Tom Corbett | Governor — Julia Hearthway | Secretary

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

News & Notes

Vol. 15 | No. 5 — *"Serving all Pennsylvanians"* — Fall/Winter 2013-2014

12th Annual Workers' Compensation Conference

This year, over 1,400 members of the workers' compensation community participated in the 2013 Workers' Compensation Conference on June 10 and 11, the highest number on record. Attendees represented various sectors of the community, including labor, employers, insurers, attorneys, health care professionals and others with an interest in Pennsylvania's workers' compensation law, practices and procedures.

Working together with workers' compensation professionals on the conference planning committee, the Department of Labor & Industry offered sessions ranging from the tried and true, "As the Claim Turns" and "Avoiding Litigation Errors," to new topics addressing digital surveillance products/techniques and how the information can be presented in workers' compensation claims, use of narcotics, a primer on how utilization review works from initial filing to petition before a workers' compensation judge, and more. Attendee evaluations were filled with positive feedback, such as "Always instructive and entertaining," "I learned a lot!" "Teacher/speaker was very knowledgeable and easy to understand," and "Excellent presentation, very well done, great amount of information, very entertaining."

Attendees also enjoyed visiting with vendors who offered products and services related to rehabilitation, investigation, insurance, case management and legal representation.

While the date and location of the 2014 event is not yet confirmed, efforts are underway to prepare the 2014 agenda. Watch the department website for more information about next year's event at www.dli.state.pa.us; click on "Workers' Compensation."

A Message from the Directors

"News & Notes" is a quarterly publication issued to the Pennsylvania workers' compensation community by the Bureau of Workers' Compensation (BWC) and the Workers' Compensation Office of Adjudication (WCOA). The publication includes articles about the status of affairs in the workers' compensation community as well as legal updates on significant cases from the Commonwealth Court. In this issue, there are two articles on the status of implementation of the Workers' Compensation Automation and Integration System (WCAIS), as well as what features the system will offer to the community. There is also an article about the Workers' Compensation Conference hosted by BWC and WCOA on June 10 and 11, 2013 in Hershey. Additionally, there is an article about preparations underway for celebration of the 100th anniversary of passage of the Workers' Compensation Act.

We have also included a prosecution blotter that documents successful criminal prosecutions of uninsured employers. Finally, there is an outstanding article entitled "A View From the Bench" in which several judges have written summaries of key recent decisions from the Commonwealth Court that will be of interest to all workers' compensation attorneys.

We trust that stakeholders in the Pennsylvania workers' compensation system will find this publication interesting and informative.

- Stephen J. Fireoved, Director – Bureau of Workers' Compensation
- Elizabeth Crum, Director – Workers' Compensation Office of Adjudication

Inside this Issue

Safety Committee Box Score

Cumulative number of certified workplace safety committees receiving 5 percent workers' compensation premium discounts as of June 27, 2013.

10,243 committees covering 1,374,213 employees

Cumulative grand total of employer savings:
$496,693,017

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.gov

A Message from the Department of Labor & Industry

The Department of Labor & Industry (department) extends its gratitude to all stakeholders in the Pennsylvania workers' compensation system for their support during the department's implementation of the commonwealth's new computer system: the Workers' Compensation Automation and Integration System (WCAIS). The department is proud and pleased to implement WCAIS as it will enhance customer service by way of 24/7 online access to an integrated system spanning three program areas: Bureau of Workers' Compensation (BWC), Workers' Compensation Office of Adjudication (WCOA), and the Workers' Compensation Appeal Board (WCAB).

Release 1 of WCAIS was implemented by WCAB and BWC's Helpline in September 2012. Release 2 of WCAIS was implemented by BWC and WCOA on Sept. 9, 2013. With Release 2, the administration and practice of workers' compensation is enhanced with improved communication, greater accessibility, less paperwork and more efficient adjudication of matters before workers' compensation judges and the WCAB.

If you have any questions about WCAIS, we urge you to send an email to the WCAIS resource account **RA-LI-PA-WCAIS-UP@pa.gov** for review and response by department subject matter experts. This is an exciting time for Pennsylvania workers' compensation and the department is dedicated to delivering a state-of-art system to stakeholders that will be efficient, effective and user-friendly.

WHAT IS WCAIS?

WCAIS is a web-based information system that will allow electronic communication among the three workers' compensation program areas of the Department of Labor & Industry (BWC, WCOA and WCAB) and the public. WCAIS will enable electronic communication and permit online filing, online document management and around-the-clock access to information.

Attorneys, employers, insurers, third-party claims administrators, injured workers and others will register to access WCAIS using screens designed for each user group. Organizations, including law firms, will be able to manage their staff's access to information in the system.

WCAB and the Helpline transitioned into the new system in September 2012. On Sept. 9, 2013, the implementation of the BWC and WCOA systems went "live." The workers' compensation community and staff will have access to all workers' compensation matters through WCAIS, including claims, healthcare services review and self-insurance.

The completed WCAIS system will provide a new tool with enhanced services which will include:

- An integrated view of workers' compensation information across the three program areas: BWC, WCOA and WCAB; customers will be a "mouse click" away from access to claims.
- Self-service and online 24/7 access to claim information:
- With greater access, there will also be greater transparency to claim information.
- Faster claim processing through Electronic Data Interchange (EDI); EDI will provide electronic record keeping and reporting, resulting in a time savings and reduction in certain paper forms;
- With greater live time access to claim information, stakeholders will experience more efficient management of claims from inception through litigation.
- Better communication will be experienced between stakeholders, attorneys and the three L&I program areas impacted by WCAIS.

After "go-live" on Sept. 9 of this year, WCAIS will offer an improved, modern system that will bring Pennsylvania to the forefront of workers' compensation practice and administration.

EDI – WHAT'S COMING?

With "go-live" on Sept. 9, 2013, First Reports of Injury (FROA) and, for the first time, Subsequent Reports of Injury (SROI) will be submitted through EDI into WCAIS.

Claims administrator, insurer, and self-insured employer trading partners can contract with one of the four transaction partners to send their FROI and SROI data to BWC. The trading partner sends the data to the transaction partner who is responsible for transmitting the data in the correct format to BWC. This is similar to what is occurring in the existing system for FROI data under the earlier IAIABC standard.

Trading partners also can choose to use the web portal to enter data on FROI and SROI transactions rather than using an approved transaction partner. The data elements captured through the web portal screens will correspond to EDI IAIABC Release 3 claims data elements. An onscreen confirmation will be received when the data entered is successfully submitted.

Trading partners will choose one method of transmitting data depending upon their own needs and capabilities. Trading partners using a transaction partner will have the benefits of that full service option, and insurers who file smaller amounts of FROI and SROI transactions can use the web portal at no cost. All data transmitted by each method will become part of the electronic case file of the claim.

After "go-live," BWC will again begin evaluating requests for direct filer status, allowing additional carriers to file directly with the bureau if all criteria and testing requirements have been met.

