TR&C

Pennsylvania Workers' Compensation Bulletin

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EDI (Electronic Data Interchange)*

What is EDI?

EDI Release 3 is the computer-to-computer exchange of standard workers' compensation data between companies and the Commonwealth of Pennsylvania. EDI standards were developed by the International Association of Industrial Accident Boards and Commissions (IAIABC), in conjunction with its members from most U.S. jurisdictions, insurers, self-insureds, TPAs and others. The standards continue to be refined and are used by many jurisdictions as an electronic means to obtain information about work injuries and statuses.

Generally used within the workers' compensation insurance community to exchange accident, payment, insurance and medical information, EDI permits the transfer of large volumes of information more efficiently and accurately than in paper form.

Who submits EDI transactions?

Insurers or self-insureds submit required data to the Bureau of Workers' Compensation (bureau) using one of three methods: (1) Trading partners are the insurance clam administrators who use EDI to report claim data to the bureau; (2) Transaction partners are organizations selected by the bureau to accept and forward EDI claim transactions from trading partners to the bureau; and (3) Direct filing is the process of submitting EDI transaction files directly to the bureau without using a transaction partner.

EDI basics

The bureau requires the electronic submission of injury reports as part of its EDI 3 Implementation. A First Report of Injury (FROI) transaction is required to establish a claim in the Workers' Compensation Automation and Integration System, or WCAIS. The EDI data submitted populates the WCAIS claim to establish things such as: claimant's name, date of injury, employer, addresses for each, etc. If any of this information needs to be changed at any point, such as a claimant's name, a new EDI transaction must be submitted.

Forms received by the bureau *prior* to submission of the initial FROI transaction *cannot* be uploaded by the bureau into WCAIS, as there is no claim established in the system to which the form can be attached or filed. In this instance, the forms are returned to the insurer, TPA or self-insurer who submits them, with instructions to submit a FROI. This could be one reason that your client has a document, but there is no record of it, or a claim, in WCAIS.

After the FROI is submitted that establishes the claim, subsequent EDI transactions that update the claim status (Subsequent Reports of Injury – SROI), such as denials, payments, etc., become part of the "Claim."

For all data and information submitted to the department via EDI, if a copy is required by law to be provided to another party, a true and correct copy still must

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COMMONWEALTH COURT CASE REVIEWS

Regis Stepp v. Workers' Compensation Appeal Board (Fairpoint Communications, Inc.), No. 2270 C.D. 2013, Filed September 10, 2014.

(Pension Offset—Where one company acquires another through stock purchase and merges all personnel and benefit operations, the successor company is entitled to pension offset.)

Claimant petitioned for review of an adjudication of the Workers' Compensation Appeal Board that denied his review offset petition. In so doing, the WCAB affirmed the decision of the Workers' Compensation Judge that employer may take an offset against claimant's workers' compensation benefits under Section 204(a) of the Workers' Compensation Act for pension benefits funded by its wholly-owned subsidiary.

Claimant began working for Marianna Scenery Hill Telephone Company on January 4, 1973. On September 1, 2000, FairPoint Communications acquired Marianna. Claimant continued to be an employee of Marianna, but FairPoint managed the human resources department for all employees of its subsidiaries. Also, all employees of FairPoint subsidiaries were covered by the same workers' compensation plan or policy.

On June 13, 2008, claimant sustained a work-related back injury and, after working for a short while on light duty, became totally disabled as of November 12, 2008. On June 28, 2010, he notified FairPoint in writing of his intention to retire on July 1, 2010. He began receiving pension payments in October 2010. On January 4, 2011, FairPoint filed a notice of workers' compensation benefit offset based on the percentage of claimant's pension benefit that was employer-funded. In his petition to review compensation benefit offset, claimant alleged that because Marianna had funded the pension plan and not FairPoint, FairPoint was not entitled to an offset.

The WCJ, in denying claimant's petition to review offset, found that as a result of FairPoint's acquisition of Marianna, FairPoint and Marianna were the same entity for determining whether claimant's compensation benefits were subject to an offset. Claimant then appealed to the WCAB. The WCAB held that FairPoint succeeded to Marianna's right to a pension offset, and affirmed the WCJ's conclusion that FairPoint was entitled to a Section 204(a) offset against claimant's disability benefits. Claimant then petitioned the Commonwealth Court for review.

The Court stated that when a change to the status quo in a workers' compensation case is a reduction due to pension offset, the employer bears the burden of proving the extent to which it funded the pension plan in question.

On appeal, claimant argued that the WCAB erred in granting FairPoint an offset for his pension under Section 204(a) of the Act because Marianna funded the pension plan, and thus FairPoint was not entitled to an offset for a pension plan funded by a different, but still existing, corporation. Section 204(a) of the Act provides that the benefits from a pension plan - to the extent funded by the employer directly liable for the payment of compensation which are received by an employee - shall be credited against the amount of the employee's disability benefits. Here, claimant argued that FairPoint, and not Marianna, was directly liable for payment of his workers' compensation benefits. Thus, only Marianna, and not FairPoint, was entitled to the Section 204(a) offset.

Relying on Section 1929 of the Business Corporation Law of 1988, the Court stated that when corporations merge, the surviving corporation succeeds to both the rights and liabilities of the constituent corporation.

Claimant argued that the merger of FairPoint and Marianna was not a true merger of the type described in Section 1929 of the Business Corporation Law, but rather was effected by a stock purchase to which Section 1929 has no application.

