



News & Notes

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"Serving all Pennsylvanians"

Fall/Winter 2010-2011

2011 Statewide Average Weekly Wage Announced

Pursuant to the Workers' Compensation Act, Section 105.1, the Department of Labor & Industry has determined the statewide average weekly wage for injuries occurring on and after Jan. 1, 2011, is \$858 per week. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2011, the percentage increase in the statewide average weekly wage is 1.5 percent.

Under the act, injured workers are entitled to indemnity (wage-loss) benefits equal to two-thirds of their weekly wage for a work-related injury. However, there are

minimum and maximum adjustments provided in the act, and the benefit rate is set using the annual maximum in place at the time of injury. The maximum is based on the Department of Labor & Industry's calculation of the statewide average weekly wage.

For a schedule of current and past weekly rates and for instructions on how to calculate this amount, visit www.dli.state.pa.us; click on "Workers' Compensation," then "Claims Information," then "Statewide Average Weekly Wage."

Construction Workplace Misclassification Act Goes Into Law

On Feb. 10, 2011, the Construction Workplace Misclassification Act (Act 72) took effect. Misclassification of employees as independent contractors is illegal for all commercial and residential construction in

Pennsylvania. The Pennsylvania Department of Labor & Industry enforces Act 72. For additional information on requirements and penalties, or to obtain a complaint form, visit www.dli.state.pa.us.

Workers' Compensation Office of Adjudication News

Beaver County Hearings: Beginning March 1, 2011, the Workers' Compensation Office of Adjudication began conducting hearings on Beaver County cases at the PA CareerLink® Beaver County Conference Room at 285 Beaver Valley Mall, Route 18, Monaca.

Butler County Hearings: Beginning Jan. 1, 2011, the Workers' Compensation Office of Adjudication began conducting hearings on Butler County cases at the

Butler County Bar Association at 201 S. Main St., Suite 101, Butler.

Effective immediately, when a decision is issued by a workers' compensation judge that involves two or more claim numbers, a separate copy of the decision will be circulated for each claim number. The claim number will be highlighted on each cover sheet to bring attention to the different claim numbers involved.

Workers' Compensation Judges Retire

The Workers' Compensation Office of Adjudication recently said good bye to two long-tenured workers' compensation judges. Francis (Frank) Desimone served as a judge in the Johnstown office for more than 27 years and retired from commonwealth service on Sept. 24, 2010. Thomas Devlin served as a judge in the Philadelphia (Arch Street) office, retiring after 19 years as a workers' compensation judge and 40 years of commonwealth service on Oct. 8, 2010.

Workers' Compensation Office of Adjudication Director

MaryKay Rauenzahn said that both Judges Desimone and Devlin served with dedication and professionalism and, through their work as workers' compensation judges, made significant contributions to the success of the adjudication process in Pennsylvania. With their retirements, the commonwealth and the Office of Adjudication have lost two outstanding and truly dedicated employees. The judges will be greatly missed by all who have come to know them. Best wishes for long and healthy retirements to both Judge Desimone and Judge Devlin.

Employer Information Services
(717) 772-3702

Claims Information Services
toll free inside PA: (800) 482-2383
local & outside PA: (717) 772-4447

Only People with Hearing Loss
toll free inside PA TTY: (800) 362-4228
local & outside PA TTY: (717) 772-4991

Email
ra-li-bwc-helpline
@state.pa.us

*Auxiliary aids and services are available upon request to individuals with disabilities.
Equal Opportunity Employer/Program*

Deputy Secretary Elizabeth Crum Honored With Award

Congratulations to Deputy Secretary Elizabeth Crum who was honored with the 2010 IAIABC Samuel Gompers Award for "improving the working conditions of the masses." Crum was recognized at the commencement of the International Association of Industrial Accident Boards & Commissions' annual convention in September by President Frances Huntley-Cooper. Crum and six individuals and organizations were recognized for their leadership in moving workers' compensation systems forward and showing dedicated commitment to the mission of the IAIABC.

Huntley-Cooper acknowledged Crum's tireless work to advance programs and systems in Pennsylvania, always with the injured worker at heart, and added that she continuously seeks to learn from others and share information that may be beneficial to peers. With her fresh ideas and innovative solutions, Crum has truly made an impact on Pennsylvania's efforts to improve outcomes for injured workers.

Forms and Petitions

Electronic Filing: The Bureau of Workers' Compensation and the Office of Adjudication continue their efforts to make claim and petition filing easier. We are pleased to be able to offer electronic filing of two additional forms: Statement of Wages, LIBC-494C, and Defendant's Answer to Claim Petition under PA WC Act, LIBC-374. In addition to these forms, the following can be filed electronically:

- Notice of Workers' Compensation Denial (LIBC-496)*
- Notice of Compensation Payable (LIBC-495)*

- Notice of Temporary Compensation Payable (LIBC-501)*
- Notice Stopping Temporary Compensation (LIBC-502)*

For additional information on electronic filing visit www.dli.state.pa.us; click on "Workers' Compensation," then "Claims Information."

Updated Forms: The forms listed below have recently undergone revision. Please note that old versions of these forms received after the "required by" date will not be accepted.

Title	Form Number	Changes	Required By
Supplemental Agreement for Compensation for Disability or Permanent Injury	LIBC-337	Contact information and fraud language were updated; duplicate request for the weekly earnings was removed; further matters section was expanded to incorporate the multiple period information; an EEO disclosure was added	2/21/11
Death Claim Supplement to Compromise and Release Agreement	LIBC-749	New form	2/1/11
Compromise and Release Agreement	LIBC-755	Overall revisions	2/1/11
Notice to the Employee	LIBC-758	Title change	6/6/11

To access these and other downloadable forms, visit www.dli.state.pa.us; click on "Downloadable Forms," then "Workers' Compensation Forms."

