



News & Notes

Workplace Safety Committee Technical Assistance Manual Available

The Health & Safety Division of the Pennsylvania Bureau of Workers' Compensation has revised the workplace safety committee technical assistance manual. The updated manual is now available online to help employers establish certified workplace safety committees. The manual outlines the structure and duties of a safety committee, explains electronic filing via the HandS system, and provides templates that are useful when creating bylaws, developing meeting agendas and writing meeting minutes. The manual also includes many forms that are useful when performing inspections and conducting new employee orientation, including safety skills and knowledge tests.

As Maureen McMahon, loss control specialist with County Commissioners Association of Pennsylvania, points out, "Often, progress is not as sweeping as the safety-conscious would like. Staying committed to improving employee health and safety is a long-term commitment and should be viewed as such. Some changes may take considerable time and effort but are well worth the patience." The bureau's goal is to support employers in the creation of safety committees and to ensure the overall health and safety of employees.

To view the manual, visit www.dli.state.pa.us. Click on "Workers' Compensation," then "Health & Safety Division," then "HandS System."

Save the Date for Annual Workers' Compensation Conference

Mark your calendars for the 11th Annual Pennsylvania Workers' Compensation Conference, June 11-12, 2012, at the Hershey Lodge & Convention Center. This popular event has it all: exciting speakers, stimulating topics and lots of opportunities for networking and educational credits. Watch our website during the coming months for more information.

Visit us online at www.dli.state.pa.us. Click on "Workers' Compensation."

Statewide Average Weekly Wage Announced

Pursuant to the Workers' Compensation Act, Section 105.1, the Department of Labor & Industry has determined that the statewide average weekly wage for injuries occurring on and after Jan. 1, 2012, shall be \$888 per week. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2012, the increase in the statewide average weekly wage is 3.5 percent.

Under the act, workers suffering a work-related injury are entitled to indemnity (wage-loss) benefits equal to two-thirds of their average weekly wage. 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 the weekly rate, visit www.dli.state.pa.us. Click on "Workers' Compensation," then "Claims Information," then "Statewide Average Weekly Wage."

Inside this Issue

Changes to Bureau Forms	2
In Memoriam: Judge Edward Pastewka	2
Kids' Chance Awards Scholarships	2
National Safety Council Training Offered	3
Companies Honored with Governor's Award	3
Prosecution Blotter	4
Health & Safety Training Resource Available	6
Workers' Compensation Updating System	6
UC Issues Update Newsletter	6
Safety Committee Box Score	6
A View From the Bench	7

Employer Information Services
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Only People with Hearing Loss
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*Auxiliary aids and services are available upon request to individuals with disabilities.
Equal Opportunity Employer/Program*

Changes to Bureau Forms

Changes have been made to two bureau forms.

The title to the *Answer to Petition To*, form LIBC-377, has been changed to *Answer to Petition To/For*. Options to answer Joinder of Additional Defendant and Penalties petitions are included, and the fraud language has been updated. This form is a non-OCR form and, therefore, does not need to be tested and approved for formatting prior to use.

Similarly, the title of the *Petition To*, form LIBC-378, has been changed to the *Petition To/For*. This form now includes petitions for penalties; updates the title of the LIBC-758 in the Notice section; adds Violation of the Act, Rules or Regulations as a reason for filing the petition; and updates the fraud language. This form is an OCR form and, therefore, will require testing and approval for formatting prior to use. Prior versions of the *Petition To*, LIBC-378, will not be accepted and will be returned.

Adding the option to include petition for penalties to the *Petition To/For*, form LIBC-378, negates the need for the *Petition for Penalties*, form LIBC-686, which will, therefore, be eliminated. After Dec. 22, 2011, the form will not be accepted and will be returned.

Electronic versions of the revised forms, along with reproduction instructions, are available at www.dli.state.pa.us. Click on "Workers' Compensation," then "Claims Information," then "Forms."

In Memoriam: Judge Edward Pastewka

Workers' Compensation Judge Edward Pastewka, who served the Erie Office of Adjudication, passed away Sept. 27, 2011, at the age of 79.

Judge Pastewka graduated from Allegheny College in 1954 and then served in the U.S. Army for three years. Upon his return, he entered the University of Pittsburgh Law School, graduating first in his class in 1960. He briefly practiced law before accepting a position as a referee and then a workers' compensation judge with the commonwealth, a position he held for 39 years. Judge Pastewka will be greatly missed by his co-workers and friends, and we extend our condolences to his family.

Kids' Chance Awards Scholarships

Kids' Chance of Pennsylvania is pleased to announce that 44 scholarships totaling \$104,000 have been awarded to deserving students for the 2011-2012 academic year. The average scholarship award exceeded \$2,300. In the 14 years since making its first award, Kids' Chance of Pennsylvania has provided \$867,750 in scholarship grants to 471 deserving candidates. Kids' Chance would like to thank its scholars program sponsors, its corporate and community partners and all other donors who make scholarships possible. For more details on the student recipients' hometowns and academic institutions, please visit the Kids' Chance website at www.kidschanceofpa.org.

