and (f) come into play.

- A statute of limitations extinguishes the remedy; a statute of repose extinguishes both the remedy and the right. Accordingly, a statute of limitations is procedural, and a statute of repose is substantive.
The 600-week limitations period of Section 301(f) acts as a statute of repose. This is because the 600-week period of Section 301(f) is triggered by a specific event, i.e., the last day of exposure to a workplace hazard, which is independent of the accrual of a remedy. Because Section 301(f) of the Act is a statute of repose, it effected a substantive change in the law. As such, it cannot have a retroactive effect without a clear directive from the legislature, and Act 46 lacks that clear directive.

_City of Warren v. WCAB (Thomas Haines, Deceased, by Sharon Haines, Claimant), No. 468 C.D. 2016 (Decision by Judge, March 9, 2017) 3/17_

- A claimant can establish a right to benefits for an ‘injury’ in the nature of a work-related disease as an injury claim under Section 301(c)(1) of the Act. This would include a repetitive/cumulative death claim that alleges exposure to carcinogenic agents in the workplace over an extended period of time resulted in decedent’s bladder cancer and death.

This in consistent with the law that provides that for an injury to be compensable under the Act, it is not required that the injury resulted from any sudden occurrence or accident; it may be due to daily trauma

In order for a fatal claim to be compensable under Section 301(c) (1) of the Act, an employee’s death must occur within three hundred weeks after the injury. For a fatal disease as injury claim to be compensable under Section 301(c) of the Act, the employee’s hazardous exposure is the injury from which the 300 week look-back period must be calculated.

A claimant who litigates a death claim resulting from exposure to chemicals as an injury claim under Section 301(c)(1) of the Act must prove the death of decent occurred within 300 weeks of the last date of injurious exposure to the agent causing the disease, whether or not such last exposure was disabling.

Therefore, where decedent died on June 23, 2006 the claimant had the burden to prove that decent was exposed to chemicals at work resulting in his bladder cancer up to 300 weeks prior to the date or up to September 22, 2000.

- Whether a hazard exists is a question of fact for the WCJ to determine. Since claimant’s exposure is a factual question, the claimant need not present scientific evidence or expert testimony to prove the existence of the hazard in the workplace. The WCJ may rely solely on the testimony of the claimant or other witnesses to prove the existence of and exposure to the hazard.’
Lay testimony of first-hand knowledge of a hazard gained from practical experience can be sufficient to prove the existence of and exposure thereto. However, the testimony of a lay person appears to require testimony of personal experience with the illness-causing element and personal knowledge.

- In the case of a Fatal Claim Petition, the surviving family member has the burden to prove that the injury or disease was a substantial contributing cause in bringing about the death of the employee. If the causal connection is not obvious, the connection must be established by unequivocal medical testimony.

Medical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a fact exists.

- In this matter the WCJ issued a reasoned decision supported by substantial evidence where she found that the claimant fulfilled her burden of proof by presenting credible fact witnesses who worked in the same environment as the claimant and who testified credibly based on their first-hand knowledge of chemical and environmental hazards, gained from their experience working for the employer, that the decedent was exposed to within 300 weeks of his death.

The claimant’s medical expert proceeded to testify credibly that the environment in which the claimant worked played a substantial contributing factor toward development of the bladder cancer that resulted in his death.

*Kimberly Clark Corporation v. WCAB (Bromley), No. 656 C.D. 2016 (Decision by Judge Covey, May 4, 2017) 5/17*

**PARTIAL DISABILITY**

- A claimant who suffers a loss of earning power attributable to her work-related injury when she returns to work in a modified-duty position with her pre-injury employer and thereafter accepts a permanent position specifically created and offered to her by her pre-injury employer at a loss of wages is entitled to Partial Disability

Therefore, the claimant was entitled to partial disability where the claimant, who had suffered an injury recognized by a Medical Only Notice of
Compensation Payable was entitled to Partial Disability where the Claimant had returned to work following her work-related injury in a modified-duty position with Employer as a telemetry R.N. at no loss of earnings and thereafter was offered and voluntarily accepted a permanent position created by Employer in the Care Management Department and that resulted in wage loss though she remained capable of performing the modified-duty telemetry R.N. position at the time that she accepted the permanent care management position.

This is because Employer, on its own, created and offered Claimant a permanent light-duty position within her restrictions at a loss of earnings for which it now claims no liability.

