TR&C

Pennsylvania Workers' Compensation Bulletin

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Editor

The Affordable Care Act (Obamacare) and Its Impact on Workers' Compensation

In large part, the Affordable Care Act, a.k.a. Obamacare, became effective in January of 2014. The Affordable Care Act does not directly focus on, nor does it even mention, workers' compensation. Nonetheless, the Act's reforms appear as though they will have tangential effects that impact the provision of workers' compensation insurance coverage.

Wellness Programs

One of the overarching goals of the Affordable Care Act is to provide affordable, universal health insurance to ensure everyone has access to appropriate preventative medical care. At face value, this should result in healthier employees and a reduction in workers' compensation claims. Further, healthier employees who have been followed more closely by their medical providers are less likely to remain reliant on workers' compensation, allowing claims to be closed sooner.

To this end, one aspect of the Affordable Care Act is that employers are encouraged to make employee wellness programs available. Further, employees who participate in wellness programs can obtain a discount in their insurance premiums. This has prompted many employers to adopt wellness programs and participation in such programs to expand. At first blush, these programs appear to be a positive development in that a healthier workforce is less likely to sustain work related injuries, thus less likely to file workers' compensation claims. Despite this clear benefit, the expansion of employer initiated wellness programs creates a potential avenue from which workers' compensation claims may arise. Should an employee suffer an injury while participating in such a wellness program, the injured employee may be able to make a claim against the employer for that injury.

If wellness programs continue to expand, as encouraged under the Affordable Care Act, it can only be anticipated that workers' compensation claims arising from said programs will also rise. In Pennsylvania, there is precedent that such claims are, in fact, compensable workers' compensation claims. In Stanner v. WCAB (Westinghouse Electric Co.), 604 A.2d 1167 (1992), an employee had a heart attack while working out on the employer's premises as part of the employer's wellness plan. The court found that the activities were "in furtherance of employer's business or affairs" thus the subsequent heart attack was a compensable injury.

Cost Shifting

Another area which has constantly been an issue in workers' compensation is attempts by uninsured claimants to seek workers' compensation coverage for a non-work related injury or for aggravation of a pre-existing injury. The extent of this issue was examined by Judge Torrey in a study of Pennsylvania workers who

(Continued on page 11)

Inside This Issue...

Commonwealth Court Case Reviews

Kris A. Trautman v. Workers' Compensation Appeal Board (Blystone Tree Service and Pennsylvania Uninsured Employer Guaranty Fund), No. 389 C.D. 2014, Filed November 14, 2014.

(Unreasonable Contest Counsel Fees – UEGF – Under §1601 of the Act, the UEGF is never subject to unreasonable contest counsel fee liability even though §1605 allows the UEGF to seek reimbursement of such fees from the employer.)

On July 5, 2007, employer asked claimant to climb a tree to prune dead branches. As he was doing this, a clip on his safety rope malfunctioned, and he fell approximately twenty-five feet. Claimant sustained many severe injuries, some of which required surgery.

Claimant filed a claim petition on September 6, 2007. He then filed a second claim petition on October 12, 2007 seeking benefits from the Uninsured Employer Guaranty Fund (UEGF) because employer did not maintain workers' compensation insurance.

The Workers' Compensation Judge granted claimant's petitions, and awarded counsel fees against employer for unreasonable contest; however, the WCJ rejected claimant's argument that unreasonable contest fees should be paid by UEGF based on the clear language of §1601 of the Workers' Compensation Act.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that §1605(b) of the Act rendered UEGF liable for the payment of unreasonable contest attorneys' fees assessed against the uninsured employer. The WCAB rejected this argument and determined that, due to the clear language of §1601 of the Act, UEGF was not subject to unreasonable contest fees.

Claimant appealed to the Commonwealth Court, arguing that the WCAB and WCJ erred in concluding that UEGF was not responsible for paying unreasonable contest fees assessed against an employer that was unable to pay the fees. Claimant contended that the only reasonable interpretation of §§1601 and 1605(b) of the Act was to require UEGF to pay unreasonable contest fees assessed against an uninsured employer that was unable to pay.

Essentially, claimant argued that there was no reason for a law authorizing the Department of Labor and Industry to seek reimbursement for unreasonable contest fees under §440 of the Act if UEGF had no obligation to pay those fees under any circumstances. UEGF countered that claimant's argument absurdly proposed that the UEGF be penalized for conduct that was not within its control, yet be protected from fees resulting from its own conduct. Claimant also argued that an interpretation of the law that would require UEGF to pay unreasonable contest fees when an employer is unable to pay was consistent with §1921(a) of the Statutory Construction Act of 1972, because it would give effect to both §§1601 and 1605(b) of the Act, whereas UEGF's interpretation would render §1605(b) meaningless, absurd and ineffective.

The Court stated that UEGF was established for the exclusive purpose of paying workers' compensation benefits, and any costs specifically associated therewith, where the employer liable for payments failed to insure or self-insure its workers' compensation liability when the injuries occurred. Nevertheless, the Court also said that the payment of unreasonable contest fees would place a burden on UEGF, and might affect its solvency and, thus, its ability to pay benefits in the future.

