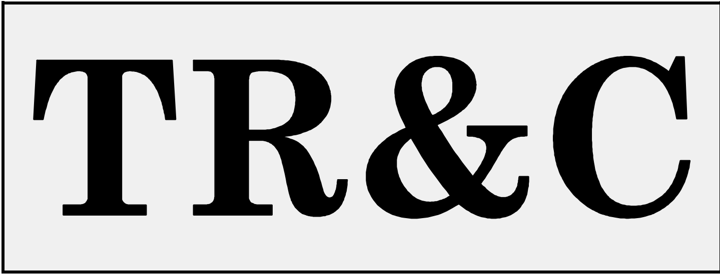

Pennsylvania Workers' Compensation Bulletin

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SUPERSEDEAS FUND

When is Relief Available?

This issue has been addressed by the Commonwealth Court in a number of recent decisions.[1] In order to receive reimbursement under §443(a) of the Act from the Supersedeas Fund, the insurer must show that:

1) Supersedeas has been requested;
2) Supersedeas has been denied;
3) the request must have been made under §413 or §430 of the Act;
4) payment of compensation is made as a result of the denial of Supersedeas; and,
5) upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable.

Only after meeting these five requirements may the insurer, which made the payments of compensation, be reimbursed.[2]

A question arises relative to the fifth requirement in cases that are resolved by stipulation. Is a judge's decision based upon a stipulation of the parties a "determination" that compensation was not, in fact, payable? Maybe.

The Court in Gallagher[3] first summarized the holdings in such cases, stating:

> "A WCJ's decision that is based entirely upon a stipulation or upon an agreement of the parties and which is not supported by evidence in the record does not constitute a final outcome in an adversarial proceeding that can support reimbursement from the Supersedeas Fund….In this event, the Bureau[4] may attack such a decision on grounds that it is not supported by evidence in the record."

One of the purposes of the Legislature in passing Act 57, however, was to minimize needless litigation. The settlement of disputes by stipulation is strongly favored. Where, however, is the incentive for an insurer to resolve a claim after supersedeas has been denied if the resolution will deprive the insurer of any hope of Supersedeas Fund reimbursement?

This issue was addressed by the Court in Optimax.[5] There, although the claim was resolved by stipulation, the Court remanded the case to the WCJ for a determination as to whether the record in the underlying termination proceeding contained any evidence to support the determination to terminate the claimant's benefits "independent of the Stipulation of Facts submitted by the parties. If the record contains such evidence, the application of Optimax, Inc. for reimbursement from the Supersedeas Fund shall be granted."

The Court examined a similar issue more recently in the case of Coyne Textile.[6] In that case, the parties entered into a Compromise and Release Agreement during the litigation of a Termination Petition, after supersedeas had been requested and denied. The Agreement specified that it related only to the claimant's right to receive *future* benefits. The Agreement specifically stated that the parties were reserving the right to an adjudication as to the claimant's right to past benefits so that the employer could ultimately seek reimbursement from the Supersedeas Fund. Although the Bureau argued that reimbursement under such circumstances was inappropriate, the Court disagreed. Given the fact that the Compromise and Release Agreement related solely to the claimant's right to future benefits,

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Commonwealth Court Case Reviews

Wal-Mart Stores, Inc. v. Workers' Compensation Appeal Board (Rider), No. 1146 C.D. 2003, filed December 9, 2003.

(Impairment Rating Evaluation - "Receipt" of benefits is key to calculation of 60 period within which to request IRE.)

In November of 1998, claimant filed a Claim Petition alleging that he was disabled due to a work injury as of October 21, 1998. Employer denied the allegations of the petition. On December 16, 1999, over a year after the Claim Petition was filed, the Workers' Compensation Judge issued an order granting claimant benefits from October 21, 1998 and continuing indefinitely. Employer appealed to the Workers' Compensation Appeal Board, which vacated the WCJ's decision and remanded the case for further findings of fact. On remand, the WCJ again concluded that claimant was entitled to benefits from October 21, 1998 and into the future. The order was circulated on November 21, 2001.

Employer did not file an appeal from the WCJ's decision on remand; however, less than one month after the decision was issued, employer did file a request for an impairment rating evaluation. The request was filed on December 10, 2001, and the IRE was conducted on January 8, 2002. The IRE physician found claimant's percentage of impairment to be 26%. Employer then sent claimant a notice advising him of a change in his disability status from total to partial.

Claimant then filed a petition to reinstate his total disability status, alleging that employer violated the Act by failing to request the IRE within 60 days of the expiration of 104 weeks. The WCJ calculated the 104 week period beginning October 21, 1998. Hence, the WCJ concluded that the 104 weeks expired on October 21, 2000, and that employer then had 60 days, or until December 20, 2000, to file the IRE request. Because the request was not filed until December 10, 2001, the WCJ granted the Reinstatement Petition. The WCAB affirmed.

Employer then sought review by the Commonwealth Court. The Court held that the IRE provisions of the Act plainly state that the 60-day period for requesting an IRE does not begin to run until the claimant "has received" total disability benefits for a period of 104 weeks. Here, pursuant to the WCJ's order of November 21, 2001, employer paid claimant total disability benefits retroactive to October 21, 1998, a period of 160 weeks. The earliest possible date that claimant could have "received" his benefits was thus November 22, 2001. Twenty days later, on December 10, 2001, employer filed its request for an IRE. Therefore, the request was timely.

The order of the WCAB was reversed.

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Leeann Krouse v. Workers' Compensation Appeal Board (Barrier Enterprises, Inc.), No. 809 C.D. 2003, filed December 9, 2003.

(Utilization Review - An employer may file a UR Request before a claim petition is filed and the UR is not moot once the claim petition is filed.)

(Utilization Review - Collateral Estoppel/Res Judicata - An unappealed UR Determination estops later review of reasonableness of bills in claim proceeding.)