The court reasoned “We simply cannot permit employers to evade the payment of pre-injury wages or partial disability benefits by creating and offering permanent, lower-paying positions to claimants that are within the restrictions imposed by the claimants’ work-related injuries.”

- A claimant is entitled to partial disability benefits if her earning power is decreased as a result of her work-related injury. Thus, a claimant whose earning power is not affected by her work-related injury is not entitled to partial disability benefits, even though her earnings may be less than her pre-injury earnings.

*Holy Redeemer Health System v. WCAB (Lux)* No. 768 C.D. 2016 (Decision by Judge Brobson FILED, June 6, 2017) 6/17

**PENALTY**

- The employer improperly denied medical bills resulting in the imposition of penalties and unreasonable contest attorney fees where its denial was premised upon its belief that the entity billing for the physical therapy was different that the entity performing the physical therapy and it failed to submit any evidence contrary to billing entities position that the treatment was rendered by that entity in connection with a joint venture that was entered into between it and another physical therapy group, which was the basis for the Employer denying the bills.

In this matter PTI, who was the billing entity, leased space and employees from pt Group for PTI’s Workers’ Compensation business and PTI then paid a flat rate to the pt Group for use of the facility and use of their employees. The leased employees were employees of the pt Group but were independent contractors with respect to PTI under a staffing lease agreement.
There was no information from CMS, the Bureau or any state or federal law enforcement agency indicating that the arrangement between PTI and the pt Group was unlawful or fraudulent.

- The WCJ did not err by awarding a penalty of 50%. This is because Section 435(d) (i) of the Act gives a WCJ discretion to impose a penalty which may be increased to fifty per centum in cases of unreasonable or excessive delays.

Here, the WCJ did not abuse its discretion in imposing a 50 percent penalty where Employer persisted in denying PTI’s bills and, as the WCJ found, then failed to submit any evidence or credible testimony to refute PTI’s status as the provider or demonstrate that there was anything illegal or improper about the leasing arrangements between PTI and the pt Group.

\textit{Derry Township Supervisors and Selective Insurance Company of America v. WCAB (Reed), No. 751 C.D.}

- The fact that the employer based in Texas was not insured in Pennsylvania and did not have the financial ability to pay the WCJ’s order granting the claimant’s Claim Petition did not relieve it of its obligations under the Act to make payment within 30 days of the receipt of the WCJ’s order despite the fact that the claimant also filed a Penalty Petition against the Uninsured Employers Guaranty Fund (Fund) who subsequently commenced payment.

Although the Employer argued that the Fund was aware of the fact that it had not paid the Claimant compensation benefits prior to the initiation of the Penalty Petition and, thus, its delay in providing benefits to the Claimant was unreasonable the Commonwealth Court agreed with the WCJ who noted that the obligation to pay the WCJ’s award granting the Claim Petition was on Employer and the fact that the Fund ultimately commenced such payments did not relieve Employer of its obligation.

There is no precedent or specific statutory language that relieves an employer from the obligation to pay an award due to purported financial inability to satisfy its obligation.

Therefore, penalties were appropriate against the employer where the WCJ issued an order granting the claimant’s Claim Petition on April 3, 2014, the Employer and the Fund filed supersedeas requests with the Board that were denied on May 20, 2014 and the Fund did not begin to make biweekly payments to Claimant until September 1, 2014.

This is because the Fund was not created to protect the uninsured employer or otherwise shield such an employer from its obligations under the Act, as
evidenced by section 1605(b) of the Act, which authorizes the Department of Labor and Industry, on behalf of the Fund, to seek reimbursement of any award paid by the Fund, as well as penalties, interest and attorney fees, from the responsible employer. The Fund was created so a third-party that would be responsible for the payment of claims to protect an injured worker and his right to be compensated for work-related injuries.

- The Fund is not considered an insurer and is not subject to penalties or unreasonable contest attorney fees

  **CMR Construction of Texas v. WCAB (Begly), No. 693 C.D. 2016 (Decision by Judge McCullough, June 26, 2017) 6/17**

**PLEADING**

- The claimant’s failure to fulfill her burden under 108(r) to prove that decedents death from lung cancer was caused by exposure a direct exposure to a carcinogen referred to in section 108(r) does not necessarily mean her Fatal Claim Petition should be dismissed because Sections 301(c)(1) and/or 108(o) might have provided a basis for recovery. Accordingly, this matter was remanded.