The Court found that, contrary to claimant's argument, there is no ambiguity between §§1601 and 1605(b) of the Act, as the former is intended to protect UEGF from the assessment of unreasonable contest fees, and the latter confers a right on the Department to seek reimbursement. The Court said that §1605(b) does not confer a right on a claimant to collect unreasonable contest fees from UEGF. Therefore, the Court stated that, because there is no ambiguity, it must give effect to the unambiguously expressed intent of the legislature, which clearly was to insulate UEGF from unreasonable contest fees. Thus, the Court held that claimant was unable to collect unreasonable contest fees from UEGF, and affirmed the WCAB's order.

****

Frog, Switch & Manufacturing Company v. Workers' Compensation Appeal Board (Johnson), No. 149 C.D. 2014, Filed December 4, 2014.

(Psychic Injury – Mental/Mental Claim – Claimant failed to prove that any specific incident(s) at work caused her psychic injury. Thus, the Court never addressed the issue of whether the incident (s) of which she complained were "abnormal working conditions.")

Employer petitioned for review of an order of the Workers' Compensation Appeal Board's January 2, 2014 order, which affirmed the decision of the Workers' Compensation Judge granting claimant's claim petition. In its petition, employer presented two issues for review: (1) whether the WCJ's findings of fact were supported by substantial evidence, and (2) whether the WCJ applied the proper standard to claimant's work injury in determining whether claimant had met her burden of

proof. For the foregoing reasons, the Commonwealth Court reversed the WCAB.

Claimant had worked for employer, a fabricator of steel products, since October 30, 1989. Her job required her to operate overhead cranes in areas where metal was molded. Claimant was one of two females and the only black female out of approximately 200 employees. She had reported three separate workplace incidents that occurred in May 2009 in a complaint filed with the Pennsylvania Human Relations Commission. In this complaint, claimant also alleged additional workplace incidents that occurred on or about August 30, 2009 and sometime in mid-September 2009.

On September 23, 2009, a meeting was held to discuss one of the incidents that occurred in May 2009 when a co-worker refused to work with claimant because of his belief that her actions were unsafe and she refused to listen to signals. Claimant left the meeting in a despondent state and was intent on filing a grievance. On September 30, 2009, she filed an accident report, in response to which employer referred her to its doctor for emotional distress. This was claimant's last day of work until she returned on April 19, 2010.

On May 10, 2010, claimant filed a claim petition, alleging that she had sustained a work injury on September 29, 2009 in the form of atypical depression related to abnormal working conditions. She sought disability benefits from September 30, 2009 through April 19, 2010 together with payment of medical bills and attorney's fees. On August 4, 2011, the WCJ granted claimant's claim petition. Employer then appealed to the WCAB, which affirmed the WCJ. Employer than appealed to the Commonwealth Court.

Employer first argued that the WCJ's Findings of Fact were not supported by substantial evidence. In making this determination, the Court must consider the evidence as a whole, view the evidence in a light most favorable to the party who prevailed before the WCJ, and draw all reasonable inferences which are deducible from the evidence in favor of the prevailing party.

Finding of Fact 14 concerned the WCJ's determination that claimant was caused to cry uncontrollably after a meeting about a noose hanging in an office shared by her supervisor and a foreman. Finding of Fact 38 pertained to the admission of the January 26, 2010 letter and progress notes of claimant's treating psychologist, Howard Dissinger, at the WCJ hearing as an exhibit. Finding of Fact 39 concerned the rejection of the testimony of Dr. Robert Charles Cohn, M.D., who opined that racial epithets of the type evidenced in this case, which could have been stressors, were without any clinical significance. The WCJ rejected this testimony because it was contrary to and inconsistent with the "credible" testimony of Mr. Dissinger. Finding of Fact 40 pertained to the WCJ's determination that based on the competent and credible evidence of record, claimant was subjected to actual abnormal working conditions, and sustained a work injury of atypical depression as a result of same.

While viewing the evidence in a light most favorable to claimant and drawing all reasonable inferences therefrom, the Court could not find in the record relevant evidence which a reasonable person might have found sufficient to support the WCJ's Findings of Fact 14, 38, 39 and 40.

Employer next argued that claimant failed as a matter of law to prove that she sustained a work injury as a result of abnormal working conditions. The Court stated that in psychic injury cases, the record must contain unequivocal medical testimony to establish the causal connection between the injury and employment. The Court further said that due to the highly subjective nature of mental injuries, an injury's occurrence and cause must be specifically delineated. The Court stated that a claimant seeking benefits for a psychic injury must meet a higher standard for causation by proving that (1) he suffered a psychic injury and (2) his psychic injury was more than a subjective reaction to normal working conditions.

The Court said that none of the bases on which the WCJ concluded that claimant's work-related psychological injury was caused by abnormal working conditions specifically delineated the cause of claimant's injury, or proved that her injury was more than a subjective reaction to normal working conditions. Therefore, the Court stated that because claimant had not met her burden of proving that her work conditions caused her mental stress, she was ineligible for worker's compensation benefits. Thus, the Court said that there was no need to determine whether said working conditions were normal or abnormal.

****

Mark Zwick v. Workers' Compensation Appeal Board (Popchocoj), Nos. 428 C.D. 2014 and 429 C.D. 2014, Filed December 11, 2014.

(Statutory Employer – An entity may be found to be a statutory employer under §302(a) of the Act, which applies to *any scenario* in which a contractor subcontracts all or any part of a contract.)