Kids' Chance of Pennsylvania Inc.

Hope, opportunity and scholarships for kids of injured workers

The hardships created by the death or serious disability of a parent often create financial challenges, making it difficult for deserving young people to pursue their educational dreams. Kids' Chance of Pennsylvania Inc. provides 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.

In 2012, Kids' Chance of Pennsylvania, Inc. announced that it has surpassed the $1 million mark in total support since its inception in 1997. This milestone was met after 48 scholarships totaling $145,000 were awarded to students for the 2012-2013 academic year. These scholarships were made possible due to the generous contributions made by our scholar sponsors, corporate and community partners, Kids' advisors and individual and organization donors. We are extremely grateful to those who help us help students!

One student shares,

"Kids' Chance is a dream come true, without this scholarship my career in college would be so much more difficult, if not impossible. I truly appreciate everything you have done for us, and we thank you from the bottom of our heart."

Kids' Chance of Pennsylvania raises scholarship funds through various events throughout the year. In June 2013, Kids' Chance held its 8th annual golf outing and recognition dinner at the Hershey Country Club. This event raised needed funds for scholarships and also provided the opportunity to recognize our generous donors. Scholarship recipients were invited to attend the event and to share their experiences on how Kids' Chance has impacted their lives. The 8th Annual Golf Outing and Recognition Dinner was held in conjunction with the Pennsylvania Bureau of Workers' Compensation Conference in Hershey, Pa on June 10-11, 2013.

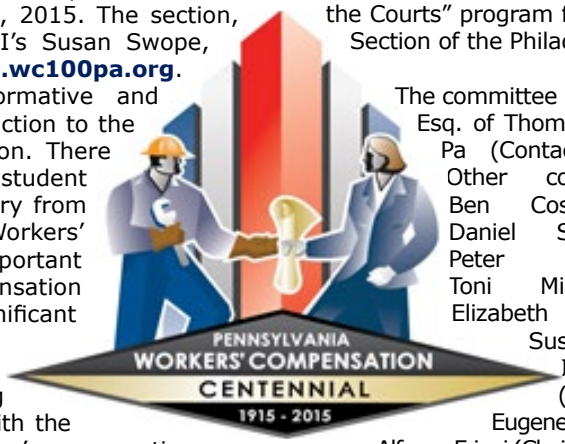
Kids' Chance hosted its annual 5/10k fun run/walk events in October 2012 in Harrisburg, Philadelphia and Pittsburgh. These events will be held once again in the fall of 2013 on Oct. 5 in South Park, Pittsburgh, on Oct. 19 in Fairmount Park, Philadelphia and on Oct. 20 in City Island, Harrisburg.

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.

The One Hundredth Anniversary of PA Workers' Compensation

The Pennsylvania Bar Association Workers' Compensation Law Section has formed a committee to plan a celebration of the 100th anniversary of the Pennsylvania Workers' Compensation Act. The anniversary date is June 2, 2015. The section, with the fine assistance of PBI's Susan Swope, has constructed a website: **www.wc100pa.org**. The site contains some informative and moving videos as a nice introduction to the history of workers' compensation. There is also information about a law student essay contest; an artwork gallery from the Philadelphia Bar Association Workers' Compensation Section; and important ways for the workers' compensation community to support this significant event.



The committee is also planning a June 2015 event in concert with the commonwealth-sponsored workers' compensation conference and will host lectures at the Fall 2015 Section meeting. There will also be a book written by committee members and edited by WCJ David B. Torrey that will include such topics as the institutional history of the Bureau of Workers' Compensation, the interpretive history of the Act and will also have depictions of the extraordinary artwork that has come from the Workers' Compensation Section of the Philadelphia Bar Association.

The committee is headed by R. Burke McLemore, Esq. of Thomas, Thomas & Hafer, Harrisburg, Pa (Contact: **bmclemore@tthlaw.com**). Other committee members include: Ben Costello, WCJ David Torrey, Daniel Schuckers, Matthew Wilson, Peter Pentz, Daniel Bricmont, Toni Minner, Barbara Hollenbach, Elizabeth Crum, Stephen Fireoved, Susan Swope and Jeffrey Gross. Judge Renee Cohn Jubelirer (Commonwealth Court); Eugene Connell (Labor & Industry); and Alfonso Frioni (Chairman, WCAB) are adjunct members.

With this pending celebration, it is an exciting time to be involved in Pennsylvania's workers' compensation system!

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 (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

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Prosecution Blotter

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conviction, it may be construed as a conviction for purposes of computing sentences on subsequent convictions.

Delaware County

Frantz Matador, agent for Lavie Medical Transportation, Inc., was sentenced April 3, 2013 by Judge Patricia H. Jenkins in Delaware County Court of Common Pleas. Frantz Matador pleaded guilty to five misdemeanor counts of the third degree. He was sentenced to five years of probation and ordered to pay the costs of prosecution, perform 100 hours of community services and pay restitution to the Uninsured Employer Guaranty Fund in the amount of $20,000. The Bureau's Compliance Unit reports that Lavie Medical Transportation Inc., is no longer operating.

Franklin County

Joann Wildeson, agent for Horst and Sons Trucking, Inc, was sentenced on May 22, 2013 by Judge Shawn D. Meyers in Franklin County Court of Common Pleas. Joann Wildeson pleaded guilty to one felony count of the third degree and one misdemeanor count of the third degree. She was sentenced to four years probation; ordered to perform fifty hours of community service and ordered to pay restitution to the United States Postal Service in the amount of $54,067.85. The Bureau's Compliance Unit reports that Horst and Sons Trucking, Inc. is in compliance according to BWC records.

Monroe County

Judge Jennifer H. Sibum entered Manuel Diaz, agent for Heritage Custom Homes, Inc., into the Accelerated Rehabilitative Disposition Program for first-time offenders on Dec. 18, 2012 in Monroe County Court of Common Pleas. Diaz was placed on probation for a period of two years. He was ordered to pay costs of prosecution, and pay restitution to the Uninsured Employers' Guaranty Fund in the amount of $29,493.81. The Bureau's Compliance Unit reports that Heritage Custom Homes Inc. is no longer operating.

Montgomery County

Theresa Henning, owner of Henning Trucking LLC, in Blue Bell, was sentenced Jan. 14, 2013 by Judge Carolyn T. Carluccio in Montgomery County Court of Common Pleas. Theresa Henning pleaded guilty to one felony count of the third degree, was sentenced to seven years probation. She was ordered to pay the costs of prosecution, a fine of $500, perform one hundred hours of community service and was ordered to pay restitution to the United States Postal Service in the amount of $172,069.17. The Bureau's Compliance Unit reports that Henning Trucking LLC is no longer operating.

