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Pennsylvania Workers' Compensation Bulletin

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Proposed Legislation Will Increase Benefits of Use of Panel Physicians

Employers currently can only require that an employee treat with particular medical providers for the first ninety days after the employee's first medical visit. However, employers may soon have the ability to direct an employee's health care for much longer. On August 6, 2013 House Bill 1636 was introduced by the House of Representatives. This bill proposes to amend Section 306(f.1)(1) of the Workers' Compensation Act. Currently, Section 306(f.1)(1) provides that an employer can establish a list of at least six health care providers, with whom an employee must visit and continue to treat with ninety days from the date of the first visit. If an employee fails to treat with the designated provider, the employer is not required to pay for the services rendered during that ninety day period. House Bill 1636 proposes to expand the period of time for which an employer can direct the employee's health care.

Under the proposed amendments to Section 306(f.1)(1) an employer would still be permitted to establish a list of at least six health care providers who the claimant is required to visit and treat with for ninety days, but the bill provides that none of those providers can be a coordinated care organization. However, the amendment would permit an employer to establish a list of one or more designated coordinated care organizations for treatment of employees. If the employer establishes such a list, its employees are required to treat with a provider or number of providers who participate in one of those organizations for the lifetime of the employee's injury.

The new bill does not change the employee's ability to seek a second opinion in situations where invasive surgery is prescribed by a physician or health care provider designated by the employer. An employee would still be permitted to choose the course of treatment recommended by the physician providing the second opinion but must obtain this treatment by the employer designated physician or provider. Under both the current law and the proposed amendments, employers are required to notify the employee of their rights and duties under Section 306(f.1)(1) and receive the employee's written acknowledgement that he has been notified of and understands his rights.

House Bill 1636 is not law and it may be quite a while before it becomes law. In order for a House Bill to become law, the Speaker of the House first sends it to a standing committee where it is reviewed, and either public committee meetings or public hearings are held. If the standing committee supports the bill, it is then presented to the House of Representatives. The majority and minority parties of the House first have an opportunity to discuss the bill during a caucus. The bill must then undergo three days of consideration by the House before a final vote is taken. If a majority of the members of the House votes for the bill, it is then sent to the Senate. The Senate will then follow the same procedure, i.e. the bill is first sent to a committee, then to a Senate caucus, and finally three days of consideration by the Senate. If the Senate proposes further amendments to the bill, it must go back to the House for consideration. If the bill passes in the Senate, it is signed by the Speaker of the House of Representatives and the President Pro Tempore of the Senate and presented to the Gov-

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COMMONWEALTH COURT CASE REVIEWS

New Enterprise Stone & Lime Co., Inc., and PMA Management Corporation v. Workers' Compensation Appeal Board (Kalmanowicz), No. 1492 C.D. 2012, Filed December 6, 2012.

(Physical/Mental Injury - Where claimant is involved in a head-on collision resulting in the death of the other driver before claimant's eyes, claimant's intimate involvement in the fatal accident is sufficient to constitute a "physical stimulus" to support a compensation award.)

Claimant was employed as a lowboy/equipment operator. His duties included moving road construction equipment from job to job on a tractor trailer. On June 1, 2009, claimant was operating a tractor attached to a trailer when an oncoming vehicle deliberately veered into claimant's lane, striking the trailer head-on. The driver of the oncoming vehicle was pressing himself on the windshield of his car and looking at claimant when the vehicle and tractor trailer collided. The other driver died upon impact. Claimant's truck was forced down an embankment and into some trees.

Claimant continued to work, but eventually began treatment for post-traumatic stress disorder (PTSD).

Claimant filed a claim petition alleging that he sustained the PTSD as a result of the accident. Employer denied the allegations. Hearings were held before a Workers' Compensation Judge, at which time claimant testified that, following the accident, he experienced nightmares. When he picked up his tractor, he was upset and experienced clammy hands, uneasiness and sweating. He stated that his fear worsened to the point that he is now afraid to drive because of oncoming traffic and he can no longer control a truck.

The WCJ awarded claimant benefits for a physical/mental injury manifested as PTSD resulting from the "triggering physical event" of the June 1, 2009 accident. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer appealed to the Commonwealth Court, arguing that the WCJ and WCAB erred in applying the standard of a physical/mental injury as opposed to a mental/mental injury. Employer argued that a physical/mental injury cannot be established based upon fear of serious injury and knowing that someone died, but claimant must also have suffered physical injuries that required medical treatment.

The Court noted that psychological injuries fall into 3 categories: (1) mental/physical - where a psychological stimulus causes physical injury; (2) physical/mental - where a physical stimulus causes a psychic injury; and (3) mental/mental - where a psychological stimulus causes a psychic injury.

In order to substantial a physical/mental injury claim, the psychological injury must be the result of a triggering physical event and the injury must arise in the course of employment.

Here, the WCJ found the collision between claimant's truck and decedent's automobile to be "a triggering physical event." The Court agreed and further found that there was substantial evidence to support the WCJ's conclusion that claimant suffered PTSD as a result of the accident. The Court stated: "It is clear in this case that claimant suffered a significant physical stimulus in the form of the head-on collision causing the death of the other driver before claimant's eyes, and disabling his loaded tractor-trailer causing it to descend an embankment. Claimant's intimate involvement in the fatal accident is sufficient to constitute a "physical stimulus" to support a compensation award. The Court summarily rejected employer's argument that this was a "mental/mental injury" and, therefore, claimant was not required to establish abnormal working conditions.

The order of the WCAB was affirmed.

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Alfred Napierski v. Workers' Compensation Appeal Board (Scobell Company, Inc. and Cincinnati Insurance Company), No. 330 C.D. 2012, Filed January 10, 2013.

(Reinstatement - Bad Faith - Where claimant had refused a light-duty job in bad faith, claimant must show his work injury worsened and he was incapable of performing the light-duty job before he could be reinstated to total disability.)

Claimant was injured on July 28, 1995 while working as a plumber. Employer accepted liability for the injury and began paying claimant total disability benefits of $509 per week.