Mark Zwick sought review of the February 27, 2014 order of the Workers' Compensation Appeal Board, which affirmed in part and reversed in part the decision of the Workers' Compensation Judge granting claim petitions filed by claimant and dismissing the joinder petition filed by the Uninsured Em-

ployers Guaranty Fund (UEGF). Specifically, the WCAB reversed the WCJ's dismissal of UEGF's joinder petition, and modified the WCJ's order to make Zwick secondarily liable to claimant as a statutory employer under section 302(a) of the Workers' Compensation Act. For the foregoing reasons, the Commonwealth Court affirmed.

On August 2, 2010, claimant filed a claim petition, alleging that he had injured his right hand while doing construction work on July 5, 2010 for Adarlan Rodrigues. On October 15, 2010, he filed a second claim petition for benefits from UEGF. On May 31, 2011, UEGF filed a petition to join Zwick as an additional defendant. The WCJ consolidated the claim petitions and joinder petition for disposition.

Claimant, a Guatemalan citizen who was an undocumented worker who came to the United States in 2007, worked five days a week for Rodrigues and earned $100.00 per day. Rodrigues would drive him to job sites, and tell him what projects to do and where to perform the work. On July 5, 2010, claimant injured his right hand while using an electric saw which Rodrigues had given him on the day of the accident. After he was discharged from Thomas Jefferson University Hospital after having his right pinky finger and right thumb amputated, Rodrigues informed him that he did not carry workers' compensation insurance.

At a hearing before the WCJ on May 18, 2011, Rodrigues testified that he was self-employed but was working for Zwick at the time of claimant's accident. He also testified that although he hired claimant to perform construction work at the property, Zwick would tell him what to do, and he in turn would tell claimant what to do. He also testified that Zwick would give money to him, and he in turn would pay claimant.

On August 31, 2011, Zwick testified that he was a licensed realtor and investor who did construction rehabilitation work on residential properties. He also testified that: 1) he had hired Rodrigues to do construction work at the property and paid him approximately $750.00 per week, 2) he did not own the property but was fixing it up for resale, 3) he had hired other contractors to work on the property in addition to Rodrigues, and 4) although he told Rodrigues what work needed to be done, he did not tell him how to do it. He also testified that he would inspect the property periodically and approve the completed work before paying Rodrigues. He also testified that he did not carry workers' compensation insurance.

The WCJ found that claimant had sustained a work-related injury on July 5, 2010, and granted his claim petitions. The WCJ further found that Rodrigues was claimant's employer, and petitioner was not his statutory employer at the time of the accident because the work performed was not a regular part of Zwick's business. Therefore, the WCJ concluded that Rodrigues primarily was liable and that UEGF was secondarily liable for claimant's injuries. The WCJ dismissed UEGF's joinder petition.

On appeal, the WCAB affirmed the WCJ's award of benefits, but reversed the finding that Zwick was not claimant's statutory employer under the Act. Specifically, the WCAB found that Zwick was a "contractor" under §302(a) of the Act. Zwick then petitioned for review by the Commonwealth Court, arguing that the WCAB should have applied §302(b) of the Act, under which he was not a statutory employer, rather than §302(a).

First, Zwick argued that §302 (a) of the Act was inapplicable because claimant's work did not involve the cutting or removal of timber from lands. However, the Court stated that the Pennsylvania Supreme Court has held that §302 (a) is not limited to scenarios involving the movement of soil, rocks, minerals, or timber, but also pertains to contractual delegations of aspects of an employer's regular or recurrent business activities.

Second, Zwick argued that §302(a) of the Act was inapplicable because he was a licensed realtor, so the work that claimant performed at the time of his injury was not a regular part of his business. However, the Court said that the credited evidence supported the WCAB's conclusion that Zwick was in the business of rehabilitating properties for resale, and he hired Rodrigues to perform work that was a regular part of his business. Thus, the Court stated that Zwick met the definition of a "contractor" under §302(a).

Third, Zwick argued that the WCAB should have applied §302 (b) of the Act rather than §302(a), and that he was not a statutory employer under this section because he neither occupied nor controlled the property at the time of claimant's injury. However, the Court said that Zwick just had to meet the criteria in *either* §302(a) or §302(b) to be held liable as a statutory employer. Therefore, because the WCAB determined that Zwick was a statutory employer under §302 (a), the Court affirmed.

****

PA Liquor Control Board v. Workers' Compensation Appeal Board (Kochanowicz), No. 760 C.D. 2010, Filed December 30, 2014.

(Mental/Mental Injury – Where substantial evidence supports the conclusion that an armed robbery is not a normal working condition, a claim for a mental injury arising out of that incident may be awarded.)

Employer petitioned for review of the order of the Workers' Compensation Appeal Board, which affirmed the Workers' Com-

pensation Judge's decision granting claimant benefits for a work-related mental injury. Because the Commonwealth Court concluded that the WCJ's findings of fact were supported by substantial evidence, and supported the WCJ's conclusion that the armed robbery that caused claimant's mental injury was not a normal working condition, it affirmed. The facts are as follows:

On April 28, 2008, claimant, who had worked for employer for over thirty years, was the general manager of its retail liquor store in Morrisville, Pennsylvania when an armed robbery occurred. During the robbery, the robber held a gun to claimant's head and tied him up with duct tape. This was the first time in thirty years' of employment that claimant had been robbed. As a result, he informed employer's HR Department that he needed to take some time off. He subsequently treated with a psychologist, Brian S. Raditz, Ed.D., on the recommendation of his attorney. Claimant had no history of prior psychological treatment.