The Court noted, however, that Marianna was a wholly-owned subsidiary of FairPoint. The operations of the two were merged, and FairPoint managed all personnel matters, which included control of the workers' compensation benefits of all employees in all of its subsidiaries. Thus, FairPoint assumed responsibility for claimant's work injury on behalf of Marianna, which remained claimant's employer. Hence, the Court said that Marianna was claimant's employer and entitled to the offset, regardless of how FairPoint and Marianna did the accounting for it.

The Court, while admitting that the merger was not governed by Section 1929, stated that to hold otherwise effectively would erase Marianna's contributions to claimant's pension, and result in a windfall for claimant in violation of Section 204(a) of the Act.

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Rachel Babu v. Workers' Compensation Appeal Board (Temple Continuing Care Center), No. 166 C.D. 2014, Filed September 15, 2014.

(Health Care Services—The services of a massage therapist who is not licensed to provide health services in Pennsylvania are not reimbursable under the Act, even if they are prescribed by a licensed health care provider.)

Claimant petitioned for review of the order of the Workers' Compensation Appeal Board that affirmed the decision and order of the Workers' Compensation Judge, which dismissed claimant's petition seeking reimbursement of bills for Ayurvedic therapy and treatment performed in India in 2008 and 2010. The Commonwealth Court affirmed the WCAB's order.

As a result of an injury sustained on June 8, 2008 while working as a licensed Pennsylvania nurse, claimant filed a claim petition on February

17, 2009. In this petition, she alleged that she sustained injuries to her left shoulder, neck, left upper extremity and right shoulder, and sought weekly indemnity and medical benefits. On March 29, 2012, the parties entered into a Compromise and Release Agreement that resolved, *inter alia*, a penalty petition, a reinstatement petition filed regarding a prior work injury, and a termination petition filed by employer. However, the claim petition remained open solely for the WCJ to determine the compensability of the Ayurvedic medical care.

After hearings, the WCJ dismissed the claim petition. The WCJ found that the practitioners who treated claimant with Ayurvedic were not licensed providers in Pennsylvania, the services provided were not under the supervision of a licensed Pennsylvania health care practitioner, and the medical certificates submitted by claimant for their services neither described the treatment or what body parts to which it was applied, nor included any medical reports required by relevant sections of the Workers' Compensation Act. Claimant appealed the WCJ's decision and order to the WCAB, which affirmed. Claimant then appealed to the Commonwealth Court.

Claimant's first argument to the Court was that employer waived the compensability argument by failing to expressly plead the defense, noting that during litigation it failed to object to claimant's testimony that her licensed physicians recommended and/or specifically prescribed Ayurvedic therapy. In finding that there was no waiver, the Court stated that strictness of pleadings is not required in workers' compensation matters. The Court said that the WCJ found that neither claimant's treating physician nor employer's medical expert ever had recommended Ayurvedic therapy to a patient. The Court also stated that there is no verification that the doctor in India whom claimant testified prescribed the Ayurvedic therapy actually prescribed it. The Court concluded that claimant fully was aware that employer had contested the compensability of Ayurvedic treatment, and acknowledged, under the terms of the Compromise and Release Agreement, that the treatment was under dispute.

Claimant's second argument to the Court was that the parties were bound by the Court's unpublished decision referred to as *Babu 2010*, which established that the services of the Ayurvedic treatment providers, although unlicensed in Pennsylvania, were compensable so long as they were *prescribed by*, or *provided under the supervision of* a licensed practitioner. As such, claimant argued that the issue of the compensability of Ayurvedic treatment in India could not be relitigated. Pursuant to this argument, claimant asked the Court to find her Ayurvedic treatment compensable by accepting her testimony that the treatment in fact was prescribed by a treating physician and/or deeming herself to be the requisite supervising heath care practitioner over her own care in India.

In rejecting claimant's second argument, the Court relied on its holding in *Boleratz v. Workers' Compensation Appeal Board (Airgas, Inc.)*, 932 A.2d 1014 (Pa. Cmwlth. 2007), in which it held that the services of a massage therapist who is unlicensed to provide health services are not reimbursable under the Act, even if they are prescribed by a health care provider. Moreover, although irrelevant based on the *Boleratz* decision, the Court noted that claimant failed to present evidence of supervision by, or prescription or referral from, a licensed health care provider. The Court also rejected claimant's contention that her Ayurvedic treatment was compensable because it was conducted under her own supervision. In so doing, the Court said that there was no evidence that claimant either was trained in massage therapy or exercised supervisory control over the practitioners in India, or in any way guided them during the provision of Ayurvedic treatments.

The Court stated that because claimant had failed to establish either that the Ayurvedic services were provided under the supervision of, or upon referral or prescription from, a licensed Pennsylvania health care practitioner, it did not need to resolve the apparent conflict between the *Boleratz* holding and the unpublished decision in *Babu 2010*.

Finally, claimant argued that §109 of the Act, which limits payment of medical bills to services by Pennsylvania licensed health care providers, is unconstitutional under the equal protection clauses of both the Pennsylvania and United States Constitutions, and the Commerce Clause of the United States Constitution. In rejecting this argument, the Court said that there was no equal protection violation because the Act had not created a classification for the unequal distribution of benefits. Moreover, the Court stated that this argument would fail under the operative rational basis review standard even if a classification had existed. This is because the Act's requirements for Pennsylvania licensing of health care providers promotes legitimate state interests of cost containment and cost certainty, and any classification of injured workers under it is related to promoting these interests. Finally, the Court said that §109 of the Act does not violate the Commerce Clause because both in-state and out-of-state health care providers must be licensed in Pennsylvania, and the burden on interstate commerce is incidental to the benefits afforded.

