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Pennsylvania Workers' Compensation Bulletin

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Pennsylvania State Senate

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Senate Co-Sponsorship Memoranda

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Senate of Pennsylvania
Session of 2017 - 2018 Regular Session

MEMORANDUM

Posted: September 11, 2017 09:23 AM
From: Senator Kim L. Ward
To: All Senate members
Subject: Re-enacting the IRE Process in Workers' Compensation

I plan to introduce legislation in the near future to address a recent Pennsylvania Supreme Court decision related to workers' compensation. This decision, known as the *Protz* case, prompted the Pennsylvania Compensation Rating Bureau to file for a mid-year loss cost increase of 6.06%: an unprecedented action that could lead to significant workers compensation premium increases for Pennsylvania employers.

The Court's decision in *Protz v. Workers' Compensation Appeals Board* eliminated Impairment Rating Evaluations (IREs), a feature of Pennsylvania's workers' compensation system since 1996. Under the system, if an injured worker received total disability compensation for a period of two years an insurer could request an IRE to be conducted by a physician. The physician evaluated the patient using guidelines from the American Medical Association (AMA) to determine the level of impairment. If impairment was determined to be less than 50 percent based on the guidelines, the patient was moved to partial disability status and wage-loss benefits were limited to 500 weeks (just under 10 years).

The IRE is a nationally accepted means of adjusting to changes that inevitably occur during the course of an employee's recovery from workplace injury. IREs are used across the country in workers compensation, as are AMA guidelines. IREs have generally served their purpose of bringing structure and fairness to the process of determining circumstances in which claimants can reasonably be expected to transition off wage-loss benefits and when benefits should be paid for the rest of an individual's life. IREs helped stabilize the overall workers' compensation system in Pennsylvania, which had experienced massive cost increases in the late 1980s and early 1990s.

In the *Protz* decision, the Supreme Court did not object to the IRE process but disagreed with the method used to update the version of the AMA guidelines used to determine the level of impairment, finding it an unconstitutional delegation of legislative authority. My legislation will simply re-enact the IRE process with specific reference to the 6th edition of the AMA Guides to the Evaluation of Permanent Impairment.

If you have any questions, please feel free to contact me or Eric Kratz at (717) 787-6063.

Commonwealth Court Case Reviews

CMR Construction of Texas v. Workers' Compensation Appeal Board (Begly), No. 693 C.D. 2016, Filed Jun e 26, 2017.

(Penalties—An employer's financial inability to pay an award does not foreclose the possibility of penalties.)

Claimant began working as a sales representative for employer in May of 2011. His job required him to solicit contracts for employer to perform home repairs. In the course and scope of his employment on January 5, 2012, claimant fell from a roof, sustaining serious injuries.

Claimant filed a claim petition on March 28, 2012. Employer answered, denying the material allegations of the petition and alleging that claimant was an independent contractor, not an employee. Upon notification in April of 2012 that employer lacked workers' compensation insurance coverage, claimant immediately filed a notice of claim against the Uninsured Employers Guaranty Fund (UEGF). Shortly thereafter, claimant filed a claim petition against the UEGF.

The Workers' Compensation Judge found that employer failed to establish an independent contractor relationship with claimant under the applicable Construction Workplace Misclassification Act. The WCJ awarded temporary total disability benefits to the claimant from January 1, 2012 through February 14, 2012, and partial disability benefits from February 15, 2012 and ongoing.

The WCJ also found that, as of the date of the injury, although employer did have a policy covering Texas employees, employer did not have insurance for work injuries occurring in Pennsylvania. Hence, the WCJ concluded that employer was uninsured and, by order dated May 20, 2014, directed that should employer fail or be unable to pay the ordered compensation, such compensation shall be paid by the UEGF.

On August 1, 2014, claimant filed a penalty petition alleging that employer failed to commence payment in accordance with the WCJ's decision and order.