Before the WCJ, claimant stated that he thought about the robbery every day, which disrupted his sleep and caused nightmares, anxiety, stress, and difficulty relating to his family. He also testified that he did not believe that he could return to his previous position because of his continued fear caused by the robbery. Dr. Raditz testified that, based on his examination and continued treatment, claimant suffered from Post-Traumatic Stress Disorder and adjustment disorder with mixed anxiety and depressed mood as a result of the robbery, and could not return to his pre-injury position. Employer's psychiatric expert agreed. Nevertheless, the claim had been denied on the basis that armed robbery is to be expected in claimant's employment.

The WCJ found that claimant's testimony and the medical testimony were entirely consistent, trustworthy and credible, and claimant's and employer's medical evidence was consistent with claimant's allegation that he had sustained a disabling mental injury related to the robbery. The WCJ also rejected any of employer's evidence which was inconsistent with claimant's testimony. The WCJ found that armed robbery is an abnormal working condition, and the fact that claimant received previous training for how to handle such a situation was not entirely relevant to defend the type of injury that he had sustained. The WCJ concluded that claimant met his burden of proving that he was subjected to abnormal working conditions, and the robbery had caused a disabling work injury. The WCAB affirmed.

Employer then petitioned the Commonwealth Court for review. The Court reversed the WCAB's order, concluding that claimant had not sustained his burden of showing that his mental injuries were the result of exposure to an abnormal working condition. Because claimant had received training on workplace violence, and the record contained evidence that there had been numerous robberies of employer's area retail stores since 2002, the Court concluded that claimant could have anticipated being robbed at gunpoint at work and, therefore, the robbery was a normal condition of his liquor store employment. Claimant appealed to the Pennsylvania Supreme Court, which granted his appeal, vacated the Commonwealth Court's order, and remanded the matter back to the Commonwealth Court.

On remand, the Court stated that to recover workers' compensation benefits for a psychiatric injury, a claimant must prove that (1) he has suffered a psychiatric injury by objective evidence and (2) such injury is other than a subjective reaction to abnormal working conditions. Thus, a claimant must present evidence establishing that the mental injury is, in fact, caused by an actual work-related event that is not a normal condition of employment. The Court said that a claimant must establish that he was subjected to conditions to which an employee in his position is not normally exposed, and that his is a reaction to a highly unusual and singular event.

In applying the aforementioned standards to this case, the Court acknowledged that employer did not contest that claimant had suffered a mental injury in the course and scope of his employment. Therefore, it stated that the only issue before it was whether claimant had met the additional burden of proving that the mental injury he had suffered was other than a subjective reaction to normal working conditions.

Employer argued that, because claimant had received training involving workplace violence and robberies had occurred at its other locations, the WCJ erred in finding the armed robbery was an abnormal working condition. Employer also argued that the WCJ erred by basing her award on a finding that workplace violence, and robberies in particular, are *per se* abnormal.

In addressing employer's arguments, the Court noted that much of the training claimant had received was focused on workplace violence in general rather than on armed robberies specifically. Moreover, the Court stated that these training materials refer to armed robberies as infrequent occurrences and emergencies. Thus, the Court concluded that a person reviewing this evidence in the light most favorable to claimant could accept it as adequate to support the WCJ's finding of fact that such training was not entirely relevant, and not dispositive, of whether the robbery was a normal working condition. The Court also said that claimant's credible testi-

mony that he had not experienced an armed robbery in over 30 years of employment constituted substantial evidence in support of the WCJ's finding that the robbery was an abnormal working condition. The Court concluded that the WCJ's findings described a singular, extraordinary event that occurred during claimant's work shift that caused his PTSD, and supported the WCJ's legal conclusion that the robbery was not a normal working condition. Thus, the Court affirmed the WCAB's order.

****

Nicole Neff v. Workers' Compensation Appeal Board (Pennsylvania Game Commission), No. 130 C.D. 2014, Filed January 8, 2015.

(Impairment Rating Evaluation – Maximum Medical Improvement – Where medical testimony supports a finding of MMI, the IRE is valid.)

Claimant suffered an injury while in the course and scope of her employment on February 20, 2004. A Notice of Temporary Compensation Payable was issued on April 30, 2004, which described the injury as "right wrist-carpal tunnel syndrome-screwing bluebird boxes together." A Notice of Conversion was subsequently issued. Two years later, both parties filed multiple petitions. As a result, the Workers' Compensation Judge determined that claimant had not recovered fully from the carpal tunnel injury, and, in fact, the Judge expanded the work injury to include chronic lateral epicondylitis of the right elbow.

On January 7, 2011, employer filed a modification petition, seeking to modify the status of claimant's wage loss benefits from total to partial disability based on a permanent impairment rating of less than 50%. Following hearings, the WCJ granted employer's modification petition based on the results of an impairment rating evaluation (IRE) of William R. Prebola, Jr., M.D., who determined that claimant had reached maximum medical improvement (MMI) and suffered a whole person impairment rating of 1%. Thus, the WCJ modified claimant's benefits accordingly. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed. Claimant then petitioned the Commonwealth Court for review.

On appeal, claimant argued that the WCAB and WCJ erred in granting employer's modification petition because the IRE was invalid. She specifically argued that an IRE is premature and invalid as a matter of law when, as here, there is a reasonable potential to undergo future surgery that could cause a change in her condition, such that the claimant cannot be at MMI. Claimant argued that she could undergo additional surgery to improve her elbow condition and, therefore, had not yet reached MMI. She also argued that the WCJ and WCAB capriciously disregarded, or otherwise misconstrued, the evidence contradicting Dr. Prebola's medical opinions. The Court was not persuaded.