Montgomery County

Osvaldo Caso, owner of D'Angelo Pizza LLC, in Glenside, was sentenced Oct. 18, 2012 by Judge William R. Carpenter in Montgomery County Court of Common Pleas. Osvaldo Caso pleaded guilty to one felony count of the third degree and 3 misdemeanor counts of the third degree. He was sentenced to four years probation and was ordered to pay the costs of prosecution. He was ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of $23,476.70. The Bureau's Compliance Unit reports that D'Angelo Pizza LLC is no longer operating.

Northumberland County

Judge Robert B. Sacavage entered Lee J. Doncheski, owner of David Distributing, into the Accelerated Rehabilitative Disposition Program for first-time offenders June 4, 2013 in Northumberland County Court of Common Pleas. Doncheski was placed on probation for a period of two years and was ordered to pay costs of prosecution. Doncheski was ordered to pay restitution to the Uninsured Employers' Guaranty Fund in the amount of $20,579.64. The Bureau's Compliance Unit reports David Distributing is in compliance according to BWC records.

Philadelphia County

John White, agent for Century Truck & Trailer, Inc., was sentenced on June 21, 2013 by Judge Karen Y. Simmons in Philadelphia County Court of Common Pleas. John White pled guilty to 5 misdemeanor counts of the third degree. Mr. White was sentenced to five years probation; ordered to pay the costs of prosecution; and was ordered to pay restitution to the Uninsured Employer Guaranty Fund in the amount of $150,000.00. The Bureau's Compliance Unit reports that century Truck & Trailer, Inc. is no longer operating.

Pike County

Judge Joseph F. Kameen entered Paul LeRoux into the Accelerated Rehabilitative Disposition Program for first-time offenders Jan. 4, 2013 in Pike County Court of Common Pleas. Leroux was placed on probation for a period of two years. He was ordered to pay the costs of prosecution and pay restitution to the Uninsured Employers' Guaranty Fund in the amount of $203,663.66. The Bureau's Compliance Unit reports that Paul LeRoux is no longer operating.

Correction: The Winter 2012 edition of News & Notes incorrectly stated that McDermott & McDermott Real Estate Inc. in Luzerne County is no longer in business. This is incorrect. McDermott & McDermott Real Estate Inc. is still in operation.

A View From the Bench

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

Executive Officer Exception is Enforceable

In Wagner v. W.C.A.B. (Wagner Auto Repairs & Sales, Inc.) 45 A.3d 461 (Pa. Cmwlth. 2012), the Pennsylvania Commonwealth Court held that the Claimant's execution of LIBC-509, Application for Executive Officer Exception, and LIBC-513, Executive Officer's Declaration, were sufficient to remove him from coverage under the Act, as contemplated by Section 104's "employee" definition.

Here, Employer, who was also the claimant, submitted signed LIBC forms 509 and 513 forms. The WCJ had found that the claimant knowingly and voluntarily signed the documents and was bound by them, despite his testimony that he did not read them before signing them and would not have signed them had he known he was waiving coverage. The carrier had offered evidence and testimony from the employer's insurance broker that when the claimant incorporated his business from a sole proprietorship that had one employee (his assistant), he did not want to include his own salary in the new corporate payroll for workers' compensation premium calculation purposes. To keep his premium the same, by not including his income, he requested the exemption forms, signed them, and was charged a premium based only on his assistant's earnings. The court also found that the carrier's failure to issue a specific endorsement concerning the exemption, as recommended in the Rating Bureau's manual, did not invalidate the exclusion because employer knowingly executed the LIBC-509 and 513 forms.

Compromise & Release Decisions are Final

In Hoang v. W.C.A.B. (Howmet Aluminum Casting, Inc.), 51 A.3d 905 (Pa. Cmwlth. 2012), the Commonwealth Court denied the claimant's post-C&R penalty and review petitions requesting relief based upon the employer's failure to pay medical bills that were outstanding.

At the C&R hearing, the claimant, represented by counsel, testified that he understood that the lump sum payment was all that he would receive. The agreement, significantly, did not indicate, in paragraphs nine and ten, that all past, unpaid medical bills would be paid in addition to the lump sum. After the appeal period expired, the claimant learned that one physician had an outstanding bill in excess of $37,000, which the employer now refused to pay.

Claimant alleged that there was a mutual mistake of fact in the agreement, because neither counsel realized that the bill had not been paid. In the alternative, claimant alleged there was a unilateral mistake of fact on his part. The WCJ found that the agreement did not provide for the employer's payment of this bill, found that no evidence was offered that the employer had been either mistaken or under the wrong impression, and found no violation by not paying the bill. On appeal to the Workers' Compensation Appeal Board (Board), the claimant argued that the WCJ failed to address his unilateral mistake argument. He also argued that the agreement, a contract, contained contradictory terms, because it purported to resolve all indemnity and medical issues, and allegedly did not. The board affirmed the WCJ and claimant appealed to the Commonwealth Court.

The court stated that to set aside a C&R agreement the party so asserting must show fraud, deception, duress, or mutual mistake. Here, there was no credible evidence of mutual mistake. The court also addressed the unilateral mistake argument, and found no evidence that the employer knew, but did not disclose to the claimant, that there was an outstanding bill that he was not aware of. Finally, the court pointed out that there was no conflict in the agreement's terms. The explicit language was that all claims, past and future, were included in the lump sum. Had the claimant wanted to ensure payment of past medical bills in addition to the lump sum, his counsel could have included appropriate language in the agreement. That the claimant had counsel was an important factor for the court.

In DePue v. W.C.A.B. (N. Paone Construction Inc.), 61 A.3d 1062 (Pa. Cmwlth. 2012), the Commonwealth Court denied claimant's post C&R penalty and review petitions.

The claimant suffered a compensable closed head injury in 1996. In 2008, the parties agreed to an indemnity only C&R that kept open medical benefits for the claimant's "closed head injury with seizure disorder and short-term memory loss," as described in paragraph four of the agreement. In 2010, the claimant first filed a penalty petition alleging that the employer failed to pay for medical bills and then filed a review petition to add a left shoulder injury, which is what the unpaid bills were for. The WCJ dismissed both petitions on *res judicata* grounds. The board affirmed.

On appeal to Commonwealth Court, the claimant argued that the C&R agreement erroneously omitted reference to the shoulder injury, as the employer had been paying bills for that body part. The employer had offered evidence below that there was nothing mistaken about omitting the shoulder injury from the agreement. Further, the claimant had not mentioned his alleged shoulder injury during the C&R colloquy. The court addressed numerous arguments, - such as fraud, deception, duress, mutual mistake, unilateral mistake based on the opposing party's fault, merger – that is, failure to expressly reserve issues for later disposition, contract construction, and promissory and equitable estoppel, and dismissed all. The court held that the C&R was valid and binding. The court also noted that voluntary payment of medical bills for non-accepted injuries does not make the injuries compensable.