Key Bureau Staff Appointments Made

The bureau recently welcomed Kathleen Dupin and Scott Weiant to two key staff positions. The retirements of two long-tenured staff members resulted in the appointments of Dupin and Weiant as chiefs of the bureau's Claims Management and Health and Safety divisions, respectively.

Dupin was appointed chief of the Claims Management Division in February 2010. She began her commonwealth career in the division in 1977, advancing through the bureau in various roles. Throughout her tenure, Dupin has been involved in key initiatives to educate and assist the workers' compensation community. Prior to being named division chief, Dupin was longtime editor of the bureau's newsletters and publications

and was instrumental in the creation of the bureau's first Web pages. In addition, Dupin was responsible for the creation and publication of the Spanish edition of "Workers' Compensation & the Injured Worker," an informational brochure describing the rights and responsibilities of injured workers. Dupin has also been responsible for coordinating the bureau's annual Workers' Compensation Conference since its inception in 2001 and coordinated the annual Governor's Occupational Safety and Health Conference from 2005 to 2010.

Weiant first came to the bureau in May 2002 and served as an accident and illness prevention analyst and then

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Key Bureau Staff Appointments Made

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certification and education section manager. In 2007, he joined the Department of Conservation and Natural Resources as department safety officer where his main areas of focus were safety, labor relations and the workers' compensation program. Weiant returned to the Bureau

of Workers' Compensation when he was appointed chief of the Health and Safety Division on Nov. 22, 2010. Prior to his commonwealth service, Weiant worked in private industry for 22 years and spent much of his time in the labor relations field. Weiant played an integral role in the development and launch of the Health and Safety Division's online data processing and management system, HandS.

21-Day Report Available Online

The Pennsylvania Workers' Compensation Act requires insurers and self-insured employers to either make first payment or deny a claim within 21 days of notification of the claim. Additionally, the rules and regulations require that a form to accept or deny a claim be sent to the claimant and filed with the bureau within 21 days. Since 1999, the bureau has been monitoring the

21-day compliance rate of insurers and self-insured employers. For the Jan. 1 – March 31, 2009, reporting period, the statewide industry compliance average was 72 percent. The full report is available online at www.dli.state.pa.us; click on "Workers' Compensation," then "Claims Information," then "Report of Insurer/Self-Insured Performance."

Now Appearing

The bureau's 2009 annual and statistical reports are available online. Check them out at www.dli.state.pa.us; click on "Publications," then "Workers' Compensation."

Listing Network Providers on Physician Panels

The Pennsylvania Workers' Compensation Act permits employers to establish a list of designated health care providers (a physician panel). When the list is properly posted, injured workers must seek treatment for their work injuries or illnesses with appropriate designated providers for the first 90 days from their first visit to a provider.

Employers are encouraged to include a variety of providers on their physician panel (e.g., chiropractor, occupational therapist, physical therapist, etc.). When providers are omitted from panel lists, injured workers may seek treatment with the provider of their choosing, leaving the employer responsible for the services rendered.

The act and regulations require employers to list the name, address, telephone number and specialty of health care

providers on their list of panel physicians. When employers name scheduling networks, instead of specific treating providers, employees may experience delays, which may interfere with the continuity of patient care.

Also, listings that reference practice names, managed care/case management companies, scheduling services and networks, other than approved coordinated care organizations, may not be enforceable, and could increase medical costs.

For additional information on provider panels, visit the department's website at www.dli.state.pa.us; click on "Workers' Compensation," then "Medical Treatment Information."

Prosecution Blotter

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

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

Berks County

Erich Anewalt, owner of D&A Lawn & Landscape Services LLC, in Berville, was sentenced on Sept. 24, 2010, by Judge Linda K. M. Ludgate. After pleading guilty to three misdemeanor counts of the third degree, Anewalt was ordered to pay the costs of prosecution and was fined \$6,500. The bureau's Compliance Unit reports that D&A Lawn & Landscape Services LLC is now in compliance with Pennsylvania's workers' compensation law.

Bucks County

Judge Rea B. Boylan entered John L. Poole, owner of JLP Enterprises I Inc., doing business as Skyline Restaurant & Bar, in Chalfont, into the ARD program for first-time offenders on Oct. 21, 2010, in Bucks County Court of Common Pleas. Poole was placed on

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Prosecution Blotter

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probation for a period of one year, and was ordered to pay the costs of prosecution as well as restitution to the Uninsured Employers Guaranty Fund in the amount of \$8,283.70. The bureau's Compliance Unit reports that Skyline Restaurant & Bar is no longer in business.

Bryan Taddei, owner of Taddei Masonry, in Trevoise, was sentenced on Jan. 5, 2011, by Judge Jeffrey L. Finley in Bucks County Court of Common Pleas. Taddei pleaded guilty to 18 misdemeanor counts of the third degree, was sentenced to 10 years' probation and was ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of \$109,940 and ordered to pay the costs of prosecution. The bureau's Compliance Unit reports that Taddei Masonry is operating as a sole proprietor.

Carbon County

Judge Richard W. Webb entered Michael J. Troutman, owner of T&T Contracting, in Leighton, into the ARD Program for first-time offenders on Nov. 2, 2010, in Carbon County Court of Common Pleas. Troutman was placed on probation for a period of two years, ordered to pay the costs of prosecution, pay restitution to the Uninsured Employer Guaranty Fund in the amount of \$14,604.11 and perform 15 hours of community service. The judge also ordered Troutman to reimburse the Bureau of Workers' Compensation \$273 for costs expended to secure unemployment compensation documents. The bureau's Compliance Unit reports that T&T Contracting is now in compliance with Pennsylvania's workers' compensation law.