The Court stated that an IRE physician must first determine that a claimant has reached MMI before calculating an impairment rating. The Court said that an individual is at MMI when his condition has become static or stable, and, while further deterioration or recovery may occur at some point in the future, one would not expect a change in condition at any time in the immediate future.

Here, Dr. Prebola repeatedly opined that claimant was at MMI for the right lateral epicondylitis sustained on February 20, 2004. He also opined that claimant had a 1% whole person impairment. Dr. Prebola agreed that surgery for claimant's elbow would be a reasonable treatment option; however, he also opined that, with or without treatment, a patient can still be at MMI. Dr. Prebola stated that, although surgery had the potential to improve claimant's pain and symptoms, it would not cure her. Rather, she would have permanent damage and remain impaired. Moreover, Dr. Prebola opined that surgery would not be significantly beneficial to claimant, and may even worsen her condition. The Court ruled that these opinions were compatible with a description of MMI pursuant to the American Medical Association "Guides to the Evaluation of Permanent Impairment (Guides)."

The Court stated that the issue of whether a claimant has reached MMI is inherently a medical determination, which, by necessity, must be the subject of medical testimony. Thus, the Court said that, provided the medical expert considers the appropriate factors required by the Guides when rendering a determination that a claimant has reached MMI, a WCJ may rely on the expert's determination that a claimant has reached MMI. Under such circumstances, the Court will not disturb the determination of MMI or otherwise second-guess the weight of the medical evidence. The Court also said that such an approach to a determination of MMI is consistent with its well-settled precedent that determinations as to evidentiary weight and credibility are solely for the WCJ as fact-finder.

Based on the aforementioned, the Court ruled that, because Dr. Prebola's credited medical opinions established that claimant had reached MMI in accordance with the Guides, employer's modification petition was based on a valid IRE. Accordingly, it affirmed the WCAB's order.

****

Janice Donahay v. Workers' Compensation Appeal Board (Skills of Central PA, Inc.), No. 869 C.D.

2014, Filed February 4, 2015.

(Suspension – Where claimant's loss of earnings is not attributable to the work injury, but rather to economic conditions, the claimant is not entitled to partial disability benefits)

On February 26, 2011, claimant ruptured her right biceps while working as a team leader and a residential services assistant. In August 2011, claimant returned to her job with restrictions, earning less than her pre-injury average weekly rate. Claimant and employer then executed a Supplemental Agreement modifying claimant's benefits from total to partial disability.

Following a February 6, 2012 IME, employer filed a petition seeking to terminate claimant's workers' compensation benefits. In the alternative, employer sought a suspension of benefits as of March 8, 2012, alleging that even if claimant was not fully recovered, she was capable of doing her pre-injury job which was then open and available to her.

At the hearing, claimant testified that she was permitted to lift up to a maximum of 50 pounds, and did not feel capable of exceeding that. She also testified that she experienced pain in her right biceps when lifting things or if she worked too many hours. Claimant also testified that, despite her hourly wage being higher than when she was injured, she was receiving partial disability benefits because she was not working as many hours as she had worked prior to her injury. Specifically, because her treating physician had limited her to working no more than 45 hours per week, she did not schedule herself for more than 45 hours. Further, claimant testified that she could not work more than 45 hours a week because it would have been too taxing on her right arm. She also testified that employer had limited the amount of overtime available to all employees due to funding cuts.

Based on employer's job descriptions for residential services assistant and team leader, employees were expected to lift or carry an average of 30 pounds, up to a maximum of 50 pounds. Likewise, employees were expected to push or pull 145 pounds, with a maximum of 180 pounds.

Employer's Human Resources Administrator testified that claimant's overtime was limited, but it was her choice to schedule herself for no more than 45 hours. She also testified that her treating physician's weight restrictions did not affect claimant's ability to do her job, and team leaders did more paperwork than direct care. Employer's Residential Director in Centre County testified that claimant's lifting restrictions were irrelevant to her ability to do her job, and claimant had not complained to her that she could not do her job. She also testified that a regular work week was 40 hours with a preference for no more than 16 hours of overtime.

The Workers' Compensation Judge found that claimant had returned to her pre-injury job with reasonable weight lifting restrictions; her residual impairment had not resulted in a loss of earning power; the overtime that she had been working was temporary due to staffing problems; and her current loss of earnings stemmed from her self-imposed limits on overtime and employer's limit on overtime for all of its employees. Thus, the WCJ denied the termination petition and suspended claimant's disability benefits as of March 8, 2012. The WCJ also concluded that a suspension was warranted because claimant's wages combined with partial disability benefits would exceed the current wages of fellow employees in employment similar to that in which claimant was engaged at the time of her injury. Claimant appealed, and the Workers' Compensation Appeal Board affirmed. Claimant then petitioned the Commonwealth Court for review.

On appeal, claimant argued that because she had suffered a loss of wages after returning to work and was under physical restrictions, her disability benefits should not have been suspended. She also argued that the WCAB erred in refusing to address her appeal of the WCJ's alternative grant of a suspension based on the wages of similarly situated co-workers.