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Dougherty v. Workers' Compensation Appeal Board (QVC, Inc.), No. 386 C.D. 2014, Filed October 14, 2014.

(Reinstatement – Where claimant returns to time of injury job with restrictions and is subsequently laid off, claimant is entitled to presumption that loss of wages is due to his work injury.)

Claimant petitioned for review of an order of the Workers' Compensation Appeal Board, which affirmed

the decision of a Workers' Compensation Judge dismissing claimant's reinstatement petition under Section 413(a) of the Workers' Compensation Act. In support of his argument, claimant contended that he was entitled to the presumption that his continuing disability caused his loss of earnings after layoff and, applying such presumption, reinstatement was warranted unless employer could establish that he committed bad faith. Because the Commonwealth Court ruled that the WCJ erred in failing to apply the legal presumption of causation, it vacated the Board's order and remanded the case to the WCJ to apply the presumption.

Claimant had been employed as a corporate video producer for nine years when he injured his Achilles tendon in January 2009. He returned to work in June 2009 when his benefits were suspended, at which time he informed his then supervisor of his physical restrictions. When claimant's position was eliminated in April 2010, he was transferred to a writer-producer position without any loss in salary. This position consisted of sedentary desk work. About a year later, employer discharged claimant because of unsatisfactory work performance. Claimant now is seeking reinstatement of wage loss benefits as of the date of his discharge.

Claimant filed a reinstatement petition before a WCJ. The WCJ found that claimant's testimony established that he was capable of performing the writer-producer position. In fact, claimant conceded that his inability to perform this job did not relate to his physical restrictions. Claimant's supervisor also testified that she was unaware of claimant's physical limitations, and he did not possess the necessary skills to perform the writer-producer job. Thus, the WCJ found that claimant's earning power was not affected adversely by his disability. Therefore, she dismissed the reinstatement petition.

Claimant then appealed the WCJ's finding to the Board that his loss of earning power did not relate to his disability. The Board affirmed the WCJ, concluding that claimant was not entitled to the presumption that his loss of earnings was caused by his work injury. Claimant then petitioned the Commonwealth Court for review of the Board's decision, asserting that he returned to his pre-injury job with restrictions, and was not qualified to perform the writer-producer job to which employer had assigned him after eliminating his pre-injury job. He contended that the WCJ erred in not awarding reinstatement when he had been discharged from an alternate job for unsatisfactory work performance.

A claimant seeking reinstatement of suspended benefits must prove that (1) his earning power once again is affected adversely by the work-related injury, and (2) the disability that gave rise to the original claim continues. Once this burden is met, the party opposing reinstatement must show that the claimant's loss in earnings was not caused by the disability arising from the work injury. Under a suspension of benefits, an employer remains responsible for the consequence of a work injury. Thus, a claimant may be entitled to a presumption of causation between the work injury and later loss of income.

The WCJ found that claimant had satisfied the second prong of the two-prong test to establish entitlement to reinstatement, because he had not made a recovery from the work injury since its occurrence. As to the first element, the Court stated that when a claimant does not return to his pre-injury job, and then is laid off from a modified duty job, the law presumes the layoff and attendant loss of earnings is attributable to the continued injury, and the burden shifts to the employer to rebut the presumption. However, where a claimant returns to his pre-injury position, works under a suspension without restrictions, and then is laid off, a claimant affirmatively must establish the work injury caused the loss of earnings.

Claimant contended that the WCJ and the Board erred in failing to apply the presumption and shifting the burden of proof to employer. He argued that because the WCJ found that his injury was continuing and he suffered a loss of earnings through his layoff, the WCJ should have granted reinstatement. Claimant asserted that he did not need to prove a causal relationship between his layoff and his disability from his work injury because he returned to his pre-injury position with restrictions. Employer countered that claimant was not entitled to reinstatement because his layoff was unrelated to his disability, but rather to his unsatisfactory work performance.

The Court noted that the pertinent inquiry in this case is whether claimant had returned to work capable of performing his pre-injury position. To this end, the Court said that his ability to perform the modified duty job had no bearing on his ability to perform his pre-injury job without modification. Because the WCJ found that claimant had returned to his pre-injury job with restrictions and his injury continued, the Court stated that her imposition of the burden of proof on claimant and her conclusion was inconsistent. Therefore, the Court held that claimant was entitled to the presumption of causation, and the WCJ and the Board erred in requiring him to demonstrate a causal connection between his layoff and continued disability.

Because causation was presumed, the burden then shifted to employer to prove that claimant's loss in earnings was not caused by his work injury. Thus, the Court remanded the matter to the WCJ to apply the presumption of causation to the facts based on the existing record. For a layoff, the employer may meet this burden by showing bad faith or misconduct by claimant that was responsible for the discharge. However, for a layoff for unsatisfactory work performance, loss of earnings is presumed to relate to the work injury when a claimant is terminated from a modified or light-duty job. In this case, the WCJ did not find that claimant had committed bad faith or misconduct.

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Holler v. Workers' Compensation Appeal Board (Tri Wire Engineering Solutions, Inc.), No. 2209 C.D. 2013, Filed October 17, 2014.

(Going and Coming Rule—Rule inapplicable to cable technician who is deemed a traveling employee even though he reports to employer's office each day.)