Kids' Chance of Pennsylvania hosted its annual 5/10K Fun Walk/Run events in October. The fourth annual Harrisburg walk/run was held on City Island on Sunday, Oct. 30, 2011, with more than 180 walkers and runners participating. The third annual Philadelphia walk/run was held in Fairmount Park on Sunday, Oct. 2, 2011, with more than 130 walkers and runners participating. Kids' Chance is pleased to announce that the first Pittsburgh walk/run was held in South Park on Saturday, Oct. 29, 2011, with more than 120 walkers and runners participating. Kids' Chance thanks its founding sponsor, Eastern Alliance Insurance Group, and its diamond sponsor, The Chartwell Law Office LLP, for their support in making these events a great success. For additional information on event sponsors, please visit www.kidschance5k.org.

Kids' Chance of Pennsylvania is a volunteer-driven nonprofit organization providing college and vocational school scholarships to children of Pennsylvania workers who have suffered serious or fatal work-related accidents or illnesses, resulting in financial need. Each year, Kids' Chance makes a significant difference in the lives of affected Pennsylvania families by providing scholarship support to help eligible students pursue and achieve their higher-education goals. For more information, please visit www.kidschanceofpa.org, email info@kidschanceofpa.org, or call 610-970-9143.

National Safety Council Training Offered

The National Safety Council's (NSC) Advanced Safety Certificate is one of the credentials accepted by the Department of Labor & Industry to qualify an individual as an 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, are accredited.

For 2012, the bureau's Health & Safety Division, along with the NSC, is co-sponsoring this training:

Safety Management Techniques
March 19-22, 2012

Principles of Occupational Safety and Health
May 7-10, 2012
Sept. 17-20, 2012

Safety Training Methods
June 25-28, 2012

Fundamentals of Industrial Hygiene
Oct. 15-18, 2012

The following discounted per-course rates apply:

Commonwealth of PA employees	\$895
National Safety Council members	\$995
Nonmembers	\$1,095

All classes will be held at the PennDOT Riverfront Office Center, 1101 S. Front St., Harrisburg.

Free parking is available at the center. Meals are not included; however, there is a cafeteria on site.

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

Companies Honored With Governor's Award for Safety Excellence

At the 85th annual Governor's Occupational Safety and Health conference, held last October in Hershey, seven Pennsylvania employers were recognized for winning the prestigious Governor's Award for Safety Excellence. The 2011 winners are:

Dallastown Area School District
York County

Gilbreth Packaging - A Cenveo Company
Bucks County

L.J. Aviation
Westmoreland County

Lancaster Safety Consulting Inc.
Allegheny County

R.A. Glancy & Sons Inc.
Allegheny County

Roll Forming Corporation (Sharon)
Mercer County

Ziamatic Corporation
Bucks County

All of the winning employers have a state-certified workplace safety committee in place. To learn about the tremendous safety accomplishments of these employers, as well as important information on other health- and safety-related topics, visit www.dli.state.pa.us. Click on "Workers' Compensation," then "Health & Safety Division," then "Governor's Award for Safety Excellence."

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 as 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.

Allegheny County

Christopher Michael Biknius, owner of Done Right Roofing in Pittsburgh, pleaded guilty to 22 misdemeanor counts of the third degree on May 18, 2011, in Allegheny County Court of Common Pleas for failing to insure the workers' compensation liability of his business. Judge Kathleen A. Durkin placed Biknius on probation for seven years, and ordered him to pay the costs of prosecution and make restitution to an injured employee in the amount of \$124,365.93. The bureau's Compliance Unit reports that Biknius, doing business as Done Right Roofing, is no longer in business.

Bucks County

Joseph David Locke Jr., Pamela A. Locke and A+ Family Movers Inc., in Philadelphia, were sentenced July 11, 2011, by Judge Robert J. Mellon in Bucks County Court of Common Pleas for failing to insure the workers' compensation liability of their business. Joseph David Locke Jr. pleaded guilty to three misdemeanor counts of the third degree. He was sentenced to two years' probation and ordered to pay all court costs. Pamela A. Locke was entered into the ARD program for first-time offenders, sentenced to two years' probation and ordered to pay all court costs. The corporation, A+ Family Movers Inc., pleaded guilty to one felony count of the third degree and was fined \$13,374. The commonwealth requested restitution for the Uninsured Employers Guaranty Fund in the amount of \$34,978.49. The defendants submitted a check to the clerk of courts in the amount of \$30,000 following the guilty plea/ARD hearings. The remaining restitution of \$4,978.49 will be paid back by Joseph Locke over the course of his probation. The bureau's Compliance Unit reports that A+ Family Movers Inc. is no longer in business.

Delaware County

On June 9, 2011, Judge Kevin F. Kelly, Delaware County Court of Common Pleas, placed George Economou, owner of Stacey's Pizza in Philadelphia, into the ARD program for first-time offenders for 24 months. Economou was ordered to pay the costs of prosecution and restitution to an injured

employee in the amount of \$30,000. Defendant Stacey's Pizza pleaded guilty to one felony count, with court-ordered probation for three years and restitution to an injured worker totaling \$30,000. The bureau's Compliance Unit reports that Stacey's Pizza is no longer in business.

John P. Fitzpatrick, owner of Scissorwiz in Aston, was sentenced Aug. 22, 2011, by Judge Ann Osborne in Delaware County Court of Common Pleas. Fitzpatrick pleaded guilty to four misdemeanor counts of the third degree and was placed on probation for four years. He was ordered to pay the costs of prosecution and restitution to the Uninsured Employers Guaranty Fund in the amount of \$16,766.48. The bureau's Compliance Unit reports that Scissorwiz is no longer in business.