In affirming the WCAB, the Commonwealth Court stated that claimant was doing her pre-injury job, and not a "light duty position," and medical restrictions are not relevant if they do not require a modification of pre-injury job duties. Moreover, the Court said that claimant earned a higher hourly wage post-injury, and her work injury did not limit the number of overtime hours that she could work. Thus, the Court stated that her loss of earnings had resulted from the addition of staff and the limitation on overtime for all employees because of funding cuts, and was not due to her work injury. Hence, the Court held that the WCAB had not erred in affirming the suspension of benefits. Finally, the Court concluded that the issue of similarly situated employees was moot because the claimant's loss of earnings was caused by economic circumstances, not the work injury.

****

IA Construction Corporation and Liberty Mutual Insurance Co. v. Workers' Compensation Appeal Board (Rhodes), No. 2151 C.D. 2013, Filed February 19, 2015.

(Impairment Rating Evaluation – A WCJ may not impose greater qualifications on an IRE physician than those set forth in the Act; there must be evidence of record to support a WCJ's

rejection of an IRE physician's opinion.)

On January 9, 2007, a decision granting claimant's claim petition was issued, describing the claimant's injuries as a traumatic brain injury with organic affective changes and persistent cognitive problems, and musculoskeletal or myofascial neck and back injuries. On July 29, 2010, employer filed a modification petition, seeking a modification of benefits as of June 24, 2010 based on an impairment rating evaluation (IRE) performed by M. Bud Lateef, M.D., which resulted in a 34% impairment rating. Claimant filed an answer denying the allegations of the modification petition. In denying employer's modification petition, the Workers' Compensation Judge rejected Dr. Lateef's opinion that claimant had a 34% impairment rating.

First, Dr. Lateef only rated three of claimant's recognized injuries and lumped several of the other injuries into those three categories. Thus, the WCJ concluded that Dr. Lateef did not address all of the diagnoses that should have been considered part of the work injury when calculating claimant's impairment rating.

Second, the WCJ noted that a significant portion of claimant's impairment rating was due to the cognitive impairments that he exhibited due to his traumatic brain injury. Therefore, given that Dr. Lateef was a physical medicine and pain management physician, and his impairment rating primarily was based on a review of records outside of his specialty and a cursory mental status examination, the WCJ determined that it would have been more reasonable to have an IRE completed by someone who was more qualified in the specialty of traumatic brain injury. Thus, she concluded that employer had failed to establish that it was entitled to a change of claimant's benefits from total to partial disability based on the IRE.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed. Specifically, the WCAB concluded that the WCJ did not err in rejecting Dr. Lateef's testimony for the previously stated reasons. Therefore, the WCAB reasoned that employer's arguments on appeal were simply challenges to the weight that the WCJ assigned to the evidence. Thus, because determinations as to evidentiary weight are solely for the WCJ as fact finder, the WCAB refused to disturb the WCJ's decision. Employer then petitioned the Commonwealth Court for review.

On appeal, employer argued that the WCAB erred in affirming the WCJ's decision because she improperly rejected Dr. Lateef's impairment rating because he did not refer the case to another specialist and did not properly rate all of claimant's injuries. Employer contended that an IRE physician is not required to refer the IRE to a specialist, and is required to rate only the injuries that are disabling as of the date of the IRE. Employer also argued that Dr. Lateef performed the IRE in accordance with the AMA Guides pursuant to the Act. Further, employer argued that no provision of the Act permits a WCJ to reject findings of the IRE and, to the contrary, a WCJ has no discretion to reject the impairment rating from an IRE under Section 306(a.2)(1) of the Act.

Employer argued that once a claimant's degree of impairment is determined from the IRE, a claimant only can challenge that rating on appeal by presenting evidence that the rating equals or exceeds 50%, pursuant to Section 306(a.2)(4) of the Act. Moreover, employer noted that: (1) employer had no ability to influence the choice of IRE physician or his findings; (2) claimant did not object to Dr. Lateef as the IRE physician; (3) the WCJ did not suggest a more suitable IRE physician or exercise her power to conduct a further investigation under section 420(a) of the Act; and (4) neither claimant nor the WCJ suggested that the impairment rating would have been different had a specialist been consulted.

The Court stated that Dr. Lateef was not required to refer claimant to a specialist in conducting the IRE. The Court also said that an impairment rating is to be based on the claimant's condition on the date of the IRE physician's evaluation.

In analyzing the WCJ's decision to reject Dr. Lateef's opinion that claimant had a 34% impairment rating, the Court stated that whether a physician is qualified to perform an IRE is governed by the Act, and a WCJ may not impose greater qualifications than those set forth in the Act. Because there was no dispute that Dr. Lateef satisfied the statutory standards to be qualified as an IRE physician, the Court said that the WCJ could not reject his testimony on the basis that brain injuries were not within his specialty, because to do so would impose standards in excess of those set forth in Section 306 (a.2)(1) of the Act.

Further, the Court stated that the WCJ's reasons for rejecting Dr. Lateef's opinion did not have any basis in the record. The Court said that if a WCJ is to reject an IRE and the deposition testimony of the doctor who conducted the IRE as unpersuasive, there must be evidence of record to support the bases for that rejection. The Court stated that here, the WCJ did not cite any provisions of the AMA Guides or other evidence in support of her reasoning that Dr. Lateef miscategorized or improperly grouped claimant's injuries, or that he improperly calculated claimant's impairment rating. The Court also said that claimant did not elicit any evidence that could have supported the WCJ's reason-

ing.

For the foregoing reasons, the Court ruled that the WCJ and the WCAB erred in denying employer's modification petition. Therefore, it reversed the WCAB's order.