Indiana County

Judge William J. Martin entered Terry Alan Watkins, owner of Home Hardware Inc., in Home, into the ARD program for first-time offenders on May 26, 2010, in Indiana County Court of Common Pleas. Watkins was placed on probation for a period of two years, was ordered to perform 20 hours of community service

and was ordered to pay the costs of prosecution as well as restitution to an injured employee in the amount of \$26,156.74. The bureau's Compliance Unit reports that Home Hardware Inc. is no longer in business.

Franklin County

Judge Shawn D. Meyers entered Mark Adjetey and Kevin Carter, owners of Zullinger Meats Inc., in Waynesboro, into the ARD Program for first-time offenders on Dec. 29, 2010, in Franklin County Court of Common Pleas. Adjetey and Carter were placed on probation for a period of 24 months, were ordered to pay \$350 to the Law Library, \$1,500 to an injured employee, restitution in the amount of \$11,986.03 to the Uninsured Employer Guaranty Fund and the costs of prosecution. The bureau's Compliance Unit reports that Zullinger Meats Inc. is no longer in business.

Lehigh County

Judge Kelly L. Banach entered Vincenzo Tucciarone, owner of Blue Moon Equestrian Enterprises Ltd. in Coopersburg, into the ARD program for first-time offenders on May 24, 2010, in Lehigh County Court of Common Pleas. Tucciarone was placed on probation for a period of two years and was ordered to pay the costs of prosecution as well as restitution to the Uninsured Employer Guaranty Fund in the amount of \$22,337. The bureau's Compliance Unit reports that Blue Moon Equestrian Enterprises Ltd. is no longer operating with employees.

Monroe County

Judge Jonathan Mark entered Donna L. Redington, owner of Maneline Hair Studio in East Stroudsburg, into the ARD program for first-time offenders on Aug. 16, 2010, in Monroe County Court of Common Pleas. Redington was placed on probation for a period of six months and was ordered to pay the costs of prosecution as well as restitution in the amount of \$1,177 to the Bureau of Workers' Compensation. The bureau's Compliance Unit reports that Maneline Hair Studio is no longer in business.

Attorney General Insurance Fraud Convictions

From the Office of Attorney General

Patrick Kitonis pleaded guilty to one count of workers' compensation fraud in Allegheny County. Kitonis was injured while unloading a truck in October 2006 and began collecting workers' compensation benefits from the State Workers' Insurance Fund, or SWIF. Though Kitonis began to work full time in October 2007, he concealed this employment from SWIF. Kitonis denied such employment on two forms submitted to SWIF. As a result of this deception, Kitonis obtained \$19,748.56 in benefits to which he was not entitled. On Sept. 7, 2010, Kitonis was sentenced to serve six months' house arrest followed by seven years' probation and ordered to pay restitution of \$19,748.56 and all court costs.

Derek Lange pleaded guilty to one count of theft by failure to make required disposition of funds received

in Franklin County. Lange, a Waynesboro police officer, began receiving workers' compensation benefits after he was injured on the job in August 2009. Under the PA Heart and Lung Act, Lange was entitled to continue to receive his regular salary from the borough provided that he endorse over to his employer any workers' compensation checks he received. However, an investigation revealed that Lange signed over three and deposited 15 of the 18 checks he received from the Penn National Insurance Company. On Nov. 17, 2010, Lange was sentenced to serve two years of probation, ordered to perform 50 hours of community service and to pay a fine of \$50, restitution of \$22,893.90 and all court costs.

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Attorney General Insurance Fraud Convictions

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William Thomson pleaded guilty to one count of insurance fraud, three counts of workers' compensation insurance fraud and two counts of theft by deception in Bucks County. Thomson was injured at work and subsequently collected workers' compensation benefits from the PMA Insurance Company. Thomson submitted forms representing that he was not employed while receiving benefits; however, an investigation revealed that he was working as a contractor and was also doing specific landscaping and snow removal work. In addition, after building a small patio roof for an elderly gentleman, Thomson accompanied the man to the bank to secure payment. Thomson filled out the elderly man's withdrawal slip and added \$3,000 to the amount of the planned withdrawal. On Dec. 6, 2010, Thomson was sentenced to serve four and one-half to 23 months' incarceration and ordered to pay restitution of \$3,000 and all court costs.

Thomas Ambrosia pleaded guilty to two counts of criminal attempt/theft by deception in Adams County. Ambrosia filed a claim with the Nationwide Insurance Company for injuries from a slip and fall in a hotel parking lot on Dec. 24, 2008, at 5:30 a.m. and also filed a workers' compensation claim with the Zurich Insurance Company for the same injuries from a slip and fall on the icy parking lot of his employer on the same date at 6:45 a.m. After filing a disability claim with the Assurity Life Insurance Company in April 2009, Ambrosia failed to report that he returned to work. On Dec. 20, 2010, Ambrosia was sentenced to serve two and one-half years' probation on each count to run consecutively, and was ordered to serve 75 hours of community service and to pay a fine of \$1,500,

restitution and all court costs.

Sheron Maxie pleaded guilty to one count of workers' compensation insurance fraud in Chester County. Maxie filed a workers' compensation claim with The Motorists Insurance Group stemming from an alleged injury he suffered while working at Greencore Building Services. Maxie claimed he injured his knee when he jumped off a box truck. However, multiple witnesses from Greencore Building Services stated that Maxie arrived at work hurt and stated that he was going to claim a workplace injury in order to gain insurance coverage. On Jan. 18, 2011, Maxie was sentenced to serve two years' probation and ordered to pay a fine of \$500 and all court costs.