Erie County

Douglas A. Pifer, owner of Douglas Pifer Trucking in Erie, was sentenced Oct. 27, 2011, by Judge Daniel Brabender in Erie County Court of Common Pleas. Pifer pleaded guilty to five misdemeanor counts of the third degree and was placed on probation for five years. He was ordered to pay the costs of prosecution, a \$500 fine and restitution to the United States Postal Service in the amount of \$94,774.28. The bureau's Compliance Unit reports that Douglas Pifer Trucking is no longer in business.

Greene County

On June 20, 2011, in Greene County Court of Common Pleas, Glen Edward Miller, owner of M&M Construction Co. in Jefferson, pleaded guilty to two misdemeanor counts of the third degree for failing to insure the workers' compensation liability of his business. Judge Farley Toothman placed Miller on probation for two years and ordered him to pay the costs of prosecution, perform 180 hours of community service and make restitution to the Uninsured Employer Guaranty Fund in the amount of \$26,167.01. The bureau's Compliance Unit reports that Miller, doing business as M&M Construction Co., is no longer in business.

Continued on page 5

Prosecution Blotter

Continued from page 4

Lancaster County

On Oct. 18, 2011, in Lancaster County Court of Common Pleas, Judge Dennis E. Reinaker entered Jerome L. Lutz, owner of Top of the Line Roofing in Mount Joy, into the ARD program for first-time offenders. Lutz was placed on probation for four years and was ordered to perform 100 hours of community service. He was also ordered to pay the costs of prosecution as well as restitution to the Uninsured Employers Guaranty Fund in the amount of \$177,208.57. The bureau's Compliance Unit reports that Top of the Line Roofing is now in compliance with Pennsylvania workers' compensation law.

Lawrence County

James M. McKnight, doing business as James M. McKnight Trucking, in New Castle, was sentenced on Sept. 8, 2011, by Judge J. Craig Cox in Lawrence County Court of Common Pleas for failing to insure the workers' compensation liability of his business. McKnight pleaded guilty to one felony count of the third degree and was sentenced to two years' probation. He was also ordered to pay a fine of \$300 as well as court costs. The bureau's Compliance Unit reports that James M. McKnight Trucking is now in compliance with Pennsylvania workers' compensation law.

Luzerne County

Judge Hugh F. Mundy entered Tracey Lee McDermott, owner of McDermott & McDermott Real Estate Inc. in Dallas, into the ARD program for first-time offenders on Nov. 16, 2011, in Luzerne County Court of Common Pleas. McDermott was placed on probation for five years, fined \$200 and ordered to pay the costs of prosecution. He was also ordered to perform 15 hours of community service and pay restitution to the Uninsured Employers Guaranty Fund in the amount of \$15,169.62. The bureau's Compliance Unit reports that McDermott & McDermott Real Estate Inc. is no longer in business.

Montgomery County

On May 17, 2011, in Montgomery County Court of Common Pleas, Judge William J. Furber Jr. entered James Scott Fesmire, owner of J.S. Fesmire Hauling in Chalfont, into the ARD program for first-time offenders. Fesmire was placed on probation for 12 months and ordered to pay the costs of prosecution. The bureau's Compliance Unit reports that J.S. Fesmire Hauling is now in compliance with Pennsylvania workers' compensation law.

Judge Steven T. O'Neill entered Mark Allyn Silfies, owner of Mark Allyn and Sons Paving Co. Inc. in Souderton, into the ARD program for first-time offenders on May 24, 2011, in Montgomery County Court of Common Pleas. Silfies was placed on probation for 12 months and ordered to pay the costs of prosecution. The bureau's Compliance Unit reports that Mark Allyn and Sons Paving Co. Inc. is no longer in business.

Philadelphia County

CAS Home Health Care Inc., owned by Sean Williams, in Philadelphia, pleaded guilty to five misdemeanor counts of the third degree on Nov. 9, 2011, in Philadelphia County Court of Common Pleas for failing to insure its workers' compensation liability. Judge David C. Shuter placed the company on probation for five years and ordered it to pay all court costs and restitution to the Uninsured Employers Guaranty Fund in the amount of \$71,397.43. The bureau's Compliance Unit reports that CAS Home Health Care Inc. is now in compliance with Pennsylvania workers' compensation law.

Snyder County

Melvin James Mowery, owner of Phoenix Enterprises LLC in Port Trevorton, was sentenced on Sept. 30, 2011, by Judge Michael H. Sholley in Snyder County Court of Common Pleas. Mowery pleaded guilty to 638 misdemeanor counts of the third degree. In addition, Phoenix Enterprises LLC pleaded guilty to 546 misdemeanor counts of the third degree. Both were placed on probation for three years, ordered to perform 100 hours of community service, fined \$500, required to provide proof of coverage quarterly, and ordered to make restitution to the Uninsured Employers Guaranty Fund in the amount of \$47,524.15. The bureau's Compliance Unit reports that Phoenix Enterprises LLC is now in compliance with Pennsylvania workers' compensation law.

Venango County

Kevin Barthen, owner of Four Star Pizza in Oil City, pleaded guilty to six misdemeanor counts of the third degree on Oct. 31, 2011, in Venango County Court of Common Pleas for failing to insure his workers' compensation liability. Judge Oliver J. LoBaugh placed Barthen on probation for six years, fined him \$600, and ordered him to pay all court costs as well as restitution to the Uninsured Employers Guaranty Fund in the amount of \$35,782.85. The bureau's Compliance Unit reports that Four Star Pizza, no longer owned by Kevin Barthen, is now in compliance with Pennsylvania workers' compensation law.