The Commonwealth Court originally issued an opinion disposing of this matter on August 22, 2014. By order dated October 17, 2014, the Court granted respondent-employer's unopposed application for reconsideration for the limited purposes of clarifying that the matter is remanded to the Workers' Compensation Appeal Board with instruction that it be remanded to a Workers' Compensation Judge for further proceedings on claimant's claim petition. For the following reasons, the Court reversed the WCAB's order and remanded the matter for further proceedings.

Claimant petitioned for review of an order of the WCAB that affirmed the decision of a WCJ to deny his petition for benefits. Claimant sought benefits for injuries that he sustained in an automobile accident that occurred while he was driving to employer's facility.

Claimant was employed as a cable technician who installed cable and network services at the homes or businesses of employer's customers. He began each work day by reporting to employer's facility, receiving his assignments, and picking up his equipment. Claimant then would travel to, and work at, various customer locations. As a courtesy, employer allowed him to take his company vehicle home each night, but prohibited him from using it for any other purpose, allowing anyone else to drive it, or have any passengers in it.

On August 13, 2010, claimant was seriously injured in a single-vehicle accident while driving his company vehicle to employer's facility prior to beginning his work day. He was not able to return to work after the accident. On January 18, 2011, claimant filed a claim petition for workers' compensation benefits. Employer objected to it, asserting that the injuries did not occur during the course and scope of claimant's employment. After the parties agreed to bifurcate the issues, the WCJ first had to determine whether claimant was in the course and scope of his employment at the time of the accident.

The WCJ concluded that claimant was not acting in the course and scope of his employment at the time of the accident. Claimant then appealed to the WCAB, which affirmed the WCJ, noting that claimant had failed to satisfy the burden of proving that the accident took place during the course and scope of his employment.

Claimant then petitioned the Commonwealth Court for review. On appeal, he argued that the WCAB and WCJ erred in concluding that he was not injured during the course and scope of his employment, because he had no fixed place of employment, his employment contract included transportation, and he was furthering employer's business when he sustained his injuries.

The Court first noted that under Section 301(c)(1) of the Workers' Compensation Act, injuries sustained while an employee is traveling to and from his place of employment are considered outside the course and scope of employment and are, therefore, not compensable; this is the "going and coming rule." However, such injuries are considered to have occurred during the course and scope of employment if either (1) the claimant's employment contract includes transportation to and from work, (2) the claimant has no fixed place of work, (3) the claimant is on a special mission for employer, or (4) the special circumstances are such that claimant was furthering employer's business.

In the instant case, claimant argued that the second exception to the going and coming rule applied because he was a traveling employee who had no fixed place of work. The determination of whether an employee is a traveling one is done on a case by case basis, and the Act must be liberally construed when making this determination. Therefore, the course of employment is broader for traveling employees, and a traveling employee is exempt from the going and coming rule.

The Court ruled that claimant was exempt from the going and coming rule because he had no fixed place of work and, thus, was a traveling employee. As such, the Court stated that claimant was entitled to a presumption that he was working for employer during the drive from his house to employer's facility. The Court said that to rebut this presumption, employer had to establish that claimant's actions at the time of the injury were so foreign to and removed from the usual employment so as to constitute an abandonment of said employment. The Court stated that employer did not establish this.

The Court therefore concluded that claimant's injury, which occurred while claimant was on his way to employer's facility, was sustained during the course and scope of his employment, and thus was compensable under the Act. The Court therefore reversed the WCAB's order, and remanded the matter for further proceedings.

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Commonwealth of Pennsylvania/ DPW – Loysville Youth Center and Inservco Insurance Services, Inc. v. Workers' Compensation Appeal Board (Slessler), No. 99 C.D. 2014, Filed October 30, 2014.

(Impairment Rating – Modification – Where a claimant seeks to rebut competent IRE evidence, he or she must present evidence of similar character, i.e., evidence of rating evaluations performed by those persons qualified to engage in rating evaluations.)

Employer petitioned for review of an order of the Workers' Compensation Appeal Board, which affirmed a Workers' Compensation Judge's decision denying employer's modification petition. Employer sought to

change claimant's workers' compensation benefit status from total to partial based on the results of an impairment rating evaluation. The Board also reversed the WCJ's determination that claimant also suffered from major depression, panic disorder, and status post C5-6 fusion, arising from his work-related injuries. The Commonwealth Court vacated in part and remanded the matter to the Board.

On September 14, 2003, claimant broke his back and ribs, and injured a disc in his neck for which he subsequently had a fusion, while in the course of his employment. On October 1, 2003, employer issued a notice of compensation payable that identified claimant's work-related injuries as neck and right Achilles tendon strain. In November 2006, the WCJ issued a decision, in which it amended the NCP to include Post Traumatic Stress Disorder and chronic pain.

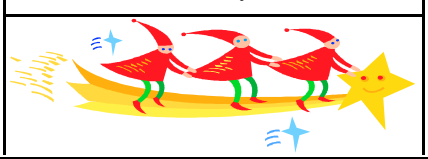
On July 6, 2009, claimant filed medical review and penalty petitions based on employer's failure to pay for an adjustable bed. On August 9, 2009, employer filed its modification petition. On January 10, 2010, claimant filed a utilization review petition, which sought to challenge a UR determination that his treatment with a pain specialist was unreasonable and unnecessary.