Voluntary Withdrawal from the Workforce

In City of Pittsburgh v. W.C.A.B. (Robinson), Pa. 67 A.3d 1994 (filed March 25, 2013), the Pennsylvania Supreme Court addressed an employer's burden of

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A View From the Bench

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proof when it seeks to modify or suspend a claimant's benefits on the basis that the claimant has retired.

Claimant was hurt, in 1997, while working as a police officer for the City of Pittsburgh. Employer provided her light duty work. In October 2001, while traveling to work-related medical treatment, claimant was involved in an automobile accident and suffered new injuries. After the accident, claimant stopped working. In late 2004, claimant applied for and received a disability pension, which was awarded to officers if a work-related injury disabled the officer from their pre-injury job.

In October 2007, claimant underwent an IME. The IME physician confirmed that Claimant was still fit only for light duty. Employer sent claimant a Notice of Ability to Return to Work advising of such clearance. Employer then filed a Suspension Petition, alleging that claimant had voluntarily removed herself from the workforce. Claimant answered that she had in fact registered with the Pennsylvania Job Center, and that the reason that she was not working was because the city had eliminated her light duty position. The WCJ denied the Suspension Petition and the board affirmed. The Commonwealth Court also affirmed.

The Supreme Court unanimously affirmed the Commonwealth Court. The court took great pains to emphasize that there is no presumption that arise from a claimant's receipt of a pension (disability or retirement), noting that there was no rational nexus between taking a pension and, from that, concluding that a claimant had completely withdrawn from the workforce. However, depending on the circumstances, the receipt of a pension may give rise to a permissive inference that a claimant has retired. Still, that fact alone is insufficient to meet an employer's burden of proof.

The court addressed, at length, its 1995 precedent SEPTA v. W.C.A.B. (Henderson), 543 Pa. 74, 669 A.2d 911 (1995). According to the court, Henderson did not establish a broad rule that the receipt of any type of pension meant that the claimant had retired, cautioning that the Henderson ruling must be read in connection with the facts presented. The court recognized that Henderson did stand for the propositions that an employer did not need an "unequivocal statement" of a claimant's retirement before advancing a removal from the workforce argument, nor did the employer have a "prohibitive" burden of proof in such proceedings. Henderson simply required the employer to first show that the claimant may have retired from the workforce, at which time the claimant needed to show that she continued to seek employment or that she was forced into retirement due to the work injury.

The Supreme Court wrote that the "totality of the circumstances" standard employed by the Commonwealth Court was consistent with Henderson in that the Commonwealth Court looked at all of the evidence presented regarding the retirement issue, instead of simply focusing on the claimant's receipt of a pension. While a worker's acceptance of a pension entitled an employer to a permissive inference that the claimant retired, there is no presumption of retirement attached. In addition, the acceptance of a pension, standing alone, is not enough to prove retirement. The employer must supplement its proof of a claimant's receipt of a pension with other relevant evidence such as a claimant's statement regarding a voluntary withdrawal from the workplace or the claimant's failure to seek further employment. Once the employer demonstrates that a claimant has voluntarily left the workforce, "then the burden shifts to the claimant to show that there in fact has been a compensable loss of earnings."

Voluntary Withdrawal Orders Affirmed Despite Lack of Employer Petitions

The Commonwealth Court, in two cases, affirmed decisions suspending benefits on the voluntary withdrawal theory noted above, even though the employer had not specifically petitioned demanding such relief.

The first case is Krushauskas v. W.C.A.B. (General Motors), 56 A.3d 64 (Pa. Cmwlth. 2012). The specific issue in this case was whether the WCJ erred when he suspended claimant's benefits, having determined that claimant had, some time ago, voluntarily withdrawn from the job market, even though: (1) the litigation had been initiated with the claimant's filing of a penalty petition; and (2) employer *never* actually filed a suspension petition. The claimant sustained a shoulder injury in September 2005. He was paid benefits voluntarily. Roughly a year later, claimant attended employer's "attrition plan" meeting. After the meeting, he signed two forms and received a lump sum of $35,000.00. The second form, "Form B" contained a he was not disabled or under duress, and released all claims against employer, including disability pay and benefits.

Claimant's indemnity benefits were suspended on or about July 1, 2006. Two years later, in March 2008, claimant filed a penalty petition alleging employer unilaterally suspended his benefits. In the proceedings which followed, evidence of the claimant's lump sum and general release was offered into evidence. Employer also presented evidence purporting to show that claimant had, by accepting the attrition plan and lump sum, undertaken a voluntary withdrawal from the work force.

The WCJ denied the penalty petition, but did find that the Act was violated via the unilateral suspension, however, there was no award upon which penalties could be assessed because no past compensation was due to claimant, since he had retired and withdrawn from the work force. The board also affirmed.

On appeal, the Commonwealth Court also affirmed. The court found that a WCJ has authority to suspend/terminate a claimant's benefits in the absence of a formal petition, where doing so would not be prejudicial to the claimant, i.e., the claimant has notice that a suspension/termination is possible and has an

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opportunity to defend against it. The court stated that a totality of the circumstances test is used to determine whether a claimant has adequate notice. In particular the court noted that the claimant had notice that a suspension was possible, and he was given an opportunity to defend against the same. Indeed, employer questioned claimant extensively regarding voluntary retirement, and claimant himself then testified that he was not voluntarily retiring. The court then applied the Robinson test and concluded that claimant had, indeed, retired and withdrawn.

In Fitchett v. W.C.A.B. (School District of Philadelphia), 67 A.3d 80 (Pa. Cmwlth., filed April 8, 2013), the Commonwealth Court affirmed a suspension of benefits, based on the voluntary withdrawal theory, even though employer had not filed a petition demanding the same. The claimant, in February 2011, suffered a compensable left shoulder, left thumb, neck, and lumbar spine injuries while working as an instructional aide for Employer. Pursuant to an NCP, claimant began receiving wage loss and medical benefits. However, claimant failed to timely return a LIBC-760 form (relating to verification of employment), so Employer stopped her benefits on Sept. 5, 2003. The employer then filed a Termination Petition, alleging Claimant's full recovery as of Sept. 15, 2003. In October 2003, claimant filed a Penalty Petition, complaining of the stoppage of her checks. Another Penalty Petition followed when employer failed to deduct her counsel fees after the WCJ's denial of a supersedeas request.

During the litigation, claimant testified that she began receiving pension benefits in 2002 and Social Security retirement benefits in 2004, but she took those benefits only because of financial pressures arising from her lack of employment. When asked whether she was retired, claimant noted that she was "collecting retirement," but had it not been for her work injuries, she would have continued working. Upon further inquiry at a later hearing, claimant said that she was planning to work as a babysitter, but did not pursue that activity for fear of injury. She also characterized herself as being retired, but later clarified that she meant that she had to leave employment with employer due to her injuries.

