



News & Notes

11th Annual Workers' Compensation Conference

Last year, close to 1,400 people attended this popular event. Join us this year to find out what all the buzz is about! This is a great opportunity to get the latest workers' compensation-related information from exciting and knowledgeable speakers and to renew and establish valuable contacts.

For more details or to register, visit us online at www.dli.state.pa.us. Click on "Workers' Compensation."

Utilization Review Help Offered

The Health Care Services Review Division of the Bureau of Workers' Compensation will provide a webinar July 11, 2012, to offer information on utilization review. The presenters will provide instruction on the proper completion of forms and will review updates to previous forms. Participants will learn where to go on the Web to access forms and information.

For details on webinar times and to register, visit us online at www.dli.state.pa.us. Click on "Workers' Compensation."

Health and Safety Training Resource Now Available

The Health & Safety Division of the Pennsylvania Bureau of Workers' Compensation has launched its online health and safety training institute, PATHS. PATHS is a free statewide service that provides employers and employees with easy access to cost-effective health and safety resources.

Learn how to reduce your workers' compensation costs through effective, proactive health and safety training programs that benefit your employees and your bottom line. PATHS provides employers with a single, comprehensive resource to receive a variety of health- and safety-related training information. Receive on-site training from one of our qualified training professionals, view the many PowerPoint presentations, videos, posters, toolbox talks and forms available to maximize safety training for your employees. For more information, visit PATHS at www.dli.state.pa.us/paths.

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving 5 percent workers' compensation premium discounts as of May 10, 2012:

9,786 committees covering 1,328,859 employees

Cumulative grand total of employer savings:

\$444,999,342

Inside this Issue

Youth Rules! Employment Tips	2
Kids' Chance of Pennsylvania	3
UC Issues Update Newsletter	3
WCAIS Update	3
Prosecution Blotter	4
A View From the Bench	7

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@pa.gov

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

TIPS for Achieving and Maintaining Compliance with Youth Employment Laws*

Every year, millions of teens work in part-time or summer jobs that provide great opportunities for learning important life skills and acquiring hands-on experience. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

Train Employees	Identify Violations	Promote Compliance	Share Accountability
<ul style="list-style-type: none"> ◆ Obtain compliance-assistance materials (posters, fact sheets, employer’s guides and forklift stickers) from www.youthrules.dol.gov or request training from your local Wage and Hour office. ◆ Incorporate youth employment laws and company policies regarding the employment of youth into training and orientation seminars for managers and teens. ◆ Provide a worksheet for youth to sign as part of initial training to test and verify their awareness of what equipment is off limits to them and what hours they can work. ◆ Attach a monthly youth safety reminder to a paycheck or time card. ◆ Conduct refresher training for all levels of management at regular staff meetings or special training sessions. 	<ul style="list-style-type: none"> ◆ Designate a youth employment compliance director whose responsibility is to monitor compliance. ◆ Conduct unannounced inspections of your establishment or branch location. ◆ Make checking for compliance a regular part of any routine quality or store inspection. ◆ Monitor the hours and times worked by youth under age 16 at the time payroll data is collected, and track and transcribe any violations. ◆ Establish a hotline for employees, parents and the public to report potential problems or concerns. ◆ Take time to interview youths at regular intervals to question them on the types of equipment they are operating. 	<ul style="list-style-type: none"> ◆ Create a “buffer zone” to prevent employees from being scheduled up to the latest time or longest shift that could be worked. ◆ Prepare two separate schedules: one for employees under age 16 and one for employees aged 16 and older. Only permit shift swapping among employees on the same schedule. ◆ Require a manager’s signature on the schedule for all shift swaps. ◆ Verify the ages of all youths by requiring legally-acceptable proof of age at the time of hiring. ◆ Post the hours youths can work next to the time clock. ◆ Color-code time cards, badges and/or uniforms so that youths can be easily identified. ◆ Post a warning sticker or a stop sign on hazardous equipment. 	<ul style="list-style-type: none"> ◆ Encourage youths to say “no” to a manager who is asking them to work too late or to operate hazardous equipment. ◆ Add “monitoring to maintain compliance” to job descriptions of managers. ◆ Include “compliance with youth employment laws” as a performance factor in managers’ reviews and recognize those who successfully maintain compliance on their shifts, in their departments or at their branch locations. ◆ Test youths about their understanding of policies and safety procedures before they start work. ◆ Send a letter to the parents of newly-hired teens informing them of the youth employment laws and who to contact to report any concerns.