Claimant sustained a work injury in the form of bilateral carpal tunnel syndrome in May of 1997. Thereafter, employer filed a UR request seeking review of chiropractic treatment received by the claimant from September 12, 1997 forward. This UR Request predated claimant's filing of a claim petition. The URO determined that the treatment was not reasonable and necessary. Claimant did not appeal this decision.

On November 3,1997, claimant filed her claim petition and the Workers' Compensation Judge granted her benefits pursuant to a decision circulated on April 7, 1999. Two years later, on April 27, 2001, claimant filed a Review Petition alleging that employer was not paying her medical expenses from September 12, 1997 forward. The WCJ treated the petition as a UR petition, granted claimant's request, and ordered that the medical bills be paid. Employer appealed.

The Workers' Compensation Appeal Board reversed the WCJ, stating that the principles of res judicata and collateral estoppel prevented claimant from seeking payment of the same medical treatment that was found to be unreasonable and unnecessary in the UR Determination from which claimant had not appealed.

Claimant then sought review by the Commonwealth Court, arguing that the WCAB erred in permitting employer to file its UR petition prior to the date her claim petition was filed. She also contended that the principles of res judicata and collateral estoppel do not apply to her case.

The Court noted that the Regulations provide that a UR Request may be filed in a "medical only" claim. Claimant argued that when she filed her claim petition, her case could no longer be classified as "medical only" and, therefore, any decision arising from the UR process was "rendered moot." The Court disagreed for two reasons.

First, a WCJ does not have original jurisdiction over issues of reasonableness and necessity. When a

claim petition is filed, there is nothing in the Act which even remotely suggests that the URO is then divested of jurisdiction.

Second, the purpose of the Regulations is to encourage payment of medical bills in cases that are treated, at least initially, as medical only. The UR process provides insurers with a method to limit payment where they believe treatment becomes unreasonable and unnecessary.

The Court noted that, under the doctrine of res judicata, four conditions must be met:
(1) Identity of the thing sued upon or for;
(2) Identity of the cause of action;
(3) Identity of persons and parties to the action;
(4) Identity of the quality or capacity of the parties suing or sued.
Here, claimant was suing for the same relief in both actions: the costs of her medical treatment from September 12, 1997 and ongoing. The issue was the same: whether employer was required to pay for that treatment. Therefore, the Court held the res judicata does bar the claimant's Review Petition.

In addition, the Court noted that the Review Petition is precluded under the doctrine of collateral estoppel. Under that doctrine, the judgment in a proceeding acts to estop a second proceeding only as to those matters at issue that (1) are identical; (2) were actually litigated; (3) were essential to the judgment; and (4) were material to the adjudication. Again, the doctrine applied to the proceedings in this case and bars the claimant's attempt to relitigate the same issues in the Review Petition.

The decision of the WCAB was affirmed.

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State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Shaughnessy), No. 1498 C.D. 2003, filed December 10, 2003.
(Supersedeas Fund Reimbursement - Reimbursement from the Supersedeas Fund is not available to insurer that makes payment when another is liable.)

Claimant filed a Fatal Claim Petition against Clearview Land Development Company and the State Workers' Insurance Fund (SWIF). SWIF defended the petition on the basis that it was not the employer's carrier at the time of the decedent's death.

The Workers' Compensation Judge granted the petition and ordered employer, through SWIF, to pay benefits to claimant. SWIF appealed and the Workers' Compensation Appeal Board remanded the case to the WCJ for a determination as to whether employer had workers' compensation coverage. Eventually, the parties stipulated that, although SWIF made all of the requisite payments pursuant to the WCJ's order, SWIF was not the responsible carrier.

Thereafter, SWIF filed an Application for Supersedeas Fund Reimbursement. The Bureau denied the application and a hearing was held before the WCJ. The WCJ found that there had been no adversarial determination that the compensation was not payable and, therefore, denied SWIF reimbursement. The WCJ further noted that reimbursement is not appropriate when the insurer is entitled to subrogation. SWIF appealed the WCJ's decision to the WCAB.

The WCAB affirmed the WCJ's decision stating that, even if the underlying decision on the fatal claim petition had been adversarial and not resolved by stipulation, the insurer's request for reimbursement must be denied as their appropriate remedy in instances where an insured makes payment when another is liable is to seek subrogation from the culpable insurer.

The Commonwealth Court agreed. In order to receive reimbursement from the Supersedeas Fund, the insurer must show that: 1) Supersedeas has been requested, 2) Supersedeas has been denied, 3) the request must have been made under §413 of the Act, 4) payment of compensation is made as a result of the denial of Supersedeas, and 5) upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable. The purpose of the Supersedeas Fund is to provide a means to protect an insurer who makes compensation payments to a claimant who ultimately is determined not to be entitled thereto. Here, it was determined that SWIF should not have paid the compensation to the claimant, not that the claimant should never have received compensation. Therefore, the Court denied reimbursement from the Fund. The Court noted that SWIF's appropriate remedy is to file a Review Petition, seek to have the employer joined by filing a Joinder Petition, and ask the WCJ to hold the employer responsible for the payment of claimant's compensation benefits and thus correct the wrong. The WCJ could order the employer to reimburse SWIF, putting SWIF back into the same financial position it would have been in had the WCJ not wrongfully ordered it to pay benefits.

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Maureen G. Bixler v. Workers' Compensation Appeal Board (Walden Books), No. 866 C.D. 2003, filed December 17, 2003.
(Average Weekly Wage - Equal Protection - Section 309(e) of the Act which excludes self-employment earnings from concurrent wages does not violate claimant's right to equal protection.)

Claimant sustained a compensable injury on January 17, 2001. Employer issued a Notice of Compensation Payable, listing an average weekly wage of $963.43, representing $320.00 in earnings with employer and $643.43 in earnings from claimant's concurrent employment as a registered nurse.

