TR&C

Pennsylvania Workers' Compensation Bulletin

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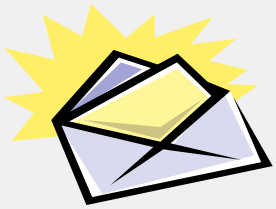

BUREAU MAIL DIRECTORY

The Bureau of Workers' Compensation recently published a listing of which forms are to be sent to which divisions within the Bureau.[1] This information is very practical, useful and bears repeating. The Bureau asks that all mail sent to its offices identify the appropriate division name. This will prevent the misdirection of mail and will enable the Bureau to more efficiently process the documentation received. Please keep the following list as a reference guide:

Claims Management Division
(717) 772-0621
Subpoenas, employment background checks, record requests from parties

Compliance Section
(717) 787-3567

- LIBC-509: Application for Executive Office Exception
- LIBC-513: Executive Officer's Declaration
- LIBC-14A: Application for Religious Exception
- LIBC-14B: Religious Exception-Employee's Affidavit and Waiver
- LIBC-510: Employer's Application to Elect Domestic Employees
- LIBC-661: Employer's Certificate of Insurance

Items relating to employer fraud (employer's failure to carry workers' compensation insurance) and employee fraud (employee's collecting benefits fraudulently)

Health and Safety Division
(717) 772-1917

- LIBC-372: Workplace Safety Committee Certification Application
- LIBC-372R: Renewal of Safety Committee Certification Application
- LIBC-211I: Insurer's Initial Report of Accident & Illness Prevention Services*
- LIBC-210I: Insurer's Annual Report of Accident & Illness Prevention Services
- LIBC-220E: Annual Report of Accident & Illness Prevention Program Status by Individual Self-Insured Employers**
- LIBC-221E: Self-Insured Employers Initial Report of Accident & Illness Prevention Program**
- LIBC-230G: Annual Report of Accident & Illness Prevention Program Status by Group Self-Insurance Funds**
- LIBC-231G: Initial Report of Accident & Illness Prevention Program Status by New Group Self-Insurance Funds**

**Should accompany insurer's li-*

(Continued on page 11)

Inside This Issue...

Commonwealth Court Case Reviews

Jack Chiconella v. Workers' Compensation Appeal Board (Century Steel Erectors, Inc. and Commonwealth of Pennsylvania Subsequent Injury Fund), No. 1739 C.D. 2003, filed March 12, 2004.

(Penalties - Subsequent Injury Fund cannot be penalized under §435 for non-payment of benefits.)

Claimant suffered a work injury in 1968 that resulted in the amputation of his left arm below the elbow. In 1990, he sustained an injury to his right wrist while working for Century Steel Erectors. A Notice of Compensation Payable was issued and claimant received benefits.

Thereafter, employer filed a Modification Petition alleging that claimant lost the use of his right arm for all practical intents and purposes. Claimant also filed a Claim Petition, alleging that he lost the use of his right hand as a result of the 1990 work injury. Employer then filed a Joinder Petition alleging that the Subsequent Injury Fund was liable for the payment of claimant's benefits.

The Workers' Compensation Judge granted the Petitions and ordered that, upon the expiration of employer's liability, the Subsequent Injury Fund was liable for payment of claimant's benefits. The Workers' Compensation Appeal Board modified the WCJ's decision to include a date of specific loss of April 19, 1990 and further ordered payment of benefits by the Subsequent Injury Fund after July 15, 1998.

On August 31, 2001, claimant filed a Penalty Petition alleging that the Subsequent Injury Fund refused to pay his benefits. The WCJ denied the Petition, stating that the Workers' Compensation Act only provides that "employers and insurers" can be penalized and, because the Subsequent Injury Fund is neither, penalties could not be assessed. The WCAB affirmed.

On appeal to the Commonwealth Court, claimant argued that the WCAB's interpretation of the Act was inconsistent with the intent of the General Assembly because the WCAB would afford the claimant no remedy for the Subsequent Injury Fund's failure to pay his benefits.

The Court noted that the Subsequent Injury Fund is a statutorily created governmental entity that performs the function of an insurer, i.e., the payment of benefits to an injured employee, after certain statutorily delineated conditions occur. Although the Subsequent Injury Fund acts as an insurer, it is not an insurer within the meaning of the term "insurer" in the Act. Because only employers and insurers are subject to penalties for violation of the Act, the Court concluded that the Legislature did not intend for the Subsequent Injury Fund to be treated like an insurer in proceedings under the Act. Therefore, the order of the WCAB was affirmed.

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John Almeida v. Workers' Compensation Appeal Board (Herman Goldner Company), No. 997 C.D. 2003, filed March 15, 2004.

(Appeals - A party cannot appeal a finding of fact alone. Only a person "aggrieved" by a decision has standing to appeal.)

After hearings, the Workers' Compensation Judge granted claimant's Reinstatement and Penalty Petitions and denied employer's two Termination Petitions. In spite of the fact that he prevailed on all four petitions, claimant appealed, challenging the WCJ's finding of fact that he did not have a herniated disc.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, noting that the WCJ had complete authority over questions of credibility, conflicting medical evidence and evidentiary weight.