Thereafter, employer referred claimant to Expediter Corporation, which helps employees return to work. Expediter found claimant a full-time sedentary job with Information Direct, Inc. (IDI), working 40 hours per week in telephone customer service. The job was funded by employer and paid less than claimant' pre-injury wage. Claimant's physician approved the job.

Claimant then began working for IDI in October of 2004. IDI moved claimant to a second office in March of 2005 due to a heating malfunction. Claimant was then moved to a third office in August of 2005 due to a mouse infestation. When claimant noticed mouse feces in paperwork that had been imported from the second office to the third, claimant immediately quit, concluding that employer was "playing games" with him.

Employer then filed a modification petition. The WCJ found that claimant refused in bad faith to work at the third office location. Accordingly, the WCJ modified claimant's benefits to a partial disability rate of $374.86 per week based on what he would have earned at IDI.

Claimant appealed to the Workers' Compensation Appeal Board and the Commonwealth Court, both of which affirmed. The Supreme Court denied claimant's petition for allowance of appeal.

Thereafter, on June 30, 2010, claimant asked employer to fund the job for him again so that he could return to work. Receiving no re-

sponse from employer, claimant filed a reinstatement petition seeking to have his partial benefits reinstated to total because the funded employment was no longer available to him.

The WCJ denied claimant's petition, concluding that because his benefits had been modified due to his bad faith refusal to work, claimant was required to prove that his medical condition had worsened to the point where he could no longer do the telephone job with IDI. The WCAB affirmed.

On appeal to the Commonwealth Court, claimant argued that funded employment represents a special situation. Claimant maintained that leaving a funded position in bad faith does not relieve the employer of having to provide a job to a claimant who comes to regret his earlier refusal of job. The Court was not persuaded. Citing its decision in Spinabelli v. WCAB (Massey Buick, Inc.), 614 A.2d 779 (Pa. Cmwlth. 1992), the Court reasoned:

> "Where we have a finding that a claimant has failed to pursue jobs in good faith, *we do not believe the employer has the responsibility of keeping a job open indefinitely, waiting for the claimant to decide when he wants to work.* As the board states in its decision, claimant's loss of earning power is not due to his disability, but due to his lack of good faith in pursuing work made available to him which was within his physical limitations. *In order to receive a reinstatement of total disability benefits, claimant must prove a change in his condition such that he could no longer perform the jobs previously offered to him.*"

It does not matter that the job was a funded position. Once a claimant has refused an available job in bad faith, his employer's obligation to show job availability ends. The claimant must live with the consequences of his decision and cannot remedy the situation by attempting to accept the previously offered position. Instead, claimant must show a worsening of his condition to be granted a reinstatement to total disability.

The decision of the WCAB was affirmed.

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Jason P. Glass v. Workers' Compensation Appeal Board (The City of Philadelphia), No. 1274 C.D. 2012, Filed January 10, 2013.

(Subrogation - Employer's entitlement to subrogation is not extinguished where employer inadvertently allows evidence critical to claimant's third party action to be destroyed.)

Claimant, a police officer, sustained injuries when he lost control of the motorcycle on which he was training and it fell on top of him. Employer accepted claimant's injuries as work-related and paid claimant Injured-On-Duty (IOD) benefits and benefits for medical treatment. Soon thereafter, claimant filed a third-party action against Philadelphia Cycle Center (PCC), alleging that improper maintenance caused him to lose control of the motorcycle. Claimant obtained an award against PCC in the amount of $490,000. Employer then filed a review petition asserting that it was entitled to subrogation and that its lien was $219,755.63. Claimant objected to the review petition, claiming that employer acted in bad faith by allowing the spoliation of evidence, which affected his third-party recovery and, thus, employer's subrogation right should be extinguished.

Before the Workers' Compensation Judge, employer submitted proof of the award received by claimant, as well as proof of its subrogation lien. In addition, employer offered claimant's engineer's report from the third-party action, which indicated that the clutch mechanism of the motorcycle had been improperly maintained, causing claimant to crash.

Claimant offered testimony from a Legal Assistant in employer's Law Department who stated that claimant's counsel had requested that employer direct its Police Department to refrain from altering the motorcycle, particularly the clutch mechanism, until claimant could have the motorcycle inspected by an engineer. The Legal Assistant stated that she contacted the Police and spoke with a Lieutenant, advising the Lieutenant of the request not to have the motorcycle altered. The Legal Assistant did not have any documentation to support that she made the request or that the Lieutenant complied with the request.

In response, the Lieutenant testified that she received nothing in writing regarding the motorcycle and denied having a discussion with anyone about not altering the motorcycle until after an inspection could occur. On September 20, 2006, a repair order was issued and the motorcycle's clutch lever was replaced.

The WCJ found the Lieutenant more credible than the Legal Assistant and thus found that the Lieutenant did not receive or issue orders that the motorcycle should not be modified. The WCJ further found that claimant failed to establish that employer "undertook in deliberate bad faith to subvert a third party suit brought by claimant" so as to extinguish employer's subrogation lien.

The Workers' Compensation Appeal Board agreed that claimant did not establish that employer acted with deliberate bad faith and, therefore, employer retained its subrogation rights under §319 of the Act.

Claimant then sought review by the Commonwealth Court, arguing that the Legal Assistant's actions in failing to ensure that the motorcycle was not altered demonstrated the employer's deliberation to subvert the third party action. The Court did not agree.

To the contrary, the Court noted that, generally, the right to subrogation is statutorily absolute and can be abrogated only by choice. Here, the circumstantial evidence presented to establish that employer acted with deliberate bad faith merely established that the alteration of the motorcycle was the product of miscommunication within employer's offices. Thus, claimant did not establish that the Legal Assistant acted in bad faith so as to hinder claimant's third-party action.

While the Court agreed that it would be unreasonable to permit an

employer to both act in deliberate bad faith to subvert an employee's third party action and then to demand subrogation arising from that action, the employer's conduct here was not such "deliberate bad faith."

The order of the WCAB was affirmed.