Abraham Rosenberg and his business, AMMA International, pleaded guilty to four counts of failure to carry workers' compensation insurance in Lackawanna County. Rosenberg was the president and person responsible for obtaining and maintaining workers' compensation insurance for AMMA International (R&G Trucking). During a period spanning several years, the business operated without the required insurance. Two employees were injured during that time. On Jan. 24, 2011, AMMA International was sentenced to serve two years' probation. Rosenberg was sentenced to serve one and one-half years' probation and ordered to pay joint and several restitution of \$85,000 and all court costs.

King Trading Inc. pleaded guilty to nine counts of failure to carry workers' compensation insurance in Philadelphia County. King Trading Inc. operated without the required workers' compensation insurance from April 1, 2007, through Dec. 13, 2007. An employee was injured during that time period and was unable to collect benefits as a result. On Jan. 21, 2011, King Trading Inc. was sentenced to serve 18 months' probation, fined \$2,500 and ordered to pay all court costs.

Certificates of Non-Insurance

Please note that the Bureau of Workers' Compensation does not issue certificates of non-insurance. To obtain a certificate of non-insurance, contact the Pennsylvania

Compensation Rating Bureau, United Plaza Building, Suite 1500, 30 S. 17th St., Philadelphia, PA 19103-4007, Phone: (215) 568-2371.

No Assessment for the Self-Insurance Guaranty Fund in 2010

The Bureau of Workers' Compensation has determined that the existing asset level of the Self-Insurance Guaranty Fund, or SIGF, remains sufficient to cover the claims being paid from the fund. As a result, the bureau will not issue an assessment against existing self-insurers for the maintenance of the SIGF in 2010 unless a sudden influx of new claims against the fund should occur.

This will be the third consecutive year in which existing self-insurers have been given relief from payment of an SIGF assessment. The SIGF is continuing the payment of workers' compensation benefits to 36 injured workers who were employed by five different insolvent, former self-insured employers.

2010-2011 Administration Fund Bills to be Reduced

The fiscal year 2010-2011 total assessment amount for financing the Workmen's Compensation Administration Fund will be \$17.4 million less than the \$75.0 million the General Assembly authorized to be paid from the fund during the year.

The Administration Fund provides funding for the administrative operations of the bureau, the Workers' Compensation Office of Adjudication and the Workers' Compensation Appeal Board. It is maintained by annual assessments issued against self-insurers and against insured employers as collected and remitted to the bureau by their insurance carriers.

Generally, the total amount billed in a given assessment

equals the approved annual budget amount for the Administration Fund. However, under Section 446(b) of the Workers' Compensation Act, if the asset level of the Administration Fund exceeds a certain level, the subsequent assessment for the maintenance of the fund is reduced by the excess amount.

The assets level of the Administration Fund exceeded the statutory maximum last year. As a result, invoices the bureau issued to self-insurers and insurance carriers in November 2010 reflect the reduced assessment amount. The bureau is unable to project whether future Administration Fund assessments after this year's will include any reductions due to the statutory funding cap.

New Self-Insurance Regulations Take Effect

On Aug. 5, 2010, the Independent Regulatory Review Commission approved the Department of Labor & Industry's final-form rulemaking amending 34 Pa. Code, Chapter 125, Subchapter A, the regulations that govern the processing of applications for and the administration of self-insurance for individual employers under the Workers' Compensation Act. The final-form rulemaking took effect with its publication in the Pennsylvania Bulletin on Sept. 11, 2010.

The final-form rulemaking is intended to improve clarity and consistency through the introduction of new standard terms, to provide more objective standards for qualifying for and maintaining self-insurance status and to improve and strengthen the department's ability to efficiently and effectively monitor and regulate workers' compensation self-insurance in Pennsylvania. Among other things, the amended regulations:

- Establish specific standards for determining whether an applicant possesses adequate financial ability, the statutory threshold to qualify for self-insurance.
- Clarify the basis for setting the amount of security on self-insurance liability and modify the formulas for calculating security, including expanding the discounts available to a self-insurer with investment-grade credit.
- Add standards for a self-insured employer to transfer its liability to an insurance carrier through a loss portfolio transfer policy.
- Eliminate the prior requirement for a self-insured employer posting a letter of credit as security to enter a trust arrangement estab-

lishing a standby fund for depositing a draw on the letter of credit.

- Revise standards under which a foreign-owned applicant may qualify for self-insurance.
- Make short-term solvency rather than long-term reserves the focus for workers' compensation funding requirements for a public employer.
- Update standards relating to excess insurance.
- Clarify the standard of review for reconsiderations and appeals of bureau decisions regarding self-insurance applications and related matters and provide procedures for show cause proceedings against a self-insured employer.
- Provide for the use of electronic forms to replace and consolidate certain paper forms previously used.
- Revise certain time frames and procedures relating to the self-insurance application process.

The final-form rulemaking amending the regulations can be found online in the Sept. 11, 2010, edition of the Pennsylvania Bulletin at www.pabulletin.com.

Questions regarding the amended individual self-insurance regulations and their implementation may be referred to the bureau's Self-Insurance Division at (717) 783-4476 or emailed to gknehr@state.pa.us.

The Pennsylvania Department of Labor & Industry Develops Health and Safety Training Resource

The Pennsylvania Department of Labor & Industry continues to develop a health and safety training resource. The primary mission of the initiative will be accident prevention through education. The resource, created and operated by the Health and Safety Division of the Bureau of Workers' Compensation, will offer free Web-based and classroom health and safety training courses to the public as well as safety training and awareness materials.

At the website you will be able to view safety training PowerPoint briefings, review safety talk topics, register and participate in various safety webinars, review course descriptions, course objectives and instructor

information. In addition, links will provide access to numerous health and safety websites.