Employer subsequently filed a Petition to Review Compensation

Benefits alleging that claimant's compensation rate erroneously included claimant's concurrent earnings, which where self-employment earnings.

At hearings before the Workers' Compensation Judge, claimant admitted that she was a self-employed registered nurse as of her date of injury. The WCJ found that the NCP was materially incorrect due to the inclusion of claimant's wages from self-employment, and ordered that the NCP be amended to reflect claimant's average weekly wage of $320.00.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that the treatment of her self-employment earnings differently from the earnings of a claimant who is concurrently employed violated her constitutional rights to equal protection. The WCAB disagreed, and affirmed the decision of the WCJ.

Claimant then sought review by the Commonwealth Court. The sole issue before the Court was whether §309(e) of the Act constitutes an equal protection violation. That section provides that "[w]here the employe is working under concurrent contracts with two or more employers, his wages from all such employers shall be considered as if earned from the employer liable for compensation." The Court noted that prior decisions have interpreted §309(e) to specifically exclude self-employment earnings from "wages."

For a statute involving economic issues to be found constitutional, it must bear a rational relationship to a legitimate governmental objective. Here, one of the stated purposes of the Act is to strike a balance between the interests of employees and employers. Since a self-employed individual is neither an employee nor an employer and is not required to contribute to a common workers' compensation trust fund, it would be inequitable to require an employer to include in the calculation of a claimant's wage loss benefits those earnings which fall outside the statutory scheme. As such, there is a rational reason to exclude self-employed claimants, which is related to the state's legitimate goal of balancing the interests of employees and employers. Moreover, the government has a legitimate interest in excluding self-employment earnings to ensure that employers are only required to pay benefits for verifiable wages and reliably reported income.

Accordingly, the exclusion of self-employment earnings from concurrent wages is related to legitimate governmental interests and does not violate claimant's right to equal protection of the law. The order of the WCAB was affirmed.

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Henry Macomber v. Workers' Compensation Appeal Board (Penske Transportation Services and Gallagher Bassett Services and Old Republic Insurance Company), No. 215 C.D. 2003, filed December 17, 2003.

(Jurisdiction - Section 305.2 does not require an out-of-state "place of business" be owned or leased by the employer in order for a claimant's employment to be "principally localized" there.)

Claimant, a resident of Pennsylvania, was employed by a trucking company that provided hauling for Super Fresh Supermarkets from a warehouse located in New Jersey to stores located in Pennsylvania, Delaware and New Jersey. Claimant's daily routine required him to go to the New Jersey warehouse to get his truck, which was loaded by Super Fresh employees. Claimant then made deliveries, spending approximately 70% of his time in Pennsylvania, and 15% each in Delaware and New Jersey. Occasionally, he kept his truck overnight at his home in Pennsylvania, but he usually returned the truck to the warehouse in New Jersey and then returned home at the end of the day.

Although the claimant's truck was loaded by Super Fresh employees, claimant's employer did have a number of employees stationed at the warehouse, including administrative personnel, five mechanics and forty truck drivers. Employer also maintained some furniture and office equipment at the warehouse. Employer did not, however, own or lease any portion of the warehouse.

In early October of 1998, Super Fresh terminated its contract with employer. Employer was given a month to retrieve its property from the warehouse.

On October 24, 1998, claimant suffered a work injury while in New Jersey. A claim was filed, however, under the Pennsylvania Workers' Compensation Act.

After hearings, the Workers' Compensation Judge found that, because employer did not own or lease the premises in New Jersey, it did not have a "place of business in New Jersey." Therefore, New Jersey had no jurisdiction over claimant's claim. The WCJ held that claimant's employment was "principally located" in Pennsylvania and granted claimant benefits.

The Workers' Compensation Appeal Board reversed, concluding that the WCJ erred in determining that an employer must own or lease property so as to have a place of business.

The Commonwealth Court affirmed. An employer is not required to own or lease property to have a place of business under §305.2 of the Act. Here, employer maintained some right of control over the activities at the New Jersey warehouse. Claimant reported to work in New Jersey and received his work assignments there. Employer had an office and kept trucks at the New Jersey warehouse. Employer had a post office box in New Jersey. Certainly, these facts are indicia that employer was conducting ongoing business operations in New Jersey where the injury occurred. Because there is substantial evidence that employer had a place

of business in New Jersey from which claimant regularly worked, the claim should have been brought in New Jersey.

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Coyne Textile v. Workers' Compensation Appeal Board (Voorhis), No. 3059 C.D. 2002, filed October 20, 2003, reported January 14, 2004.

(Supersedeas Fund Reimbursement - Where the parties enter a Compromise and Release Agreement as to future benefits only and expressly reserve the right to adjudicate past benefits so that the employer may seek Fund relief, the Compromise and Release Agreement does not render the ongoing petition relative to past benefits moot.)

After attempting to return to work following his work injury, claimant filed a Reinstatement Petition, seeking reinstatement of his benefits as of July 27, 1999, and a Review Petition seeking to amend the Notice of Compensation Payable. At the same time, employer filed a Termination Petition alleging that claimant had fully recovered from the work injury. Thereafter, claimant filed a Challenge Petition, challenging employer's suspension of his benefits under §413.

During the pendency of the proceedings, the parties entered into a Compromise and Release Agreement to settle all future compensation. The Workers' Compensation Judge approved the C&R, concluding that it provided for the discontinuance and withdrawal of the Reinstatement and Review Petitions. By the express terms of the C&R, however, the Termination and Challenge Petitions were to remain open for adjudication by the WCJ.

Thereafter, one additional hearing was held relative to the Termination and Challenge Petitions. The WCJ then issued an order denying and dismissing the petitions, concluding that the issues had been disposed of by the C&R. The WCJ noted that the sole reason for employer's request that the petitions be adjudicated was to allow employer the opportunity to seek reimbursement from the Supersedeas Fund.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's order dismissing the Termination and Challenge Petitions as moot.