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Eleazar Ortiz v. Workers' Compensation Appeal Board (Raul Rodriguez d/b/a Rodriguez General Contractors and Uninsured Employer's Guaranty Fund), No. 446 C.D. 2012, Filed January 15, 2013.

(Unauthorized Alien - Suspension - To suspend weekly wage benefits of an unauthorized alien, an employer need only demonstrate that a claimant's medical condition has improved enough to work at some job, even one with restrictions.)

Claimant suffered a work injury when he fell from a ladder while working for employer. Claimant sought workers' compensation benefits. Because employer did not have a workers' compensation insurance policy in place, claimant sought benefits from the PA Uninsured Employers Guaranty Fund. The Fund denied liability.

Following a hearing, the Workers' Compensation Judge awarded claimant total disability benefits from the date of injury through November 2007, at which time claimant had been released to part-time work. Accordingly, partial disability benefits were awarded after November 2007. Neither party appealed.

On September 28, 2009, employer filed a suspension petition alleging that claimant was not authorized to work in the United States and that he had returned to work. In his answer, claimant admitted that he was not authorized to work in the United States, but contended that he was entitled to benefits because his medical condition had not improved. The WCJ found that, although claimant was not authorized to work in the United States, claimant's medical condition had not changed. Because the WCJ concluded that employer was required to prove a change in claimant's medical condition and failed to do so, the suspension petition was denied.

The Workers' Compensation Appeal Board reversed, reasoning that employer had demonstrated a change in claimant's medical condition by virtue of his return to modified duty work. Once claimant was able to work, physically, he was no longer eligible for any disability benefits. At that point, claimant's immigration status resulted in his loss of earning power, not the work injury.

Claimant appealed to the Commonwealth Court arguing that benefits cannot be suspended solely on the basis that he is not authorized to work in the United States. The Court agreed that a claimant's status as an undocumented alien worker does not preclude him from receiving **total** disability benefits under the Act, but disagreed that an undocumented alien worker is entitled to **partial** disability benefits.

The Court looked to the Supreme Court's decision in the case of Reinforced Earth Company v. WCAB (Astudillo), 570 Pa. 464, 810 A.2d 99 (2002). In that case, the Court held that an employer seeking to suspend disability benefits of a claimant who is an unauthorized alien is not required to show job availability. In that situation, employer need only demonstrate that claimant is an unauthorized alien and that claimant is no longer totally disabled.

Here, claimant acknowledged that he is not authorized to work in the United States. He was medically cleared to return to part-time work and was, in fact, working. His loss of earning power is now due to his status as an unauthorized alien, not the work injury. As such, the order suspending claimant's benefits was affirmed.

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Michael DePue v. Workers' Compensation Appeal Board (N. Paone Construction, Inc.), No. 1113 C.D. 2012, Filed January 30, 2013.

(Review - Once a Compromise and Release Agreement has been approved, the claimant may not file a review petition seeking to add additional injuries to the Notice of Compensation Payable.)

Claimant suffered a work-related closed head injury in 1996. Employer issued a Notice of Compensation Payable and benefits were paid. In 2008, claimant and employer entered into a Compromise and Release Agreement to settle the wage loss portion of the claim for $175,000. The injuries subject to the C&R were described as "any and all injuries suffered at North Paone Construction Company, including but not limited to *the accepted injuries of a severe closed head injury with seizure disorder and short term memory loss."* Employer agreed to continue to pay "all reasonable and related medical bills." After a hearing held on March 3, 2008, the Workers' Compensation Judge approved the C&R Agreement.

On July 19, 2010, claimant filed a penalty petition alleging that employer had failed to pay his medical bills. On September 7, 2010, claimant filed a review petition, alleging that the description of his work injury was incorrect and should include a left shoulder injury.

During the litigation, the evidence showed that the only medical bills at issue related to treatment of the claimant's left shoulder. Employer had paid for treatment of the claimant's left shoulder prior to the resolution of the claim, but had never formally accepted the left shoulder injury.

In response to claimant's petitions, employer submitted the WCJ's prior decision approving the C&R Agreement, the transcript of the hearing held relative to the C&R, and a packet consisting of a proposed addendum to the C&R prepared by claimant's counsel and a hand written notation made by employer's counsel thereon. Specifically, claimant's counsel sought to add the left shoulder fracture to the injuries described in the C&R, but employer's counsel rejected the proposal, noting "we already negotiated these injuries at the time of the last settlement."

The WCJ concluded that claimant's review and penalty petitions were barred by the doctrine of res judicata because claimant was aware

of the left shoulder injury and agreed not to include it in the C&R Agreement. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court. The Court noted that it is well established that a valid C&R Agreement, once approved, is final, conclusive and binding on the parties. An approved C&R can be set aside only upon a clear showing of fraud, deception, duress, mutual mistake, or unilateral mistake caused by the opposing party's fault. Any issue which was not expressly reserved in the agreement may not be raised later.

Here, after negotiations with employer, claimant agreed to omit the left shoulder injury from the description of his accepted injuries in the C&R agreement. The record simply did not support claimant's assertion that the left shoulder injury was erroneously omitted in the final draft of the agreement. Moreover, claimant cannot rely upon employer's voluntary payment of the medical bills prior to the execution of the C&R agreement. An employer's voluntary medical payment does not constitute an admission of liability for an injury.

As a result, the Court affirmed the order of the WCAB.

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Brian Walsh, D.O. (c/o East Coast TMR) v. Bureau of Workers' Compensation Fee Review Hearing Office (Traveler's Insurance Co.), Nos. 839 C.D. 201, 840 C.D. 2012 and 841 C.D. 2012, Filed April 22, 2013.

(Fee Review - Downcoding Procedure - Before downcoding, an insurer *must* comply with the requirements of 34 Pa. Code §127.207.)

In this case, nine physicians, represented by their billing and collection companies, filed a total of 61 review applications after the insurance carrier for the claimants' employers, Traveler's, "downcoded" claims that the physicians had submitted to Traveler's for therapeutic magnetic resonance (TMR) treatment for the claimants.