Claimant then sought review by the Commonwealth Court. He asserted that a finding as to whether or not he had a herniated disc was not germane to the issue of whether or not he had fully recovered. In response, employer requested that the Court dismiss the appeal because claimant was not aggrieved by the WCJ's order and thus had no standing to pursue an appeal. The Court agreed.

Under Pennsylvania Rule of Appellate Procedure 501, and in Section 702 of the Administrative Agency Law, only a person "aggrieved" by a decision has standing to appeal the tribunal's order. A party who has prevailed in a proceeding below is not an aggrieved party and, consequently, has no standing to appeal.

Claimant argued further that he was "prejudiced" because he was not put on notice of the issue

decided by the WCJ, i.e., whether claimant had a herniated disc. The Court noted, however, that claimant had notice that two termination petitions were pending and, in fact, he presented medical testimony on the question of whether his disability had ceased. Claimant cannot claim prejudice because it was his own witness who opined that he did suffer the disc herniation. Therefore, he was on notice as to the question of the herniated disc. Finally, claimant prevailed. Hence, there is no prejudice to be claimed by claimant.

The Court noted that there is no case law which stands for the proposition that one can appeal a factual finding without appealing the order resulting from the finding of fact. A factual finding alone may not be appealed. The claimant's appeal was, therefore, dismissed.

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Georgia Rebel v. Workers' Compensation Appeal Board (Emery World Wide Airlines #150), No. 1351 C.D. 2003, filed March 16, 2004.

(Average Weekly Wage - Where claimant is on maternity leave, returns to work and then suffers an injury, the average weekly wage is calculated under §309(d). This is not an equal protection violation.)

Claimant filed a Claim Petition alleging that she suffered a work-related injury on July 12, 2000. After hearings, the Workers' Compensation Judge accepted claimant's evidence and awarded her benefits based upon an average weekly wage (AWW) of $386.91.

Claimant filed an appeal to the Workers' Compensation Appeal Board arguing that the WCJ miscalculated her AWW. She maintained that $386.91 was artificially low inasmuch as she had missed a substantial amount of work due to maternity leave. Claimant also argued that §309(d) violated her right to equal protection of the laws inasmuch as it diminished her right to compensation based solely on her gender. The WCAB disagreed, and affirmed the decision of the WCJ.

Claimant then sought review by the Commonwealth Court. The Court noted the recent cases holding that a claimant's AWW calculation must reasonably reflect the claimant's pre-injury earning experience. The Court further noted that the cases hold that where a claimant is laid-off or off work due to a non-work related disability, the employment relationship is nevertheless maintained and the employee should be considered to be "employed" during those time periods for purposes of calculating the AWW.

Here, claimant was on unpaid maternity leave from April through November of 1999; however, claimant was deemed to be continuously employed during that time period for purposes of calculating her AWW under §309(d). Consequently, the WCJ did not err.

With regard to claimant's equal protection argument, the Court noted that §309 treats all absences from work during a period of continuous employment in a similar manner, regardless of gender. Maternity leave or a pregnancy-related disability is not treated any differently from any other non-work related type of leave or lay-offs, shutdowns, non-work related accidents or other causes that prevent a claimant, male or female, from working an entire 52 week period prior to his or her injury.

Section 309 classifies workers by length of employment in order to determine their AWW. The classification does not involve a suspect class or fundamental right. Because using the claimant's length of employment to determine the AWW is a rational method of achieving a legitimate governmental goal, i.e., to establish an accurate AWW, §309 of the Act does not violate the claimant's right to equal protection under the law of the United States or Pennsylvania Constitutions.

The order of the WCAB was affirmed.

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Renee Snizaski, widow of Randy Snizaski, deceased, v. Workers' Compensation Appeal Board (Rox Coal Company), No. 154 C.D. 2003, filed March 19, 2004.

(Penalties - Penalties are inappropriate when a defendant fails to pay within 30 days under §428 where supersedeas request is pending.)

Claimant filed a fatal claim petition, which was denied by the Workers' Compensation Judge. The Workers' Compensation Appeal Board, however, reversed the denial of benefits and remanded the case to the WCJ for the computation and award of benefits. Employer then filed a timely application for supersedeas with the WCAB in accordance with the regulations in effect at that time.

The regulations provided that the application for supersedeas had to be filed within 20 days of the WCAB's order, and the opposing party then had 10 days to respond. The WCAB was then required to render a decision granting or denying supersedeas

within 20 days following the receipt or due date of claimant's answer. If the WCAB failed to render a decision, the application was deemed denied.

Here, while the request for supersedeas was pending before the WCAB, but after the 30-day time period for payment of an award required by §428 of the Act, claimant threatened to execute against employer's property. Due to that threat, employer paid claimant $147,000 in back due compensation. Thereafter, the WCAB denied employer's request for supersedeas.