Employer then sought review by the Commonwealth Court. The Court noted that the language of the C&R entered into by the parties and approved by the WCJ expressly reserved for future adjudication the Challenge and Termination Petitions. On its face, the C&R clearly and unambiguously settled only the issue of the employer's potential liability "from August 16, 2000 into the future." As such, the C&R clearly did not dispose of the issue of compensation and/or benefits due claimant for the period *prior* to August 16, 2000.

The Court held that employer's motive of seeking supersedeas reimbursement did not render the Termination and Challenge Petitions moot, particularly when the C&R expressly related only to employer's liability beyond the date at issue in the Termination and Challenge Petitions. Consequently, the order of the WCAB was reversed and the case was remanded for ongoing proceedings on the Termination and Challenge Petitions.

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Villanova University v. Workers' Compensation Appeal Board (McElaney), No. 1427 C.D. 2003, filed January 16, 2004.

(Review Petition - If claimant wishes to have a subsequent condition acknowledged in the NCP, it is proper to file a Claim Petition. If, however, claimant wants the condition acknowledged as a consequence of the work injury, then a Review Petition is proper.)

Pursuant to Notice of Compensation Payable, claimant received benefits for an injury described as 'OS Shoulder Strain/Sprain." Five months later, he returned to work with no loss of earnings such that his benefits were suspended.

At some point thereafter, claimant began to experience kidney problems. He then filed a Reinstatement Petition alleging that his condition had worsened and that, as a result, he was again experiencing a loss of earnings. Employer denied the allegations of the petition. Claimant later amended his petition to include a Review Petition for the purpose of including nephrotic syndrome as a part of his work-related injury.

The Workers' Compensation Judge accepted the testimony of claimant's expert, who stated that the claimant's nephrotic syndrome was caused by his use of a nonsteroidal anti-inflammatory drug (NSAID), prescribed in treatment of the work injury. Consequently, the WCJ granted the claimant's petitions. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued that the Board erred in affirming the WCJ's decision in light of the case of Jeannes Hospital v. WCAB (Haas), 819 A.2d 131 (Pa.Cmwlth. 2003). In that case, the Court held that when a work-related injury results in subsequent injuries that are the direct result of the original work-related injury, a claimant should file a claim petition rather than a review petition. The only exception to this general rule occurs where the claimant's disability arises as a natural consequence of the work-related injury.

Here, if the claimant wished to have his nephrotic syndrome acknowledged in the NCP, then it would have been proper to file a Claim Petition. However, because claimant alleged that his nephrotic syndrome occurred as a consequence of the injury already acknowledged by the NCP, it was proper for claimant to file a Review Petition.

Accordingly, the order of the WCAB was affirmed.

Jeffrey R. Weikel v. Workers' Compensation Appeal Board (PECO), No. 1919 CD 2003, filed January 21, 2004.

(Appeal - *Nunc pro tunc* appeal filed by claimant four months late was allowed due to clerical error.)

(Average Weekly Wage - Money from a flex benefit plan actually used to buy medical and dental benefits will not be included in calculation of average weekly wage.)

Claimant sustained a work-related injury to his wrist on October 22, 1996. A Notice of Compensation Payable was issued, and claimant received total disability benefits of $509.86 per week based upon an average weekly wage of $756.03. On August 14, 2000, claimant filed a petition alleging that the average weekly wage (AWW) was not properly calculated because employer failed to include "flex dollars" which were provided for the selection of healthcare and other benefits.

Employer's payroll manager testified that the flex dollar program provided employees with a dollar amount from which they could choose from a menu of benefits, including medical, dental, group life insurance, accidental death and dismemberment, and short and long-term disability. If the cost of the benefits selected exceeded the flex dollar amount, then the employee paid the difference. If the cost of the chosen benefits was less, the excess was paid to the employee over the course of the year as wages. Claimant allocated all of his flex dollars for medical and dental benefits and took no flex dollars as cash.

The Workers' Compensation Judge found that the flex dollars did not constitute wages under §309 of the Act and denied claimant's petition. Four months later, claimant filed an appeal to the Workers' Compensation Appeal Board. Employer filed a motion to quash the appeal as untimely. The WCAB found that claimant provided an adequate excuse for the late filing and allowed the appeal to proceed *nunc pro tunc*. The WCAB further found, however, that the flex dollars were not to be included in the calculation of the AWW and affirmed the decision of the WCJ.

The Commonwealth Court noted that §423 of the Act requires an appeal to be filed within 20 days after a WCJ's decision. However, under certain circumstances, a late appeal will be allowed. Here, the clerical person in claimant's counsel's office who had responsibility for filing the appeal became ill and neglected to file the appeal within the statutory twenty days. The Court found this excuse to be acceptable and, therefore, the WCAB did not err in allowing the appeal to proceed *nunc pro tunc*.

The Court further noted, however, that §309(e) specifically excludes from wages "employer payments for or contributions to a retirement, pension, health and welfare." Because health and welfare benefits are excluded, the WCAB did not err in finding that claimant's flex dollars used towards medical and dental benefits were properly excluded from the calculation of the AWW.

The decision of the WCAB was, therefore, affirmed.

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George L. Fonder v. Workers' Compensation Appeal Board (Fox Integrated), No. 1443 C.D. 2003,

SCRAMBLED "EGG" - SPERTS!!

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filed February 11, 2004.
(Course and Scope - Claimant is not entitled to benefits where he had a fixed place of business and was on his way home between jobs to rest, shower, etc. Claimant argued that the injury was caused by fatigue from a long shift.)

Claimant worked as an over-the-road dispatcher. He had a fixed place of work at employer's terminal in Hatfield, Pennsylvania. His job duties, as a truck driver, required him to spend the beginning and end of every delivery cycle on employer's premises inspecting his tractor-trailer and receiving dispatches.