Continued on page 6

Prosecution Blotter

Continued from page 5

Westmoreland County

Frank Dennis Letterine, owner of Denny's Trucking in Murrysville, was sentenced on Sept. 13, 2011, by Judge John E. Blahovec in Westmoreland County Court of Common Pleas. Letterine pleaded guilty to one felony count of the third degree. He was sentenced to five years' probation and ordered to pay restitution in the amount of \$25,876.37 as well as the costs of prosecution. The bureau's Compliance Unit reports that Denny's Trucking is now in compliance with Pennsylvania workers' compensation law.

Pennsylvania Health and Safety Training Resource Now Available

The Health & Safety Division of the Department of Labor & Industry's Bureau of Workers' Compensation's has launched its online health and safety training resource, PATHS. PATHS is a free statewide service that provides employers and employees with easy access to cost-effective health and safety resources. PATHS helps participants in the workers' compensation system achieve greater efficiency in their workers' compensation cost-containment efforts by creating safer, accident-free workplaces.

PATHS gives employers access to a comprehensive, online collection of health- and safety-related training sessions available through reputable sources. This training will help employers reduce workplace health and safety incidents, resulting in reduced workers' compensation premiums. Workers' compensation costs associated with incidents in the workplace are a considerable portion of an employer's business costs. Learn how to reduce your workers' compensation costs through effective, proactive health and safety training programs that will benefit your employees and your bottom line.

Visit PATHS at www.dli.state.pa.us. Click on "Workers' Compensation," then "Health & Safety Division," then "PATHS."

Workers' Compensation Updating System to Integrate and Streamline Business Processes

The Department of Labor & Industry is developing a computer system that will replace the aging technology currently in use for workers' compensation in Pennsylvania. The Workers' Compensation Automation and Integration System, or WCAIS, will integrate and streamline business processes for the Bureau of Workers' Compensation, the Office of Adjudication and the Workers' Compensation Appeal Board, while respecting the integrity of each separate business area. The system will be introduced in the fall of 2012 and completed in the fall of 2013.

If you would like to receive information about the WCAIS Project, send your name and email address to RA-LI-PA-WCAIS-UP@pa.gov. Your input is important to the successful development and implementation of WCAIS.

UC Issues Update Newsletter

The Pennsylvania unemployment compensation program's quarterly online newsletter provides critical and up-to-date unemployment compensation information. To read it, visit www.uc.pa.gov. Click on "Employer Services," then "UC Issues Update Newsletter."

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving 5 percent workers' compensation premium discounts as of Dec. 31, 2011:

9,631 committees covering 1,314,309 employees

Cumulative grand total of employer savings:

\$431,029,979

A View From the Bench

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

Medical bills paid after supersedeas denial for services rendered before the denial are to be reimbursed by the supersedeas fund.

In Department of Labor & Industry, Bureau of Workers' Comp. v. WCAB (Crawford & Company), 23 A.3d 511 (Pa. 2011), a 5-2 decision, the Pennsylvania Supreme Court held that an insurer that paid, after a workers' compensation judge's supersedeas denial order, a bill for surgery performed before the denial was entitled to reimbursement from the supersedeas fund.

The claimant suffered work-related right shoulder tendonitis on July 21, 1995. He underwent a defense medical examination on March 16, 2004, in which the examiner found he was fully recovered. On June 1, 2004, the claimant underwent right shoulder surgery. On July 19, 2004, the employer filed a termination petition and requested supersedeas. The workers' compensation judge's Aug. 30, 2004, interlocutory order denied supersedeas. The provider submitted the surgery bill to the insurer Oct. 11, 2004. The insurer paid the bill on Jan. 25, 2005. On June 28, 2005, the workers' compensation judge granted termination effective March 16, 2004. When the insurer filed its supersedeas fund reimbursement application, the bureau defended, asserting that the date of service, well before the supersedeas request was made and denied, controlled, so that reimbursement was not appropriate. The workers' compensation judge held that the service date created a *potential* obligation, but that only the billing date created the *actual* obligation, and that, therefore, the payment made in January was reimbursable as made pursuant to the supersedeas denial. The Workers' Compensation Appeal Board affirmed the decision, as did an *en banc* Commonwealth Court, with a two-judge dissent. After discussing the parties' contentions and the policy behind supersedeas, Justice Eakin wrote that, because the bill arrived after the supersedeas denial order, notwithstanding that the service was performed before the order, the bill was paid as the result of the denial and could be reimbursed. Reimbursement is not dependent upon the date of the event upon which the bill is based. Rather, it is premised upon the billing date, as that is when the obligation to pay arises.

The adequacy of a claimant's Section 312 notice is a fact-specific inquiry, determined by analysis of the totality of the circumstances.