Because employer did not pay claimant within 30 days of the WCAB's original order, claimant filed a penalty petition. Employer denied the allegations of the petition, alleging that the payment was not late inasmuch as the petition for supersedeas was pending. The WCJ granted claimant's petition and awarded penalties of $14,771.92 and attorney's fees of $2,810.80.

The WCAB reversed the WCJ's decision, concluding that employer had no obligation to pay while its supersedeas request was still pending before the WCAB.

Claimant petitioned for review by the Commonwealth Court relying upon the Court's decision in the case of Hoover v. Workers' Compensation Appeal Board (ABF Freight Systems), 820 A.2d 843 (Pa.Cmwlth. 2003). In that case, the Court held that a WCJ did not abuse his discretion by awarding penalties for an employer's delay in making payment of an award in excess of 30 days just because a request for supersedeas was pending. Employer argued that Hoover was wrongly decided and should be reversed. The employer was merely following the WCAB's regulations and rightfully anticipated that its obligation to pay was stayed while the petition for supersedeas was being processed by the WCAB. The Court agreed, noting that to hold an employer liable for penalties for not paying compensation while a request for supersedeas is pending is, in effect, to make the employer's right to seek a supersedeas a nullity. Therefore, Hoover was overruled and the decision of the WCAB was affirmed.

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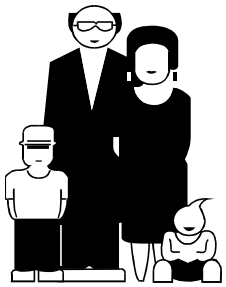
Estate of Rosalie Harris v. Workers' Compensation Appeal Board (Sunoco, Inc. and Esis/Signa), No. 1934 C.D. 2003, filed March 24, 2004.

(Specific Loss Benefits - Decedent's estate is not entitled to specific loss benefits where decedent was receiving total disability benefits at the time of death and died of causes related to compensable injury.)

On September 27, 1999, decedent was involved in a serious motor vehicle accident while in the course of her employment. She remained hospitalized thereafter until her death on November 26, 1999. Ten days prior to her death, her right leg had to be amputated above the knee.

A Notice of Compensation Payable was issued, pursuant to which employer paid all of decedent's medical expenses, her total disability benefits until her death, and the statutory funeral allowance on account of her death.

On January 25, 2002, decedent's estate filed a petition for review, requesting that her injuries be resolved to a specific loss. The Workers' Compensation Judge held that the estate could not meet the prerequisites for an award of specific loss benefits. The Workers' Compensation Appeal Board affirmed.



On appeal, the estate argued that the WCAB erred as a matter of law. It argued that decedent did not leave any dependents; therefore, employer will not pay death benefits. Consequently, the estate argued that it is thus entitled to claim specific loss benefits.

Employer argued that specific loss benefits may be awarded after the death of an injured employee only where the death is unrelated to the work injury and only to a statutory dependent of the decedent, not to an estate.

The Court noted that had decedent survived, she would have been entitled to specific loss benefits for the loss of her leg, as well as total disability benefits for her other, multiple injuries. Where, as here, an employee is fatally injured, §307 of the Act provides that the employee's compensation benefits survive in the form of "fatal claim" benefits, which can be claimed only by a surviving spouse, children, parents, brothers and sisters who were dependents of the decedent. Here, none of the decedent's survivors could show dependency and, thus, were not eligible for fatal claim benefits.

Section 306(g) provides that specific loss benefits can be paid to the same dependent listed in §307 of the Act, but only where the employee dies from some cause other than the injury.

The Court refused to allow a claim for payment of specific loss benefits to an estate, not a dependent, where death is caused by the work-related injury and not by another cause.

The decision of the WCAB affirming the WCJ's denial of the claim was affirmed.

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State Workers' Insurance Fund and Harley Davidson of Erie, Inc. v. Workers' Compensation Appeal Board (Lombardi), No. 1763 C.D. 2003, filed March 29, 2004. **(Average Weekly Wage - Concurrent Employment - The Act requires that a claimant must be in an employer/employee relationship with each employer before wages from each job may be included in the calculation of the AWW under §309(e).)**

Claimant, a part-time funeral escort motorcycle operator with employer, sustained a fractured fibula of his left leg when he lost control of his motorcycle and landed in a ditch. Employer issued a Notice of Compensation Payable accepting liability for a "left leg fracture."

At the time of his injury, claimant was also employed full-time on a commission-only basis as a real estate agent with Coldwell Banker. Therefore, pursuant to §309(e) of the Act, employer calculated claimant's average weekly wage (AWW) by combining his earnings as a real estate agent with wages earned from employer.

Employer subsequently sought to adjust claimant's AWW downward, claiming that he should not have been considered as having concurrent employment for purposes of §309(e) of the Act.

Relying on Hughes v. WCAB (Salem Transportation Company), 513 A.2d 576 (Pa.Cmwlth 1986), the Workers' Compensation Judge denied employer's request, concluding that claimant was concurrently employed at the time of his injury. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued that claimant was an independent contractor with Coldwell Banker, not an employee, and, thus, could not be considered to have been concurrently employed.