****

Pamela Murphy v. Workers' Compensation Appeal Board (Ace Check Cashing Inc.), No. 1604 C.D. 2013, Filed February 20, 2015.

(Psychological Injury—Physical contact resulting in little or no injury, which is incidental to a traumatic event but which does not cause a mental injury, does not transform a mental/mental claim into a physical/mental claim.)

Claimant filed a claim petition alleging that she sustained work-related injuries to her neck, shoulders, thoracic spine, wrists and ankles, as well as post-traumatic stress disorder (PTSD), anxiety and depression when she was physically and psychologically assaulted during an armed robbery of employer's main office on June 19, 2010. Employer denied the allegations of the petition.

The Workers' Compensation Judge found as fact that claimant worked as employer's general manager. On June 10, 2010, claimant and her husband arrived at employer's main office and parked in her normal parking spot next to a dumpster. When claimant's husband opened the car door, a gunman jumped out of the dumpster, bound the claimant's husband's hands and feet and pushed him into the backseat of the car. While pointing the gun at claimant, the gunman and claimant entered employer's premises, turned off the alarm and opened the vault. The gunman then threw claimant on the ground and hog-tied her. After the gunman left, claimant managed to free her hand to reach her cell phone. She called 911. After the police arrived, claimant began experiencing chest pains and was taken to the hospital by ambulance.

Claimant sought treatment from her family physician, Dr. Temple, who treated her for an aggravation of pre-existing lumbar degenerative disc disease. Dr. Temple also referred her to a psychiatrist, Dr. Landes. Dr. Landes opined that claimant suffered from PTSD as a direct result of the armed robbery of employer's office and that, as a result, claimant was totally disabled.

Employer submitted testimony from Dr. Brody, who opined that claimant's physical examination was normal and her test results were consistent with an expected progression of advanced degenerative disc disease. Employer did not dispute that claimant suffered a psychological injury as a result of the robbery. Instead, employer presented testimony relative to employer's security measures and procedures, claimant's training in that regard, and employer's suspicions that claimant was involved in the commission of the robbery.

The WCJ accepted Dr. Landes opinion that the claimant suffered from disabling PTSD; however, the WCJ also credited Dr. Brody's opinions that claimant's ongoing physical difficulties were not the result of the armed robbery. The WCJ found that the robbery was not an abnormal working condition for claimant who was a general manager for a check cashing business. As such, the WCJ concluded that claimant could not be compensated for any mental disability or medical treatment for a physical injury.

On appeal to the Workers' Compensation Appeal Board, claimant argued that the WCJ erred in failing to consider her claim under the physical/mental standard and in finding that the armed robbery was not an abnormal working condition. The WCAB held that claimant's physical injuries, for which she did not need medical treatment according to the credited opinions of Dr. Brody, were insufficient to apply the physical/mental standard.

The claimant sought review by the Commonwealth Court arguing that: (1) her claim should be considered under the physical/mental standard; and (2) even if considered under the mental/mental standard, the armed robbery was not a normal working condition.

The Court analyzed the case law addressing the physical/mental standard. Simply stated, the Court rejected claimant's argument that physical contact alone is sufficient to implicate the physical/mental standard. Here, the credited evidence was that claimant suffered slight bruising that required no medial treatment. This is not the type of physical injury required for the physical/mental standard to apply. Moreover, claimant's PTSD was not the result of the physical injury, but to the entire experience of the armed robbery. As such, the Court held that the physical/mental standard was inapplicable and claimant's mental injury must be determined using the mental/mental standard.

The Court then noted that the WCJ focused on claimant's employment and concluded that the robbery was not an abnormal working condition for a general manager of a check cashing business. The WCJ did not examine the actual events of the June 19, 2010 armed robbery to determine whether they represented "a singular, extraordinary event during claimant's work shift" that caused claimant's PTSD in accordance with the Supreme Court's decision in the case of Payes v. WCAB (PA State Police), 79 A.3d 543 (Pa. 2013)(Payes II). Thus, the case was remanded to the WCJ to determine whether the armed robbery

was an abnormal working condition.

****

Patrick Washington v. Workers' Compensation Appeal Board (National Freight Industries, Inc.), No. 1070 C.D. 2014, Filed March 4, 2015.

(Service – Date of Mailing – Only mail addressed to a party's *correct* address will constitute service as of the date of mailing under the Act.)

From 2007 to February 13, 2011, claimant was employed as a tractor trailer driver. In February 2009, he was injured in a non-work related accident when his car was rear-ended by another car. Claimant missed seven work days as a result, after which he returned to full duty work. Claimant experienced pain in his shoulders, arms and hands after the accident, which worsened over time. On February 13, 2011, he stopped working for employer, contending that he was no longer able to do his job because of the pain.

On October 31, 2011, claimant filed a claim petition seeking total disability benefits beginning February 14, 2011 and payment of medical bills, asserting that he had suffered aggravation of neck, shoulder and hand pain, as well as bilateral carpal tunnel syndrome, as a result of the repetitive motion, lifting and driving required by his work. Because the claim petition listed an incorrect address for employer, employer did not file an answer until December 16, 2011, 43 days after the Bureau of Workers' Compensation had mailed the petition. In its answer, employer denied claimant's allegations.

The Workers' Compensation Judge held an evidentiary hearing on September 20, 2012. At the close of the hearing, the issue arose as to whether employer was barred from disputing the factual allegations of the claim petition because its answer was not filed within 20 days of the mailing of the petition. The WCJ gave the parties 60 days to brief this issue; however, no such brief from either party appeared in the record, and the record did not indicate that any further evidence had been submitted to the WCJ on this issue by either party.