The WCJ found that claimant had retired as of June 4, 2005, and suspended her benefits as of that date. The board and Commonwealth Court affirmed. The Commonwealth Court cited Krushauskas and noted that a WCJ can consider relief not formally requested so long as the parties were on notice of the issue and had full opportunity to litigate it. In this case, because claimant's receipt of pension benefits and Social Security retirement benefits were implicated in the litigation and the subject of an Interlocutory Order, claimant was on notice that they would have significance in the litigation. Moreover, the court determined that the parties had fully litigated the retirement issue.

Regarding the merits of the suspension of claimant's benefits based upon a claim of her retirement, the court noted the WCJ's reliance upon claimant's receipt of a pension and Social Security retirement benefits, as well as her acknowledgement that she was not looking for work. The court also held that the WCJ properly suspended claimant's benefits and that his decision to do so was based upon his determination that claimant's testimony was not credible. In particular, the court noted that the WCJ rejected claimant's assertion that she only took the pension and retirement benefits because she could not work due to her injury, that he pointed out she applied for Social Security and retirement pension benefits prior to her benefits being terminated, and that here work injuries were relatively minor and had all resolved.

Notice of Ability to Return to Work (LIBC Form 757)

The Commonwealth Court has rendered decisions in two cases wherein it has held that, under certain factual situations, an employer need not tender a notice of ability to return to work to a claimant before it is entitled to suspension of benefits. The first case is Smith v. W.C.A.B. (Caring Companions, Inc.), 55 A.3d 181 (Pa. Cmwlth. 2012). In this case, the court ruled that a second - Notice of Ability to Return to Work (Form 757) did not have to be tendered to claimant before she was obliged to return to work, because claimant's own physician had advised claimant that she was fit for a return to work, prior to employer's offer of such work.

The claimant was employed as a home health aide. She suffered an injury in October 2008 while working at a client's home. Employer, uninsured at the time, began issuing bi-weekly checks to claimant. These checks approximated claimant's compensation rate, but employer deducted taxes from that amount resulting in claimant receiving a lesser amount. Claimant filed a claim petition in December 2008. The employer offered work to the claimant, on Dec. 14, 2008, but she did not respond. Meanwhile, employer tendered to her a Form 757, on Jan. 8, 2009. That form stated that claimant provided no proof of a work-related disability, indicated that her current disability was due to a non-work-related sinus infection, and referenced the earlier job offer.

A month later, a hearing was held on the claim petition. At that time, claimant's counsel had in his possession a report of claimant's treating physician, which concluded that claimant could return to light duty work. In April 2009, employer, via letter, again offered claimant a light duty job. The letter consisted of a list of job responsibilities, and it explained that the position was within the restrictions imposed by claimant's treating physician. Still, claimant did not return to work.

The WCJ ultimately awarded benefits but, suspended the same after April 16, 2009, the date of the most recent job offer. In doing so, the WCJ determined that employer was entitled to a modification as of that date because the April 2009 job offer was in good faith, and claimant had not responded. The board affirmed, rejecting claimant's contention that "employer's failure to send a new notice rendered the April 2009 job offer ineffective."

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A View From the Bench

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Commonwealth Court affirmed. The court agreed that the issuance of the Form 757 is necessary as "a threshold burden for modification[.]" However the court concluded that employer did not need to issue a second Form 757 in this instance. That was because employer received the new medical information from claimant herself and to require employer to then provide claimant with a second notice, based upon the information she provided, was redundant and in no way served the purpose of a notice requirement since the purpose of the law had already been achieved.

The second case is Brewer v. W.C.A.B. (E2 Payroll & Staffing Solutions), 63 A.3d 843 (Pa. Cmwlth., filed February 13, 2013). The court once again held that, under the circumstances of the case, employer was not obliged to have tendered Form 757 as a condition precedent to arguing for suspension.

The claimant, Brewer, was packer in a warehouse. He sustained orthopedic injuries when a co-worker operating a forklift hit him and then pinned him against a conveyor belt. Employer's agent immediately took him to the hospital and his injuries were verified. However, claimant tested positive for illegal drugs and, pursuant to employer's policy, he was at once discharged from work. The credible evidence ultimately showed that claimant, even in the wake of the injury, was fit for sedentary work.

Employer opposed claimant's disability claim. At hearings, employer's witness testified that but for the firing, claimant would have had available to him the sedentary work. The WCJ granted the claim but, having accepted employer's evidence and argument, denied disability benefits. The board affirmed.

Before the Commonwealth Court, claimant asserted that before employer could receive the suspension, it was obliged to have tendered Form 757. The court, however, rejected this argument. The court stated that the statute which requires Form 757 is expressly limited to modifications sought upon the receipt of medical evidence by an employer. However, in this case, the WCJ found that although claimant had suffered a work-related injury, his loss of earnings was caused by his misconduct, not his injury. Therefore, a Form 757 was not required.

FAILURE TO ATTEND IME OR VOCATIONAL INTERVIEW UNDER SECTION 314

In the case of Giant Eagle, Inc., v. W.C.A.B. (Givner), 614 Pa. 606, 39 A.3d 287 (2012), the Pennsylvania Supreme Court dealt with the issue of what sanctions are available for a WCJ to impose upon claimants who fail to attend either independent medical evaluations or vocational interviews which they have been ordered to attend pursuant to Section 314 of the Workers' Compensation Act.

In this case the claimant's disability benefits had been suspended following her failure to attend an IME, which she was ordered to attend. The employer appealed arguing that the judge should have suspended her medical benefits as well as her weekly disability benefits. The board and Commonwealth Court both affirmed. On appeal the Pennsylvania Supreme Court accepted the review of the case limited to the following issue: "Whether 'compensation' as the word is used in Section 314(a) of the Workers' Compensation Act…. must include medical benefits as well as wage loss benefits."

Following lengthy analysis, the Pennsylvania Supreme Court concluded that the use of the term "compensation" for purposes of Section 314 does not necessarily include medical benefits and they affirmed the Commonwealth Court's holding that Section 314(a) gives the WCJ discretion to order the withholding of only disability benefits, or to order the withholding of both disability and medical benefits in cases where that is necessary in order to compel the claimant to comply with the ordered examination or interview. The opinion clearly establishes that in Pennsylvania the WCJ has the discretion to suspend a worker's medical benefits if he/she fails to attend an ordered IME or vocational interview and that the WCJ is not limited to merely suspending disability benefits under such a scenario. Pursuant to the language of Section 314, the suspension would end when the injured worker complies and attends the examination or interview.

EMPLOYMENT RELATIONSHIPS IN THE TRUCKING INDUSTRY

In the case of American Road Lines v. W.C.A.B. (Royal) and Royal v. W.C.A.B. (Ayerplace Enterprises), 39 A.3d 603 (Pa. Cmwlth. 2012), the WCJ had found an owner-operator and a motor carrier jointly liable for the work-related injury and death of their truck driver. On appeal the board found the motor carrier exercised sufficient control over the decedent to qualify as his employer, or, alternatively, to qualify as a statutory employer, and held the motor carrier solely liable. The Commonwealth Court affirmed, although on different grounds.