In Gentex Corp., et al. v. WCAB (Morack), 23 A.3d 528 (Pa. 2011), the facts established that Ms. Morack, a 45-year employee of Gentex, developed

bilateral hand pain and swelling and finger-locking from 2003 to 2005. In January 2005, she informed her supervisor that she could no longer tolerate the pain, and she left work. The employer sent her to a physician, who immediately excused her from work. She reported her continuing absences daily, as required, informing the human resources department that she had disabling hand swelling. In February 2005, she applied for non-occupational short-term disability benefits, indicating on the form that her symptoms were due to pre-existing fibromyalgia and high blood pressure, and were not work related. In March 2005, she was referred to a rheumatologist, who diagnosed, *inter alia*, bilateral carpal tunnel syndrome, trigger finger and de Quervain's tenosynovitis, and opined that they were work-related conditions and not related to her non-occupational ailments. The claimant testified that she immediately (i.e., within 120 days of her knowledge) and repeatedly attempted to inform human resources of this new information, but she never received a return call. She did leave at least one message informing human resources that she had "work-related problems." She filed her claim petition in October 2006, more than 18 months later. The employer's witness testified that no notice was provided until September 2006, when the petition was filed. Its §§ 311 and 312 notice defenses were unsuccessful before the workers' compensation judge, who credited the claimant's testimony, found that she gave both timely and adequate notice, and awarded benefits. The Workers' Compensation Appeal Board affirmed the judge's decision. Commonwealth Court, in its reported decision at 975 A.2d 1214, found that the telephonic messages were timely under § 311 but were insufficiently specific under § 312 to qualify as proper notice, and it reversed the award.

The Supreme Court's opinion contains a lengthy discussion of the reasons for § 312's requirement of some specificity. Essentially, the employee must describe the injury in ordinary language and say that it occurred while working on a certain date and in a certain location. Madame Justice Todd wrote:

In sum, we conclude that what constitutes adequate notice ... is a fact-intensive inquiry, taking into consideration the totality of the circumstances... (T)he notice only need be conveyed in ordinary language, can take into consideration the context and setting of the injury, and may be provided over a period of time or a series of communications, if the exact nature of the injury and its work-relatedness is not immediately known by the claimant.

Continued on page 8

A View From the Bench

Continued from page 7

Once the employer has that information, even if not “perfect,” it has sufficient knowledge to begin its own § 406.1 investigation. In reaffirming the principle that meritorious claims should not be defeated for technical reasons, relying on the humanitarian purpose of the act, and liberally construing its provisions in favor of injured workers, the court held that the claimant’s collective communications to the employer complied with section 312’s intent. The Supreme Court reversed the Commonwealth Court and reinstated the award of benefits.

Not looking for work is not equivalent to retirement.

In Keene v. WCAB (Ogden Corp.), 21 A.3d 343 (Pa. Cmwlth. 2011), the court held that a discouraged worker’s failure to continue looking for work over a period of two years is not the same as voluntary retirement. In such a case, an employer does not receive the benefit of the presumption that a claimant has retired, and is not relieved of the burden of establishing job availability.

In this case, the claimant suffered a 1989 knee injury, underwent replacement surgery and began to look for work in newspapers and on the Internet. She applied for numerous positions, but was not hired. In 2007, the employer filed a suspension petition based upon her alleged voluntary removal from the work force. Shortly thereafter, she applied for more jobs, but was not hired. The workers’ compensation judge believed her when she said she tried to work but became discouraged and depressed at her lack of success. She did not “formally” retire and did not seek or receive a pension from any employer. She did receive Social Security disability, but not old age benefits. The employer did not offer job availability evidence and did not offer affirmative evidence of retirement other than the failure to look for work. Suspension was denied. The Workers’ Compensation Appeal Board reversed the decision, finding that the claimant’s failure to continue applying for jobs for more than two years was a voluntary withdrawal from the work force.

The Commonwealth Court reversed this ruling, reinstated the workers’ compensation judge’s decision and restored benefits. The court made it clear that failure to look for work, in and of itself, does not establish voluntary retirement. The employer may not shift the burden to the claimant to show active job seeking, unless the evidence is clear that the claimant is retired, has accepted a retirement pension, is receiving old age benefits or refuses a suitable job while receiving a pension. Otherwise, the employer must show job availability, or earning capacity, or must affirmatively prove to the adjudicator’s satisfaction that the claimant has unalterably chosen to not work.

An employer’s job offer letter to its injured employee need not be overly descriptive to adequately inform him of its suitability.

In an initially unpublished decision, Commonwealth Court held that an employer’s job offer letter to its injured employee is sufficient if it informs him that there is work available within the physician’s specific restrictions and it includes accommodation language. Vaughn v. WCAB (Carrara Steel Erectors), 19 A.3d 545 (Pa. Cmwlth. 2011).

The claimant suffered a 2005 back injury. The employer’s physician examined the claimant in January 2008, opined that he could perform medium-duty work and set down specific physical requirements and restrictions. In May 2008, the employer sent him a letter offering him a job at his pre-injury wages and, although it did not list a specific job title, duties or tasks, it stated that it would accommodate the doctor’s specific restrictions. When the claimant did not report for work, a suspension petition was filed. The employer’s fact witness described various available job tasks, which its medical witness said the claimant could do, while the claimant and his doctor testified he could not work. The workers’ compensation judge suspended benefits, and the Workers’ Compensation Appeal Board affirmed the decision, as did Commonwealth Court. The court noted that the claimant was a heavy-duty steel laborer, and that he was expected to return to his pre-injury job with accommodations. Because he was familiar with the work to be done and would know what portions of his former work he could still do, no more specificity was required. The letter was sufficiently descriptive, and his failure to return to work demonstrated bad faith.

Stipulations that resolve litigation are binding in future litigation.