Information about YouthRules! can be found at www.youthrules.dol.gov. For information about the laws administered by the Wage and Hour Division, log on to www.wagehour.dol.gov, or call the Department of Labor’s toll-free help line at 866-4USWAGE.

* Different rules apply to farms, and state laws may have stricter rules.

Kids' Chance of Pennsylvania

The mission of Kids' Chance of Pennsylvania Inc. is to provide scholarships for college and vocational education to children of Pennsylvania workers who have been killed or seriously injured in a work-related accident resulting in financial need. The hardships created by the death or serious disability of a parent often include financial trouble, making it difficult for deserving young people to pursue their educational dreams.

Kids' Chance of Pennsylvania awarded 46 scholarships totaling \$107,500 for the 2011-2012 academic year. These scholarships were made possible thanks to the generous contributions made by scholars sponsors, corporate and community partners, Kids' advisors and individual and organization donors.

Kids' Chance of Pennsylvania will hold its 7th annual golf outing/recognition event at the Hershey Country Club on Sunday, June 10, 2012. This event helps raise needed funds for scholarships and also provides an opportunity to recognize donors. Scholarship recipients have been invited to attend the event and to share how Kids' Chance has affected their lives. Kids' Chance will be hosting its annual 5/10K fun run/walk events in October 2012 in Harrisburg, Philadelphia and Pittsburgh.

Inspired by the determination and accomplishments of the students helped, Kids' Chance of Pennsylvania is more committed than ever to its mission. One student writes, "Your gift not only financially assists me, but honestly helps make my dreams come true. To this I want to offer my deepest thanks. I cannot put into words how grateful I am, but I want you to know that you have made a significant impact on my life and every part of my future."

Making dreams a reality is part of investing in the future. Through the scholarship program, Kids' Chance of Pennsylvania is making a significant difference in the lives of all children affected by a workplace injury by helping them pursue and achieve their educational goals.

For more information about Kids' Chance of Pennsylvania, visit www.kidschanceofpa.org.

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."

Workers' Compensation Automation and Integration System Update

The Department of Labor & Industry is continuing to develop the Workers' Compensation Automation and Integration System, or WCAIS. WCAIS is a web-based information system that will allow electronic communication among three workers' compensation program areas of the department (the Bureau of Workers' Compensation, the Workers' Compensation Office of Adjudication and the Workers' Compensation Appeal Board), as well as between the public and the three program areas. WCAIS will enable electronic communications, permit online filings and document management, and provide around-the-clock access to information.

WCAIS will be implemented in two releases. The first stage, or Release 1, is slated for the fall of 2012. Following this release, parties will be able to obtain basic information on the status of appeals through the Bureau of Workers' Compensation's information helpline and through the use of an online function.

Also under Release 1, once an individual has registered and created a WCAIS account, he or she can file appeals, petitions and documents, such as briefs, online with the Workers' Compensation Appeal Board. Users will also be able to search for and view those filings, documents and related correspondences and appeal summaries through the web.

Attorneys, employers, insurers, third-party claims administrators, claimants and others will be able to register to access WCAIS using screens designed for each user group. Attorneys registering to use WCAIS will be required to provide identification documents as part of the registration process, and organizations, including law firms, will have the ability to manage their staff's access to the system.

With the second release of WCAIS in the fall of 2013, users will be able to do online filings and searches and will be able to retrieve information on petitions, applications, forms and other documents related to the operations and services of the Bureau of Workers' Compensation and the Workers' Compensation Office of Adjudication. Additionally, Release 2 will include the mandatory filing of most claims-related forms through electronic data interchange, or EDI.

Whether you're an insurer, an employer, an attorney, or an injured worker, the new system will benefit you.

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

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.