The WCJ concluded that employer had failed to satisfy its burden to demonstrate that claimant's impairment was sufficiently low to provide support for its modification petition, which sought a change from total to partial disability. However, the WCJ also concluded that claimant had failed to establish that his impairment rating was between 53% and 58%. The WCJ also unilaterally determined that claimant also suffered from major depression, panic disorder, and status post C5-6 fusion as a result of his work-related injuries. The WCJ also denied claimant's utilization review, penalty and medical review petitions, but none of those aspects of the WCJ's order were considered by the Commonwealth Court on appeal.

Employer then appealed to the Board, contending that it satisfied its burden to prove that claimant's reduced impairment warranted a reduction to partial disability, and challenging the WCJ's conclusion that claimant had the additional work-related conditions. The Board affirmed the WCJ's decision regarding employer's modification petition, but reversed regarding claimant's injuries. Employer then appealed to the Commonwealth Court, in which it raised a sole issue of whether the Board erred in affirming the WCJ's decision regarding claimant's impairment rating.

In its appeal, employer contended that the Board erred in two respects. First, employer asserted that the WCJ erred in concluding that Michael Wolk, M.D. did not provide competent testimony when he testified that, other than his cervical spine condition, which constituted an impairment rating of 8%, claimant's other physical conditions did not warrant an additional impairment rating. Second, employer contended that if Dr. Wolk's opinion was competent, then the WCJ erred in relying on the opinion of David J. Longo, Ph.D. to refute Dr. Wolk's opinion, because Dr. Longo neither was a medical practitioner nor licensed to perform IREs. In sum, employer argued that Dr. Wolk's testimony satisfied its burden of proof and persuasion, and claimant failed to present evidence that supported the WCJ's pertinent factual findings.

Section 306(a.2)(1) of the Workers' Compensation Act provides employers with the right to seek modification of a claimant's benefits from total to partial based on the results of an IRE indicating that a claimant's impairment is less than 50%. This section also gives employers the right to require a claimant who has received total disability benefits for a period of 104 weeks to submit to an IRE. If an employer makes such a demand within 60 days after the 104-week period has elapsed, and the IRE indicates that the impairment is less than 50%, a WCJ may grant a modification based solely on the results of the IRE as a matter of course. If an employer, like in this case, requests that a claimant submit to an IRE after the 60-day window, an employer still may seek modification of benefits from total to partial based on the IRE, but the normal administrative process for obtaining a modification of benefits applies, and the IRE becomes simply an item of evidence like the results of a medical examination. The WCJ must make credibility determinations relating to an employer's IRE and supporting expert medical evidence.



First, the Court held that the WCJ erred as a matter of law in determining that Dr. Wolk's testimony was incompetent because he did not apply the AMA Guides to the facts. The Court stated that any failure of a medical expert to apply pertinent guidelines would affect the *credibility* of the witness rather than his *competency*.

Second, the Court held that the WCJ and the Board erred in concluding that the testimony of a non-medical expert, Dr. Longo, as to the rating of claimant's condition, was competent to rebut the employer's evidence. Thus, the Court stated that because Dr. Longo's testimony was not competent, the WCJ could only consider Dr. Wolk's testimony and claimant's cross-examination of him when considering Dr. Wolk's competency and credibility, .

The Court stated that when a claimant does not produce any competent evidence in opposition to employer's evidence, or fails to provide such evidence through cross-examination, a WCJ must articulate the reasons why he is rejecting the evidence. In the instant case, the WCJ did not believe Dr. Wolk's testimony and IRE report, but did not specify any record evidence on which he may have relied in his decision. Therefore, the Court was unable to engage in effective appellate review. Thus, the Court vacated the Board's order to the extent it af-

firmed the WCJ's order denying employer's modification petition based on claimant's impairment rating, and remanded the case to the Board with instruction that it remand it to the WCJ.

The Court said that on remand, the WCJ should not consider Dr. Longo's testimony, and should issue new findings regarding Dr. Wolk's credibility and competency with sufficient reference to actual and competent *evidentiary* support for his new findings or lack thereof. The Court also stated that the WCJ may not use his own medical opinion of how physicians should properly apply the AMA Guides.

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1912 Hoover House Restaurant v. Workers' Compensation Appeal Board (Soverns), No. 309 C.D. 2014, Filed November 10, 2014.

(Course and Scope—Momentary departure from duties while on smoke break, i.e., petting a dog, does not take claimant out of course and scope of employment.)

Employer petitioned for review of the order of the Workers' Compensation Appeal Board, which affirmed the decision of the Workers' Compensation Judge granting claimant's claim petition. The WCJ's decision was predicated on claimant being injured during the course and scope of his employment. The Commonwealth Court affirmed the Board because it discerned no error.

Claimant was employed part-time by employer as a line cook one evening each week. On March 16, 2010, he sustained facial lacerations as a result of being bitten by a co-worker's dog which he petted while on his smoking break. On April 19, 2010, claimant filed a claim petition alleging that he sustained these facial lacerations in the course of his employment, which employer denied in its answer. The WCJ then held hearings.

During the hearings, the WCJ found that claimant was permitted to take smoke breaks while working; he was in an approved smoking area when he was bitten; employer had provided an ashtray tower for employees' use; claimant was about three feet away from the ashtray tower and smoking when he was bitten; employer had no written or oral rule prohibiting an employee from bringing a dog to the break area; claimant sustained permanent visible scars on the lower right part of his lower lip and on the center part of his chin below his lower lip; claimant missed six days of work and incurred numerous unpaid medical bills.