The Court noted that, in the Hughes case, it was determined that despite the Commonwealth's inability to regulate the federal government, the federal government still fits the definition of an employer under the Act because it was the master and the claimant was the servant. Accordingly, while the federal government is not subject to the Pennsylvania Workers' Compensation Act, it could nevertheless be deemed a concurrent employer for purposes of computing a claimant's compensation. Hughes does not eliminate the Act's requirement that a claimant must be in an employer/employee relationship with each employer before wages from each job may be included in the calculation of the AWW under §309(e).

The Court also noted that the Act specifically states that a licensed real estate salesperson is not an employee if he or she qualifies as an independent contractor for state or federal tax purposes.

Because the WCJ made no findings of fact as to the nature of claimant's relationship with Coldwell Banker, the case was remanded for further findings of fact. If the WCJ concludes that claimant is an independent contractor for state or federal tax purposes, then claimant's wages from Coldwell Banker must be excluded.

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Thomas Williams v. Workers' Compensation Appeal Board (City of Philadelphia), No. 1850 C.D. 2003, filed April 12, 2004. **(Course and Scope of Employment - Injury sustained in courtesy van provided by employer while in its parking lot is sustained while in the "course and scope of employment.")**

Claimant filed a Petition alleging that, on March 14, 2000, he suffered a work-related post-concussive illness with anxiety when he climbed into employer's van, which was located on employer's premises, and hit his head on the van's ceiling. Claimant was on duty at the time, and had entered the "courtesy" van that employer supplied to take employees from their work facility to public transportation.

The Workers' Compensation Judge denied claimant's Petition, concluding that the injury did not occur in the course of claimant's employment. On appeal, the Workers' Compensation Appeal Board affirmed. Claimant then filed a petition for review with the Commonwealth Court.

The Court noted that whether an injury occurs in the course of employment is a question of law. An employee not engaged in the furtherance of the employer's business must satisfy three conditions in order for an injury to be "in the course of employment:"

1) the injury must have occurred on the employer's premises;

2) the employee's presence thereon was required by the nature of his employment; and,

3) the injury was caused by the condition of the premises or by the operation of the employer's business thereon.

Here, the parking lot adjacent to the workplace is considered to

be the employer's premises. Moreover, an employee's presence in the parking lot immediately before or after he arrives or departs from the workplace is "required by the nature of his employment."

Claimant here argued that the van service met the "condition of the premises" factor. The Court agreed. Although the van service was a voluntary activity conducted by employer for the convenience of its employees, the Court felt constrained by the humanitarian purpose of the Act to consider the van service to be within the scope of employer's "business or affairs." The condition of the premises or operation of the employer's affairs need not be the immediate or direct cause of the injury; it must merely play some role in the causative chain.

The decision of the WCAB was reversed and the case was remanded for a determination of the amount of compensation benefits payable to claimant.

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Stephen Hilyer v. Workers' Compensation Appeal Board (Joseph T. Pastrill, Jr. Logging), No. 1024 C.D. 2003, filed April 21, 2004.

(Impairment Rating Evaluation - Employer is entitled to a second IRE within twelve-month period upon timely request, without showing change in claimant's disability status.)

Claimant suffered an injury to his spinal cord for which he began receiving workers' compensation benefits. On May 14, 2001, claimant underwent an impairment rating evaluation (IRE) by Dr. Matthews, who found the claimant to have an impairment rating of 55 percent. Employer objected, asserting that a non-work related injury had been considered in rendering the determination. Thereafter, employer's insurer requested that claimant submit to a second IRE, which claimant refused. As a result, insurer filed a Review Petition.

The Workers' Compensation Judge concluded that the Act did give insurer the right to request and receive an IRE twice in a twelve-month period. Claimant filed an appeal to the Workers' Compensation Appeal Board, which affirmed the order and decision of the WCJ.

On appeal to the Commonwealth Court, claimant argued that insurer is not entitled to a second IRE without showing that the status of his disability has changed sufficiently to rebut the presumption of continuing disability. The Court disagreed. The Act clearly does not require such a prefatory showing as a condition precedent to a second requested IRE. In fact, the Act specifically grants an insurer the right to a second IRE within a twelve-month period upon timely request thereof without any prefatory showing.

The order of the WCAB was affirmed.

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County of Allegheny (Department of Aviation) v. Workers' Compensation Board of Appeal (Jernstrom), No. 1328 C.D. 2003, filed April 22, 2004.

(Occupational Disease Claim - Burden of Proof - Section 301(d) of the Act requires a claimant to prove nothing more that employment for the stated number of years in an occupation having such a hazard.)

Claimant, a steamfitter, worked continuously for a number of different employers from 1952 to 1994, when he retired. In his employment, he used materials containing asbestos, such as pipe insulation, block insulation, brackets and cement. Often, he worked in confined spaces such as boiler rooms. Even after asbestos was no longer used in these materials, he continued to work with piping covered in asbestos wrapping. Claimant was disabled from asbestosis as of August 7, 1996. The only question was whether employer was responsible for workers' compensation benefits.