During the litigation before the WCJ, the motor carrier (American Road Lines) and the owner/operator (Ayerplace) each contended that the decedent was not their employee and asserted that he was an independent contractor. With respect to the independent contractor argument, the court noted that the claimant bears the burden to demonstrate an employer-employee relationship.

The court discussed the relevant facts associated with the issues of the decedent's employment status and found that did not engage in an independent trade or profession and could not control his time nor the manner of his work. Thus, regardless of the fact that he signed an "independent contractor agreement," decedent was not an independent contractor as he had no right to control the work to be done or the manner of its performance.

The court then addressed the "Employer Identity-Joint and Several Liability" issues. The court held that Ayerplace, the owner-operator, was serving as an agent to American, the motor carrier, and accordingly the directives that they issued to the decedent were not serving their own interests. Thus, since Ayerplace did not have

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its own customers, but instead solely served the interest of American, and could only direct assignments of American it was not decedent's employer. Rather, the court concluded that American, was decedent's sole employer. In support of its conclusion, the court pointed out that: (1) American was the entity which did the hiring and training of truck drivers; (2) the truck drivers were directly affiliated with American and not the owner-operator; (4) the owner-operator had none of its own policies to enforce and received no paperwork from decedent showing the work he performed and how he performed it; (5) American received and maintained all employment paperwork, and ultimately determined the decedent's day-to-day schedule through its agent, the owner-operator; and (6) the decedent did not perform work for the interests of the owner-operator except to the extent that Ayerplace's interests coincided with those of American due to its agent status.

AMENDING THE DESCRIPTION OF INJURY

In the case of Dillinger v. W.C.A.B. (Port Authority of Allegheny County), 40 A.3d 748 (Pa. Cmwlth. 2012), the Commonwealth Court held that an injured worker may not expand the description of injury set forth in bureau documents more than three years after the last einstatement petition was filed under Section 413 within 500 weeks. In Dilliger, the claimant, a bus driver, suffered an injury when she was attacked by a passenger in Nov. 15, 2003. In Dec. 5, 2003, employer issued a Notice of Temporary Compensation Payable describing the injury as a left shoulder strain. Claimant signed a series of supplemental agreements, the last of which was a final receipt and suspended her benefits as of Feb. 20, 2004. Then, on Dec. 3, 2005, claimant alleged a recurrence of her work injury, which was denied by employer on March 17, 2006. On March 22, 2007, claimant filed a petition to review compensation benefits, alleging that she suffered PTSD due to her original work injury, but that employer, while paying to treat this condition, failed to accept it formally as work-related. On that same date, claimant also filed a petition to reinstate her compensation benefits, alleging that her left shoulder injury had recurred. Then, on Nov. 13, 2007, claimant filed a claim petition, alleging an aggravation of her PTSD.

The WCJ granted claimant's petition to amend the description of her work injury to include post traumatic stress disorder (PTSD), and had therefore dismissed as moot her separate claim petition for aggravation of post traumatic stress disorder. The board reversed. The Commonwealth Court affirmed in part and reversed in part and remanded in part.

In reaching its conclusion, the court noted that where an injured worker is attempting to expand the description of injury set forth in the bureau documents to include a condition that was present as the direct result of the injury the Review Petition must be filed within three years of the last payment of compensation. In this case the claimant's disability benefits had been suspended more than three years prior to the filing of her Review Petition seeking to expand the description of her injury, and therefore she was time-barred. The court refused to consider the Claimant's Review Petition as timely filed just because she already had a Reinstatement Petition filed alleging that she had again become disabled due to her physical limitations associated with her accepted injury. The court noted that, under Section 413 a party may file a reinstatement petition within 500 weeks of the suspension date. The court also indicated that the claimant cannot benefit from the reinstatement provisions of Section 413. The court wrote: "The Supplemental Agreement suspending claimant's benefits recognized her work-related injury as a left shoulder strain only. Therefore, payments for her alleged PTSD are not encompassed by Section 413's provision permitting resumption of benefits within the outlined 500-week period."

The court also rejected claimant's argument that her three year filing period should be expanded because the defendants had paid for some treatment for her post traumatic stress disorder. In rejecting this argument the court noted that the doctrine of equitable estoppel cannot be used to toll the statute of limitations unless the claimant can establish fraud, concealment, or misrepresentation on the part of the employer, and in this case claimant did not allege such conduct.

Finally, the court held that the WCJ and Board erred by dismissing the claim Petition as there was no finding concerning whether or not the claimant had been exposed to abnormal working conditions and therefore ordered the case remanded for further proceedings on the separate claim petition claimant had filed.

The Effect of Previous Litigation - *Res Judicata* / Collateral Estoppel

The opinion of the Pennsylvania Commonwealth Court in Cytemps Specialty Steel v. W.C.A.B. (Crissman), 39 A.3d 1028 (Pa. Cmwlth. 2012), discussed the effect of the doctrines of *res judicata* and or collateral estoppels in workers' compensation cases.

Prior to September 1993, claimant had reported injuries to employer on many occasions. Shortly after Sept. 8, 1993 Employer had issued a Notice of Compensation Payable accepting a May 7, 1993 work injury described as a cervical sprain and employer began paying total disability benefits as of September 8, 1993. Following litigation, a modification of the claimant's disability benefits was ordered in March of 1995 based upon his refusal to accept an available full-time light-duty position with the employer; and that decision was affirmed by the boardas well as the Commonwealth Court. See Crissman v. W.C.A.B. (Cytemp Specialty Steel), 740 A.2d 767 (Pa. Cmwlth. 1999)

While the first WCJ decision was on appeal a modification petition was filed, and in 1997 the WCJ reduced claimant's partial disability benefits effective May 30, 1995, based upon earnings at a job the claimant had secured at a Salvation Army Thrift Shop following assistance from the Vocational Rehabilitation Center. In that second

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decision the judge rejected the claimant's argument that he was totally disabled as of Nov. 7, 1995, and the judge further found that the claimant's shoulder tendonitis was not causally-related to his May 7, 1993, work injury.

Following the second WCJ decision, claimant then filed a claim petition against the Vocational Rehabilitation Center alleging that he had sustained injuries while working at the Salvation Army Store; alleging that on ten different occasions he sustained injuries to his back, chest, shoulders, wrists, right arm, right thumb, left hip, knees, and right foot, and also alleging that the job at the Salvation Army Store caused or aggravated atrial fibrillation. The Vocational Rehabilitation Center joined employer on the theory that his injuries may be recurrences of his 1993 work injury. On Sept. 18, 2000, the WCJ denied both the claim and joinder petitions, rejecting the testimony of the claimant and his long-time treating physician. The claimant appealed, and the board vacated and remanded for the WCJ to accept and evaluate "newly discovered evidence." The WCJ issued another decision in 2003 essentially reaffirming his prior findings. He once again denied the claim and joinder petitions. The claimant again appealed to the board, which denied his appeal.