On December 2, 2010, the WCJ granted the claim petition, concluding that claimant sustained an injury while in the course and scope of his employment that resulted in serious, permanent and unsightly disfigurement. The WCJ awarded claimant 63 weeks of workers' compensation benefits, and based his Average Weekly Wage on concurrent employment, as he primarily was employed in a manufacturer's paint department where he averaged 60-65 hours per week. Employer then appealed to the Board, arguing that the WCJ erred in determining that claimant was in the course and scope of his employment at the time of injury. Employer also argued that the disfigurement award exceeded the typical range for such injuries, and there was not substantial evidence to base the AWW on concurrent employment.

The Board affirmed the WCJ's finding that claimant was in the course and scope of his employment at the time of injury and also affirmed the award of 63 weeks of WC benefits; however, the Board concluded that the evidence did not support the WCJ's findings regarding the AWW. Therefore, the Board remanded the matter to the WCJ for the limited purpose of establishing and recalculating the AWW.

On November 9, 2012, the WCJ again granted claimant's claim petition, which employer appealed to the Board. The sole issue on this appeal was whether claimant was in the course and scope of his employment when he was injured on March 16, 2010. The Board affirmed the remand decision.

Employer then petitioned the Commonwealth Court for review. On appeal, employer argued that: (1) the WCJ's findings of fact were so incomplete and limited that its 2010 decision was not reasoned; (2) the WCJ's findings did not support its conclusion that claimant's actions were merely a temporary departure and furthered employer's business interests; and (3) the WCJ's conclusion that claimant was injured in the course and scope of his employment was contrary to well established case law.

Regarding employer's first argument, the Court stated that the WCJ, as fact finder, has exclusive province over questions of credibility, and a reviewing court cannot reweigh the evidence or review the credibility of witnesses. Thus, the Court said that it was within the province of the WCJ to weigh the evidence in claimant's favor and find that he was on employer's premises when the injury occurred. Moreover, the Court stated that the WCJ considered the events surrounding the incident and the location where the injury occurred.

Regarding employer's second argument, the Court said that claimant did not disengage actively from his work to pet the dog. Rather, the Court stated that it was similar to a short cessation from work duties, especially since he still had a cigarette in his hand when he was bitten. The Court further said that claimant was on a break expressly permitted by employer in an area designated as the break area. Moreover, the Court stated that claimant did not feel the need to inform his co-workers that he would be departing from his normal duties as a line cook. Therefore, the Court ruled that the WCJ did not err in finding that claimant's act of petting the dog was a temporary departure from his work duties. The Court also found that claimant's act of petting the dog was not such an inherently high risk behavior so as to remove him from the course and scope of his employment.

Regarding employer's third argument, the Court said that the cases cited by employer in support of its appeal were not dispositive in the instant case because claimant's actions did not amount to an abandonment of his employment. Rather, the Court stated that claimant's initial smoke break was a temporary departure from his work to administer to his personal comforts and, thus, did not take him out of the course of his employment. Moreover, the Court said that claimant's petting of the dog was an inconsequential departure from his job as a line cook. Therefore, the Court ruled that the WCJ did not commit an error of law by concluding that claimant established that he was in the course and scope of his employment at the time of his injury.

For the foregoing reasons, the Court affirmed the Board's order.

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James Stermel v. Workers' Compensation Appeal Board (City of Philadelphia), No. 2121 C.D. 2013, Filed November 13, 2014.

(Subrogation – Unlike workers' compensation benefits, Heart and Lung benefits paid to an employee injured in a motor vehicle accident are not subject to subject to subrogation.)

Claimant petitioned for review of an adjudication of the Workers' Compensation Appeal Board, which held that employer was entitled to recover a portion of the Heart and Lung benefits that it paid claimant from his third party tort claim settlement. After the Workers' Compensation Judge had granted employer's subrogation request based on a holding by the Commonwealth Court, the Pennsylvania Supreme Court reversed that particular holding. The Board, while acknowledging this development, determined that, because part of the Heart and Lung benefits paid actually were workers' compensation benefits, they could be recovered from a claimant's third party settlement. The Commonwealth Court reversed based on its conclusion that the Board erred.

Where a compensable work injury is caused by a third party, Section 319 of the Workers' Compensation Act gives the employer a right of subrogation against the employee's tort recovery. The Heart and Lung Act, which provides public safety employees who temporarily are unable to perform their duties because of a work injury their full salary, has been construed as giving the employer the right to subrogate. The Motor Vehicle Financial Responsibility Law, which was enacted in 1984, abolished the employer's ability under Section 319 of the Workers' Compensation Act to subrogate its compensation payments against a claimant's motor vehicle tort recovery.

The Commonwealth Court has interpreted Heart and Lung benefits as a type of benefit ineligible for subrogation where the injury arises from a motor vehicle accident. Also, as of 1984, a plaintiff injured in a motor vehicle accident could not include workers' compensation or Heart and Lung benefits as an item of damages in a tort action. However, in 1993, Act 44 amended the Workers' Compensation Act and the Motor Vehicle Financial Responsibility Law to restore the employer's right of subrogation for workers' compensation benefits paid to a claimant whose work injury resulted from an automobile accident. Thus, a plaintiff injured in an automobile accident may include workers' compensation payments as an item of damages in a tort action.

In 2009, the Commonwealth Court also held that Heart and Lung benefits were subject to subrogation. However, in 2011, the Pennsylvania Supreme Court reversed.