The Workers' Compensation Judge examined claimant's work history and found that most of the exposure to asbestos occurred between 1952 and the mid-1970's. Claimant only began working for employer on March 13, 1989 and stayed there until his retirement on March 31, 1994. From 1984 to 1989, the WCJ found claimant's total exposure to asbestos was 6 months. Between 1989 and 1994, the WCJ found 7 1/2 months of exposure to asbestos. This total of 13 1/2 months of exposure fell short of the 24 months required by statute. The Claim Petition was denied.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that the WCJ misapplied §301(d) of the Act, which requires two years of employment in an occupation having an asbestos hazard. Claimant argued that it was not necessary that he show actual, daily physical exposure to asbestos during that two year period.

The WCAB remanded the case to the WCJ, who found that claimant had established that he had been employed for a total of 53 months in an occupation "potentially involving" an as-

bestos hazard. Using the WCAB's interpretation of §301(d), the WCJ then granted benefits to the claimant.

Employer then appealed to the WCAB, which affirmed the decision of the WCJ. On further appeal to the Commonwealth Court, employer argued that the WCAB erred in reducing claimant's burden of proof to one of "potential exposure" instead of "actual exposure" to the occupational hazard. The Court disagreed. Section 301(d) requires nothing more than employment for the stated number of years in an occupation having such a hazard. It is not the claimant's burden to reconstruct each day of the statutory two year period to show the presence of asbestos in the workplace on a daily basis and in a specified degree. Such a construction of §301(d) would be inconsistent with the remedial nature and humanitarian objectives of the Act. The decision of the WCAB was affirmed.

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North Penn Sanitation, Inc. v. Workers' Compensation Appeal Board (Dillard), No. 2115 C.D. 2003, filed May 10, 2004.

(Compromise and Release - WCJ has inherent power to set aside previously approved compromise and release agreement.)

In 1990, employer acknowledged that claimant suffered a work injury in the form of a "fractured skull, body contusions & lacerations."

Nine years later, claimant approached employer's carrier, SWIF, about settling his claim. The parties negotiated an agreement whereby SWIF would pay claimant $50,000 in exchange for a full and final compromise and release of his claims. Claimant was not represented by an attorney during the negotiations.

A petition seeking approval of the proposed agreement was then filed and a hearing was held before a Workers' Compensation Judge. The claimant, who proceeded pro se, testified with regard to his understanding of the agreement. The WCJ found that claimant understood the full legal significance and import of the agreement and approved it by an order dated April 19, 1999.

On April 26, 2001, over two years later, claimant filed a Petition to Review/Set Aside Compromise and Release Agreement. At the hearing, claimant testified that he was blind following the work injury and contacted SWIF to settle his claim only because he needed money. He agreed to settle for $50,000, but employer did not advise him that he had the right to be represented by an attorney. No one advised him that he might be entitled to a separate payment for his loss of vision. He stated that immediately prior to the hearing relative to the Compromise and Release Agreement, he met with SWIF's counsel. He stated that he advised SWIF's counsel that he could not see the document. The attorney told him where to sign and physically held claimant's hand to the document. None of the documents were read to the claimant.

He stated that during the hearing on the Compromise and Release Agreement, he did acknowledge going over the document before the hearing. He stated that he did not mention that he was blind because he thought that was obvious.

The WCJ found that claimant is blind due to the work injury and was blind at the time of the April 19, 1999 hearing. As a result of his blindness, he was unable to read the agreement. No one read it to him and he signed it without knowing what the document said.

The WCJ further found that the WCJ at the hearing relative to the Compromise and Release Agreement was never apprised of the claimant's blindness due to the work injury.

Given these findings, the WCJ concluded that the Compromise and Release Agreement was

EMPLOYER'S CORNER

Q. Does an employer have any obligation to advise its employee of his or her right to FMLA leave after being notified of the employee's serious health condition?

A. Yes. In the case of *Conoshenti v. Public Service Electric & Gas Company*, decided on April 13, 2004, the Third Circuit Court of Appeals found that an employer's failure to advise an employee of his right to twelve weeks of FMLA (Family and Medical Leave Act) leave after he properly gave notice of his serious health condition would constitute actionable interference with the employee's ability to meaningfully exercise his right to FMLA leave, if the employee could show resulting prejudice.

The Court noted that an employer's failure to give the notices required by the regulations promulgated by the United States Department of Labor and the failure to advise of FMLA rights could be said to "deny," "restrain," or "interfere with" the employee's exercise of his or her right to take leave. The employee would then have a cause of action against the employer.

(An "Overview of the Family and Medical Leave Act" as well as other items of interest to employers may be found online at: www.trc-law.com. *Click on "Articles and Publications.")*

based upon a material mistake of fact. The WCJ thus granted claimant's petition to set aside the agreement. Claimant's total disability benefits were reinstated. Employer was entitled to a credit for the compensation paid pursuant to the Compromise and Release Agreement, but employer was ordered to pay 10% interest on all past due compensation, as well as claimant's litigation costs.

Employer filed an appeal with the Workers' Compensation Appeal Board, which affirmed the decision of the WCJ.