Upper Darby Township v. WCAB (Nicastro), 23 A.3d 601 (Pa. Cmwlth. 2011) is another originally unpublished decision. The claimant suffered a 2002 lower back injury, received a closed period of benefits, returned to work under a suspension of benefits and then allegedly suffered a new lower back injury in 2004. During litigation of the claim petition involving the alleged 2004 injury, the parties stipulated that the claimant suffered a new injury resulting in a closed period of disability from June to October 2004, that he returned to work without restrictions or earning loss in October, and that, when he left work in December 2004, it was for reasons unrelated to his back injury. The workers’ compensation judge’s May 2006 decision adopted this stipulation and suspended benefits effective October 2004.

Continued on page 9

A View From the Bench

Continued from page 8

In 2008, the claimant sought reinstatement as of January 2008, later conceding that there was no specific incident prompting his petition, and asserting a relief date as of his December 2004 stoppage of work. He testified that he left work in 2004 because he had taken too many sick days, some of which he attributed to his work injury despite the earlier stipulation. He conceded that he could have done his pre-injury job without restrictions continually after his December 2004 termination until his 2008 testimony. He did not work after 2004 and had no subsequent injuries. He sought treatment with a new physician in November 2006 and continued to treat with her. Despite not having full access to the claimant's medical records - specifically the surgical records, diagnostic studies or records between December 2004 and November 2006, when she first saw him - she testified that the claimant could not have done his pre-injury job at any time after December 2004. The employer's doctor evaluated the claimant in 2003, 2004 and 2008. He reviewed the records and diagnostic studies, noting no changes over that time and no worsening of the study results. He opined that the claimant could have done his pre-injury job at all times after December 2004. The workers' compensation judge credited the claimant and his witness and reinstated benefits as of November 2006, when his new doctor first saw him. The Workers' Compensation Appeal Board affirmed the decision but Commonwealth Court reversed it, holding that the claimant's physician's testimony and opinions were legally incompetent, as they were contrary to the earlier stipulated and adjudicated fact, as well as the claimant's testimony. The doctor's opinion was in direct conflict with the stipulation and was based on incorrect facts; therefore, it was incompetent to support favorable findings. The claimant could not meet his reinstatement burden of proof. The award was reversed.

A termination of benefits can be granted as of a date before the issuance of a notice of compensation payable.

The Commonwealth Court's Dec. 16, 2010, decision in City of Philadelphia v. WCAB (Butler) was withdrawn before publication, then reissued with some changes in July, at 24 A.3d 1120 (Pa. Cmwlth. 2011). Although the July decision vacated and remanded the suspension petition, it reaffirmed the December holding concerning the penalty petition, which is the significant aspect of this decision. There is a long procedural history, although the crucial timing issue is fairly straightforward. The claimant was in a work-related motor vehicle accident on Sept. 28, 1995. The panel physician diagnosed soft tissue injuries. He found her fully recovered as of his Oct. 19, 1995,

examination, but referred her for a second opinion because she complained of ongoing symptoms. The referral physician also found her fully recovered. On Nov. 7, 1995, the employer issued a notice of compensation payable, recognizing contusion injuries and noting that it paid salary in lieu of workers' compensation benefits. In December 1995, the employer filed a petition requesting termination of benefits as of Oct. 20, 1995, the day after the panel physician's examination and finding of full recovery. It also requested suspension. The claimant filed a penalty petition, alleging three weeks of unpaid benefits from October 7-24. The workers' compensation judge granted termination and dismissed the suspension and penalty petitions as moot. The Workers' Compensation Appeal Board vacated and remanded the decision as the penalty petition was not moot and had to be decided on the merits. The workers' compensation judge again granted termination and denied the penalty, and the Workers' Compensation Appeal Board affirmed the decision. In 2005, a Commonwealth Court panel reversed the decision, relying upon Beissel v. WCAB (John Wanamaker Inc.), 465 A.2d 969 (Pa. 1983) to hold that the employer had to prove that the claimant's disability had resolved after the issuance of the notice of compensation payable on Nov. 7, 1995; its proof of recovery before then, i.e., Oct. 20, 1995, could not support termination. In addition, it required a decision on the merits of the suspension petition, which had heretofore been considered moot. The workers' compensation judge found that the claimant could have returned to work as of Oct. 31, 1995, still before the notice of compensation payable issuance, and, alternatively, as of Sept. 25, 1997. As this latter date was after the notice of compensation payable, the workers' compensation judge chose that as the suspension date. The workers' compensation judge awarded a small penalty. The Workers' Compensation Appeal Board affirmed the penalty assessment but reversed the suspension decision, holding that the employer did not show a change of condition after the issuance of the notice of compensation payable. The employer's evidence established only full recovery before the notice of compensation payable; thus, its evidence could not support a subsequent 1997 change of status date. The employer appealed the suspension decision only.

The court's December 2010 decision held that the notice of compensation payable date was not controlling, and that suspension could have been granted as of October 1995. The claimant's reconsideration request concerning the factual merits of the suspension was granted, the decision vacated and the July 2011 decision remanded the suspension, affirmed the penalty and confirmed its earlier analysis on the timing issue. Essentially, it

Continued on page 10

A View From the Bench

Continued from page 9

held that its 2005 decision misapplied Beissel, because that matter involved an employer attempting to repudiate causation based on new medical evidence, while the employer here was not disavowing liability but was simply trying to establish a change of status. The November 2005 notice of compensation payable did not state that disability continued as of its issuance. Thus, the employer was not attempting to retroactively change what it had accepted by that document. The court discussed the policy reasons for permitting this result. As an *en banc* court, it reversed its 2005 panel decision and specifically held that the date of a notice of compensation payable does not preclude termination, suspension or modification as of an earlier date. Remand was necessary to address suspension issues not previously considered by the Workers' Compensation Appeal Board.