Employer stipulated that it had not made any payments to claimant, but noted that the UEGF began making biweekly payments to claimant as of September 1, 2014. Employer alleged that it could not afford to comply with the order due to significant debt and financial obligations. Employer's financial condition had improved, however, by late 2014 such that it entered into an agreement to make monthly payments of $1,000 to the UEGF, beginning December 1, 2014.

The WCJ granted the claimant's penalty petition, noting employer's purported inability to afford to comply was "not justification for being in violation of the Act." Further, the WCJ found that employer had the obligation to pay the award and the mere fact that the UEGF did not start doing so until September, 2014, does not relieve them of the obligation. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer appealed to the Commonwealth Court, arguing that the WCJ's decision ignores the legislative intent behind the creation of the UEGF and its demonstrated financial inability to comply with the award. The Court disagreed.

Section 428 of the Act essentially provides that an employer violates the Act if it fails to make payments within 30 days of the date on which its obligation to pay arises. Additionally, §430(b) of the Act specifically cautions that "any insurer or employer who terminates, decreases or refuses to make any payment provided for in the WCJ's decision without filing a petition and being granted a supersedeas shall be subject to a penalty as provided in §435…" Only a grant of supersedeas relieves an employer of an obligtion to pay.

Although employer sought supersedeas from the WCAB, the WCAB denied employer's request. Moreover, while employer cited a financial inability to pay the award, it offered no authority to support an argument that a purported inability to pay forecloses the imposition of penalties.

The UEGF was established as a third-party that would be responsible for payment of claims; however, it was created to protect the injured worker and was not created to protect the uninsured employer or otherwise shield an employer from its obligations under the Act, as evidenced by §1605(b) of the Act, which authorizes the Department of Labor & Industry, on behalf of the UEGF, to seek reimbursement of any award paid by the UEGF, as well as penalties, interest and attorney fees, from the responsible employer. Moreover, the fact that the UEGF did not pay claimant prior to the initaition of the penalty petition is of no moment. The obligation to pay was on employer and the fact that the UEGF did not immediately commence such payments did not relieve employer of its obligation.

The order of the WCAB, which affirmed the decision of the WCJ, was affirmed.

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Wilgro Services, Inc. v. Workers' Compensation Appeal Board (Mentusky), No. 1932 C.D. 2016, Filed June 28, 2017.

(Traveling Employee—Course and Scope of Employment—A traveling employee is entitled to a presumption that he or she was futhering the employer's business at the time of injury. To rebut this presumption, employer bears the burden of proving that the claimant's actions were so foreign to be removed from his or her usual employment as to constitute an abandonment thereof.)

Claimant was working for

employer as an HVAC mechanic at a building owned by KVK-Tech, cleaning condenser coils on the air conditioning units, which were located on the roof of the building.

On June 27, 2014, claimant arrived at 7 AM and ascended the roof on a ladder placed by roofers who were also working at the building. Claimant testified that he had accessed the roof by means of this ladder since the job had begun. He stated that he was never told by the roofers not to use the ladder, and because the ladder had always been left there overnight, he used it as well to leave the roof area when his shift ended.

As such, when he finished his job at around 2:15 PM and gathered his tools and supplies, he looked and saw no one else on the roof. The ladder was gone. He tried a roof hatch, but found it locked. He had a cell phone, but did not try to call the building owner because, whenever he tried that number in the past, no one answered. He never considered calling 911 or any emergency number, nor did he call out for help. He waited about 30 minutes to see someone entering or exiting the building, but saw no one. He estimated the roof to be 16-20 feet off the ground and, because the ground was covered with mulch, he thought he could jump without injury. He was wrong. He was taken by ambulance to a local hospital.

Employer denied claimant's claim petition, alleging that, at the time of injury, claimant was beyond the scope of any employment relationship and, hence, is not entitled to any workers' compensation benefits. Employer argued that claimant deliberately and intentionally jumped off the roof to injure himself. Claimant testified that the decision to jump was not smart, but he never thought he would be injured.