This is because a claimant can proceed under theories of compensability that were not previously pleaded. The form of the petition filed is not controlling where the facts warrant relief, and that if a claimant is entitled to relief under any section of the Act, his petition will be considered as filed under that section.

This is the case whether or not the claimant attempts to amend the petition.

  **Cheryl Steele and Roy Steele (deceased), v. WCAB (Findlay Township), No. 875 C.D. 2016 (Decision by Judge Cohn Jubelirer, March 8, 2017) 3/17**

**REASONED DECISION**

- Section 422(a) of the Act, which addresses the requirement to provide a reasoned decision, states in part:

  *Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers’ compensation judge must identify that evidence and explain adequately the reasons for its rejection.*

The requirement that the WCJ adequately explain his reasons for accepting or rejecting evidence protects the parties to a decision by ensuring that a legally erroneous basis for a finding will not lie undiscovered. The WCJ’s prerogative to
determine the credibility of witnesses and the weight to be accorded evidence has not been diminished by the amendments to Section 422(a). Such determinations are binding on appeal unless made arbitrarily and capriciously.

In providing an adequate basis for appellate review, the WCJ is not required to address all of the evidence presented in a proceeding in her written adjudication. Instead, to satisfy the “reasoned decision” requirement, a WCJ must only make findings necessary to resolve the issues raised by the evidence and relevant to the decision.


**REINSTATEMENT**

- WCJ properly dismissed claimant’s Petition for Reinstatement premised upon worsening of left shoulder following rotator cuff surgery based upon the doctrine of collateral estoppel where a WCJ previously, upon granting employer’s Petition for Termination, denied claimant’s prior Petition to Review finding the left shoulder was not injured in the work injury and the WCJ’s decision denying the Petition to Review was not appealed by the claimant beyond the WCAB, hence making it a final decision.

In this matter, the question of whether the left rotator cuff tear was a result of the work-related injury was previously determined in the context of the termination petition. Therefore, Claimant is collaterally estopped from re-litigating that fact in this proceeding.

- To reinstate benefits after termination, a claimant must establish a causal connection between her current condition and the prior work-related injury. To establish this causal connection, a claimant must demonstrate that her disability has increased or recurred after the date of the prior award, and that her physical condition has actually changed in some manner.

*McNeil v. WCAB (Department of Corrections) No. 2022 C.D. 2016 (Decision by JUDGE McCullough, September 1, 2017)* 9/17

**REMAND**

- A WCJ must restrict her decision on remand to the instructions within the remand order. However, the WCJ is not required to produce the same result as the initial decision.
The WCAB has broad discretionary authority under section 419 of the Act to remand a matter to a WCJ. The language of section 419 imposes no requirement that the Board remand a matter to the same WCJ who issued the underlying decision.

More succinctly, Section 419 is neither a statutory mandate that a case be remanded to an original WCJ, nor is it a statutory prohibition on remanding the matter to a new WCJ.

Therefore the WCAB did not exceed its authority by recommending that this matter being remanded for a third time go to a new Judge for a de novo hearing where the original WCJ failed to conduct a complete review of all of the evidence submitted by the parties when rendering her original decision.

Pennsylvania Rule of Appellate Procedure 1551 provides, the court may in any case remand the record to the government unit for further proceedings if the court deems them necessary.

Part of the inquiry made upon determining whether remand is appropriate is whether the petitioner could not by the exercise of due diligence have raised the issue before the WCJ.

In this matter remand was denied where the court was not satisfied that Claimant could not have, by the exercise of due diligence, raised this question of permanency of the alleged loss of use of the right index finger before the government unit. Claimant was precluded from questioning his medical expert about the issue of permanency.

The employer was only entitled to subrogation against claimant’s third party recovery that was based upon the portion of its lien that resulted from the third
party tortfeasors negligence. This means employers subrogation was limited to the compensation it paid to Claimant for the work injuries caused by the third party defendant’s negligence.

This is because to establish its right to subrogation, the employer must demonstrate that it was compelled to make payments due to the negligence of a third party and that the fund against which the employer seeks subrogation was for the same compensable injury for which the employer is liable under the Act.

This is consistent with the language of Section 319 that states:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer…

Therefore the employer was not entitled to subrogation for portion of its lien that related to its payment of disfigurement benefits and medical bills resulting from injuries sustained to claimant’s hands, neck, face and head, trachea, larynx, and lungs because those specific injuries resulted from the work gloves and air supplied face shield that were not manufactured or supplied by the third party tortfeasor.