On June 22, 2000, while driving home from the Hatfield terminal in his own vehicle in order to sleep, shower and change clothes before returning back to the terminal, he fell asleep at the wheel, hit a tree and sustained injuries. He had been on duty for at least 10 hours the day before the accident.

The WCJ found, however, that the claimant could have slept in his tractor-trailer, but chose not to do so. Therefore, he was not in the course and scope of his employment when injured. The claimant's Claim Petition was, thus, denied.

The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that he is not barred from recovery by the coming and going rule because he was acting in furtherance of employer's business at the time of the accident. He argued that because he was engaged in work-related activities for 48 hours prior to the accident, and those activities caused his fatigue, the resulting injuries should be deemed to be work-related.

The Court disagreed. Public policy precludes holding that self-induced exhaustion that gives rise to an injury should be compensable.

Claimant then argued that he was furthering the business interests of employer and, as such, his claim should be allowed as a "special circumstance" exception to the coming and going rule.

Again, the Court disagreed. Claimant cannot prevail under this exception because he was not involved in an act ordered by employer. Although employer expected claimant to be clean and rested, this is no more than is typically required by any employer, and does not present a "special circumstance."

Finally, claimant argued that he was on a "special mission" and , therefore, his claim should fall under that exception to the coming and going rule. Again, the Court disagreed, stating that the facts of this case support the WCJ's finding that employer expected claimant to comply with federal laws regarding the amount of time a driver must rest between trips, rules with which claimant failed to comply. Thus, his driving beyond the limits of endurance was not certainly a "special mission" for employer's benefit. Further, under the special mission exception, one must be "*on* a mission," not "*between* missions."

Inasmuch as the claimant was not within the course and scope of his employment at the time of his injury, the WCAB's order denying benefits was affirmed.

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Altoona Wholesale Distributors and Kemper Insurance Companies v. Workers' Compensation Appeal Board (Bell), No. 1629 C.D. 2003, filed January 30, 2004.
(Earning Power Evaluation - Claimant waived <u>Caso</u> objection to earning power evaluation by attending interview. Furthermore, with reversal of <u>Caso</u>, the vocational expert need not be pre-approved by Department.)

The Workers' Compensation Judge in this case made one conclusion of law in this case in response to employer's petition seeking to modify or suspend claimant's benefits pursuant to an Act 57 labor market survey: "Section 306(b)(2) of the Act requires expert opinion testimony to be presented by an expert approved by the Department. Without such approval, the testimony of the expert is not competent to meet the Employer's burden under Section 306(b)(2)...Because the expert vocational testimony in this case was based on an interview conducted by an expert not then approved by the Department, the Employer does not have sufficient competent evidence to proceed." Employer's petition was thus dismissed.

The Workers' Compensation Appeal Board found no merit in employer's argument that claimant's objection to the vocational expert's lack of approval was untimely. Therefore, the decision of the WCJ was affirmed.

On appeal to the Commonwealth Court, employer asserted that claimant waived his objection to the admission of the labor market survey because of the lack of the Department's approval of the vocational counselor's qualifications under §306(b)(2) by attending the interview.

The Court agreed, citing <u>Wheeler v. WCAB (Reading Hospital and Medical Center)</u>, 829 A.2d 730 (Pa.Cmwlth. 2003). In that case, the Court expressly held that the claimant waived the lack of Departmental approval by voluntarily attending the interview. The Court further noted, however, that given the recent reversal by the Supreme Court of the Commonwealth Court's decision in <u>Caso v. WCAB (School District of Philadelphia)</u>, 790 A.2d 1078 (Pa.Cmwlth. 2002), the law now holds that 1) there is no requirement that the Department "pre-approve" interviewers, and 2) a WCJ is authorized to consider the qualifications of an interviewer in light of the Bureau's regulations. Therefore, the WCJ must consider the qualifications of the vocational interviewer and evaluate the contents of the labor market survey.

The case was remanded for con-

sideration by the WCJ of the merits of employer's Petition for Modification or Suspension.

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SUPERIOR COURT CASE REVIEWS

Miriam Leggett, Individually and as Administratrix of the Estate of Micah G. Leggett and as Parent and Natural Guardian of Zadok M. Leggett, et al. v. National Union Fire Insurance Company of Pittsburgh, PA., No. 14 MDA 2003, filed March 2, 2004.

(Course and Scope - The term "acting within their duties" in an umbrella insurance policy is not synonymous with the term "course and scope of employment.")

(Collateral Estoppel - Determination by WCJ in workers' compensation proceeding does not have collateral estoppel effect in declaratory judgment action seeking an interpretation of the language of the insurance policy.)

Leggett was employed by High Safety Consulting Services, Ltd., an affiliated company of High Industries, Inc., holder of an umbrella insurance policy with National Union Fire Insurance Company.

Leggett had lost his company cell phone. Therefore, on a Saturday, after taking his sons to a Boy Scout activity, he and the boys drove to Reading where he believed he lost the cell phone. While there, he and the boys had lunch, and stopped at two stores where they looked for Boy Scout uniforms and hunting clothes. After visiting the stores and on the drive home, they were involved in an automobile crash. Leggett and one minor son were killed. His other minor son was injured.

A workers' compensation claim was filed. The Workers' Compensation Judge determined that Leggett was not acting with the "course and scope of his employment" at the time of the auto accident. Therefore, benefits were denied.

The Administrator of Leggett's estate then filed a declaratory judgment action against National Union Fire Insurance Company, seeking a declaration that Leggett was covered under his employer's umbrella insurance policy. The trial judge held that the policy did cover Leggett in that he was acting within the scope of his duties. Further, the trial judge found that, because of the different legal standards, the determination by the WCJ was not collateral estoppel.

The Superior Court affirmed. The Court noted that the policy in question provided coverage for "Named Insureds," defining such as "Any of your partners, executive officers, directors, stockholders or employees but only while acting within their duties." The Court then determined that the only issue was whether Leggett was "acting within [his] duties" when the accident occurred.