Regarding the instant case, on June 7, 2006, claimant, a police officer, injured his back when his police cruiser was rear-ended. As a result, he missed 21 weeks of work. In lieu of workers' compensation benefits, claimant received salary continuation pursuant to the Heart and Lung Act. On October 31, 2006, he returned to work with no wage loss, and his Heart and Lung benefits stopped. Claimant then proceeded with a third party tort claim against the driver who hit him and the tavern that served the other driver alcohol when he was visibly intoxicated. He made a total recovery of $100,000.00 from both defendants.

Employer then asserted a subrogation lien against claimant's third party recovery for $7,244.37 for medical bills and $20,498.96 for lost wages. Claimant argued that (1) Heart and Lung benefits are not subject to subrogation and (2) he, as a government employee, enjoyed immunity from the subrogation claim. The WCJ granted employer's review offset petition. Claimant then appealed, and the Board reversed, concluding that there is no right of subrogation against a motor vehicle tort recovery for benefits paid under the Heart and Lung Act. Following the employer's requested rehearing, the Board granted employer's review offset petition, and concluded that it was entitled to subrogation because two-thirds of the Heart and Lung disability benefits paid by this self-insured employer represented workers' compensation benefits.

On appeal to the Commonwealth Court, claimant raised three issues: (1) employer waived the issue of whether it was entitled to subrogation; (2) the Board erred because it did not follow the Supreme Court's holding that an employer has no right of subrogation for Heart and Lung benefits paid to victims of motor vehicle accidents; and (3) Section 23 of Act 44 gave him immunity from any subrogation claim as a government employee.

Regarding the waiver issue, because it was claimant who appealed to the Board, and employer raised the issue of subrogation at its first opportunity in its petition for rehearing, the Court ruled that employer did not waive the issue of subrogation.

Regarding the issue of subrogation for Heart and Lung benefits, the Court stated that this case involved the Motor Vehicle Financial Respon-

sibility Law, which, per Section 25 (b) of Act 44, prohibits a plaintiff from including as an element of damages payments received as workers' compensation benefits, but not Heart and Lung benefits. Therefore, claimant continued to be precluded from recovering the amount of benefits paid under the Heart and Lung Act from the responsible tortfeasors. Thus, the Court said that there could be no subrogation out of an award that did not include workers' compensation benefits. The Court also stated that because the tort recovery, as a matter of law, could not include a loss of wages covered by Heart and Lung benefits, claimant had not received a double recovery of lost wages or medical bills.

Regarding the issue of immunity, claimant argued that the plain language of Section 23 of Act 44 granted him immunity against employer's subrogation claim. Employer responded by arguing that Section 23 of Act 44 did not confer sovereign immunity on claimant. The Court did not reach this issue because it concluded that employer was not entitled to subrogation under Section 25(b) of Act 44.

For the foregoing reasons, the Court ruled that the Board erred in granting employer's petition to review compensation benefit offset seeking subrogation against claimant's third party recovery arising from a motor vehicle accident.

Therefore, the order of the Board was reversed.

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Jacqueline Fields v. Workers' Compensation Appeal Board (City of Philadelphia), No. 42 C.D. 2014, Filed November 14, 2014.

(Specific Loss – Benefits for multiple specific losses arising out of the same injury must be paid consecutively, not concurrently.)

Claimant petitioned for review of an order from an equally divided Workers' Compensation Appeal Board, which affirmed, by operation of law, the decision of the Workers' Compensation Judge granting her petition to review medical treatment and/or billing, and denying her petition for penalties. The Commonwealth Court considered the issue as to whether benefits for multiple specific losses arising from the same injury should be paid consecutively or concurrently under the Workers' Compensation Act. The Court affirmed the order of the Board, determining that such benefits should be paid consecutively.

In January 2003, claimant sustained work-related injuries to her left shoulder, arm, wrist and hand. In December 2003, she received weekly total disability benefits of $450.59. In August 2006, pursuant to her review petition, a partial tear of the left rotator cuff, a left brachial plexus traction injury, and reflex sympathetic dystrophy of the left upper extremity were added to claimant's work injuries. In February 2008, pursuant to her claim petition, claimant was awarded 410 weeks of benefits for a specific loss of her left arm as of August 2006, and a 20-week healing period. Accordingly, the WCJ ordered that claimant would continue to receive total indemnity benefits while she remained totally disabled, and then would receive the award for the specific loss.

In June 2008, claimant filed a review petition alleging the specific loss of her right lower extremity and/or right foot, which she subsequently amended to include the specific loss of her left leg. In September 2009, the WCJ found that all of claimant's 2003 work injuries had resolved into specific losses of her left arm and both legs. Accordingly, he granted the review petition and awarded her 410 weeks of specific loss benefits for her right leg, 410 weeks of specific loss benefits for her left leg, and a 25-week healing period. He also ruled that claimant's employer, the City of Philadelphia, was entitled to a credit for weekly temporary total disability benefits paid through the date of his decision. Subsequently, the WCJ issued an amended/corrected decision changing the dates on which interest was due for the various awards.

On appeal, the Board determined that the WCJ had erred by awarding interest to commence on a different date for each specific loss, and modified the accrual date to October 8, 2008 for all three awards. The Board stated that it was on that date when claimant had evidence that all of her injuries had resolved into specific losses, and specific loss benefits were payable after total disability benefits had ended.

The Commonwealth Court affirmed in 2012.