Expert Opinion Evidence

In the case of City of Philadelphia v. WCAB (Kriebel), decided on Oct. 19, 2011, 29 A.3d 762 (Pa. 2011), the Supreme Court of Pennsylvania reviewed a case where the workers' compensation judge held that the employer had successfully rebutted the statutory presumption of causation for a firefighter who suffered from Hepatitis C. The Workers' Compensation Appeal Board had reversed the workers' compensation judge, and the Commonwealth Court of Pennsylvania had reversed the Workers' Compensation Appeal Board (reinstating the workers' compensation judge's decision and order). The Supreme Court reversed the Commonwealth Court.

The Supreme Court pointed out that the opinion expressed by the employer's expert witness was based upon a single isolated reference in the deceased claimant's 1971 military medical records (which indicated that he had contracted "serum hepatitis from drug usage" in 1969), combined with the medical literature suggesting that complications from Hepatitis C (such as the cirrhosis that had ultimately led to the claimant's death) will not manifest for approximately 30 years following acquisition of the disease. The court explained that in order for an expert's opinion to be competent, the facts that the expert relies upon must be warranted by the evidentiary record. In this case, the court held that the opinions expressed by the employer's expert were based upon a series of assumptions that lacked a factual predicate and rested upon a series of unsubstantiated assumptions. Initially, the court points out that the expert assumes that the drug use reference in the 1971 medical note was needle-based or intravenous; however, there is no evidence in the

subsequent 30 years of medical records to corroborate a finding that the decedent was an intravenous drug user. Furthermore, the expert had extrapolated from his assumption that there was injectable drug use that the decedent must have used contaminated needles and consequently contracted Hepatitis B and Hepatitis C. The court notes that while an expert may base his or her opinions on facts of which they have no personal knowledge, those facts have to be supported by evidence in the record, and the record in this case does not support the factual assumptions that the expert was relying upon. In fact, they felt the expert was simply relying on a "presumption on a presumption," and that the doctor's opinion constituted nothing but conjecture and speculation. Consequently, the employer's expert's opinion was insufficient to overcome the statutory disease causation presumption for the claimant firefighter, who had died at the age of 52 from liver disease caused by Hepatitis C.

Average Weekly Wage Figure Calculations

In Lenzi v. WCAB (Victor Paving), 29 A.3d 891 (Pa. Cmwlth. 2011), the Commonwealth Court of Pennsylvania affirmed the decisions of the workers' compensation judge and Workers' Compensation Appeal Board granting benefits to the claimant but excluding unemployment compensation benefits from the calculation of the claimant's average weekly wage figure.

The claimant was a truck driver. The year preceding his injuries, he had experienced periods of time where he was off work and receiving unemployment compensation benefits. There was no question that the employment relationship between the claimant and the defendant employer had remained intact throughout that year prior to the work injury. The claimant argued that excluding the income the claimant received from unemployment compensation benefits during his periods of layoff fails to present a "reasonable picture of claimant's pre-injury earning experience for use as a projection of potential future wages and, correspondingly, earning loss" and fails to present "the economic reality of a claimant's recent pre-injury earning experience" quoting Triangle Building Ctr. v. WCAB (Linch), 560 Pa. 540, 746 A.2d 1108 (Pa. 2000). However, the court felt that this issue had conclusively been determined by the Pennsylvania Supreme Court in the case Reifsnnyder v. WCAB (Dana Corp), 584 Pa. 341, 883 A.2d 537 (2005), where the court expressly held that unemployment compensation benefits are not to be counted as income in average weekly wage calculations in cases where the claimant and employer had maintained the employment relationship through economic layoffs, utilizing the statutory formula for

Continued on page 11

A View From the Bench

Continued from page 10

average weekly wage calculations under Section 309(d) of the act. The Supreme Court's language from the Reifsnyder decision indicates that "the workers' compensation system operates to insure a worker against the effects of a workplace injury, not against the economic effects of variations in the business cycle." As the Commonwealth Court noted, "under Reifsnyder, unemployment compensation benefits are expressly excluded from Section 309(d)'s average weekly wage calculations for the act's purposes."

Supersedeas Fund Reimbursement

In the case of GMS Mine Repair and Maintenance Inc. v. WCAB (Way), 29 A.3d 1193 (Pa. Cmwlth. 2011), the Commonwealth Court held that the employer was not entitled to supersedeas fund reimbursement. The employer had made workers' compensation payments to a deserving claimant in a case where it had ultimately been decided that the employer who paid those benefits was not the responsible entity, and that the benefits should have been paid by a different entity. Unlike a case where a claimant is ultimately determined not to be entitled to benefits, so that the employer/insurer may then recover from the supersedeas fund the amount it had been required to pay after a denial of a request for supersedeas, the court held that the employer in this case must seek reimbursement from the responsible entity rather than the supersedeas fund. In reaching this conclusion, the court cited its own prior holding in State Workers Insurance Fund v. WCAB (Shaughnessy), 837 A.2d 697 (Pa. Commonwealth 2003), affd 583 Pa. 60, 874 A.2d 1158 (2005), appeal denied 605 Pa. 702, 990 A.2d 731 (2010). The court was not swayed by the argument that this remedy is insufficient because the entity ultimately found liable for the claimant's benefits was no longer in business and did not have workers' compensation insurance coverage during the period of the claimant's employment anyway. It cited its own holding from a previous decision indicating that the supersedeas fund does not assume financial responsibility for injuries caused by third parties. See Kidd-Parker v. WCAB (Philadelphia Sch. Dist.), 907 A.2d 33, (Pa. Cmwlth. 2006).