After the downcoding, the physicians filed fee review applications with the Fee Review Hearing Office, which resolved the applications in favor of Traveler's. The physicians then requested a hearing. Traveler's filed a motion to dismiss the applications, arguing that the hearing officers had resolved the same coding issue in previous fee review applications involving the same parties. The hearing officer granted Traveler's' motion and dismissed the fee review applications. The hearing office noted that under 34 Pa. Code §127.207, an insurer generally bears the burden in fee review proceedings to demonstrate that it properly downcoded a treatment or procedure. Here, however, because the same downcoding issue had been previously decided in Traveler's' favor, the physicians were collaterally estopped from challenging future downcoding by Traveler's for TMR services.

The physicians then sought review by the Commonwealth Court arguing that, under the Regulations, the issue of the appropriateness of a billing code is not subject to review until the insurer has demonstrated that it has strictly complied with the procedural requirements for downcoding. Under 34 Pa. Code §127.207(d), where an insurer does not demonstrate compliance, the Bureau must resolve the dispute in favor of the provider.

In response, Traveler's argued that the Court should reject the providers' reliance on the "strict compliance" language of the Regulation, contending that the downcoding Regulation is applicable to providers only, rather than to individual patients. Thus, because the issue of proper downcoding has been decided in a previous proceeding between the provider and the insurer, the Bureau need not make an evaluation regarding compliance with the procedural requirements because the ultimate outcome is the same once collateral estoppel applies to the merits of the downcoding.

The Court was not persuaded by the insurer's argument. The Court noted that the plain language of the Regulation is clear: before downcoding, an insurer *must* comply with the requirements of 34 Pa. Code §127.207. Otherwise, subsection (d) of the Regulation directs that "the Bureau [upon initial review of a fee review application] will resolve an application for fee review filed under §127.252...*in favor of the provider under §127.254*." 34 Pa.Code §127.207 (emphasis added).

Accordingly, the matter was remanded to the Fee Review Hearing Office for a hearing to consider the question of the insurer's compliance and, only if there was compliance, the hearing officer may then consider whether collateral estoppel precludes consideration of the merits of the providers' challenge to the downcoding at issue in this matter.

(For a copy of the Regulations considered by the Court in this matter, please send a request via email to: wc@trc-law.com.)

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Jamie Whitesell v. Workers' Compensation Appeal Board (Staples, Inc.), No. 205 C.D. 2013, Filed July 10, 2013.

(Fatal Claim - The term "injury" for purposes of the 300-week limitation does not include consequential injuries suffered after the commencement of the compensable injury.)

On October 15, 2003, decedent sustained a work-related injury which was accepted by her employer as a "lumbar strain/sprain." After undergoing two spine surgeries, decedent filed a Petition to Review Compensation Benefits seeking to amend the description of her injury to "lumbar strain/sprain and lumbar disc disruption L4-L-5, resulting in total disc arthroplasty at L4-L5 level." The petition was granted on June 28, 2006. On June 13, 2010, decedent dies as a result of mixed drug toxicity from medications prescribed by her treating physician.

On June 8, 2011, a Fatal Claim Petition was filed. Employer filed an Answer asserting that the petition must be dismissed because decedent's death did not occur within

300 weeks of the date of her work injury as required by §301(c)(1) of the Act. The Workers' Compensation Judge agreed with employer and denied the petition.

Claimant appealed to the Workers' Compensation Appeal Board arguing that because decedent's death arose from an additional "injury" that was accepted pursuant to the WCJ's 2006 decision, her death was within the 300-week time limitation. The WCAB held that, because decedent suffered a work injury as opposed to an occupational disease, the 300-week limitation applied. This is true even in the case of an apparently consequential injury, arising subsequent to the date of the recognized injury. The 300-week period is to be calculated beginning with the date of the original work injury.

On appeal to the Commonwealth Court, claimant argued that the term "injury" for purposes of the 300-week limitation should mean the original injury as was other injuries which occurred as a result of the original injury. Hence, the 300-week limitation to file a death claim starts from the date that the additional injuries occurred. The Court was not persuaded.

Relying upon the case of Shoemaker v. WCAB (Jenmar Corp.), 604 A.2d 1145 (Pa.Cmwlth.), *appeal denied,* 533 Pa. 614, 615, 618 A.2d. 403, 404 (1992), the Court held that, without exception, §301 (c)(1) denies benefits to a claimant when more than 300 weeks have elapsed between the commencement of the compensable injury and the injury-related death. It is irrelevant that the work injury was legally expanded by the WCJ in 2006.

The order of the WCAB was affirmed.

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Southeastern Pennsylvania Transportation Authority (SEPTA) v. Workers' Compensation Appeal Board (Cunningham), No. 2045 C.D. 2011, Filed July 12, 2013.

(Suspension - There is no need for an employer to show job availability where non-work related injuries are the cause of the claimant's total disability.)

On June 11, 1996, claimant suffered a work-related injury to his right knee. At the time of his injury, he was working under permanent, light-duty restrictions. He returned to his light-duty work shortly after the June 11, 1996 injury.

On July 7, 1996, claimant was involved in a non-work related car accident. He suffered injuries to his left knee, low back and left hand. As a result, he was out of work again on July 12, 1996.

In January of 1997, claimant underwent surgery for the work-related right knee injury. He then returned to his light-duty position in April of 1997.

On December 24, 1998, claimant was involved in a second, non-work related car accident, suffering injuries to his left knee, low back, left hand and left shoulder. Claimant again stopped working.

In the interim, on August 28, 2006, employer filed a Modification/Suspension Petition, alleging that, as of April 12, 2006, claimant failed to respond in good faith to jobs referred to him within his physical and vocational capabilities. During that litigation, employer filed a second petition alleging that claimant was able to return to work as of November 2005, but for his December 1998 non-work related injuries.

Before the Workers' Compensation Judge, employer presented testimony of an orthopedic surgeon who opined that claimant's right knee had recovered sufficiently to allow claimant to perform sedentary work as of November 9, 2005, and that the only cause of his continuing disability was the non-work related December 1998 accident. Testimony was also presented from a vocational consultant, who stated that he found 4 open and available jobs that would have provided claimant with wages of $400 per week. Although claimant went to the interviews, he began swearing and threatening people.