The Workers' Compensation Judge made the following dispositive findings of fact: (1) Claimant was a traveling employee furthering employer's business, so that he was in the course of his employment when he jumped from the roof; (2) Claimant did not intentionally and/or deliberately attempt to injure himself when he jumped; (3) Claimant's misguided decision to jump is not a bar from receiving benefits under the Act, a no-fault system; (4) Claimant was not engaged in horseplay when he jumped; (5) Claimant did not usually jump off the roof at the end of a work day; (6) Claimant did not violate any positive work order because there was no proper protocol established by employer if stuck on a roof; and (7) Claimant suffered the work injury while in the course and scope of his employment and his disability is ongoing.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

Employer then sought review by the Commonwealth Court, arguing that claimant's actions in jumping from the roof were wholly foreign to his employment and sufficient to remove him from the course and scope of his employment under the case of *Penn State University v. Workers' Compensation Appeal Board (Smith), 15 A.3d 949 (Pa.Cmwlth. 2011).* Employer argued that the Court should focus on the intentional, premeditated, deliberate, extreme and high-risk nature of claimant's conduct, which would compel a denial of benefits under *Penn State*.

In response, claimant argued that *Penn State* is distinguishable because claimant here was a traveling employee and did not act on a "whim," but rather made a difficult decision which, however misguided or stupid, was in the course and scope of employment and related thereto, consistent with the holding in *Baby's Room v. Workers' Compensation Appeal Board (Stairs), 860 A.2d 200 (Pa.Cmwlth. 2004, appeal denied, 871 A.2d 195 (Pa. 2005).*

In *Penn State,* the claimant was on an unpaid lunch break at his employers' premises and intentionally jumped down a flight of 12 stairs, suffering injuries to his legs and ankles. The claimant was not found to be acting in the course and scope of his employment, despite the fact that employees who remain on an employer's premises for their lunch break and sustain an injury are generally considered to be in the furtherance of the employer's business, unless the activity they are in engaged in was so wholly foreign to their employment. Claimant did not trip or fall, and the facts did not establish that claimant's actions furthered a specific interest of employer.

In *Baby's Room*, the claimant was delivering furniture to a customer and, while walking back to the truck, he jumped up to touch the rim of a basketball hoop when he fell backwards, hitting his head on the concrete pavement and suffering a traumatic brain injury. The Court deemed the claimant's actions as an "inconsequential departure" from work duties which did not take the claimant out of the course and scope of his employment. Claimant was a traveling employee and injuries sustained by traveling employees are given more latitude when considered if compensable.

Here, like the claimant in Baby's room, claimant was a traveling employee. As such, he is entitled to a presumption that he was furthering the employer's business at the time of injury. To rebut this presumption, the employer bears the burden of proving that the claimant's actions were so foreign to and removed from his or her usual employer so as to constitute an abandonment thereof.

The Court stated that, certainly, jumping off a roof was not one of claimant's job duties, but exiting a work site is necessary component of any job and so advanced employer's business and affairs. The grant of benefits was affirmed.

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David C. Harrison v. Workers' Compensation Appeal Board

(Commonwealth of Pennsylvania), No. 658 C.D. 2016, Filed June 28, 2017.

(Pension Offset—Where claimant elects a lower pension benefit so as to provide a survivor benefit for his spouse in the event of his death, employer is still entitled to an offset to the extent the employer funds the pension and survivor annuity, not simply on the net amount received by the claimant.)

Claimant suffered a work injury in June of 2010, which was accepted pursuant to a notice of compensation payable. In February 2012, employer issued a notice of workers' compensation benefit offset advising claimant that, based on information received from the PA State Employees' Retirement System (SSERS), employer was entitled to a pro-rate pension offset for benefits claimant received in the amount of $1,885.03 per month.

Section 204(a) of the Act provides in part: "the benefits from a pension plan *to the extent funded by the employer* directly liable for the payment of *which are received by an employee* shall also be credited against the amount of the award made under the Act."

Claimant filed a petition for review, challenging the offset. Claimant argued that the offset should be calculated based on the amount of pension benefits he actually receives, not the maximum monthly amount of benefits he could have received had he not opted for a lower monthly rate, thereby providing for a survivor benefit for his spouse in the event of his death.