Beaver County

Karen L. Beatrice, owner of K. Beatrice Food Service in Beaver Falls, was sentenced Feb. 29, 2012, by Judge John Dohanich in Beaver County Court of Common Pleas. Beatrice pleaded guilty to 10 misdemeanor counts of the third degree. She was sentenced to 10 years of probation and ordered to pay the cost of prosecution, restitution to the Uninsured Employers Guaranty Fund in the amount of \$71,296.08 and restitution to the Department of Public Welfare in the amount of \$560,661.72. The bureau's Compliance Unit reports that K. Beatrice Food Service is now in compliance with Pennsylvania workers' compensation law.

Blair County

Paolo Alderino Dottavio, owner of D'Ottavio's Italian House in Hollidaysburg, was sentenced Dec. 19, 2011, by President Judge Jolene Grubb Kopriva in Blair County Court of Common Pleas. Dottavio pleaded guilty to two misdemeanor counts of the third degree and was sentenced to one year of probation and ordered to pay the costs of prosecution as well as a fine of \$500. The bureau's Compliance Unit reports that D'Ottavio's Italian House is now in compliance with Pennsylvania workers' compensation law.

Butler County

Jacob Dressler, owner of Clover Lane Farm in Evans City, was sentenced March 29, 2012, by Judge Timothy F. McCune in the Butler County Court of Common Pleas. Dressler pleaded guilty to two misdemeanor counts of the third degree. He was sentenced to two years of probation and ordered to complete 25 hours of community service work. In addition, Dressler was ordered to pay the costs of prosecution, a \$200 fine and restitution to the Uninsured Employers Guaranty Fund in the amount of \$9,848.27. The bureau's Compliance Unit reports that Clover Lane Farms is now in compliance with Pennsylvania workers' compensation law.

Greene County

Robert L. Durbin, owner of Robbie Durbin Construction in Aleppo, was sentenced Jan. 11, 2012, by Judge Farley Toothman in Greene County

Court of Common Pleas. Durbin pleaded guilty to 57 misdemeanor counts of the third degree. He was sentenced to nine and one-half years of probation, ordered to pay restitution of \$84,420.89 to the Uninsured Employers Guaranty Fund and ordered to pay the costs of prosecution. The bureau's Compliance Unit reports that Robbie Durbin Construction is no longer in business.

Lancaster County

Kathy J. Eberly, owner of Elite Auto Sales & Detailing Inc. in Manheim, was sentenced Feb. 16, 2012, by Margaret C. Miller in Lancaster County Court of Common Pleas. Eberly pleaded guilty to three misdemeanor counts of the third degree and was sentenced to three years of probation. She was ordered to pay restitution in the amount of \$13,638.81 to the Uninsured Employers Guaranty Fund as well as the costs of prosecution. The bureau's Compliance Unit reports that Elite Auto Sales & Detailing Inc. is no longer in business.

Lehigh County

Judge Douglas G. Reichley entered Richard Arthur Howells, owner of Penns Woods Tree Company in East Texas, into the ARD program for first-time offenders on Feb. 16, 2012, in Lehigh County Court of Common Pleas. Howells was placed on probation for a period of 15 months and was ordered to pay the costs of prosecution as well as restitution to the Uninsured Employers Guaranty Fund in the amount of \$28,388.59. The bureau's Compliance Unit reports that Penns Woods Tree Company is no longer in business.

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 of 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.

A View From the Bench

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

Withdraw From the Workforce - Impact of Social Security Disability on Workers' Compensation

On Jan. 13, 2012, the Commonwealth Court decided a significant case concerning the importance of Social Security disability benefits when considering whether or not a claimant has withdrawn from the workforce. The courts for several years have been developing a doctrine whereby an injured worker who withdraws from the workforce may be considered no longer entitled to receive ongoing workers' compensation disability benefits without requiring the employer to prove that suitable work is actually available to the worker.