"Duties" is not defined in the policy. Given the natural, plain and ordinary usage of the term, the Court determined "duty" to mean: "Obligatory tasks, conduct, service or functions that arise from one's position (as in life or in a group.) Leggett had a duty to search for company property that he lost. The fact that he did it on a Saturday does not alter that fact. The trip to Reading was job-related in that it was made so that the phone could be recovered and used on the next work day. Therefore, the trial judge appropriately concluded that Leggett was acting within the "duties" of his employment at the time of his death.

Although the Court acknowledged that the WCJ found that Leggett was not acting within the "course and scope of his employment," the Court found that a different standard applied in this case. Here, the issue is a common-sense determination of the language of the policy. In workers' compensation proceedings, the WCJ "must make determinations under specific Workers' Compensation standards, developed for specialists rather than lay people." One's obligations or duties to an employer is a broader concept than the Workers' Compensation inquiry into "course and scope." Therefore, given the "common-sense" interpretation of the language of the policy, the Court affirmed the trial judge's interpretation that Leggett was acting within his "duties," although not acting within the "course and scope of his employment."

(Editor's Note: Please note that if your company holds an umbrella insurance policy, and if "employees" are among those covered, you may end up being tagged with liability for an injury sustained by the employee even if the injury is not compensable under the Pennsylvania Workers' Compensation Act.)

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SUPREME COURT CASE REVIEWS

Brubacher Excavating, Inc. v. Workers' Compensation Appeal Board (Bridges), No. 24 MAP 2002, decided November 20, 2003.

(Subrogation - Before subrogation is permitted under §319 of the Act, it must be established that the third party caused the "compensable injury.")

Claimant worked as a master mechanic for employer in September of 1992 when he injured his back while lifting a cylinder head from an engine. As a result, he received total disability benefits.

In July of 1993, claimant was released to light duty work. He

then obtained a position with Diesel Services, Inc. as a Service Writer/ Service Advisor. As a result of his earnings, his workers' compensation benefits were reduced to a partial amount.

Shortly thereafter, Diesel terminated claimant because its workers' compensation insurance carrier refused to extend coverage to claimant. Claimant then resumed receiving total disability benefits from employer.

In February of 1995, claimant filed suit against Diesel under the Americans with Disabilities Act. Employer sought subrogation against any recovery obtained by claimant under §319 of the Act. The ADA claim was settled in 1996 for an undisclosed amount.

The Workers' Compensation Judge determined that employer was not entitled to subrogation because the two injuries, the back injury and the unlawful termination, were different in type and causation. The Workers' Compensation Appeal Board and the Commonwealth Court affirmed that decision.

Employer then sought review by the Supreme Court. The Court noted that the plain language of §319 of the Act permits subrogation only when a third party causes "the compensable injury." Hence, only when a third party brings about the compensable injury will an employer's right to subrogation arise. The term "compensable injury" is interpreted to have two components: (1) a work-related physical or mental injury suffered by a claimant and (2) some disability, i.e., loss of earning power.

Here, Diesel did not "cause" claimant's compensable injury, i.e., cause both his physical injury and the resulting loss of earning power. While Diesel's actions may have resulted in a loss of earning power, it is undisputed that Diesel did not in whole or in part cause claimant's physical injury. Consequently, §319's statutory requirement of causation of a compensable injury has not been met and employer is not entitled to subrogation.

The order of the Commonwealth Court was affirmed.

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City of Erie v. Workers' Compensation Appeal Board (Annunziata), No. 17 WAP 2003, decided December 17, 2003.

(Heart and Lung Benefits - The Heart and Lung Act requires an injured employee who is receiving Heart and Lung benefits to turn over to the employer <u>all</u> workers' compensation benefits he or she receives.)

Claimant, a police officer, suffered an injury on April 22, 1998 while in the course and scope of his employment with the City. At that time, he also had concurrent employment as a part-time security guard for the Holiday Inn , as well as part-time employment as an automatic teller machine maintenance person for Great Lakes Armored, Inc. The City accepted liability for claimant's injury, but stated that he would continue to receive his full salary of $777.81 per week pursuant to the Heart and Lung Act in lieu of workers' compensation benefits.

Claimant then filed a petition seeking workers' compensation benefits from the City for his loss of earnings from his employment with Holiday Inn and Great Lakes. Based upon earnings information provided by the claimant, the City calculated claimant's average weekly wage as $988.37, which included $210.56 per week for his jobs at the Holiday Inn and Great Lakes, as well as his full salary of $777.81 as a police officer. Under the Workers' Compensation Act, an average weekly wage of $988.37 would entitle claimant to $561.00 in benefits. The City therefore denied any obligation to pay claimant additional benefits because the amount it was paying under the Heart and Lung Act already exceeded the amount claimant was entitled to under the Workers' Compensation Act.

The Workers' Compensation Judge denied claimant's petition, stating that the claimant is not entitled to both Heart and Lung benefits and workers' compensation benefits.

The Workers' Compensation Appeal Board reversed the WCJ's decision, concluding that benefits payable as a result of concurrent employment are not subject to the reimbursement requirement of the Heart and Lung Act.

The Commonwealth Court affirmed the WCAB's decision, noting that the employer's obligations under the two statutes are separate and conceptually different. The court held that the set-off provision in the Heart and Lung Act applies only where the employee seeks or receives workers' compensation benefits for the same employment for which he is receiving Heart and Lung benefits, not concurrent employment.

The Supreme Court disagreed. The Heart and Lung Act is to be strictly construed. The unambiguous language of Section 1(a) of the Heart and Lung Act provides that "**any** workmen's compensation received or collected by the employee for the period of injury shall be turned over..." to the employer. The Court noted that "any" means any. Therefore, an injured employee who is receiving Heart and Lung benefits must turn over to his or her employer **all** workers' compensation attributable to that period of disability. Claimant may not retain workers' compensation benefits that he could have collected from his concurrent employment. Because the City is self-insured, rather than mandating the City to pay benefits to claimant and then requiring claimant to turn around and remit them, it was proper for the City to refuse to pay benefits.