On appeal to the Commonwealth Court, employer argued that the WCJ lacked authority to set aside the agreement. The Court disagreed, stating that: 'Even though the General Assembly did not expressly authorize the WCJ to set aside a compromise and release, the power to set aside has, by implication, been conferred upon the WCJ as necessarily incident to the exercise of the adjudicatory power expressly granted. It would be illogical to give a WCJ authority to approve a compromise and release but no authority to rescind his action."

Given the WCJ's inherent power to set aside compromise and release agreements, the Court further held that the WCJ here did not abuse his discretion by setting aside the agreement on the basis of mistake. Claimant presented evidence that he was blind as a result of the work injury and that SWIF was aware of that fact prior to negotiating the settlement. Although his blindness was known to both parties, it was not included in the NCP or in the Compromise and Release Agreement. Hence, a mutual mistake of fact was found to exist at the signing of the Agreement because the eye injury is compensable as a specific loss disability. Additionally, since the WCJ was unaware of the claimant's condition, he could not have ascertained if the claimant fully understood the legal significance of the agreement.

Therefore, it was not error to set aside the Compromise and Release Agreement. The Court noted that the Act is remedial in nature and intended to be liberally construed in favor of the injured employee. The order of the WCAB was, therefore, affirmed.

***(CAUTION TO EMPLOYERS AND CARRIERS!!! - Negotiating a settlement with an unrepresented claimant requires careful consideration. It may be wise to secure counsel for the claimant in such instances so as to be assured of his or her adequate representation. Further, as set forth above, the execution and approval of a Compromise and Release Agreement may not necessarily mean the end of a claim. This is true even though the appeal period has expired! In the above case, the claimant waited over 2 years before filing his petition to set aside the agreement.*)**

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Bell's Repair Service v. Workers' Compensation Appeal Board (Murphy, Jr.), No. 2267 C.D. 2003, filed May 13, 2004.

(Unreasonable Contest - Employer's contest of claim based on fact that injury was unwitnessed and uncorroborated is unreasonable and will result in the imposition of attorneys' fees.)

(Unreasonable Contest - Employer's denial of claim because claimant's medical evidence is based on claimant's uncorroborated statements to medical professionals is unreasonable and attorneys' fees will be assessed.)

(Unreasonable Contest - Employer's challenge to the duration of claimant's disability where employer has no medical evidence to support its position is unreasonable and attorneys' fees will be imposed.)

Claimant worked as a mechanic when, on January 22, 2001, he slipped and fell on some ice, injuring his hip and back. The emergency room physicians diagnosed him as having spasm of the musculature, right hip and lumbar area contusion with radicular symptoms, and a possible herniated disc. Two days later, claimant sought treatment from another physician who prescribed medication, therapy and an electrical muscle stimulator.

On March 16, 2001, claimant filed a Claim Petition, alleging the work injury of January 22, 2001, as well as ongoing disability. Employer denied the allegations of the Petition.

By May of 2001, claimant was under the care of an orthopedic surgeon, Dr. Levy, who diagnosed lumbar strain, significant disc degeneration, and pre-existing degenerative disc disease. In addition, Dr. Levy noted that claimant suffered a lumbar strain in the slip and fall accident of January 22, 2001. By June 25, 2001, Dr. Levy concluded that claimant had fully recovered from the work injury and released him to return to full duty work without restrictions.

On January 10, 2002, claimant met with Dr. Tissenbaum at employer's request. Dr. Tissenbaum agreed with Dr. Levy and concluded that claimant suffered a work-related lumbosacral sprain,

but had fully recovered and could work full duty as of June 25, 2001. Despite Dr. Tissenbaum's opinion, employer maintained its challenge of the claim.

The Workers' Compensation Judge issued an order on August 15, 2002 granting claimant a closed period of disability from January 23, 2001 through June 25, 2001. Further, the WCJ found employer's contest to be unreasonable and ordered employer to pay claimant's attorneys' fees.

Employer filed an appeal with the Workers' Compensation Appeal Board, which affirmed the order of the WCJ. Employer then sought review by the Commonwealth Court.

The Court noted that when a claimant prevails in a litigated case, the WCJ must assess attorneys' fees against the employer unless the employer satisfies its burden of establishing a reasonable basis for the contest.

Employer argued that because the injury was unwitnessed and uncorroborated, it had a reasonable basis to contest the petition. The Court disagreed. In the context of an unwitnessed injury, an employer must have some evidence to support a challenge to the credibility of the claimant. Here, employer offered no evidence to contradict or challenge claimant's allegations that he suffered an injury in the manner, time and place averred. Therefore, employer's argument was found to be without merit.

Employer next argued that its challenge was reasonable inasmuch as the claimant's medical evidence was based upon claimant's uncorroborated recounting of his injury to his physicians, as well as claimant's subjective complaints of pain. Again, the Court disagreed, noting that claimant's medical witnesses also based their diagnoses upon clinical tests and evaluations that corroborated claimant's complaints, such as x-rays, MRI scans and CT scanning.