In the case of Susan Burks v. WCAB (City of Pittsburgh), 36 A.3d 639 (Pa. Cmwlth. 2011), the workers' compensation judge had suspended the claimant's benefits because she had voluntarily removed herself from the workforce. The Workers' Compensation Appeal Board affirmed the decision. On appeal, the employer argued that a worker who has been receiving Social Security disability benefits and has, therefore, not been looking for any work over a period of years, has thereby withdrawn from the labor market and is not entitled to ongoing workers' compensation benefits. The Commonwealth Court, citing its prior opinion in Keene v. WCAB (Ogden Corporation), 21 A.3d 243 (Pa. Cmwlth 2011), wrote:

We agree with Employer that because Claimant sought a disability pension that was based on her inability to engage in substantial gainful employment and because Claimant's work injury did not prevent Claimant from engaging in substantial gainful activity, Claimant voluntarily withdrew from the workforce. In Keene, this Court noted that the receipt of Social Security Disability benefits could be evidence that the Claimant's work injury forced him or her out of the labor market. Indeed, if the WCJ finds that a Claimant suffers from a work injury and non-work-related medical conditions, then the receipt of Social Security Disability benefits can mean only that the Claimant's work injury has forced him or her out of the labor market. On the other hand, if the WCJ finds that the Claimant suffers from a work injury and non-work-related medical conditions and that the work injury does not prevent the Claimant from working, then the receipt of Social Security Disability benefits can mean only that the Claimant is unattached to the workforce for reasons unrelated to the work injury. Here, Claimant suffered from a work injury that limited Claimant to light-duty work, but she also suffered from non-work-related medical conditions that limited Claimant further. Because of the latter

conditions, Claimant chose to apply for Social Security Disability benefits. To continue her receipt of those benefits, Claimant can work only through Social Security's "Ticket to Work" program, but there is no evidence in this case that Claimant participates in that program. Thus, Claimant's decision to receive Social Security Disability benefits shows that she has voluntarily withdrawn from the workforce for reasons unrelated to the work injury. Accordingly, we affirm.

Withdrawal From The Workforce - Burden of Proof

In the case of City of Pittsburgh v. WCAB (Marinack), 37 A.3d 39 (Pa. Cmwlth. 2011), the Commonwealth Court dealt with another "withdrawal from the workforce" case. In this case the workers' compensation judge had granted the city's suspension petition, and the Workers' Compensation Appeal Board reversed the decision. In this appeal by the employer, the main focus was on burdens of proof. The claimant did not agree that he had retired, did not accept a retirement pension and, therefore, contended that it could not be presumed that he had withdrawn from the workforce pursuant to the Commonwealth Court's earlier holding in City of Pittsburgh v. WCAB (Robinson), 4A.3D 1130 (Pa. Cmwlth 2010). In Marinack the court also discussed its prior opinion in Keene v. WCAB (Ogen Corporation), 21 A.3d 243(Pa. Cmwlth. 2011). The court indicated that in order for the employer to be relieved of its normal obligation to assist the injured worker in returning to the workforce, the employer has the burden of proof to show that the claimant intended to withdraw from the workforce in some other way. The court recognized that this is a "difficult burden," but then stated: "Nevertheless it is clear under Robinson and Keene that a claimant's lack of effort to look for a job does not prove an intention to withdraw from the work force. Accordingly, it was Employer's burden to show that it assisted Claimant in returning to the workforce, and it did not present such evidence. We are constrained by Robinson to hold that the Employer did not make a case for suspension."

Reinstatement Following Suspension

In the case of Karen Verity v. WCAB (The Malvern School), 38 A.3d 936 (Pa. Cmwlth. 2011), the Commonwealth Court examined an unusual situation where an injured worker had been performing light-duty work and then stopped performing that light-duty work based upon her mistaken understanding of her doctor's restrictions. The claimant told her employer that Dr. Lam had restricted her to work with