The Workers' Compensation Judge upheld the offset as calculated by the employer and the Workers' Compensation Appeal Board affirmed. Claimant then sought review by the Commonwealth Court.

The Court noted that the WCJ found the testimony presented by the employer to be credible and convincing.

First, the Claims Representative testified that the notice of offset indicated that, based upon information provided to her by SERS, the employer-funded amount of claimant's monthly pension benefit to be $1,885.03. That amount divided by 4.34 yields a weekly offset of $434.34.

Next, SERS's Director of Benefit Administration testified that claimant had various pension options he could select. Some options provide a greater monthly payout than others; however, options with a lower monthly payout offer other benefits such as payments to a spouse should the retiree predecease the spouse. When calculating the pension offset, SERS does not take into account which payment option the participant chooses. SERS always calculates the offset based on the participant's maximum single life annuity (MSLA), which is the maximum amount an injured employee could elect to receive each month. Here, claimant's MSLA was $3,742.51 per month. Because he elected a different payment option, his gross monthly amount was $3,434.16. After deductions, claimant received a net monthly payment of $3,053.01.

Finally, employer presented testimony from SERS' actuary. He explained that in determining the extent to which the employer funds an employee's pension, it is necessary to determine how much will be needed to fund the employee's pension for the rest of his life. Here, claimant elected the "joint and 100% survivor annuity benefit." Although claimant will receive a somewhat lower benefit each month, benefits will be payable to his wife until her death if he predeceases her. As such, although claimant is not receiving a benefit equivalent to his MSLA, the reduction in the MSLA will fund the survivor benefit for his spouse. Thus, the claimant's pension benefits under this option remains the actuarial equivalent to his MSLA.

Claimant presented no testimony to challenge employer's actuarial calculations. Instead, claimant relied upon the case of *City of Philadelphia Gas Works v. Workers' Compensation Appeal Board (Amodei), 964 A.2d 963 (Pa.Cmwlth 2009),* where the Court held that a pension offset should be based on the **net** amount that the claimant actually receives. Claimant did not dispute the credible testimony of employer's witnesses but asserted that SERS' actuary erred in basing the offset on the **gross** MSLA of $3,742.51. The Court disagreed.

As noted, §204(a) focuses on the extent to which benefits are funded by the employer. Although claimant will receive a somewhat lower benefit per month, the reduction takes into account the fact that this amount will be payable to his wife until her death if he predeceases her. Therefore, in exchange for a reduction in payments to himself, claimant added his wife as a joint annuitant with a right of survivorship. Employer will be required to fund both his and his wife's annuity benefits in an amount equivalent to claimant's MSLA.

The Court could discern no error in the WCJ's decision.

Claimant also argued that the offset must be calculated based on his net MSLA after taxes rather that the gross MSLA of $3,742.51 month. Again, the Court disagreed. The Regulations provide that an employer may calculate the offset based on the gross amount of the benefit received by the employee, subject to a correction once the employee notifies the insurer he has paid the required tax.

The order of the WCAB upholding the WCJ's denial of claimant's review offset petition was affirmed.

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Anthony Kalmanowicz v. Workers' Compensation Appeal Board (Eastern Industries, Inc.), No. 1790 C.D. 2016, Filed July 7, 2017.

(Subrogation—An employer does not waive its right to subrogation

under §319 of the Act by contesting a claim.)

On June 1, 2009, during the course of his employment as a truck driver for employer, claimant was injured in a motor vehicle accident. Claimant filed a claim petition on April 26, 2010. On April 27, 2011, claimant entered into a settlement agreement with a third-party involved in the motor vehicle accident in the amount of $15,000.00, with a net recovery (after attorneys' fees and costs) of $9,498.25. On October 11, 2011, the Workers' Compensation Judge granted claimant's claim petition, awarding benefits for injuries, including PTSD, sustained during the June 1, 2009 accident. The October 11, 2011 decision also required employer to pay claimant's reasonable and necessary medical expenses.