More importantly, however, the Court noted that employer's own expert, Dr. Tissenbaum, agreed with claimant's medical expert as to both causation and the duration of disability. Hence, employer's contest was clearly unreasonable.

Finally, employer argued that its challenge as to the duration of claimant's disability provided it with a reasonable basis to contest the petition. The Court noted, however, that at the time the Answer was filed, employer was not in possession of any evidence whatsoever to support its challenge. After-acquired medical evidence does not provide a reasonable basis to contest a petition. In this case, employer was in an even worse position because it never had evidence to challenge the duration of claimant's disability. Dr. Tissenbaum concurred with Dr. Levy. Therefore, employer's contest was unreasonable.

The imposition of attorneys' fees by the WCJ, as affirmed by the WCAB, was affirmed by the Court.

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Jerry Burrell v. Workers' Compensation Appeal Board (Philadelphia Gas Works and CompServices, Inc.), No. 1517 C.D. 2003, filed May 18, 2004.

(Modification of Benefits - Earning Power - 1) No need for Form 757 where the modification is based upon claimant actually working a job he found as opposed to an earning power assessment; 2) Employer's burden does not include a showing of no job availability in this situation; 3) Substantial evidence must support decision of Workers' Compensation Judge.)

Claimant was employed as a compressor operator when he sustained two separate groin injuries between December of 1997 and June of 1998. An Agreement for Compensation was executed by the parties.

Thereafter, employer filed various petitions seeking to end or limit claimant's benefits. During the course of the litigation, employer obtained a videotape depicting claimant at work in a shoe shine shop. Claimant later testified that he was working for his mother at her shoe shine shop for 8-10 hours per week and received no pay or gratuities.

Employer presented testimony from a vocational expert who opined that the average hourly wage for a shoe shiner is $9.93 per hour. The Workers' Compensation Judge accepted employer's evidence and ordered modification of claimant's benefits based upon an earning capacity of $9.93 per hour for 8 hours per week.

Both parties filed appeals with the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

Again, both parties sought further review.

Claimant argued the employer failed to comply with the requirements of the Act. First, employer failed to provide him with a Notice of Ability to Return to Work (Form 757). Second, employer failed to prove that it had no position available within his physical limitations under §306(b)(2) of the Act. Finally, claimant argued that there was not substantial evi-

dence to support the WCJ's finding of "earning power."

The Court noted that the purpose of the Notice of Ability to Return to Work form is to share new medical information with a claimant about his or her physical capacity to work, as well as its possible impact upon his or her continued receipt of benefits. Here, claimant determined his own physical capacity by working without new medical information. Formal notice to him under these circumstances that he has the ability to work is not required. Thus, it is not necessary to give notice of ability to return to work to a person found actually performing work.

Second, while the statute does require an employer to offer an available position if one exists, it does not require an employer to prove the non-existence of such a position. Nor does the statute preclude a claimant from proving the existence of such a position as a defense to modification. Therefore, the Court held that where a claimant unilaterally demonstrates residual productive skill, an employer need not address the existence of positions it may have as a part of its case-in-chief.

Third, claimant challenged the vocational expert's testimony based on "flawed calculations" of a shoe shiner's hourly wage. The Court noted, however, that the critical inquiry is whether there is evidence in the record to support the findings of the WCJ. Here, the decision is supported by substantial evidence given the vocational expert's testimony. The accuracy of his calculations goes to the weight of his testimony, a matter exclusively within the province of the WCJ.

Employer sought review of the decision, arguing that it was entitled to a credit for the overpayment of benefits paid from the date claimant began working at the shoe shine shop. The Court noted that, under §443, an employer may recoup overpayments directly from the claimant in order to prevent unjust enrichment. The Court further noted, however, that claimant testified that he worked without pay or gratuities. Hence, because there was no evidence that claimant received any compensation, claimant was not unjustly enriched.

Accordingly, the order of the WCAB was affirmed.

SUPREME COURT CASE REVIEWS

General Electric Company v. Workers' Compensation Appeal Board (Myers), No. 47 WAP 2002, decided May 27, 2004.
(Funded Employment - Subsidized employment is the functional equivalent of temporary light-duty employment.)
(Funded Employment - When the period of subsidization ends, total disability benefits must be reinstated.)

Employer sought to modify claimant's benefits based upon his refusal to accept a position with Smart Telecommunications.

In support of its petition, employer offered testimony establishing that claimant was offered a position as a customer service surveyor for 40 hours per week at the rate of $9.00 per hour. The position was to be fully subsidized by employer's insurance

REMINDER: "MEDICAL ONLY" NCP NOW AVAILABLE!!

Just a reminder: Effective March 29, 2004, the Bureau revised form LIBC-495, the Notice of Compensation Payable (NCP). The last date that the Bureau would accept the old form was June 1, 2003. Consequently, all users must now submit the revised form. The older forms will be returned by the Bureau to the sender unprocessed.

The revised NCP form includes a "medical only" checkbox to be used when reporting a claim for medical compensation only.

Copies of the revised Notice of Compensation Payable (LIBC-495) are available by contacting the Bureau's Claims Information Services Helpline at (800) 482-2383 (toll free within PA) or (717) 772-4447.