Continued on page 6

A View From the Bench

Continued from page 5

certain limitations and provided the employer with a note confirming those restrictions, which prevented the claimant from doing any climbing of stairs whatsoever. Since her job involved some climbing of stairs, the employer informed her that they could no longer make work available to her and the claimant then stopped working. However, the claimant testified that she felt she could climb stairs and that, in fact, she was climbing up and down a flight of 10 stairs at home approximately four times each day. When Dr. Lam testified, she indicated that the claimant couldn't go up and down stairs on a repeated basis, but also testified that she had encouraged the claimant to continue performing her light-duty part-time job for the employer, and that she did not intend to take the claimant totally off steps. She testified that when she wrote her note, she intended to restrict the claimant from doing steps frequently. Because of this misunderstanding, the claimant lost a significant amount of income. The employer ultimately prevailed before the workers' compensation judge because the claimant did not convince the judge that she had a loss of earning power caused by her work injury since there had been no worsening in her condition, the doctor's testimony did not support a restriction of "no stairs," and the claimant testified that she could climb stairs. Referring to Finding of Fact No. 11 in the workers' compensation judge's decision, the court indicated that the judge concluded that "it was not credible that the claimant could not continue to work after June 2008 because she could not climb the stairs at work." The Workers' Compensation Appeal Board determined that the claimant had voluntarily left her light-duty position, and it was her burden to prove that her condition had worsened to the point where she could not perform the light-duty position, or that work within her restrictions was not otherwise available to her.

On appeal to Commonwealth Court, the claimant argued that the standard of proof was incorrect, and that because there was no evidence of her bad faith rejection of available suitable work, she should be entitled to a reinstatement of her disability benefits. The court reviewed precedent and discussed the opinion of the Pennsylvania Supreme Court in Bufford v. WCAB (North America Telecom), 606 Pa. 621, 2 A.3d 548 (Pa. 2010). The Commonwealth Court noted that the Supreme Court had effectively eliminated the requirement that a claimant seeking reinstatement following a suspension of benefits prove that their loss of earnings was through no fault of their own and explained the correct standard was whether or not the injured worker's earning power was once again being adversely affected by their work-related disability. The court noted that in this case the claimant was not disabled from performing the light-duty job at all, but rather, had

stopped working because of a misunderstanding with Dr. Lam, even though she personally believed she could continue performing the job. The employer did not eliminate the claimant's light-duty position. The claimant did not contact Dr. Lam to request a clarifying note so that she could continue working, or do anything of the sort; she simply stopped working. The court wrote:

Had Claimant secured a note from Dr. Lam that did not contain the inaccurate restrictions that prevented her from working, she would not have had to stop her light-duty work. It was the Claimant's failure to do so that caused the loss of her light-duty job, not her medical condition or the Employer's actions. In short, there is no credible evidence that Claimant was unable to perform her light-duty position due to an inability, caused by her work-related disability, to go up and down stairs Thus, Claimant failed to prove, pursuant to Bufford, that her earning power was once again adversely affected by her work-related disability.

Calculation of Average Weekly Wage

Joseph Bucceri was a union worker who received a supplemental income from his union (supplemental unemployment benefits, or SUB) whenever he was unemployed. In his review petition he contended that the SUB benefits should have been included in his earnings for the purposes of calculating his average weekly wage for a subsequent work-related injury that took him out of work. The Commonwealth Court concluded that SUB benefits were different from unemployment compensation benefits because they were paid by the employer as a benefit negotiated through a collective bargaining agreement and that they should be included in the calculation of the average weekly wage figure. The court concluded that such benefits are more like sick and accident benefits rather than government-funded unemployment compensation benefits. The name of the case is Joseph Bucceri v. WCAB (Freightcar America Corporation), 31 A.3d 985 (Pa. Cmwlth. 2011).

Technical Res Judicata

In the case of Hakif Namani v. WCAB (A. Duie Pyle), 32 A.3d 850 (Pa. Cmwlth. 2011), Commonwealth Court reviewed a situation where the injured worker lost on a termination petition and then tried to raise new theories on a reinstatement petition, which should have been raised in defense of the earlier termination petition. In essence, the claimant lost his appeal because those same issues could have, and should have, been litigated earlier on the termination petition. The reader, faced with potential res judicata issues, may wish to turn to this case for a concise and yet thorough statement of the law on that subject.