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MIXED-UP EXPERTS (from Page 6): *Orthopedist; Physiatrist; Toxicologist; Pulmonologist; Neurosurgeon; Psychiatrist; Chiropractor*

Ashley Rossa, a minor, v. Workers' Compensation Appeal Board (City of Philadelphia), No. 30 EAP 2002, decided December 30, 2003.

(Survivor Benefits - Paternity may be determined to exist by Workers' Compensation Judge upon a mere "preponderance" of the evidence.)

On December 13, 1990, Patricia Rossa gave birth to Ashley Rossa. On February 6, 1991, Daniel Boyle (decedent) was killed in the course and scope of his employment as a police officer. A fatal claim petition was filed, alleging that decedent was claimant's father. The City denied the claim, disputing the allegations of paternity and that claimant was eligible for benefits.

The Workers' Compensation Judge found the claimant and her witnesses to be credible, found that decedent was the father, and granted the petition.

Employer appealed to the Workers' Compensation Appeal Board, which vacated the WCJ's decision inasmuch as issues of paternity are beyond the WCAB's scope of review. Such matters are to be determined by the courts of common pleas.

Claimant then appealed to the Commonwealth Court, which reversed the WCAB's order, stating that no Pennsylvania case had decided whether a workers' compensation fact-finder has the authority to determine paternity. Employer again appealed.

The Supreme Court noted that the Workers' Compensation Act vests in the WCJ the responsibility of determining to whom compensation must be paid by the employer. In a death claim, the WCJ must decide from the evidence presented 1) whether there is a surviving spouse; 2) whether there are children and, if so, how many; 3) if there is not a surviving spouse or child, whether there is a dependent parent; and, 4) if none of the above, then whether there are brothers or sisters actually dependent upon the decedent and, if so, how many. Given the familial relationships that the WCJ must often disentangle, determining the eligibility of a child is not an extraordinary task. Because the WCJ has the duty to determine who is to be compensated upon the death of an employee, the WCJ necessarily has the authority to determine paternity for the purposes of the eligibility of a child.

The Court also addressed the standard of proof for deciding the eligibility of a child. The general evidentiary burden on workers' compensation claimants is to prove the elements of the claim by a preponderance of the evidence. Here, employer argued that paternity requires a higher evidentiary standard and, therefore, must be established by clear and convincing evidence. The Court disagreed, noting that there is nothing in the Act which imposes a more stringent standard.

The order of the Commonwealth Court was affirmed. Dissenting opinions were filed by Justices Nigro and Newman., both of whom believe that the issue of paternity is of such importance, and impacts "substantial liberty interests" of both the father and child, that the issue must be determined by a court of common pleas pursuant to the Rules of Civil Procedure and the Rules of Evidence.

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Louann Coleman v. Workers' Compensation Appeal Board (Indiana Hospital and Phico Services Company), No. 16 WAP 2003, decided February 17, 2004.

(Independent Medical Examination - A "physical examination" pursuant to 77 P.S. §651(a) of the Workers' Compensation Act includes diagnostic testing.)

Claimant suffered a lifting injury to her right shoulder while working as a licensed practical nurse. She underwent two surgeries, had an MRI, bone scan, nerve blocks, physical therapy, psychological therapy, drug therapy, and used a TENS unit. Despite this treatment, she continued to complain of pain in her right shoulder and arm, which worsened with activity.

In March of 2000, claimant submitted to an IME by Dr. Khalouf. In order to complete his evaluation, Dr. Khalouf requested a triphasic bone scan and MRI. Claimant refused to comply, so employer filed

EMPLOYER'S CORNER

Q. If my company hires an individual to provide 'freelance" services, such as writing text for a website, is that individual an "employee" for purposes of unemployment compensation?

A. It depends upon the type of relationship between the parties.

In determining whether an individual is self-employed, the Pennsylvania Supreme Court in Hammermill Paper Company v. Rust Engineering Co., 430 Pa. 365, 243 A.2d 389 (1968) set forth the factors to be considered including: control in the manner in which work is to be done; responsibility for result only; terms of agreement between parties; skill required for performance; whether the individual is engaged in a distinct occupation or business; who is responsible for supplying the tools; whether payment is by the time or by the job; whether the work is part of the alleged employer and whether the alleged employer has the right to terminate employment at any time.

All factors need not be present. The key factor to consider is whether the alleged employer had the right to control the work to be done and the manner in which it was to be performed. If the alleged employer had the right, an employer-employee relationship existed. See e.g., Holt v. Unemployment Compensation Board of Review, No. 1876 C.D. 2003, filed January 16, 2004.

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a petition to compel her cooperation.

The Workers' Compensation Judge found Dr. Khalouf's report indicating that the tests would be "most helpful" in formulating his opinion to be credible. Accordingly, employer's petition was granted. Claimant appealed to the Workers' Compensation Appeal Board, but by the time of oral argument, claimant had already undergone the testing. The WCAB dismissed the appeal as moot.

Claimant then filed a Petition for Review with the Commonwealth Court, contending that the issue was an exception and was not moot inasmuch as it was capable of repetition and likely to escape judicial review. The Court agreed and allowed the appeal. The Commonwealth Court then concluded that non-invasive diagnostic testing such as an MRI or bone scan falls within the meaning of a physical examination under the Act. The order of the WCJ permitting the testing was reinstated.

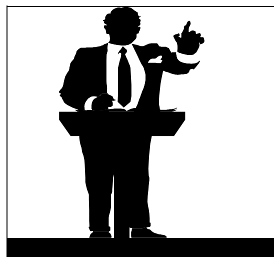
Claimant then sought further review by the Supreme Court. She argued that a "physical examination" should be limited to what a physician may observe through his or her senses, even when enhanced by a stethoscope or sphygmometer.