Serrano v. WCAB (Ametek, Inc.), No. 2684 C.D. 2015 (Decision by Judge Leavitt, February 13, 2017) 2/17

- Pa. Supreme Court grants employer’s Petition for Allowance of Appeal and agrees to address the following issues:

  (1) Is compensation payable pursuant to Article III of the Pennsylvania Workers’ Compensation Act, when the Claimant suffers a work related injury and is concurrently entitled to benefits under the Pennsylvania Workers’ Compensation Act and the Heart and Lung Act?

  (2) Did the Commonwealth Court err in its determination that a self-insured municipality [sic] is not entitled to subrogation, to the extent of the compensation payable pursuant to Article III of the Pennsylvania Workers’ Compensation [Act], when it has concurrent obligations to an injured State Trooper under the Pennsylvania Workers’ Compensation Act and the Heart and Lung Act?

- It will be recalled that the Commonwealth Court had held that 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 was 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.

*Pennsylvania State Police v. WCAB (Bushta), No. 483 WAL 2016, (Decision by PER CURIAM, April 18, 2017) 4/17*

- Act 46 applies to all claims filed after July 7, 2011. In other words, any claimant who files a timely claim after July 7, 2011, is entitled to the benefits of Act 46. Therefore, Independence Blue Cross was entitled to payment of its entire line even though the claimant’s injury was October 18, 2009 and some of the treatment pre-dated the enactment of Act 46 because the claim was made by the claimant after its enactment.

- The Subrogation rights of a non-occupational insurer under the second paragraph of Section 319 of the Act are not self-executing. In the absence of an agreement, the party asserting a subrogation lien under this paragraph must assert and establish its lien through litigation.

- Independent Blue Cross sufficiently preserved its medical lien through its submission a single document titled “Consolidated Statement of Benefits” where the City on the record waived any hearsay objections to the document and time during the hearing did not raise any of the issues with respect to the exhibit. Under these circumstances, and in the absence of a Walker Rule challenge, it was both reasonable and lawful for the WCJ to rely on Exhibit I-1 as evidence of both the existence and amount of IBC’s subrogation lien.

The Walker rule allows an adjudicator to rely on hearsay evidence admitted without objection to support finding of fact so long as it is corroborated by other evidence of record, applies with equal force to workers’ compensation proceedings.

*City of Philadelphia v. WCAB (Knudson), No. 675 C.D. 2016 (Decision Judge Brobson, July 3, 2017) 7/17*

- The employer did not waive its right to subrogation by contesting the claimant’s Claim Petition. Therefore the employer was entitled to subrogation even though the Employer was contesting Claimant’s Claim Petition at the time the third-party settlement funds were distributed.
To hold otherwise would hold an employer “hostage” by forcing them to accept any injury alleged by a claimant when a third party is involved in the incident. Any employer failing to accept a claim would expose itself to the possibility that a Claimant may protect a third-party settlement from subrogation by settling the third-party claim while the employer contests the Claim Petition.

- Absent a bad faith or “dereliction of duty,” the court has never concluded that an employer has waived its right to subrogation under the Act without an express agreement to waive that right.

There are very narrow circumstances in which a court may find that an employer waived its right to subrogation under the Act.

- An employer may agree via contract to waive its right to subrogation of accrued liens as well as future third-party settlements. Such a contract, however, must expressly waive the right to subrogation.

- Under certain circumstances a party’s failure to exercise “due diligence” in pursuing a claim—i.e. failing to raise a claim for subrogation until fourteen months after a claimant settled his or her claim—may constitute waiver of the right to subrogation.

- Subrogation is automatic and by its terms, admits no express exceptions, equitable or otherwise.

- An employer bears the burden to establish its right to subrogation by demonstrating that it was compelled to make payments due to the negligence of a third party and that the fund against which the employer seeks subrogation was for the same injury for which the employer is liable under the Act. *Kalmanowicz v. WCAB (Eastern Industries, Inc.), No. 1790 C.D. 2016 (Decision by Judge Brobson, July 7, 2017)* 7/17

- The Pennsylvania Supreme Court grants the claimant’s Petition for Allowance of Appeal and shall address the following issues:

  *Did the Commonwealth Court err in concluding that the term “instalments of compensation” in Section 319 of the Workers’ Compensation Act, encompasses both medical and disability compensation?*

  *Did the Commonwealth Court err in finding that the defendant-employer did not waive its rights under Section 319 of the Workers’ Compensation Act?*
• It will be recalled that the Commonwealth Court had held 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 employer’s subrogation right included indemnity and medical paid and its credit against the balance of recovery included a credit against future indemnity and medical, during which time the employer was obliged to pay its pro-rata share of attorney fees and cost.