Continued on page 7

A View From the Bench

Continued from page 6

Supersedeas Fund Reimbursements

The employer in the case of Comcast Corporation v. WCAB (Jones), 33 A.3d 127 (Pa. Cmwlth. 2011), was seeking reimbursement from the supersedeas fund for alleged overpayments after proving that an injury was accepted only because of false or misleading information that the claimant supplied to Comcast Corporation. Commonwealth Court reversed several of its own prior precedents (holdings) and concluded that reimbursement was due to the employer from the supersedeas fund. Quoting from a 2010 opinion, the court wrote: “(T)he purpose of the... Fund is to provide a means to protect an Employer who makes compensation payments to an employee who is ultimately determined not to have been entitled to those payments.” (citation omitted)” The court then stated: “In this case, because of what the WCJ found were material misrepresentations by Claimant at the time Employer issued the NCP, Employer made nearly four (4) years of compensation payments to someone who is not entitled to those payments. Employer requested supersedeas on February 26, 2007 on this basis, but was denied. As a result, Employer was required by law to pay compensation that was later determined not to be payable to Claimant. Under the clear and unambiguous language in Section 443 (a) of the Act, Employer is entitled to reimbursement from the Fund for the period from February 26, 2007, the date of its Review Petition and request for supersedeas, until September 4, 2008, the date of the WCJ decision granting the Review Petition and setting aside the NCP.”

C&R’s Affect Eligibility for Unemployment Compensation Benefits

In the case of Nicole Lee v. UC Board of Review, 33 A.3d 717 (Pa. Cmwlth. 2011), Commonwealth Court held that the employee was not eligible for unemployment compensation benefits where she had resigned her employment voluntarily as part of her compromise and release agreement to settle her workers’ compensation case. More specifically, the court held that when a claimant agrees to execute a resignation/release in order to settle a workers’ compensation claim, they terminate their employment voluntarily without necessitous and compelling cause. Under Section 402(b) of the unemployment compensation law, a worker who resigns is not eligible for unemployment compensation benefits unless they can establish a necessitous and compelling reason for quitting their job.

Home Improvements Versus Medical Appliances

In Commonwealth of Pennsylvania Department of Transportation v. WCAB (Clippinger), 38 A.3d 1037 (Pa. Cmwlth. 2011), the court addressed a claim

for a home aqua therapy pool plus an addition to the home to hold the pool. The claimant in this case suffered permanent impairment from the waist down that included partial paralysis, weakness, loss of sensation, difficulty with balance and partial bowel and bladder dysfunction as the result of his work injury. Aquatic therapy had been prescribed because the claimant’s very substantial neurological deficits interfered with his ability to perform land-based exercise. He had been receiving aquatic therapy at a physical therapy facility. The claimant testified before the workers’ compensation judge that he felt that facility was too busy with other patients, that he has great difficulty getting from his vehicle into the building, particularly when it is wet or slippery, and has difficulty changing in the locker room and walking in the locker room because of the slippery floors, and since there is no one available to assist him. He also testified that at home his wife can assist him. The claimant further testified that his physician had prescribed a particular home therapy pool for his aquatic exercise. It would be a small pool with a treadmill that could be raised and lowered and that would allow the claimant to get in and out of the water without twisting his back. His doctor testified in support of his claim. His doctor testified that the claimant should perform aquatic therapy one hour per day, five days a week for the rest of his life. The doctor acknowledged that it is possible for the claimant to use the public facility, but that someone could bump him or he could fall on the slippery floors, and so forth, and could suffer very severe injury. The employer’s medical expert agreed that the prescribed aquatic treatment was reasonable, necessary and casually-related to the work injury, but opined that as long as there are other more reasonable ways of performing aquatic therapy, it would not be appropriate to require that a home therapy pool be installed at the claimant’s house. The workers’ compensation judge found the aquatic therapy program to be reasonable, but concluded that the employer’s expert witness’ objections to the home-based aquatic therapy were “neither legally competent nor factually relevant.” The judge granted the review petition and ordered the defendants to pay for the installation of a physical therapy pool in the claimant’s home along with the necessary renovations to install the pool. On appeal, the Workers’ Compensation Appeal Board affirmed the decision. In so doing, the board analogized this situation to that in the Supreme Court’s opinion in Griffiths v. WCAB (Seven Stars Farm, Inc.), 596 Pa. 317, 943 A2d 242 (2008), that concerned a wheelchair-accessible van for a quadriplegic. In Griffiths the Supreme Court held that the wheelchair-accessible van did constitute an “orthopedic appliance” under Section 306(f.1)(I)(ii) of the Workers’ Compensation Act.