Undocumented Aliens

Undocumented workers who may be in Pennsylvania illegally are still entitled to receive workers' compensation benefits if they are injured while in the course of their employment. See Reinforced Earth Co. v. WCAB (Astudillo), 570 Pa. 464, 810 A.2d 99 (Pa. 2002). However, once it has been shown that such an injured worker is capable of performing some modified-duty work, the defendant employer is then entitled to a suspension

of benefits without proving job availability because of the claimant's undocumented status. See Moria v. WCAB (DDP Contracting Co.), 845 A.2d 950, (Pa. Cmwlth. 2004). At that point, the undocumented alien's loss of earning power is caused by their immigration status, not their work injury, and it would be an exercise in futility to require the employer to show job availability.

In Kennett Square Specialties v. WCAB (Cruz), 31 A.3d 325 (Pa. Cmwlth. 2011), the employer had assumed that they would be entitled to a suspension pursuant to the Commonwealth Court's holding in Moria, supra, and did not present any actual evidence of the claimant's immigration status. When asked about that subject, the claimant simply refused to testify, citing his fifth amendment rights. The workers' compensation judge drew an adverse inference from the claimant's refusal to answer and found as fact that the claimant is not a U.S. citizen and is not authorized to work in this country. The judge therefore granted the employer a suspension. The Workers' Compensation Appeal Board reversed this decision, stating that there was no substantial evidence in the record to support the finding that the claimant is an illegal immigrant worker, because an adverse inference is not sufficient to support a finding of fact. On appeal, the Commonwealth Court agreed with the Workers' Compensation Appeal Board and noted that "an adverse inference cannot serve as substantial evidence to support a finding of fact ... because an adverse inference does not constitute evidence, period," citing Harring v. Unemployment Comp. Bd. of Review, 452 A.2d 914 (Pa. Cmwlth. 1982).

Course of Employment/Horseplay/Positive Work Orders

In Habib v. WCAB (John Roth Paving Pave Masters), 29 A.3d 409 (Pa. Cmwlth. 2011) ordered published Oct. 20, 2011, the Commonwealth Court of Pennsylvania was faced with an unusual fact pattern involving an injury that occurred after the issuance of a verbal "positive work order."

The claimant and other members of a paving crew were idle while waiting for a truckload of asphalt to arrive, and the workers began to play with a discarded bowling ball found next to the parking lot where they were working. Initially, the bowling ball was used for shot putting and then "a challenge arose to see if anyone could break the bowling ball with a sledgehammer. Claimant then swung the sledgehammer towards the bowling ball, which then cracked. Claimant struck the ball a second time, causing a piece of the bowling ball to break off and strike him in the eye. As a result of the strike, he sustained a laceration to his right eye, which resulted in the loss of claimant's eye." The claimant's

Continued on page 12

A View From the Bench

Continued from page 11

foreman testified that he did not authorize the employees to attempt to break the bowling ball with the sledgehammer, and had, in fact, told the claimant to "knock it off, or stop" in between the first and second hammer strikes. He said that he had informed the claimant that he would not be taking him to the hospital if something happened. The workers' compensation judge reasoned that the claimant had not deliberately put himself at risk of injury, but rather, was merely careless. The judge concluded that this behavior did not take the claimant outside the scope of his employment, even though the foreman had issued a direct warning that he needed to stop that behavior, because the warning was not made sufficiently in advance to be considered a positive work order. The judge was persuaded by the claimant's argument that an employee does not depart from being engaged in the furtherance of the business or affairs of their employer during intervals of leisure during work.

The Workers' Compensation Appeal Board reversed this decision, holding that the claimant had acted in violation of a positive work order, that his conduct obviously had significant consequences and that the conduct leading to his injury was clearly not connected to his work duties. The Commonwealth Court noted that the violation of positive work orders is an affirmative defense that employers can raise. It requires that the employer prove that (1) the injury was in fact caused by the violation of the order or rule; (2) the employee actually knew of the order or rule; and (3) the order or rule implicated an activity not connected with the employee's work duties. The court cited City of New Castle v. WCAB (Sallie), 546 A.2d 132, (Pa. Cmwlth. 1988) and Johnson v. WCAB (Union Camp Corp.), 749 A.2d 1048 (Pa. Cmwlth. 2000). They also pointed out the affirmative defense that a claimant's act violated

a positive work order is essentially a claim that the injury did not arise in the course of employment, and that "acts which are in direct hostility to, and in defiance of, positive orders of the employer ... are not compensable," citing Camino v. WCAB (City Mission and MCRA Inc.), 796 A2d 412 (Pa. Cmwlth. 2002) and Dickey v. Pittsburgh and Lake Erie Railroad Co., 297 Pa. 172, 146 A.2d 543 (Pa. 1929). In this case, there was no question that the claimant's action caused his injury; that the claimant knew he had been told by his foreman not to take that action; and that the action was not connected with the claimant's work duties (the workers' compensation judge found as fact that the activity of hitting the bowling ball was clearly not connected to the claimant's work duties). Therefore, the affirmative defense for violation of a positive work order applies. The court affirmed the Workers' Compensation Appeal Board; thus, the employer prevailed.

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