The training resource will offer free, high-quality employee training to help Pennsylvania businesses reduce workers' compensation costs and keep employees safe and on the job. The goal of the training resource is to reduce the number of work-related injuries, illnesses and fatalities in Pennsylvania by elevating safety awareness throughout the commonwealth. Please visit the Health and Safety Division's Web page at www.dli.state.pa.us; click on "Workers' Compensation," then "Health & Safety Division" for upcoming announcements.

Nominations Sought for Governor's Award for Safety Excellence

Each year, select Pennsylvania employers are presented with the Governor's Award for Safety Excellence for demonstrating outstanding progress in accident and injury prevention. The Governor's Award is a great way to recognize both the hard work that goes into preventing injuries and the remarkable results that can be achieved by safety excellence. Employers can nominate themselves, or they can be nominated by another party. All nominations must be submitted by June 1, 2011.

Additional information, nomination forms and overviews of past winners can be found at www.dli.state.pa.us; click on "Workers' Compensation," then "Health and Safety," then "Governor's Award for Safety Excellence." You can also obtain award information by contacting Amy Zacks, program coordinator, at (717) 772-1917 or by email at azacks@state.pa.us.

2011 National Safety Council (NSC) Training for Advanced Safety Certification (ASC) Offered

The National Safety Council's advanced safety certificate is one of the credentials acknowledged by the Department of Labor & Industry for an individual to be recognized as a qualified accident and illness prevention services provider under the Health and Safety Regulations of the PA Workers' Compensation Act. The act requires that providers who deliver prevention services on behalf of a workers' compensation insurer or self-insured employer, or who deliver safety committee training in the three required topics for state certification or recognition, be qualified.

For 2011, the bureau's Health and Safety Division is, along with the NSC, co-sponsoring this training. Courses/dates are:

Principles of Occupational Safety and Health
May 2-5, 2011
Sept. 19-22, 2011

Safety Training Methods
June 20-23, 2011

Fundamentals of Industrial Hygiene
Aug. 15-18, 2011

The cost is as follows:
Commonwealth employees\$895 per course
National Safety Council members\$995 per course
Non members\$1,095 per course

All classes will be held at the PennDOT Riverfront Office Center, 1101 S. Front St., Harrisburg, with free parking. Meals and refreshments will be on your own, and there is a cafeteria on site.

Course descriptions and registration forms are available online at www.nsc.org; click on "Products and Training," then "National Training Calendar."

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving 5 percent workers' compensation premium discounts as of March 28, 2011: 9,258 committees covering 1,274,214 employees

Cumulative grand total of employer savings: \$400,725,623

A View From the Bench

Prepared by the Committee on Human Resource Development of the Pennsylvania Workers' Compensation Judges Professional Association

The Pennsylvania Supreme Court, in Bufford v. WCAB (N. Am. Telecom), 2 A.3d 548 (Pa.2010), modified its landmark Pieper case, which was the leading precedent setting forth the basic rule of how a claimant proceeds when he or she seeks reinstatement after suspension. See Pieper v. Ametek Thermox Instruments Div., 584 A.2d 301 (Pa. 1990).

The burden on the claimant has seemingly been lessened. The claimant still has the initial burden of moving forward. However, if the employer believes that some "fault" is attendant to the claimant's renewed loss of earnings, the employer must prove the same. Importantly, "fault" does not include (a) discharge for unsatisfactory job performance; and (b) a voluntary quit of light duty to take a higher-paying job, followed by later economic layoff from such employer. Indeed, fault circumstances are governed by the traditional "good faith/bad faith" job availability analysis, and the Commonwealth Court was wrong to portray "fault" as having been committed outside of this context. In this regard, the court disapproved precedents that created "fault" circumstances not tied to the conduct-based affirmative defenses of the Act like violation of law and self-inflicted injury.

The claimant, Bufford, was employed in a skilled labor job with North American Telecom (NAT). He suffered serious injuries in September 1998 when he was struck by a car. The employer paid TTD voluntarily under a Notice of Compensation Payable. One month later, in October 1998, the claimant returned to his employer at light duty, with a loss of earning power. The employer reduced benefits to TPD. Five months passed. Then, Bufford voluntarily left his employer and the light duty job for a new job at Ronco Machine. He was now employed as an industrial electrician "for higher pay and less onerous physical job requirements." The employer filed a Notice of Suspension and legitimately suspended TPD. Another four and one-half years passed. Then, in January 2003, Ronco laid the claimant off, citing economic reasons. At this point, notably, NAT's facility, out of which the claimant had worked, had permanently closed.

The claimant filed for reinstatement, but the workers' compensation judge denied the request. He concluded "that any loss of earnings ... was caused by [claimant's] layoff from Ronco, not by worsening of the work-related injury." The Workers' Compensation Appeal Board and Commonwealth Court affirmed, but the Supreme Court reversed. Accordingly, the court remanded for reinstatement of disability checks.

The Commonwealth Court had relied on the seminal Supreme Court precedent, Pieper, and held that claimant had not shown that his recurrent loss of earning power was caused "through no fault of his own." The Commonwealth Court, in particular, had equated claimant's voluntary departure from light duty at the

original employer as fault, the consequences of which were to be attributable to him.

In reversing, the Supreme Court acknowledged that the Pieper precedent specifically held that a claimant, to gain reinstatement after suspension, "must [first] prove that through no fault of his own his earning power is once again adversely affected by his disability." However, the court held that Commonwealth Court had in fact misinterpreted this concept, particularly when taking into account a 2000 precedent, Stevens v. WCAB (Consolidation Coal), 760 A.2d 369 (Pa. 2000). There, a claimant who had returned to work on a suspension with a different employer had been let go for "unsatisfactory job performance." The Supreme Court in that case rejected the idea that this circumstance constituted an act of disqualifying "fault" under the Pieper analysis. Thus, the claimant in Stevens was not disqualified from reinstated benefits.