Continued on page 8

A View From the Bench

Continued from page 7

The Commonwealth Court agreed, in part, with the employer's argument that this case involved orthopedic appliances. The court felt that it was significant that the claimant is not wheelchair bound and was continuing to perform full-time modified-duty work in a clerical position for the employer. Mr. Clippinger, unlike the claimant in Griffiths, would not be confined to a bed or room if he did not obtain the device in question. Mr. Clippinger was sufficiently mobile to work full time and travel to a physical therapy facility in order to receive aquatic therapy. The court also noted that, unlike Griffiths, the device in question here was not "indispensible" as was the wheelchair-accessible van because there was a viable alternative to a new in-home pool (travel to an aquatic therapy facility). The court noted that those available facilities have on-staff physical therapists available, and they pointed out that the utilization reviewer had determined that an in-home therapy pool would be reasonable and necessary only "if alternative means were not available." It was clear from the claimant's own testimony that alternative means existed. The court noted that although the judge had made findings to the effect that the home aquatic therapy pool would be preferable to a public facility for reasons of safety, accessibility and convenience, those same concerns exist for any injured claimant undergoing physical therapy at a public facility and are not specific to the claimant. The court reasoned that those findings by themselves "do not justify installation of a new in-home hydro pool at the claimant's house and a new addition to house it." The court wrote:

(T)he workers' compensation judge erred by failing to consider all the circumstances, including circumstances that may relate to an "indispensible device" and to "windfalls." This is most obvious in the WCJ's curt dismissal of Employer's Physician's concern for alternative means as "neither legally competent nor factually relevant." [cite omitted]. The existence of alternative means and a concern for "windfalls" are clearly matters to be evaluated. See Griffiths. The cost of the claimant's new van and the value of vehicles he owned before his

injury were relevant to the Supreme Court in Griffiths. Similarly, the cost of the proposed "orthopedic appliances" and the current and post-improvement values of the claimant's home are so obviously relevant as to dispel the need for further discussion. Unfortunately, the WCJ here made no findings about any of these essential circumstances. Moreover, alternatives to brand new construction were not considered. This patent legal error requires vacation of the "orthopedic appliance" portion of the WCJ's decision. Like the Supreme Court's disposition in Griffiths, further fact-finding is necessary.

The court added that "it is not clear that all the circumstances support the extraordinary relief of installation of a new in-home pool as well as a new addition to the claimant's home to house the pool." Accordingly, the case was remanded for further proceedings. While the opinion is not a final disposition, the court has given guidance as to what is significant in this type of situation.

Credits and Offsets for Old Age Social Security Benefits

In Rose White v. WCAB (City of Pittsburgh), 38 A.3d 1031 (Pa. Cmwlth. 2011), the claimant successfully advanced the novel argument that Social Security benefits she received as a widow should not be offset against her workers' compensation benefits, unlike Social Security old age benefits that she received as a result of her own work history. The court agreed with the Workers' Compensation Appeal Board that the Workers' Compensation Act allows a 50 percent offset for only the portion of Social Security benefits available to a claimant under Section 402(a) of the Social Security Act, in other words "old age benefits," and not for widow's benefits. Editorial Note: The claimant in this case unsuccessfully advanced a constitutional challenge to the old age benefit offset, and has filed a petition for allowance of appeal to argue that before the Supreme Court of Pennsylvania. Likewise, the claimant in Caputo v. WCAB (Comw. of Pa), 34 A.3d 908 (Pa. Cmwlth. 2012), is raising a similar constitutional challenge and has filed a petition for allowance of appeal as well. As of March 21, 2012, there had been no ruling by the Supreme Court concerning either petition for allowance of appeal.

News & Notes is published quarterly by the Bureau of Workers' Compensation
Forward questions or comments about this newsletter to the Bureau of Workers' Compensation,
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Director, Bureau of Workers' Compensation Stephen J. Fireoved
Director, WC Office of Adjudication Vacant

WC Web Information
www.dli.state.pa.us