• The Commonwealth Court had further held that although an employer may waive its 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 Commonwealth Court concluded that 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.

*Whitmoyer v. WCAB (Mountain Country Meats), No. 924 MAL 2016 (PER CURIAM, September 15, 2017) 9/17*

**STATUTE OF LIMITATIONS**

• A statute of limitations extinguishes the remedy; a statute of repose extinguishes both the remedy and the right. Accordingly, a statute of limitations is procedural, and a statute of repose is substantive.

The 600-week limitations period of Section 301(f) acts as a statute of repose. This is because the 600-week period of Section 301(f) is triggered by a specific event, i.e., the last day of exposure to a workplace hazard, which is independent of the accrual of a remedy. Because Section 301(f) of the Act is a statute of repose, it effected a substantive change in the law. As such, it cannot have a retroactive effect without a clear directive from the legislature, and Act 46 lacks that clear directive.

*City of Warren v. WCAB (Thomas Haines, Deceased, by Sharon Haines, Claimant), No. 468 C.D. 2016 (Decision by Judge, March 9, 2017) 3/1*

**STATUTE OF REPOSE**
The provision of 301(f) of the Act enacted part of Act 46 on July 7, 2011 that permits a claim to be filed under Section 108(r) within 600 weeks after the last date of exposure to the hazards of the disease is a statute of repose does not apply retroactively.

Therefore, the claimants Fatal Claim Petition was time barred because the decedent died on August 18, 2009, which was approximately 341 weeks after his retirement, and at the time of Decedent’s death Section 301(c) (2) of the Act governed the limitation for the submission of an occupational disease claim and this provision provided that the employee’s disability or death must occur within 300 weeks of his last date of employment for the occupational disease to be compensable.

Act 46 created a new time limitation for a Section 108(r) claim by a firefighter that his cancer is an occupational disease and, thus, compensable. Instead of the limit of 300 weeks that applies to all other occupational diseases, a claim filed under Section 108(r) may be made within 600 weeks after the last date of exposure to the hazards of the disease. It is not necessary that the firefighter sustain disability or die within 600 weeks.

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. Only after a firefighter establishes that his cancer is an occupational disease under Section 108(r) of the Act do the rebuttable presumptions in Sections 301(e) 8 and (f) come into play.

A statute of limitations extinguishes the remedy; a statute of repose extinguishes both the remedy and the right. Accordingly, a statute of limitations is procedural, and a statute of repose is substantive.

The 600-week limitations period of Section 301(f) acts as a statute of repose. This is because the 600-week period of Section 301(f) is triggered by a specific event, i.e., the last day of exposure to a workplace hazard, which is independent of the accrual of a remedy. Because Section 301(f) of the Act is a statute of repose, it effected a substantive change in the law. As such, it cannot have a retroactive effect without a clear directive from the legislature, and Act 46 lacks that clear directive.

City of Warren v. WCAB (Thomas Haines, Deceased, by Sharon Haines, Claimant), No. 468 C.D. 2016 (Decision by Judge, March 9, 2017) 3/17
A claimant can establish a right to benefits for an ‘injury’ in the nature of a work-related disease as an injury claim under Section 301(c)(1) of the Act. This would include a repetitive/cumulative death claim that alleges exposure to carcinogenic agents in the workplace over an extended period of time resulted in decedent’s bladder cancer and death.

This is consistent with the law that provides that for an injury to be compensable under the Act, it is not required that the injury resulted from any sudden occurrence or accident; it may be due to daily trauma.

In order for a fatal claim to be compensable under Section 301(c)(1) of the Act, an employee’s death must occur within three hundred weeks after the injury. For a fatal disease as injury claim to be compensable under Section 301(c) of the Act, the employee’s hazardous exposure is the injury from which the 300 week look-back period must be calculated.

A claimant who litigates a death claim resulting from exposure to chemicals as an injury claim under Section 301(c)(1) of the Act must prove the death of decedent occurred within 300 weeks of the last date of injurious exposure to the agent causing the disease, whether or not such last exposure was disabling.