The WCJ credited employer's witnesses and reduced claimant's benefits for the period of April 2006 to January 2007. Additionally, the WCJ found claimant's non-work related injuries rendered him incapable of all possible work and suspended claimant's benefits as of January 26, 2007.

Claimant appealed both the modification and suspension of benefits. The Workers' Compensation Appeal Board affirmed the WCJ's decision to modify claimant's benefits, but reversed the suspension order, finding that employer failed to establish job availability of a job equal to or greater than claimant's pre-injury weekly wage of $825.91.

On appeal to the Commonwealth Court, employer argued that it was not required to demonstrate job availability given that claimant's non-work related injuries were totally disabling. The Court agreed.

Generally, a suspension of benefits is appropriate where employer establishes that claimant has recovered all of his earning power; otherwise benefits are only modified. 309 Nissan v. WCAB (Horowitz), 819 A.2d 126 (Pa.Cmwlth. 2003). Employer has the burden of proving that claimant's work-related injury has improved sufficiently for claimant to return to work and that an appropriate job is available to claimant; once employer meets that burden, claimant must then demonstrate that he responded to the offer in good faith. Darrall v. WCAB (H.J. Heinz Co.), 792 A.2d 706 (Pa.Cmwlth. 2002). However, in Schneider, Inc. v. WCAB (Bey), 560 Pa., 608, 747 A.2d 845 (2000), the Supreme Court held an employer is not required to show job availability where the claimant is totally disabled by non-work related conditions.

Here, similar to the claimant in Schneider, claimant was involved in a non-work related auto accident that left him totally disabled. Thus, the WCJ correctly concluded that a suspension of benefits was in order. It would be unreasonable to require employer to present evidence of available jobs where claimant is totally disabled due to non-work related conditions.

The order of the WCAB was reversed.

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Mansfield Brothers Painting and Selective Insurance Company of America, v. Workers' Compensation Appeal Board (German), No. 1858 C.D. 2012, Filed July 26, 2013.

(Course and Scope of Employment - Premises - For an injury to be compensable because it occurred on the employer's "premises," the critical factor is whether the employer caused the area to be used by employees in performance of their assigned tasks.)

In the summer of 2009, claimant, a painter who receives work assignments from his union, was assigned to paint the Quadrangle Building at the University of Pennsylvania. Claimant commuted to the work site by train. On June 24, 2009, claimant completed his shift, left the Quadrangle Building and began walking to the train station at 34th & Market Streets. He crossed Spruce Street, a public street, and continued on a slate path going behind the Wistar Building, located on the University's campus. Claimant tripped on an uneven part of the slate path and fell onto his back. The incident occurred about 150 feet from the Quadrangle Building.

Employer filed an answer to claimant's Claim Petition, denying that claimant's injury was work-related. The Workers' Compensation Judge concluded, without explanation, that claimant was in the course of his employment when he fell.

The Workers' Compensation Appeal Board affirmed, concluding that claimant was on employer's "premises" when he fell. The WCAB reasoned that claimant was injured while on premises where employer's business affairs were being carried on, i.e., the University campus and that a condition of the premises, i.e., the uneven slate pathway, contributed to claimant's work injury.

Employer then sought review by the Commonwealth Court, arguing that claimant was not injured within the course and scope of his employment because claimant wan not on employer's premises when the injury occurred. Claimant responded that he was on employer's premises because employer provided only one means of entrance to the Quadrangle Building.

The Court noted that an injury takes place in the course of employment in two ways: 1) an injury is compensable if it occurs while the claimant is furthering the business or affairs of his employer, whether on or off employer's premises; or 2) even if claimant is not furthering employer's business, claimant is entitled to benefits if he is injured on the employer's premises at a reasonable time before or after the work period.

The claimant must prove all of the following:

> That he was (a) on the premises occupied or under the control of the employer, or upon which employer's business or affairs are being carried on; (b) is required by the nature of his employment to be present on his employer's premises; and (c) sustains injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

An employer's "premises" is not necessarily limited to properly controlled, occupied or owned by employer. Rather, "premises" can encompass property that "could be considered an integral part of the employer's business." Property becomes "integral" when the employer requires employees to use that property.

Here, employer did not require claimant to use the train station at 34th & Market, or even that he commute by train. There was nothing preventing claimant from using another train or commuting by car. Employer had no interest in or control over the route claimant chose to travel home. Thus, the sidewalk on which claimant sustained his injury was not integral to employer's business and cannot be consider part of employer's premises.

The order of the WCAB was reversed.

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Clyde Kennedy v. Workers' Compensation Appeal Board (Henry Modell & Co., Inc.), No. 1649 C.D. 2013, Filed August 1, 2013.

(Subrogation—Employer is entitled to subrogation even where claimant's judgment does not come from a third party tortfeasor, but from the tortfeasor's liability insurer.)

Claimant sustained a crush injury to his right hand while using a conveyor belt at work. As a result, employer paid total disability benefits and medical bills.

The conveyor belt had been manufactured and installed by Keystone Spray Equipment, Inc. Claimant filed a products liability action against Keystone and employer asserted a subrogation lien against any recovery for the compensation benefits it paid.

Keystone's insurance carrier, Regis Insurance Co., refused to defend the action, claiming that the injury fell within the "products hazard" exclusion found in Keystone's policy. Keystone itself was insolvent and unable to pay a judgment or settlement to claimant or to pursue Regis for indemnification.

The trial court approved a consent judgment against Keystone in the amount of $426,723.44. Claimant agreed not to pursue Keystone for judgment. Instead, claimant pursued Regis for collection of the judgment by filing a complaint against Regis for breach of contract and bad faith. The trial court ruled in claimant's favor. Regis appealed and the Superior Court affirmed.

Employer then sought payment of its subrogation lien in the amount of $81,095.09. When it did not receive payment, employer filed a review offset petition. The Workers' Compensation Judge concluded employer was entitled to subrogation because the judgment against Regis arose out of claimant's work injury. Employer's petitions were granted and the Workers' Compensation Appeal Board affirmed.