On June 13, 2012, employer filed a petition to modify or suspend claimant's benefits, alleging that claimant had failed to reimburse employer a subrogation lien as required by §319 of the Act. By opinion circulated on June 10, 2013, the WCJ concluded that employer had not sought subrogation or accepted claimant's work injuries at the time of claimant's settlement of the third-party claim. Thus, the WCJ held that there were no funds available to employer for subrogation and denied employer's petition.

The Workers' Compensation Appeal Board reversed, concluding that §319 of the Act granted employer an absolute right to subrogation, which could only be abrogated by consent. There was no indication that employer sought to relinquish or waive its right to subrogation and, to the contrary, it clearly argued for subrogation. Accordingly, the WCAB remanded the case to the WCJ to make findings on employer's entitlement to subrogation. The WCJ disposed of the matter by adopting and incorporating a stipulation of facts agreed to by the parties, which provided in relevant part that the subrogation amount sought by employer equals $9,498.25 and that employer is entitled to take a credit of $65.00 per week until the subrogation lien is paid in full. The claimant again appealed to the WCAB, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant abandoned his argument made before the WCAB. There, claimant took the position that because the third-party settlement funds were distributed prior to employer accepting claimant's work-related injury, there was no fund against which the employer could seek subrogation. Now before the Commonwealth Court, claimant argued that employer effectively waived its right to subrogation by contesting the claim petition.

The Court disagreed, stating: "There are very narrow circumstances in which a court may find that an employer waived its right to subrogation under the Act. An employer may agree via contract to waive its right to subrogation of accrued liens as well as future third -party settlements. Such a contract, however, must expressly waive the right to subrogation….Absent bad faith or "dereliction of duty," we have never concluded that an employer has waived its right to subrogation under the Act without an express agreement to waive that right."

The order of the WCAB, affirming the order of the WCJ upon remand, was affirmed.

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Carlos Urena Morocho v. Workers' Compensation Appeal Board (Home Equity Renovations, Inc.), No. 1393 C.D. 2016, Filed August 3, 2017.

(Specific Loss—While case law does not specify what evidence is required to prove a permanent loss of use for all practical intents and purposes, it is clear that a claimant must present supporting medical evidence.)

On August 28, 2012, claimant sustained an injury to his right hand, including injuries to his thumb, and index and middle fingers, while using a table saw in the course and scope of his employment. On May 16, 2013, claimant filed claim petitions against employer and the Uninsured Employers Guaranty Fund (UEGF), seeking workers' compensation benefits for, among other things, a specific loss of use of his right index finger.

At a hearing before the Workers' Compensation Judge, claimant testified that he has difficulty doing almost anything with his right hand. His index finger appears to be bent toward the middle finger. Claimant submitted records of surgery performed by Dr. Chen, including a right index finger irrigation debridement of open fracture, open reduction, internal fixation index finger, and a distal interphalangeal fusion of the index finger. Claimant also submitted a report from Dr. Chen, who opined that claimant "has effectively lost function of the index finger at this time for all intents and purposes." Dr. Chen did not address the permanence of claimant's loss.

Nevertheless, finding the claimant and Dr. Chen to be credible, the WCJ found that claimant sustained the permanent loss of use of his right index finger for all intents and purposes, and awarded claimant specific loss benefits, consisting of 50 weeks of compensation plus 6 weeks for the healing period.

Employer and the UEGF appealed, arguing that the WCJ erred in finding the claimant loss to be permanent. The Workers' Compensation Appeal board agreed that the evidence of record does not support a conclusion that claimant's loss of function in his index is permanent and, thus, claimant was not able to meet his burden of proof. The award of benefits was reversed.

Claimant then sought review by the Commonwealth Court, arguing that Dr. Chen's report constitutes substantial evidence to support a finding of permanency of the loss of use of his right index finger.

The Court noted that, although

the term "specific loss" does not appear in the Act, it is used to describe the compensation payments to be made where a claimant has suffered a permanent injury. When a claimant seeks specific loss benefits for an injury, he has the burden of proving that he has permanently lost the use of his injured body part for all practical intents and purposes. Competent medical evidence of permanent loss of use for all practical intents and purposes must by presented before further support in the form of a claimant's testimony can be considered.