In April 2010, claimant filed the petition to review medical treatment and/or billing, which included a request for a personal care attendant, and a penalty petition alleging that the City had violated the Act. In June 2011, the WCJ concluded that claimant had met her burden in support of the review medical petition, and denied the penalty petition. The WCJ concluded that the City was required to pay claimant 1210 weeks of specific loss benefits, plus a 25-week healing period, in weekly, consecutive installments. Both parties then appealed.

The Board affirmed the WCJ via a *per curiam* order, but disagreed with the manner in which the Act required the City to make benefits payments. The Commissioners who voted to affirm agreed with the WCJ that the benefits should be paid consecutively. The remaining Commissioners, who also voted to affirm, would have modified the WCJ's decision to require the City to make payment of the three awards of specific loss benefits concurrently, in the manner initiated by the City following the WCJ's September 2009 decisions.

The issue that the Commonwealth Court had to address was whether benefits for multiple specific losses arising from the same injury should be paid consecutively or concurrently. The Court agreed with the City's position that, although a claimant can choose to receive specific loss benefits rather than total disability benefits, the specific loss benefits must be paid consecutively under Section 306(c)(21) of the Act.

The Court stated that, under Section 306(c)(23) of the Act, the Board has discretion to determine that a claimant with a bilateral loss is entitled to specific loss benefits where those benefits prove to be more advantageous than total disability benefits; however, that discretion never has been construed to mean that benefits for specific losses arising from the same injury must be paid concurrently in order to maximize weekly benefits. Moreover, the Court said that the plain language of Section 306(c)(21) of the Act dictates that the City pay claimant's specific loss benefits consecutively.

Finally, the Court stated that the claimant was attempting a back-door commutation request or, at the very least, a request to accelerate the payment of benefits. However, the Court said that commutation provisions must be construed narrowly in order to carry out the overall purpose of the Act as an income maintenance program. To this effect, the Court stated that the legislature requires claimants who desire accelerated payment to file petitions for commutation, and there is no authority or statutory support for the concurrent payment of benefits for multiple specific losses arising from the same injury.

The Court affirmed the Board because it agreed that, because claimant's disabilities resulted from a single occurrence, her multiple specific losses should be aggregated pursuant to Section 306(c)(21) of the Act and paid consecutively.

(Continued from page 1)

be provided to that party consistent with the Act, regulations and/or any applicable department-issued policy statement or written guidance.

Forms to be filed with BWC

The following forms are required to be submitted to the bureau. Submission of the EDI transactions alone do not satisfy the filing requirements under the PA Workers' Compensation Act:

LIBC-336 Agreement for Compensation for Disability or Permanent Injury
LIBC-337 Supplemental Agreement for Compensation for Disability or Permanent Injury
LIBC-338 Agreement for Compensation for Death
LIBC-339 Supplemental Agreement for Compensation for Death
LIBC-340 Agreement to Stop Weekly Workers' Compensation Payments (Final Receipt)
LIBC-380 Third Party Settlement Agreement

(Continued on page 11)

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Forms to be filed AND sent to the injured worker

In addition to the EDI transaction, the forms listed below must be sent to the injured worker and filed with the bureau. Written notice to the injured worker has not changed due to implementation of EDI Release 3, and is still required.

LIBC-494C Statement of Wages (For Injuries Occurring On or After June 24, 1996)
LIBC-495 Notice of Compensation Payable
LIBC-496 Notice of Workers' Compensation Denial
LIBC-501 Notice of Temporary Compensation Payable
LIBC-502 Notice Stopping Temporary Compensation (WCAIS has a screen that will collect the LIBC-502 information *and create the form that the claim administrator must print and send to the injured worker*.)

Forms no longer needed

The following forms are available for download from the Department of Labor & Industry website. These forms will not be filed with the bureau because an EDI transaction satisfies the bureau reporting requirement. However, a copy of the information submitted via the EDI transaction must be sent to the employee/claimant as required by the PA Workers' Compensation Act.

Form	Description
LIBC-392A	FINAL STATEMENT OF ACCOUNT OF COMPENSATION PAID
LIBC-498	COMMUTATION OF COMPENSATION
LIBC-761	NOTICE OF WORKERS' COMPENSATION BENEFIT OFFSET
LIBC-762	NOTICE OF SUSPENSION FOR FAILURE TO RETURN FORM LIBC-760
LIBC-763	NOTICE OF REINSTATEMENT OF WORKERS' COMPENSATION BENEFITS

Where do I find Bureau Documents that have been uploaded/submitted?

If the document (NCP, TNCP, etc.) was submitted to the Bureau prior to September 9, 2013 (WCAIS go live), or if it is a Miscellaneous document, e.g. any document not currently found in the list on the Action tab such as a scanned check, payment statement, or form no longer required by the Bureau, click on the "Documents and Correspondences" tab from the Claim Summary, and a link to the document should be there.

If the document was uploaded or submitted to the Bureau after September 9, 2013, you can find it by clicking on the "Actions" tab, and then, the link to the document you are looking for. Bureau documents may be viewable in the dispute if the Judge entered them as exhibits in a dispute. You should then be able to view them from the Exhibits tab.

Resources

Recorded EDI webinars covering basic first reports of injury, subsequent reports of injury and Web portal training are available, along with other valuable WCAIS educational resources at www.dli.state.pa.us/wcais.

EDI specific questions can be directed to RA-CMDEDI@pa.gov. Questions regarding WCAIS and petitions, the litigation process or matters in litigation can be directed to RA-LI-WCOA-PetUnit@pa.gov. Questions regarding matters on appeal with the WCAB can be directed to ra-li-wcab@pa.gov.

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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.

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