Claimant then petitioned the Commonwealth Court for review, arguing that, because claimant's judgment did not come from a third party tortfeasor, but from the tortfeasor's liability insurer, employer has no right to subrogation. The Court did not agree.

Relying upon the Supreme

Court's decision in Poole v. WCAB (Warehouse Club, Inc.), 570 Pa. 495, 810 A.2d 1182 (2002), the Court noted that §319 of the Act provides that the employer "*shall be subrogated to the right of the employe...against such third party*" that caused the compensable injury. The funds against which the employer asserts a subrogation lien must be for the same compensable injury for which the employer is liable under the Act. That is the case here.

Claimant's lawsuit against Regis allowed him to collect the judgment against Keystone. Claimant himself had no independent cause of action against Regis stemming from its refusal to defend and indemnify Keystone. Claimant merely stepped into the shoes of Keystone as an assignee to pursue indemnification because Keystone could not. Claimant's lawsuit against Regis depended upon Keystone's negligence and placed liability on its carrier, Regis, as the proper party.

By allowing reimbursement of the lien, all purposes of subrogation are met: 1) claimant will not receive a double benefit; 2) employer will not be compelled to pay for the negligence of a third party; and 3) liability is place on the proper party.

The order of the WCAB was affirmed.

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Randall Harrison v. Workers' Compensation Appeal Board (Auto Truck Transport Corp.), No. 769 C.D. 2013, Filed October 2, 2013.

(Impairment Rating Evaluation—The grant of a Modification Petition based on the results of an IRE does not automatically change the description of the claimant's work injury on the NCP.)

Employer issued a Notice of Compensation Payable (NCP) describing claimant's work injury as a "right ankle sprain" and paying total disability benefits. On August 25, 2010, Dr. Bednarz performed an impairment rating evaluation (IRE) and assigned claimant a 13% whole body impairment rating. On this basis, employer filed a Modification Petition to change the claimant's disability status from total to partial. Shortly thereafter, Dr. Raklewicz preformed an independent medical examination (IME) and found claimant to be fully recovered. As such employer also filed a Termination Petition.

Claimant then filed a Review Petition seeking to amend the injury as described on the NCP to include additional right foot and ankle conditions described by Dr. Bednarz in his IRE report. Because Dr. Bednarz was asked to evaluate claimant's ankle and foot, he took into account two diagnoses: 1) claimant's ankle sprain and 2) his preexisting flat foot deformity.

The Workers' Compensation Judge credited Dr. Bednarz 13% impairment rating, as well as the testimony of Dr. Raklewicz. As such, the WCJ granted employer's petitions. The WCJ found that, other than the ankle sprain, claimant's foot, ankle and leg problems were attributable to a congenital condition, not the work injury. Claimant's review petition was denied.

The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that Dr. Bednarz's IRE report established that the compensable injury was more than an ankle sprain. As such, Dr. Raklewicz's testimony, which addressed only the ankle sprain, was not competent to support a termination petition.

The Court noted that the WCJ may amend the NCP at any time during litigation of any petition if the evidence shows that the work injury is different or more expansive than that listed in the NCP. In addition, the NCP may be amended if claimant files a review petition and proves that he suffered additional injuries. The burden of proof, however, lies with the party seeking to change the NCP. Here, claimant failed to meet that burden.

An IRE is undertaken to determined the claimant's level of disability. It is separate and distinct from an IME, which is undertaken to determined if the claimant has recovered from the work injury. The IRE physician is to address his impairment opinion on the injury described in the NCP. Here, Dr. Bednarz considered all of claimant's ailments, but that does not implicitly amend the NCP to include claimant's other problems. Moreover, Dr. Bednarz did not opine that the work injury was anything other than an ankle sprain.

The order of the WCAB was affirmed.

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Kevin Moran v. Workers' Compensation Appeal Board (McCarthy Flowers and Donegal Mutual insurance), No. 830 C.D. 2013, Filed October 16, 2013.

(Utilization Review - Employer may be liable for payment of massage therapy if rendered by an LPN.)

Claimant suffered a work-related low back injury. As a result, his physician prescribed massage therapy which was then performed by Gail Kozlowski, LPN (Nurse Kozlowski). Employer requested utilization review with regard to the reasonableness and necessity of Nurse Kozlowski's treatment.

The UR reviewer determined that the license of an LPN does not include a certification in massage therapy and, thus, the treatment provided was not reasonable or necessary.

Claimant filed a petition for review of utilization review determination. Employer argued that the case was controlled by the case of Boleratz v. WCAB (Airgas, Inc.), 932 A.2d 1014 (Pa.Cmwlth. 2007). In that case, the claimant received massage therapy from a non-licensed health care provider. The Court determined that such services were not reimbursable under the Act.

The Workers' Compensation Judge was not persuaded by employer's argument and granted claimant's petition. The Workers' Compensation Appeal Board reversed, however, stating that, in order for the cost of Nurse Kozlowski's services to be payable under §306(f) of the Act, it must be a service which the provider is li-

censed as a practical nurse to provide. Citing to the Court's decision in Boleratz, the WCAB held that, because massage therapy was not within the scope of Nurse Kozlowski's practice as an LPN, her services were found not to be reimburse able under the Act.

Claimant then sought review by the Commonwealth Court, arguing that the WCAB erred in applying Boleratz to the facts of this case. In Boleratz, the therapy was not provided by a health care provider; whereas, here, the therapy was provided by a licensed practical nurse. The Commonwealth Court agreed.

The order of the WCAB was reversed.

SUPREME COURT CASE REVIEWS

City of Pittsburgh and UPMC Benefit Management Services, Inc., v. Workers' Compensation Appeal Board (Robinson), No. 18 WAP 2011, Decided March 25, 2013.

(Suspension - Claimant's acceptance of retirement or disability pension does not create a presumption that claimant has voluntarily withdrawn from the workforce thereby entitling employer to a suspension; at most, claimant's acceptance of a pension entitles employer to a permissive inference that claimant has retired and that inference must be considered in the context of the totality of the circumstances.)