Therefore, where decedent died on June 23, 2006 the claimant had the burden to prove that decedent was exposed to chemicals at work resulting in his bladder cancer up to 300 weeks prior to the date or up to September 22, 2000.

Whether a hazard exists is a question of fact for the WCJ to determine. Since claimant’s exposure is a factual question, the claimant need not present scientific evidence or expert testimony to prove the existence of the hazard in the workplace. The WCJ may rely solely on the testimony of the claimant or other witnesses to prove the existence of and exposure to the hazard.‘

Lay testimony of first-hand knowledge of a hazard gained from practical experience can be sufficient to prove the existence of and exposure thereto. However, the testimony of a lay person appears to require testimony of personal experience with the illness-causing element and personal knowledge.

In this matter the WCJ issued a reasoned decision supported by substantial evidence where she found that the claimant fulfilled her burden of proof by presenting credible fact witnesses who worked in the same environment as the claimant and who testified credibly based on their first-hand knowledge of chemical and environmental hazards, gained from there experience working for the employer, that the decedent was exposed to within 300 weeks of his death.

The claimant’s medical expert proceeded to testify credibly that the environment in which the claimant worked played a substantial contributing factor toward development of the bladder cancer that resulted in his death.
SUPERSEDEAS FUND REIMBURSEMENT

- An insurer is only entitled to reimbursement from the Supersedeas Fund where it is determined that compensation was not, in fact, payable to the claimant.

The right to reimbursement does not attach where it is determined that the compensation was not payable by employer’s initial carrier on the date of the recognized injury but was, in fact payable to the claimant by employer’s subsequent carrier at risk on the date it was determined claimant suffered an aggravation and hence new injury.

This is because resolution of question of whether compensation was payable to the claimant is independent and separate from the determination of which carrier was responsible for the payment of compensation.

- This holding is consistent with the plain language of Section 443(a) of the Act that provides:

  (a) If, in any case in which a supersedeas has been requested and denied under the provisions of section 413 or section 430, payments of compensation are made as a result thereof and upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable, the insurer who has made such payments shall be reimbursed therefor.

SUSPENSION

- Where it is established that the claimant's loss of earnings is no longer the result of the work-related disability, the employer is not required to establish the availability of an alternative job within the claimant's medical restrictions.

The courts have further held that an employer does not need to demonstrate that a claimant is physically able to work or that available work has been referred to a claimant where the claimant has voluntarily retired or withdrawn from the workforce.
Therefore the WCJ did not err in granting the employer’s Petition for Suspension where she found that the Claimant was actually working within his physical restrictions at the time he stopped reporting to work and that the claimant quit the job that was within his restrictions because her refused to sign a letter regarding the reprimand.

In the context of the facts of the case where Employer established that Claimant’s loss of earnings was related to a factor other than his work injury, i.e., his voluntary quit, Employer was not required to establish the availability of an alternative job within Claimant’s medical restrictions. Further, where, as here, Claimant’s loss of earnings is related to a factor other than his work injury, Claimant’s benefits must be suspended.

Under the facts of this case, additional medical evidence potentially clarifying Claimant’s physical limitations is not required.

Torijano v. WCAB(In A Flash Plumbing), No. 1686 C.D. 2016 (Decision by Judge Hearthway, August 30, 2017) 8/17

UNINSURED EMPLOYERS GUARANTY FUND

- The fact that the employer based in Texas was not insured in Pennsylvania and did not have the financial ability to pay the WCJ’s order granting the claimant’s Claim Petition did not relieve it of its obligations under the Act to make payment within 30 days of the receipt of the WCJ’s order despite the fact that the claimant also filed a Penalty Petition against the Uninsured Employers Guaranty Fund (Fund) who subsequently commenced payment.

Although the Employer argued that the Fund was aware of the fact that it had not paid the Claimant compensation benefits prior to the initiation of the Penalty Petition and, thus, its delay in providing benefits to the Claimant was unreasonable the Commonwealth Court agreed with the WCJ who noted that the obligation to pay the WCJ’s award granting the Claim Petition was on Employer and the fact that the Fund ultimately commenced such payments did not relieve Employer of its obligation.

There is no precedent or specific statutory language that relieves an employer from the obligation to pay an award due to purported financial inability to satisfy its obligation.