A PDF version is also available on the internet for reference purposes only. It should not be printed and used. It may be found at www.state.pa.us, PA Keyword: WORKERS COMP. Then click on "Downloadable Forms."

carrier, with the carrier paying claimant's wages, insurance taxes, equipment and training. The subsidization period was limited in duration to typically 90 days or less. Thereafter, if the claimant's productivity met Smart's standards, Smart may have continued to employ him on its own payroll.

Claimant would be required to contact various businesses by telephone to verify their names and addresses so that Smart's clients could send the businesses information about products. Three doctors approved the position as within claimant's physical capabilities. Claimant declined the position based on his family doctor's advice.

The Workers' Compensation Judge granted employer's modification petition in part and denied it in part. The WCJ determined that claimant could perform the surveyor position and that his refusal of the position was improper. The WCJ also found, however, that the position was only temporarily available to claimant for 90 days. Therefore, the WCJ ordered claimant's benefits to be modified, but only for a period of 90 days. The Workers' Compensation Appeal Board and the Commonwealth Court both affirmed the WCJ's decision.

On appeal to the Supreme Court, employer argued that the WCJ erred in finding the position was only temporary because claimant could have continued to work for Smart if he met the productivity requirements. The Court noted, however, that Smart had a high turnover of employees, that few subsidized employees remained with Smart after the subsidy period ended, and that claimant's wages and hours could be reduced by Smart after the subsidy period ended. Therefore, the WCJ did not err in finding the position available to claimant for only 90 days.

Employer next argued that the WCJ was required to indefinitely modify claimant's benefits because there was no evidence that claimant or employer knew the position was temporary when it was referred to claimant. In response, the Court stated that while a claimant's benefits are generally modified indefinitely after a bad faith refusal, they may be modified only temporarily in circumstances in which the job was clearly temporary at the time it was referred to the claimant. The Court found that the WCJ did not err in finding, based upon the record presented, that the subsidized Smart position was clearly temporary and, as such, did not err in modifying claimant's benefits for the 90 days that the position was available to claimant.

The decision of the Commonwealth Court was thus affirmed.

Justice Saylor filed a concurring opinion, and Justice Newman filed a dissenting opinion in which Justice Eakin joined. The dissenters would have granted employer an indefinite modification of benefits given claimant's failure to pursue the Smart position in good faith.

Upon request, Thomson Rhodes & Cowie is pleased to provide seminars and training sessions on issues relevant to workers' compensation, as well as topics concerning other areas of employment and labor law, for your benefit, as well as that of your co-workers and employees.

If you would be interested in scheduling such an event, please contact: Margaret M. Hock, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, (412) 232-3400, mmh@trc-law.com.

Bureau Mail Directory

(Continued from page 1)

cense to write application to the PA Insurance Department
***Should accompany employer's/fund's application for self-insurance status*

Health Care Services Review Division – Fee Review Section
(717) 772-1900

- LIBC-507: Application for Fee Review
- LIBC-9: Medical Report Form

Medical bills, documentation to support medical bills, explanation of benefits (EOB), copy of hearing request on fee review decision

Health Care Services Review Division – Medical Treatment Review Section
(717) 772-1914

- LIBC-601: Utilization Review Request
- LIBC-603: Petition for Review of Utilization Review Determination
- LIBC-604: Utilization Review Determination Face Sheet

(Continued on page 12)

(Continued from page 11)

- LIBC-621: Peer Review Request
- LIBC-623: Application for Authorization to Act as a Utilization Review Organization and/or Peer Review Organization

Utilization Review Organization/ Peer Review Organization Reauthorization Application
Qualifications of Review

Information Services Section – Helpline Unit
(717) 772-3702
Employer Workers' Compensation Verification Requests: The Bureau provides this information as a courtesy. The source of the information provided is the Pennsylvania Compensation Rating Bureau. The Bureau of Workers' Compensation neither creates nor maintains the files searched and is not responsible for the accuracy of this information.

Medical Fee Review Hearing Office
(717) 783-5421
Requests for fee review hearing; Medical Fee Prehearing Filing forms

Self-Insurance Division
(717) 783-4476

- LIBC-366: Application to Initiate Self-Insurance Status
- LIBC-366A: Addendum to Initiation Application for Self-Insurance Status
- LIBC-366R: Application to Renew Self-Insurance Status
- LIBC-366RA: Addendum to Renewal Application for Self-Insurance Status
- LIBC-415: Report of a Runoff Self-Insurer
- LIBC-369: Application to Operate as a Group Workers' Compensation Fund
- LIBC-368: Application for Membership in a Group Workers' Compensation Fund

In addition, any inquiries on qualifying for or maintaining individual or group self-insurance status should be referred to this division, along with any inquiries on excess insurance, self-insurance security, or the calculation of special fund assessments.

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[1] "News & Notes," PA Bureau of Workers' Compensation, Vol. 9, No. 2, Winter 2003/04. *(Reprinted with permission.)*

ATTENTION READERS, the editors of 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, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.