On December 4, 2012, the WCJ issued a decision denying the claim petition. In so doing, the WCJ found the testimony of claimant and his medical expert, Dr. Jaeger, credible with respect to claimant's symptoms and injuries from the accident. However, the WCJ rejected as credible Dr. Jaeger's opinions that claimant's work had contributed to those injuries. The WCJ credited employer's medical expert's opinion that claimant's condition was caused solely by a non-work accident. Thus, the WCJ concluded that claimant had not satisfied his burden of proving that he had suffered a work-related disability.

Before the Workers' Compensation Appeal Board, claimant argued that employer's answer was late and the WCJ erred in failing to rule on and grant his request to bar employer from contesting that his injury was work-related. On May 28, 2014, the WCAB affirmed the WCJ's denial of the claim petition, holding that claimant had failed to show that employer's answer was late because the claim petition was not mailed to employer's correct address. The WCAB also denied claimant's request to remand the case to the WCJ to permit him to submit additional evidence concerning the address to which the Bureau had mailed the claim petition.

Claimant then appealed to the Commonwealth Court, arguing, as he did to the WCAB, that employer's answer was filed late and, thus, the WCJ erred in permitting employer to contest that claimant's injury was work-related. The Court did not agree. The Court stated that claimant did not show that employer's December 16, 2011 answer was untimely. The 20-day period within which an employer is required to file its answer under §416 of the Act begins to run when the Bureau serves the claim petition on the employer. Although the Bureau had mailed the claim petition on November 3, 2011, the address used in the mailing was not employer's correct address.

Under the Act, only a mailing to a party's correct address constitutes service on the date of mailing. The Court stated that, where the claim petition is mailed to an incorrect address, an answer is not untimely simply because it was filed more than 20 days after that mailing, and §416 of the Act does not necessarily bar the employer from denying and fully defending against the allegations of the claim petition. Therefore, the Court concluded that because the WCAB's mailing to an incorrect address did not constitute service as of the date of mailing, and there was no evidence submitted to the WCJ that employer had received the claim petition more than 20 days before December 16, 2011, employer's answer was timely and the WCJ properly adjudicated the claim petition on the merits without deeming any facts admitted by employer.

Claimant next argued that the address error should have been disregarded because a different letter sent to the incorrect address, which belonged to an affiliated corporation of employer, was received by employer. Again, the Court was not persuaded. The mere fact that one piece of mail sent to an erroneous address successfully reaches a party after it knew that its mail was being sent to that address does not support an inference that all mail sent to the erroneous address was actually received by that party. The order of the WCAB was affirmed.

(Continued from page 1)
were accepting lump sum settlements from 2005 through 2006. He found that over 50% of such claimants did not have medical insurance.

The Affordable Care Act, with some minor exceptions, requires and provides affordable, universal medical insurance. Moreover, plans under the Affordable Care Act cannot deny coverage based upon a pre-existing condition, cannot charge a higher premium based upon a pre-existing condition, and cannot refuse to cover treatment for pre-existing conditions. It is believed that providing such coverage will reduce this attempted cost-shifting from the health insurance system to the workers' compensation system.

Costs of Workers' Compensation Insurance Coverage

There is also a concern that the Affordable Care Act will result in an increase in the cost of workers' compensation insurance coverage due to several aspects of the law. These concerns primarily stem from the belief that as insurance coverage is more widely held, the corresponding demand on the healthcare system will result in delayed provision of services. This in turn will result in longer return-to-work timelines.

A further exacerbating factor in Pennsylvania is the lowering of Medicaid reimbursement levels. Pennsylvania, as well as the majority of other states, uses Medicaid rates as the basis for the reimbursement of medical providers servicing workers' compensation claimants. The Affordable Care Act seeks to increase efficiency and thus lower Medicaid reimbursement levels. In turn, this will drive down the reimbursement levels on workers' compensation claims. This has the potential of creating further difficulty for workers' compensation claimants to secure appropriate care.

Additional Areas of Potential Impact

Another potential impact the Affordable Care Act may have is to aid in facilitating lump sum settlements of workers' compensation claims. As previously stated, medical insurance carriers are required to offer all individuals affordable coverage and are unable to exclude coverage for pre-existing conditions, including work injuries. As such, this fact may remove some of a claimant's anxiety about future medical expenses, thus facilitating lump sum settlements.

Moreover, the requirement that all individuals must secure health insurance coverage should remove any issue of delayed care in a situation where a workers' compensation claim is initially denied. In the past, a denied claim or delayed approval may have prevented an employee from being able to secure medical care for an alleged work-related injury. Under an Affordable Care Act plan, a claimant's health insurance must pay for the medical treatment while a determination of the workers' compensation claim is made.

Conclusion

In conclusion, the Affordable Care Act's reforms seek to create a healthier and more universally covered work force. In turn, the logical progression of these reforms is that workers compensation carriers should see the number of claims begin to drop over time and realize a cost savings. Conversely, the effect of the Affordable Care Act may result in additional costs and claims. Given the relative lack of time to examine the true effects since the Act became effective, the true impact of the Affordable Care Act on workers' compensation remains yet to be determined.

Thomson, Rhodes & Cowie, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219

TR&C

ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

Prior issues are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, hwr@trc-law.com.