During the course of the litigation claimant had continued receiving partial disability benefits, but by May 2003 he had used up his 500 week entitlement to partial disability and his benefits ended. Claimant then filed multiple petitions in June and October of 2003, all alleging that he had been totally disabled by work injuries that he sustained working for Cytemp. By the time of hearing he had reduced his claims to three specific injuries: a low back, right hip and right leg injury on May 29, 1992; a low back and right hip injury on Dec. 7, 1992; and a right shoulder injury on May 7, 1993. On April 19, 2005, the WCJ denied the claimant's most recent petitions finding that the May 1992 and December 1992 injury claims were time-barred and that the right shoulder injury claim had been fully and completely litigated to conclusion in previous litigation and therefore was barred under the doctrine of *res judicata*. The board affirmed.

Some of the petitions filed in May 2003, were separated, including those in which claimant alleged that he had sustained a head, neck and shoulder injury on Sept. 23, 1992, while working for the employer and had suffered disability beginning Nov. 7, 1995, as a result of that injury. Those petitions were not addressed in the April 2005 decision because the WCJ had ordered those petitions put in "indefinite postponement" status via an interlocutory order.

In separate proceedings on those petitions another WCJ found that claimant had sustained a cervical strain and cervical spinal stenosis at work on Sept. 23, 1992, which totally disabled the claimant beginning Nov. 7, 1995, and ordered payment of total disability benefits beginning that date and continuing. The employer appealed, arguing that the decision was barred by *res judicata* and collateral estoppel. The board affirmed. The Commonwealth Court remanded in order for the WCJ to make additional findings of fact. Specifically, the court noted the WCJ had not made a finding as to whether the claimant sustained two (2) separate neck injuries on Sept. 23, 1992, and on May 7, 1993, or whether there was really only one cervical injury that the employer had mistakenly dated in its Notice of Compensation Payable. The court concluded that the claimant had already received all of the compensation which he was entitled to receive for the May 7, 1993, work injury described as a cervical strain in the Notice of Compensation Payable.

On remand, the WCJ found that the claimant had in fact suffered two separate cervical injuries; a cervical strain with cervical stenosis on Sept. 23, 1992, and a cervical sprain on May 7, 1993. The WCJ also found that the claimant was totally disabled as of Nov. 7, 1995, based upon his long-time treating physician's testimony. The employer appealed and the board affirmed, concluding that because there were two separate cervical injuries, neither *res judicata* nor collateral estoppel barred the grant of the claim eetition. Employer appealed to the Commonwealth Court.

On appeal, employer argued that the board had erred in granting the claim petition for two reasons: substantial evidence did not support the finding the claimant sustained two different neck injuries; and that the doctrines of res judicata and/or collateral estoppel bar further litigation on the question of whether the claimant was totally disabled by a work injury on Nov. 7, 1995. The court held that the record did not support a finding that the claimant sustained two separate neck injuries. Specifically, the court noted that claimant's treating physician testified that he was treating the claimant for a Sept. 23, 1992, injury and had no knowledge of a May 1993, neck injury. The court also noted that the claimant himself testified that: (1) he sustained one neck injury and that the Notice of Compensation Payable which listed his neck injury as having occurred on May 7, 1993, was incorrect; and (2) that he had sustained a shoulder injury in May of 1993. The court noted that the incident report entered into evidence by the claimant also showed that he suffered a neck sprain in September of 1992 and a shoulder injury in May of 1993.

Accordingly, the court stated that claimant was barred from receiving total disability benefits as of Nov. 7, 1995, because the nature and extent of his ability to work as of that date has been fully litigated, twice. In 1997, the WCJ found the claimant's work related neck injury rendered him partially disabled but able to do the Salvation Army job and in 2000, the WCJ denied the petitions regarding the injuries the claimant allegedly sustained while working at the Salvation Army. The court stated that claimant could not avoid the doctrine of *res judicata* by proving that his neck injury was misdated during that prior litigation. It stated that *res judicata* applies to issues that were litigated and issues that should have been litigated. Otherwise, claimant could litigate his disability as of Nov. 7, 1995, one work injury at a time. The court held that it was claimant's duty to identify all work injuries, including his Sept. 23, 1992, work injury, when the question of his physical ability to work as of Nov. 7, 1995, was previously litigated.

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PENSION OFFSETS

In March and April of 2012 the Commonwealth Court decided two cases concerning the Employer's entitlement to take an offset for pension benefits.

In the case of Glaze v. W.C.A.B. (City of Pittsburgh), 41 A.3d 190 (Pa. Cmwlth. 2012) the Commonwealth Court held that an employer seeking to establish its entitlement to a Section 204 pension offset, may meet its burden of proving the extent of their contributions to a claimant's defined benefit pension by credible actuarial evidence, and does not have to identify actual contributions to the individual claimant's pension fund.

In Glaze, the court reviewed multiple decisions which had been consolidated for litigation on various fire fighters' cases against the City of Pittsburgh. The Court explained that an employer seeking to establish its entitlement to a Section 204 pension offset, may meet its burden of proving the extent of their contributions to a claimant's defined benefit pension by credible actuarial evidence, and does not have to identify actual contributions to the individual claimant's pension fund. The court remanded the case and indicated that the WCJ should consider the court's decision in the School District of Philadelphia v. W.C.A.B. (Davis), 38 A.3d 992 (Pa. Cmwlth. 2011). In Davis the Court held that where an employer meets its prima facie burden of establishing the extent of its contributions to a claimant's pension by credible actuarial evidence, a claimant challenging the credibility of the employer's actuarial evidence must present evidence demonstrating the materiality and relevance of her challenge. In Glaze, the court noted that the WCJ cited, as reasons for rejecting employer's offset calculations, the claimants' expert's criticisms of the data and sources used by employer's expert. Significantly, although claimants' expert criticized the data and number of sources used by employer's expert, claimants' expert performed no alternative offset calculations using the different data and sources he believed to be more appropriate. Thus, the court held that claimants' expert did not establish the materiality of his criticism of employer's calculation of any individual claimant's pension offset. Consequently, claimant failed to show how, if at all, use of the data or sources claimants' expert found more reliable or appropriate would materially impact the extent of employer's contributions as determined by employer's expert.