Claimant, a police officer, sustained a work-related injury in 1997 and employer placed her in a light-duty position performing office work. In 2001, while traveling to an appointment to obtain treatment for her work-related injury, she was involved in an auto accident in which she suffered new injuries. Employer accepted the subsequent injuries as work-related. After the accident, claimant did not return to her light-duty position, nor was she offered any other light-duty work.

In late 2004, claimant sought and received a disability pension, which is awarded to City police officers if a work-related injury "disables him or her from performing the duties of his or her position or office." Three physicians certified that she was unable to perform her pre-injury job.

Three years later, claimant submitted to an IME at employer's request. The IME physician concluded that, although claimant was incapable of performing her prior job as a police officer, she could perform modified duty work. As such, a Notice of Ability to Return to Work was sent to claimant. Shortly thereafter, employer filed a Suspension Petition, asserting that claimant was capable of working but had voluntarily removed herself from the work force by not looking for or seeking employment in the general labor market.

The Workers' Compensation Judge denied the petition, concluding that claimant had not voluntarily removed herself from the workforce. The WCJ found that claimant was forced into retirement when employer eliminated her light-duty position. Moreover, claimant testified that she had reported to the Pennsylvania Job Center, that she had debilitating pain and did not know what level of work she could do, and that her condition had worsened since she last worked in 2001.

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

Employer then sought review by the Commonwealth Court. The Court adopted what it termed a "totality of the circumstances" standard, stating:

> "Circumstances that could support a holding that a claimant has retired include: (1) where there is no dispute that the claimant retired; (2) the claimant's acceptance of a retirement pension; or (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions."

Applying this standard, the Court concluded that employer did not present sufficient evidence to show that claimant intended to retire. For example, claimant had accepted a disability pension conditioned upon her inability to perform her time-of-injury position, rather than a disability pension that precluded her from working in any capacity, or an "old-age" pension. As such, the Court affirmed the denial of employer's Suspension Petition.

The Supreme Court then granted allocator to address the following issue:

> Did the Commonwealth Court err by holding that, in a petition to suspend compensation benefits based upon an alleged voluntary withdrawal from the workforce, the employer bears the burden of showing by the totality of the circumstances that the claimant has chosen not to return to the workforce?

The Court concluded that, while a claimant's receipt of a pension may give rise to a permissive inference that the claimant is retired, this is just one fact of many possible probative facts that must be considered in determining whether the claimant has voluntarily withdrawn from the workforce. The inference to be drawn from a person's receipt of a pension (whether disability or retirement) viewed alone, is equivocal and inconclusive. The receipt of a pension is not sufficient evidence, in and of itself, to satisfy the employer's burden of proof.

The order of the Commonwealth Court was affirmed.

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Gina Cozzone, Executrix of the Estate of Andrew A. Cozzone, v. Workers' Compensation Appeal Board (PA Municipal/East Goshen Township), No. 51 MAP, Decided August 19, 2013.

(Statutory Construction - The provisions of §413(a), including the 500-week and 3-year periods, are not mutually exclusive and both provisions must be given meaning and effect.)

On January 24, 1989, claimant sustained serious back injuries when he fell through a roof while working for the Township. The Township then paid claimant total disability benefits until he returned to his pre-injury position on September 20,

1989, with no loss of earnings. Thirteen years later, on May 19, 2003, the parties entered into a Supplemental Agreement reinstating TTD benefits from February 24, 2003 to March 17, 2003. TTD benefits were again reinstated from June 15, 2005 to August 29, 2005. Again, on June 20, 2007, TTD benefits were reinstated. On November 27, 2007, claimant began working modified-duty for a different employer. As such, the parties entered into an agreement on January 7, 2008, reducing claimant's benefits from total to partial. Claimant's modified duty position ended on January 24, 2008. Claimant subsequently filed a Reinstatement Petition, seeking a modification of his benefits from partial to total.

The Workers' Compensation Judge granted claimant's petition. The Workers' Compensation Appeal Board reversed and the Commonwealth Court affirmed that reversal holding that claimant's petition was filed beyond the 500-week period for which compensation was payable under §413(a) of the Act. The Court noted that the Supplemental Agreements executed by the parties after the expiration of 500 weeks were void and unenforceable and could not be used to resurrect the claimant's claim.

The Supreme Court granted discretionary review to address the issue: Whether claimant's petition to reinstate was barred by §413(a) of the Act when (1) he filed the petition within three years from the date of last payment of compensation paid pursuant to a supplemental agreement; (2) partial payments were ongoing; and (3) employer unilaterally ceased payments while the petition was pending?

Before the Court, claimant argued that the plain language of §413 (a) allows for a petition for reinstatement of benefits within three years of the most recent compensation payment. Claimant further argued that there is no sound policy justification for distinguishing between partially-disabled claimants who have received 500 weeks of partial disability benefits and are still permitted to petition for reinstatement of total disability benefits provided they do so within 3 years of the most recent payment and those, like claimant, who have experienced some period suspension.

The Township argued that claimant's right to benefits expired in 1999 by reason of §413(a)'s 500-week statute of repose which only permits a singular period for the running of the 500-week period for which partial is payable and does not permit stacking of limitations periods. The Township argued further that, given the nature of the 500 -week limitation as a statute of repose, the failure to file within that time period extinguishes a claimant's right to file. (*In contrast to statutes of limitation that limit the time in which a party may pursue a certain remedy, statutes of repose completely extinguish a claimant's substantive right, not just the remedy, if he fails to claim a right to compensation within the time limits of the statute*.)

The Supreme Court noted that §413(a) provides:

> [N]o notice of compensation payable, agreement or award shall be reviewed, modified or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation made prior to the filing of such petition….And provided further, that where compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury that payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable (*i.e., 500 weeks*)…

The Court further noted that the statute is silent as to the effect of resumed payments on a claimant's right to petition for a modification following a suspension after an attempted return to work. Nevertheless, the two parts of the statute are to be read concurrently and to the extent possible so that meaning and effect may be given to both parts.