Here, Dr. Chen's records and report describe claimant's diagnoses, but do not detail whether these are expected to be permanent. The evidence does not explain the factual significance of these diagnoses as they relate to the permanency of claimant's condition. Moreover, Dr. Chen's statement that "claimant has effectively lost function of the index finger at this time for all intents and purposes," is not factual medical evidence regarding permanency, but rather is simply a legal conclusion.

Because claimant failed to meet his burden of roof, the order of the WCAB was affirmed.

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House of Representatives
Session of 2017 - 2018 Regular Session
MEMORANDUM

Posted: August 17, 2017 04:01 PM
From: Representative Rob W. Kauffman and Rep. Garth D. Everett
To: All House members
Subject: Protz Workers Compensation Legislative Fix

A recent PA Supreme Court ruling invalidated a provision of PA's 1996 Workers' Compensation reforms that allows employers to request an Impairment Rating Evaluation (IRE) after an injured worker has been out of the workplace for 104 weeks. The IRE process helps to lower workers' compensation costs by providing certainty for insurers and employers, as well as injured workers, and it incentivized injured workers to attempt to return to work. The Court did not find any constitutional problems with the IRE process itself, but disagreed with the method the Act provided for updates to the standards for evaluating a worker's degree of impairment.

We plan to introduce legislation to address the PA Supreme Court's and prevent the significant increases in workers' compensation insurance premiums that employers will experience as the result of this decision.

These Workers' Compensation reforms have been in place for more than 20 years and have worked as intended. According to the PA Compensation Ratings Bureau (PCRB), the 1996 reforms, along with other reforms enacted in the 1990's, contributed to a 62.3% reduction in loss costs (a major component in the calculation of insurance premiums). The Supreme Court's ruling will put workers' compensation premiums on track to reverse course and increase dramatically. As the result of this decision, the PCRB took the very unusual step of filing for an increase of loss costs of 6.06% in the middle of the current policy year.

Our legislation is narrowly focused and will simply repeal the subsection invalidated by the court, and reenact the language, clarifying the guidelines to be used for IREs. We are not proposing any substantive policy changes to the IRE process or the Act – this bill is merely intended to address the issue identified in the Court's ruling.

Please join us and cosponsor this important legislation which will save employers from significant increases in workers' compensation premiums. If you need further information on this issue, please feel free to contact one of us or John Scarpato, Executive Director for the House Labor and Industry Committee.

Introduced as HB1840

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October 10, 2017

Labor & Industry Committee
c/o Hon. Rob W. Kauffman, Chair
166 S. Main Street
Chambersburg, PA 17201

Dear Committee Members:

We are writing to voice our support for House Bill 1840. As a law firm representing many of the Commonwealth's largest employers, as well as several of the Nation's leading workers compensation carriers, we are affected daily by the Supreme Court's decision *in Protz v. WCAB (Derry Area School District),* Nos. 6 WAP 2016, 7 WAP 2017, which struck down the Impairment Rating Evaluation (IRE) provisions of the Workers' Compensation Act as an unconstitutional delegation of legislative authority.

The IRE provisions are a cornerstone of Act 57, and were intended to reduce premiums and assist Pennsylvania employers. Even with these provisions in effect, Pennsylvania was ranked 26th in the Nation for high workers' compensation premiums according to a recent study.

The *Protz* decision has thrown Pennsylvania's workers' compensation industry into turmoil. Employers and insurers continue to pay workers' compensation benefits to employees whose benefits otherwise would have been capped at 500 weeks. Additionally, our clients are spending time and money litigating cases addressing whether the *Protz* decision nullifies prior agreements and decisions, which were based on IREs.

We believe that restoring the IRE provisions will again reduce workers' compensation premiums and help Pennsylvania provide a competitive market for employers. We ask that this be expeditiously addressed in an effort to avoid an impending rate increase, recently requested by the Ratings Bureau and necessitated by the Supreme Court's decision.

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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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