In the case of United Airlines v. W.C.A.B. (Gane), 42 A.3d 379 (Pa. Cmwlth. 2012) the Commonwealth Court held that, even if a pension plan has been taken over by the United States Federal Pension Benefit Guarantee Corporation (her inafter "PBGC"), an employer that can prove it funded a pension plan is entitled to an offset. Here, the WCJ had decided the case in the claimant's favor and denied the employer's claim for a pension offset to reduce the claimant's indemnity benefit. The employer, United Airlines, had gone bankrupt and the PBGC had terminated United's pension plan and became trustee of the plan. PBGC is funded with premiums paid by all pension plans including underfunded pension plans such as the one they had taken over from United. United had funded only 32 percent of their pension liabilities rather than 100 percent that it had funded prior to going into bankruptcy. Given these circumstances, claimant argued that the employer's offset should be reduced based on the 32 percent contribution, and that the claimant should receive more of his previous workers' compensation benefit entitlement. The WCJ had found that the pension was funded entirely by United without any contributions from the claimant up until May 11, 2005, and accordingly United was entitled to a 100 percent offset against the claimant's workers' compensation benefits through that date. The WCJ also found, based upon the employer's actuary's testimony, that after May 11, 2005, the employer had failed to prove its contribution per employee. The actuary had admitted that: (1) thathe did not do specific calculations to arrive at his positive offset figure but rather took the figure used in the documents he had reviewed; and (2) that it was difficult to come to an actual value of the contribution that the United made to have PBGC assume its pension's assets and liabilities because the market value of the transfer would be hard to timony was speculative and not persuasive with respect to what benefit calculations should be used to offset the claimant's workers' compensation benefits.

On appeal the Commonwealth Court framed the issue as "[w]hether a pension plan previously funded by an employer is entitled to an offset under Section 204(a) of the Workers' Compensation Act (Act) once the employer's plan is taken over by the PBGC." The Court stated that the "key inquiry is the extent to which the employer funded an employee's pension, not who is liable for payment. To the extent that an employer can establish that it funded a pension plan, it is entitled to an offset, regardless of whether the PBGC has taken over the plan and assumed liability for it." The court then goes on to state that the extent to which an employer can take an offset is set forth in the Act's associated regulations relating to calculation of offsets when the pension benefit is payable from a multiple-employer pension plan, citing 34 Pa. Code Section 123.10(b). The court then held that even though claimant filed the petition to review the offset, because United is the party seeking to receive the offset and its Chapter 11 bankruptcy changed the status quo, it has the burden to establish the amount of the offset. Even though United offered expert testimony on the issue, the WCJ specifically found that its testimony was not persuasive on what benefit offset calculation should be used and that United failed to prove its post-May 11, 2005, contribution per employee or by actuarial testimony. Thus, based upon this determination the court held United was not entitled to an offset.

STATUTORY EMPLOYER LIABILITY

In Six L's Packing Co. v. W.C.A.B. (Williamson), Pa., 44 A.3d 1148 (2012) the Pennsylvania Supreme Court held that statutory employer liability for landowners is not limited to cases involving soil/rocks/minerals timber.

Six L's involved statutory employer liability under Section 302(a) of the Act. In Six L's the claimant was a truck driver who was employed by F. Garcia & Sons (Garcia). Six L's Packing Company, Inc.'s business included the

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growing, harvesting, processing and distributing of tomatoes and other produce. It owned and leased various farms and distribution/processing facilities in North America. Garcia contracted with Six L's to perform various services including transporting tomatoes between a Pennsylvania warehouse and a processing facility in Maryland. The claimant was injured while transporting Six L's tomatoes between the two locations. At the time of the work injury Garcia did not maintain workers' compensation insurance. Six L's defended the claim that they were the injured worker's statutory employer on the theory that this case cannot satisfy the five-element standard set forth in McDonald vs. Levinson Steel Company, 302 Pa. 287, 153 A. 424 (1930) and Gann vs. W.C.A.B. (MBS Management/Wellington East Development), 792 A.2d 701 (Pa. Cmwlth 2002). The WCJ opined that the McDonald test was met and found Six L's liable for payment of the workers' compensation benefits due the claimant.

The Workers' Compensation Appeal Board (Board) affirmed the WCJ, but on different grounds. The board indicated that the McDonald test was inapplicable to the facts, and concluded that Six L's situation satisfied the plain language of the Workers' Compensation Act citing Delich vs. W.C.A.B. (Lyons), 661 A.2d 936 (Pa. Cmwlth 1995). The board regarded Six L's as a contractor under Section 302(a) of the Act and F. Garcia & Sons as a subcontractor since Garcia did not have workers compensation insurance. On appeal, the Commonwealth Court affirmed based upon reasoning which was essentially the same as utilized by the board.

When this case came before the Pennsylvania Supreme Court, Six L's pointed out that the McDonald rule had been applied by the lower appellate courts to all statutory employer determinations for the last thirty (30) years and that the Delich decision should be limited to the specific type of work that was involved in that case (movement of soil, rocks, minerals or timber) pursuant to the language contained in Section 302(a). Six L's also argued that under caselaw, a property owner simply cannot be a statutory employer and that line of cases should be extended to cover Section 302(a) liability.

The Supreme Court rejected Six L's arguments and concluded that there was nothing in the caselaw to impede the court from giving full effect to the plain meaning of Section 302(a) of the Act, consistent with the decisions of the Commonwealth Court and the board. The court concluded that there was no basis for limiting statutory employer liability for landowners to cases involving soil/rocks/minerals/timber. The court stated that when viewing the statutory scheme as a whole, liberally construing it in furtherance of its remedial purposes it was clear that the "Legislature meant to require persons (including entities) contracting with others to perform work which is a regular or recurrent part of their businesses to assure that the employees of those others are covered by workers' compensation insurance, on pain of assuming secondary liability for benefits payment upon a default." The court also held that the owner exclusion, which has arisen in the context of Section 302(b), has no applicability in the Section 302(a) setting and, therefore, neither the McDonald test, nor a per se owner exclusion applies under Section 302(a) of the Act.

AVERAGE WEEKLY WAGE FIGURE CALCULATIONS IN SPECIFIC LOSS CASES

In the case of Lancaster General Hospital v. W.C.A.B. (Weber – Brown), Pa. 47 A.3d 831 (2012), the Supreme Court held that in specific loss cases the employee's average weekly wage is to be calculated based upon the workers earnings at the time of the loss, not at the time of the incident which ultimately led to the loss.

In this case, a healthcare worker was exposed to and contracted a disease of the eye in 1979 or 1980 while employed by Lancaster General Hospital. As a result of thedisease process, claimant experienced a complete loss of use of that eye in 2007 after she had left the employ of Lancaster General Hospital in 1985 for unrelated reasons. Her eye had become infected several times in the years between 1979 and 2007. At the time that she actually suffered the loss of use of her eye, she was employed by The Heart Group and was making substantially more money than she was making in 1979 or 1980 when she was employed at Lancaster General Hospital.

The only issue on appeal was how to properly calculate the claimant's average weekly wage. The court concluded that in specific loss cases the employee's "wages" under Section 306 of the Act are to be calculated based upon the workers earnings at the time of the loss, not at the time of the incident which ultimately led to the loss. It should be noted that Lancaster General Hospital was not denying that the exposure during the claimant's employment with them was what caused the specific loss many years later.

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