The Supreme Court disagreed, noting that this rigid definition would thwart the purpose of the Act by excluding such modern diagnostic tools as laboratory testing and imaging. The purpose of the examination under the Act is to assess the extent and severity of an individual's injury. Therefore, the Court interpreted the term "physical examination" to include all *reasonable and necessary* medical procedures and tests necessary to permit a provider to determine the extent of a claimant's disability. The Court noted that the question to be addressed is whether the testing is unreasonably intrusive.

The invasiveness of a needle is not unreasonably intrusive. The collection of blood samples is not unreasonably intrusive. Here, claimant was injected with a radiotracer so the imaging device could provide a more accurate assessment of her condition. The result is no more intrusive that if she was required to ingest a contrasting agent before a CAT scan, a noninvasive imaging procedure.

In sum, diagnostic testing falls under the definition of a physical examination when sought to evaluate the extent of a claimant's injuries, provided that the employer demonstrates that 1) the tests are necessary, 2) involve no more than minimal risk, and 3) are not unreasonably intrusive. The Order of the Commonwealth Court was affirmed.

Madame Justice Newman filed a dissenting opinion. In her opinion, when the Legislature amended the Act to read "physical examination" where it used to read simply "examination," the Legislature intended to limit the scope of an examination sought by an employer under §314(a). Therefore, she would reverse the Commonwealth Court's decision and disallow the testing.



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SUPERSEDEAS FUND

When is Relief Available?

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reimbursement may be had with regard to the benefits paid in the past to the claimant. Had that specific language, however, not been in the Agreement, the insurer would have had no recourse.

Consequently, reimbursement *may* be available even though the underlying petition is amicably resolved. Of course, the other requirements set forth at the beginning of this article must be met.

For instance, the request for supersedeas must be made under §413 or §430 of the Act. A request for forfeiture under §306(f.1)(8)[7] will not provide the basis for reimbursement, even if it is ultimately determined that compensation was not, in fact, payable.[8]

Reimbursement will not be granted for benefits paid prior to the date that Supersedeas was requested. The date of the request is the date that the petition is filed. Benefits paid prior to filing the petition are forever lost. Therefore, even though the WCJ may ultimately determine that a claimant had fully recovered long before the filing of a Termination Petition, reimbursement is only available from the date that the Termination Petition was filed.[9]

Further, a determination that the carrier was not liable for payment of the compensation benefits may not be sufficient. The "determination" necessary is that the compensation, itself, was not, in fact, payable. Therefore, the issue is whether the claimant is entitled to the benefits, and not whether the carrier which made the payments was, in fact, the responsible carrier.[10]

Finally, if the insurer has a right of subrogation against a third party, the insurer must recoup the fund paid by enforcing its subrogation

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lien. The insurer may not seek to recover the payments it made due to the fault of a third party from the Supersedeas Fund.[11]

When dealing with these issues, please keep in mind that:

> The Legislature created the Supersedeas Fund to protect insurers who have paid compensation to claimants who are ultimately determined not to be entitled to the compensation, in light of the impracticality of recoupment of paid benefits from the claimant and the benevolent purposes of the Act. Bureau of Workers' Compensation v. Workmen's Compensation Appeal Board (Allstate Ins. Co.), 508 A.2d 388 (Pa.Cmwlth. 1986), appeal denied, 514 Pa. 632, 522 A.2d 560 (1987). The Department, however, cannot meet its responsibility of maintaining and conserving the Supersedeas Fund, if it must pay out on all claims based on agreements to which it is not a party. Bureau of Workers' Compensation v. Workmen's Compensation Appeal Board (Ins. Co. of North America), 516 A.2d 1318 (Pa.Cmwlth. 1986).[12]

Consequently, while reimbursement is theoretically available, as a practical matter, the Courts may, at times, determine that it is not in an effort to assist the Bureau in its role as conservator. Some may argue that, in so doing, the Courts have forgotten that it is the insurance industry which funds the Supersedeas Fund and the standards for reimbursement should be more lenient. The Courts are, however, bound by the provisions of the Act. As such, any meaningful change in this regard will need to come from the Legislature.

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[1] See e.g., Coyne Textile v. WCAB (Voorhis), *infra, p. 5.*

[2] State Workers' Insurance Fund v. WCAB (Shaughnessy), 837 A.2d 697 (Pa.Cmwlth. 2003).

[3] Gallagher Bassett Services v. WCAB (Bureau of Workers' Compensation), 756 A.2d 702 (Pa.Cmwlth. 2000).

[4] The Bureau acts as the conservator of the Fund.

[5] Optimax, Inc. v. WCAB (Yacono), 806 A.2d 994 (Pa.Cmwlth. 2002).

[6] Coyne Textile v. WCAB (Voorhis), *infra, p. 5*

[7] Section 306(f.1)(8) provides that if an employee who refuses reasonable services of health care providers, surgical, medical and hospital services, treatment, medicines and supplies, he shall forfeit all rights to compensation for any injury or increase in his capacity shown to have resulted from such refusal.

[8] Commonwealth of Pennsylvania v. WCAB (Exel Logistics), 827 A.2d 529 (Pa.Cmwlth. 2003).

[9] Wausau Insurance Companies v. WCAB (Commonwealth of Pennsylvania), 826 A.2d 21 (Pa.Cmwlth. 2004).

[10] State Workers' Insurance Fund v. WCAB (Shaughnessy), 837 A.2d 697 (Pa.Cmwlth. 2003).

[11] Pep Boys, Inc. v. WCAB (Young), 818 A.2d 601 (Pa.Cmwlth. 2003).

[12] Optimax, Inc. v. WCAB (Yacono), 806 A.2d 994 (Pa.Cmwlth. 2002).

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