Consequently, the Court held: "...under §413(a), workers' compensation claimants retain the right to petition for any modification that they hold at the time of any worker's compensation payment, for a minimum of three years from the date of that payment. And, where such payments have been suspended due to a return to work, and an attempted return, without a loss in earnings, §413(a) extends that right to petition to the entire 500 -week period during which compensation for partial disability is properly payable. In the event that payments are resumed after suspension, workers' compensation claimants continue to retain the right to petition for any modification that they hold at the time of any workers' compensation payment received subsequent to suspension, for a minimum of three years from the date of that payment. And finally, in the event that a period of suspension comes to an end upon the resumption (or commencement as the case may be) of workers' compensation payments, claimants retain the right to petition for modification as set forth in §413(a)."

Here, following his injury, claimant returned to work without any wage loss through the 500-week deadline, which was April 21, 1999. He did not file a reinstatement petition within three years of that date. As such, claimant no longer retained the statutory right to petition for reinstatement of benefits. The Supplemental Agreements entered into by the parties were a nullity. The Act provides no mechanism whereby an agreement can create or resurrect a right under the statute, where the statute itself mandates that the right is expired.

The Order of the Commonwealth Court was affirmed.

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Philip Payes v. Workers' Compensation Appeal Board (Commonwealth of PA State Police), No. 50 MAP 2011, Decided October 30, 2013.

(Whether a mental or psychic injury is compensable is, for the reviewing court, a mixed question of law and fact.)

Claimant, a trooper with the State Police, was driving his patrol car on Route 81 on November 29, 2006 while it was dark. A woman, dressed all in black, suddenly ran out in front of, and was struck by, claimant's patrol car. The woman flipped over the vehicle and landed on the highway. Claimant immediately pulled his car around into the traffic lane and rushed to attend to the woman, giving her mouth-to-mouth resuscitation as she bled from the mouth. She could not be revived and was ultimately pronounced dead at the scene. It was later determined that the woman suffered from mental illness and had been seen by several drivers waiting along the interstate prior to the incident.

As a result of the incident, claimant was permitted to be off work until January 2, 2007. Then, he returned to work but performed office work instead of his normal patrol duties. After working 4 days, however, claimant's feelings of anxiousness and stress led him to believe that he could not continue to perform the duties of a state trooper. He did not return to work after January 5, 2007.

Claimant subsequently filed a claim petition alleging that he suffered from work-related post-traumatic stress disorder (PTSD). At the hearing before the Workers' Compensation Judge, employer presented testimony of Major McDaniel, who testified about police cadet training regarding stress management, standards for State Police response to auto accidents, and State Police practice of rendering first aid at a crash site. Major McDaniel also testified about an incident where another State Trooper had struck and killed an individual who dashed in front of his patrol vehicle. Expert psychiatric testimony was also presented.

The WCJ determined that claimant had proven a mental injury arising from a work-related mental stimulus. The WCJ further found that, although State Troopers may expect to encounter or be involved with violent situations, the work-related mental stimulus here was not one normally encountered by or expected of State Troopers. Thus, the WCJ found that claimant's mental injury was caused by an abnormal working condition, making the mental injury compensable under the Act.

The Workers' Compensation Appeal Board reversed the WCJ's decision stating that the incident did not constitute an abnormal working condition given claimant's profession. The Commonwealth Court agreed, stating: "Indeed, it is not beyond the realm of possibility for an officer to have to take someone's life." While the event that occurred may have been unusual, it was not so much more stressful and abnormal that the already highly stressful nature of claimant's employment.

On appeal before the Supreme Court, claimant argued that it was error for the Commonwealth Court to disregard the fact, as found by the WCJ, that the decedent intended to kill herself by running in front of the vehicle.

In response, the State Police argued the "suicide by cop" is not unheard of and, thus, is not an abnormal working condition for police officers. Moreover, police officers are expected to deal with suicides and inadvertent deaths. While the event here was "unusual," it was not far removed from a police officer's expected duties.

The Court noted that issues involving mental or psychic injuries are highly sensitive to the factual circumstances of the case. Appellate review is a two-step process of reviewing the factual findings and then the legal conclusion. The existence of a compensable mental or psychic injury is, for the reviewing court, a mixed question of law and fact.

The Court reviewed the case law addressing this issue beginning with Martin v. Ketchum, 568 A.2d 159 (Pa. 1990), the foundational decision in this field. Overall, an individual seeking benefits for a psychic injury caused by a psychic stimulus (i.e.,, a "mental-mental injury") must establish "abnormal working conditions." Although the case law states that whether working conditions are abnormal, the cases also reflect that psychic injury cases are highly fact sensitive. Thus, appellate review of such cases are a two-step process of reviewing the factual findings and then the legal conclusion.

Here, claimant established that he suffered an injury (PTSD) and resulting disability stemming directly from his working conditions. The only remaining question is whether the causative working conditions were "abnormal." The WCJ found as fact that the type of incident (i.e., suicide by cop) was not one to which State Troopers are normally exposed. Thus, unless that finding was arbitrary and capricious, the WCAB and the Commonwealth Court were bound by it when analyzing the legal issue of whether the working condition was abnormal. The Court further noted that the WCJ's findings were supported by the evidence of record.

Hence, the Court held that the Commonwealth Court erred by not accepting the facts found the WCJ which established an extraordinarily unusual and distressing single work event experienced by claimant, resulting in a disabling mental injury. The Order of the Commonwealth Court was reversed and the case was remanded for reinstatement of the WCJ's decision.

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(Continued from page 1)

ernor. The bill will become law once the Governor approves and signs the bill.

House Bill 1636 was assigned to the Labor and Industry Committee on August 6, 2013. The Labor and Industry Committee has not yet voted on the bill, thus it may be some time before the proposed bill, if passed, would be effective to modify the length of time that employers can direct an injured employee's health care. Members of the general public are welcome to comment on the bill at public hearings. We encourage you to contact your local representative to express your opinion of House Bill 1636.

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