According to the court, under Pieper and Stevens, the Commonwealth Court was wrong to consider Bufford's voluntary departure from light work as "fault" for purposes of disqualifying him from reinstated benefits. According to the court, the pivotal determination of "fault" circumstances is not to be so broadly interpreted. Instead, fault circumstances are governed by the traditional "good faith/bad faith" job availability analysis, or such things as self-inflicted injury and violation of law.

In addition, the court held that the burden of proof of showing fault was on the employer, not on the claimant. The court held that after a claimant seeking reinstatement proves that his or her earning power is once again affected by his or her disability, the burden shifts to the employer to "show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in this Court's decisional law." The court specifically announced that, with regard to a claimant such as Bufford, "a claimant remains eligible for reinstatement of suspended benefits where the claimant's employment with a post-injury employer is terminated, even where the claimant had previously performed modified post-injury duties for the time-of-injury employer."

In light of this new case, an employer can avoid reinstating TTD after suspension by once again locating physically and vocationally-appropriate modified work for the injured worker. As always, an employer can schedule an IME to determine if the claimant still has restrictions and, if so, their precise nature. An employer can also avoid reinstating TTD after suspension by

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A View From the Bench

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proving that the renewed loss of earning power has been caused by violation of law, self-inflicted injury, intoxication or violation of positive orders. An employer cannot, however, avoid reinstating benefits by asserting that the claimant's less willing acts, like being subject to layoff and termination for unsatisfactory job performance, constitute "fault."

The Commonwealth Court in Verizon v. WCAB (Guyders), 999 A.2d 665 (Pa. Cmwlth. 2010), reversed the part of the WCAB's decision that imposed a six-month expiration on employer's IME. The case was then remanded for the workers' compensation judge to make factual findings and conclusions of law as to the jobs not previously considered, i.e., the job referrals that occurred more than six months after the October 2003 IME.

This case commenced with the 2006 filing of a petition to suspend or modify a claimant's benefits arising from a 1994 carpal tunnel injury. The employer provided medical evidence from a physician who performed an IME in 2003 and a vocational expert who provided 73 job leads to the claimant between 2003 and 2006 based upon the restrictions provided by the IME physician. The claimant testified that her carpal tunnel symptoms had not changed since 1997, and presented testimony of a vocational expert.

The issue on appeal arose when the claimant's vocational expert expressed the opinion that medical evidence is stale within six months to a year, and the workers' compensation judge relied on this evidence in refusing to consider any job leads provided more than six months after the 2003 IME.

The Commonwealth Court determined that this case is governed by Kachinski v. WCAB (Vepco Constr. Co.), 532 A.2d 374 (Pa. 1987), since the claimant's injury occurred prior to June 24, 1996. After providing an analysis of the arguments provided by the employer and claimant, the court made its decision based upon a lack of substantial evidence noting that:

1. the claimant's vocational expert was not qualified to provide medical opinions as to when a medical opinion is stale;
2. the claimant's vocational expert actually agreed that the claimant was employable and capable of working within the medical restrictions provided by the IME physician; and
3. the workers' compensation judge's decision to place a six-month expiration date on the IME results was simply arbitrary, noting that the claimant did not refute the employer's medical evidence, she did not show a change in her condition subsequent to the IME and she testified that her work injury did not change after 1997.

Finding that substantial evidence did not support the workers' compensation judge's finding that the employer's medical evidence was stale after six

months, the Commonwealth Court determined that a remand was required so that the workers' compensation judge could make a determination under Kachinski on the job referrals that were not considered by the judge because they were made more than six months after the IME exam. The part of the Workers' Compensation Appeal Board decision that imposed a six-month expiration on an employer's IME was reversed.

The Commonwealth Court also reversed the Workers' Compensation Appeal Board and modified the claimant's benefits based upon an earning power of \$347.41 per week in the earning power assessment case of Phoenixville Hosp. v. WCAB (Shoap), 2 A.3d 689 (Pa. Cmwlth. 2010).

This litigation began with a modification petition alleging that work was generally available to the claimant within her physical restrictions as of Aug. 28, 2007. The IME physician found that the claimant did have a residual loss of function in her left shoulder due to her left shoulder tendonitis and brachial plexopathy work injury from September 2003. The IME also determined that the claimant was capable of returning to sedentary work and approved the job descriptions from the vocational counselor. The employer's vocational expert then testified that there were five jobs that were open and available in the claimant's usual employment area that were within the restrictions provided by the IME physician.

The claimant's doctor expressed the opinion that she was not physically able to perform the duties of the five jobs identified by the employer's expert. The claimant's vocational expert testified that those five jobs were not vocationally appropriate for the claimant. In addition, the claimant testified that she applied for the five positions, which resulted in one telephone interview and no job offers. The claimant had not looked for work independently.

The workers' compensation judge credited the testimony of both of the employer's experts and rejected the testimony of the claimant's experts. However, the judge credited the claimant's testimony that she applied to all five jobs that the vocational counselor found for her and did not receive an offer of employment. Therefore, the judge found that the claimant established that, in good-faith, she followed through on all of the jobs referred to her by her employer and that none of the referrals resulted in an offer of employment. The workers' compensation judge denied the employer's modification petition and the Workers' Compensation Appeal Board affirmed.