Therefore, penalties were appropriate against the employer where the WCJ issued an order granting the claimant’s Claim Petition on April 3, 2014, the Employer
and the Fund filed supersedeas requests with the Board that were denied on May 20, 2014 and the Fund did not begin to make biweekly payments to Claimant until September 1, 2014.

This is because the Fund was not created to protect the uninsured employer or otherwise shield such an employer from its obligations under the Act, as evidenced by section 1605(b) of the Act, which authorizes the Department of Labor and Industry, on behalf of the Fund, to seek reimbursement of any award paid by the Fund, as well as penalties, interest and attorney fees, from the responsible employer. The Fund was created so a third-party that would be responsible for the payment of claims to protect an injured worker and his right to be compensated for work-related injuries.

- The Fund is not considered an insurer and is not subject to penalties or unreasonable contest attorney fees

*CMR Construction of Texas v. WCAB (Begly), No. 693 C.D. 2016 (Decision by Judge McCullough, June 26, 2017)* 6/17

**UTILIZATION REVIEW**

- The Utilization Review (UR) process is not the proper method to determine the causation of an injury or condition. Pursuant to regulations, the UR process is the proper method for determining whether disputed treatment is reasonable and necessary.
  Put more succinctly, an action concerning causation cannot be raised before a URO; therefore, it must be raised in a petition that is intended to be heard directly by a WCJ. Likewise, an action concerning the reasonableness and necessity of treatment is to be raised in a request for UR that will be submitted to a URO.

In this matter the WCJ did not err in denying employer’s petition Seeking Review of a UR Determination where Employer did not contend that the challenged treatment was not a reasonable and necessary treatment for Claimant’s RSD/CRPS but rather argued that the RSD/CRPS was not related to the recognized work injury.

*Haslam v. (London Grove Communication), No. 1655 C.D. 2016 (Decision by Judge Hearthway, September 1, 2017)* 9/17

**VOCATIONAL**

- The mere presentation of evidence of unsuccessful application to jobs listed in a Labor Market Survey (LMS) /Earning Power Assessment does not mandate a
finding that the positions identified were not open and available and that claimant lacked any earning capacity. Such evidence from a Claimant, though relevant is not dispositive with regard to the earning power inquiry.

Therefore the WCJ’s decision that granted employer’s Petition for Modification was affirmed because the WCJ found that the claimant’s testimony on the application process failed to show that the jobs identified by the LMS were not vocationally suitable or actually open and available.

The fact the claimant had applied for several positions but was not hired did not automatically compel the WCJ to reject the earning capacity found in the LMS.

- This result is not inconsistent with the Supreme Court decision of Phoenixville Hospital v WCAB (Shoap), 81 A.3d 830 (Pa. 2013) where the court held that although section 306(b) of the Act does not require that the claimant be offered a job, an employer may prevail on a modification petition under section 306(b) only if it proves the existence of meaningful employment opportunities, and not the simple identification of jobs found in want ads or employment listings.

Under the direction of Phoenixville Hospital, if the WCJ accepts the evidence of the vocational expert, the WCJ’s inquiry is not over if the claimant submits evidence regarding her or his experience in pursuing the jobs identified by the employer’s vocational expert witness.

Evidence of unsuccessful employment applications is relevant but not dispositive to rebut the employer’s argument that the positions identified were proof of the potentiality of a claimant’s substantial gainful employment.

This means that a claimant may offer evidence that the position was filled by the time the claimant had had a reasonable opportunity to apply for it. If the job is already filled, it does not exist.

The fact that the claimant was not hired, as opposed to being filled, does not mean each job did not exist. Phoenixville Hospital stated “substantial gainful employment which exists” requires that the jobs remain open until such time as the claimant is afforded a reasonable opportunity to apply for them.

Whether a claimant had a ‘reasonable opportunity’ to apply and did, in fact, apply for an identified position and whether the job was already filled by the relevant time are factual matters that the WCJ is fully qualified to determine.

In this matter using his discretionary powers the WCJ to assess credibility found that the positions identified were physically and vocationally appropriate for the claimant and open and available to her.

VOLUNTARY QUIT

- Where it is established that the claimant's loss of earnings is no longer the result of the work-related disability, the employer is not required to establish the availability of an alternative job within the claimant's medical restrictions.

The courts have further held that an employer does not need to demonstrate that a claimant is physically able to work or that available work has been referred to a claimant where the claimant has voluntarily retired or withdrawn from the workforce.

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