The Commonwealth Court provided a lengthy analysis of the application of Kachinski v. WCAB (Vepco Constr. Co.), 532 A.2d 374 (Pa. 1987), versus the application of Act 57 and Section 306(b)(2) of the Workers' Compensation Act. The defining points centered on "earning power," "available employment" and "existing jobs." The court noted that in Edwards v. WCAB (MPW Indus. Servs., Inc.), 858 A.2d 648 (Pa. Cmwlth. 2004), it stated that there is no requirement that the claimant be offered a job under Act 57, and that employer need only establish

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a claimant's earning power. The court concluded that "although the jobs must be available, 'the Act contains no clear indication that a claimant actually receive an offer of employment in order to establish earning power.'" Edwards, 858 A.2d at 652, [citing South Hills Health Sys. v. WCAB (Kiefer), 806 A.2d 962 (Pa. Cmwlth. 2002)]. Rather, the jobs must be available at the time an expert conducts a job survey. South Hills, 806 A.2d at 971. The court, however, agreed with the workers' compensation judge and the board that the reference in the act to "existing jobs" means jobs that not only "exist" but "exist" in reality and are open and available to a claimant.

The Commonwealth Court stated that it was being asked to determine whether a job not only exists, but is available to a claimant for the purposes of Section 306(a) of the act, when she applies for each individual job contained in a labor market survey and does not receive an offer of employment where the workers' compensation judge finds that the jobs were open and available at the time they were identified as employment opportunities by the vocational expert. The court determined that an employer is not precluded from obtaining a modification of benefits where, as here, the claimant pursued the jobs contained in the labor market survey weeks after they were identified as open and available by the credible testimony of the employer's vocational expert.

The only position not considered to be open and available was the one where the claimant was interviewed over the phone. The court determined that this job remained "open" even weeks after the labor market survey was conducted since the claimant was interviewed, but the job was not "available" since it was not offered to the claimant. Since this "unavailable" position was the lowest paying of the five jobs identified by the vocational expert, the court did not disturb the expert's calculation of the earning power of \$347.41 per week.

Therefore, the Commonwealth Court reversed the order of the Workers' Compensation Appeal Board and found that the employer was entitled to a modification of benefits based upon the \$347.41 earning power since the workers' compensation judge had already found the employer's vocational expert credible.

Modification of Status Based Upon Late IRE

In Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005), the Pennsylvania Supreme Court held that an employer can pursue a modification of a claimant's disability status from total disability to partial disability utilizing an Impairment Rating Evaluation, or IRE, even where they failed to request such IRE within the 60-day window provided in Section 306 (a.2) of the Act (77 P.S. Section 511.2). This is the so-called "late" IRE. However, there was some uncertainty as to whether or not the IRE doctor's opinion evidence would be sufficient evidence standing alone to support such a change in the claimant's disability status.

In Diehl v. WCAB (I.A. Constr.), 5 A.3d 230 (Pa. 2010), the Pennsylvania Supreme Court affirmed the holding of the Commonwealth Court to the effect that an employer seeking to change a claimant's workers' compensation disability status from total disability to partial disability under Section 306 (a.2) of the act (77 P.S. Section 511.2) using an IRE which was done too late to obtain an automatic change of status under Section 306 (a.2), does not need to present evidence of job availability nor an earning power assessment/labor market survey. If believed, the "late" IRE opinion evidence is sufficient basis for the workers' compensation judge to modify the claimant's disability status from total to partial and start the clock ticking on the 500-week maximum period of partial disability benefits.

Retirement Cases

Two recent opinions from the Commonwealth Court have shed further light on the significance of retirement status in workers' compensation cases.

In City of Pittsburgh v. WCAB (Robinson), 4 A.3d 1130 (Pa. Cmwlth. 2010), the claimant had worked under a modified-duty program for the defendant employer until they terminated the program. She subsequently qualified for their disability pension program. However, after obtaining an IME, which cleared the claimant to perform light duty or sedentary duty work, the employer sought to suspend the claimant's disability benefits on the theory that she had voluntarily withdrawn from the work force because she had retired and was not looking for suitable work within her limitations after retiring. After their petition was filed, the claimant went to the local employment center to look for jobs that she believed she could perform, but did not actually apply for a job. The workers' compensation judge concluded that the employer had forced the claimant into retirement due to her work injury, and also found that she was looking for work. Relying upon SEPTA v. WCAB (Henderson), 669 A.2d 911 (Pa. 1995), the Workers' Compensation Appeal Board affirmed.

The Commonwealth Court affirmed, holding that the key to this case involves ascertaining whether the claimant had ever actually retired. Referring to prior appellate opinions, the court stated: "[T]he issue of whether a claimant had retired has rarely been in dispute." The court's opinion reviews those earlier holdings in detail. The court acknowledged that there are retirement pensions and then there are disability pensions. The court analysis of the factual and legal issues reads in relevant part as follows:

"There are also different types of disability pensions. Some, like the disability pension at issue, require only a showing that the recipient cannot perform her time-of-injury job. That a claimant is unable to perform the time-of-injury job due to a work-related injury is part of a claimant's burden of proof in order to receive workers' compensation benefits in the first place. Thus, accepting this type of disability pension by itself, would not, without

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more, indicate that the claimant has voluntarily left the entire work force. Rather, it is merely an acknowledgement that the claimant cannot perform her time-of-injury job, which has already been determined ... The [PA] Supreme Court has described the dual obligations that employers have under the Act as paying benefits and also assisting injured workers to return to the work force The injured workers have a reciprocal obligation to cooperate with that effort Of course, as the Supreme Court held in Henderson, an employer is not required to help a claimant find available work or prove the availability of that work if the claimant has indicated, by retiring from the work force, a desire not to work. However, we cannot relieve an employer of its obligation to help a claimant reenter the work force, by identifying the claimant's residual work abilities and finding available positions within those abilities, unless it is clear from the totality of the circumstances that such efforts would be unavailing. The Supreme Court has long stressed the importance and gravity of an employer's burden to show suitable work. In order to show that efforts to return a claimant to the work force would be unavailing because a claimant has retired, an employer must show, by the totality of the circumstances, that the

claimant has chosen not to return to the work force. Circumstances that could support a holding that a claimant has retired include: (1) where there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions. To impose a lesser standard on an employer to show that a claimant has retired would not be consistent with the humanitarian purpose of the Act or our Supreme Court's precedent."

The court held that Robinson's circumstances did not establish that she had an intent to terminate her employment or her career. Because her employer failed to carry its burden under Henderson, supra, to show that she had retired, the court agreed with the Workers' Compensation Appeal Board that the employer needed to show the availability of suitable work within the claimant's restrictions and abilities in order to meet its burden on the suspension petition. Judges Pellegrini and Leavitt filed dissenting opinions.

In Day v. WCAB (City of Pittsburgh), 6 A.3d 633 (Pa. Cmwlth. 2010), the workers' compensation judge granted the employer's petition to suspend compensation benefits because the claimant had retired

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A Message From Kids' Chance of Pennsylvania

Whenever one enters a new year, it is customary to look back and reflect. Kids' Chance of Pennsylvania is pleased to report that 2010 was a very successful year. We also recognize that our success is due in part to your continued support of our mission.

Our most significant accomplishment for the past year was awarding 48 scholarships, totaling \$121,000, to deserving students for the 2010-2011 academic year. These scholarships continue to be possible thanks to the generous contributions made by our Scholars Program Sponsors, our Corporate and Community Partners and individual donors. Visit our website at



Scholarship Recipients

www.kidschanceofpa.org to read student letters, expressing in their own words the difference that Kids' Chance of Pennsylvania has made in their lives.

Annual fundraising events help to raise additional scholarship funds. This past year Kids' Chance of Pennsylvania hosted several successful events: the 5th Annual Golf Outing and Recognition Event in Hershey, the 3rd Annual Walk/Run in Harrisburg and the 2nd Annual Walk/Run in Philadelphia. These events, in addition to numerous events held on behalf of Kids' Chance by partnering organizations

we refer to as "advisors," raised significant scholarship funds while raising community awareness of the Kids' Chance mission. As we look forward to 2011's fundraising events, we encourage you to mark your calendars now for the 6th Annual Kids' Chance Golf Outing on May 31, 2011, at the Hershey Country Club, East Course.

Kids' Chance of Pennsylvania is more committed than ever to its mission. We continue to be inspired by the determination and accomplishment of the students we help. One student writes, "I cannot even begin to express how much you have touched my family and my life through this scholarship." We may be touching students' lives, but in turn, their stories and successes continue to touch ours.



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and had failed to show either that he was forced to retire from the entire work force due to his work injury or that he was looking for work. The claimant suffered a work-related neck injury in 1992 and underwent surgery, then returned to full-duty work in 1993 or 1994 but was unable to continue and, therefore, was placed into light-duty positions starting in 1995 and 1996. The claimant was then laid off by the employer in 2000 or 2001. Following layoff he received unemployment compensation and looked for light-duty work, but he found none. He then took Social Security benefits when his unemployment compensation ran out and stopped looking for suitable work.

The employer obtained an IME clearing the claimant for full-time medium-duty work and then filed a petition to suspend compensation benefits alleging that the claimant had voluntarily withdrawn from the workforce. The workers' compensation judge granted a suspension on the basis that the claimant had voluntarily withdrawn himself from the work force. The Board affirmed, focusing upon the claimant's failure to look for work after his unemployment compensation benefits expired and he took his Social Security pension. The Commonwealth Court rejected the claimant's argument that the burden of proof should have remained on the employer to show that suitable jobs were available for the claimant, and that the claimant had not voluntarily withdrawn from the workforce. The court noted that the employer can satisfy its general burden of showing that the claimant is no longer suffering from a loss of earning power due to his work injury by establishing that "by the totality of the circumstances, that the claimant

has chosen not to return to the workforce" citing Robinson, supra. The court wrote: "The totality of the circumstances here, including Claimant's acceptance of a pension from Employer, and a Social Security pension after receiving and exhausting UC benefits, along with Claimant's testimony that he believed he could work but was not looking for work, justify a holding that, like the claimant in Henderson, Claimant intended to terminate his career and, therefore, retired." Judge McGinley concurred in the result only, Judge Leavitt and Judge McCullough filed separate concurring opinions.

Utilization Review

In The Road Toad Inc. v. WCAB (McLean), 8 A.3d 922 (Pa. Cmwlth. 2010), the employer relied upon the medical opinion of the physician who performed an IME after the petition for review of utilization review determination had been filed. The Commonwealth Court rejected the claimant's argument that it was improper for the workers' compensation judge to have considered the physician's testimony since the IME occurred after the petition had been filed.

Collateral Estoppel and Res Judicata

In Commonwealth of Pa., Dep't of Corrs. v. WCAB (Wagner-Stover), 6 A.3d 603 (Pa. Cmwlth. 2010), the Commonwealth Court held that a workers' compensation judge cannot disregard the findings of fact by the secretary of the Department of Corrections to the effect that the claimant had fully recovered from her work injury. The court concluded that a full and fair due process hearing was held in the Act 632 proceeding, and the question as to whether the claimant was fully recovered in that proceeding was the same question at issue in the subsequent termination proceeding before the workers' compensation judge.

UC Issues Update Newsletter

Pennsylvania's unemployment compensation program's quarterly online newsletter provides critical and timely information. To access this important information, visit www.uc.pa.gov; click on "Employer Services," then "UC

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