pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

NEWS & NOTES

"Serving All Pennsylvanians"

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In This Issue

Workers' Compensation Conference a Success!

On May 30 – 31, staff members from the three workers' compensation program areas, led by Mistie Snyder, organized and accomplished another successful workers' compensation conference. More than 1,300 people registered to attend this year's conference, representing employers, case managers, third-party administrators, defense/ claimant counsel, labor, and others.

The committee began preparations for the 2025 conference in July. We are fortunate to have subject matter experts willing to share their expertise and educate stakeholders on issues of interest each year.

We thank the committee, speakers, staff, and everyone who has attended the conference over the years and participated in the breakout session conversations. This is what makes the Pennsylvania Workers' Compensation Conference a huge success!

WCAB Hires Three New Commissioners

This summer, three new Commissioners joined the Workers' Compensation Appeal Board: the Honorable Alexander Brown, Esq., the Honorable Joseph A. Petrarca, Esq., and the Honorable Catherine Surbeck, Esq.

Commissioner Brown, prior to joining the WCAB, litigated a wide variety of civil cases in state and federal court, including the briefing and arguing of appeals to the three Pennsylvania appellate courts and the United States Court of Appeals for the Third Circuit. His first job after law school was clerking for the United States District Court for the Western District of Pennsylvania. He graduated cum laude from Case Western Reserve University School of Law in 2016 after making the law review and mock trial team, and graduated summa cum laude from Grove City College in 2013 with highest honors in political science. Commissioner Brown also has prior public service experience. He was appointed and later elected to New Stanton Borough Council, then served two years as president of the Council before being named its solicitor. In addition, he served as Chair of Westmoreland County's Board of Assessment Appeals and was also named solicitor to the Westmoreland County District Attorney. Outside of work, Commissioner Brown enjoys running, hunting, and spending time with family and friends.

Commissioner Petrarca, prior to joining the WCAB, was a member of the Pennsylvania House of Representatives where he chaired the Judiciary, Agriculture and Rural Affairs, and Children and Youth Committees, as well as the Southwest Caucus. He also served as a commissioner on the Pennsylvania Commission on Crime and Delinquency. By gubernatorial appointment, Commissioner Petrarca served during his entire time in the House on the Organ Donation Advisory Board. Before being elected to the House, he was a Deputy Attorney General in a litigation division. Prior to that, he was an Attorney/Advisor for Federal Administrative Appeals Judges at the U.S. Department of Labor, Benefits Review Board, Washington, D.C., reviewing case determinations by administrative law judges and writing Decisions and Orders pursuant to federal worker's compensation law. Commissioner Petrarca received his undergraduate degree from St. Vincent College, and his law degree from the University of Pittsburgh School of Law. He and his wife Elise are the parents of five amazing children.

Commissioner Surbeck joins the WCAB with more than 30 years of workers' compensation experience, representing employers/carriers the first five years and injured workers for the past 25 years. She began her career as in-house counsel at Travelers Insurance Company and then as an associate at Rawle & Henderson. She then moved to representing injured workers, first with the former Honorable Christina J. Barbieri and thereafter at Freedman & Lorry. In 2002, she opened her own practice focusing exclusively on representing injured workers under the Longshore and Harbor Workers' Compensation Act, and its extensions. Commissioner Surbeck graduated from University of Washington and Temple University School of Law. She resides in Bryn Mawr with her husband David and Misty (family bichon) with visits from her two daughters Chloe (new Temple University graduate) and Maya, rising sophomore at Reed College in Portland, Oregon. In her spare time, she loves to cook and garden.

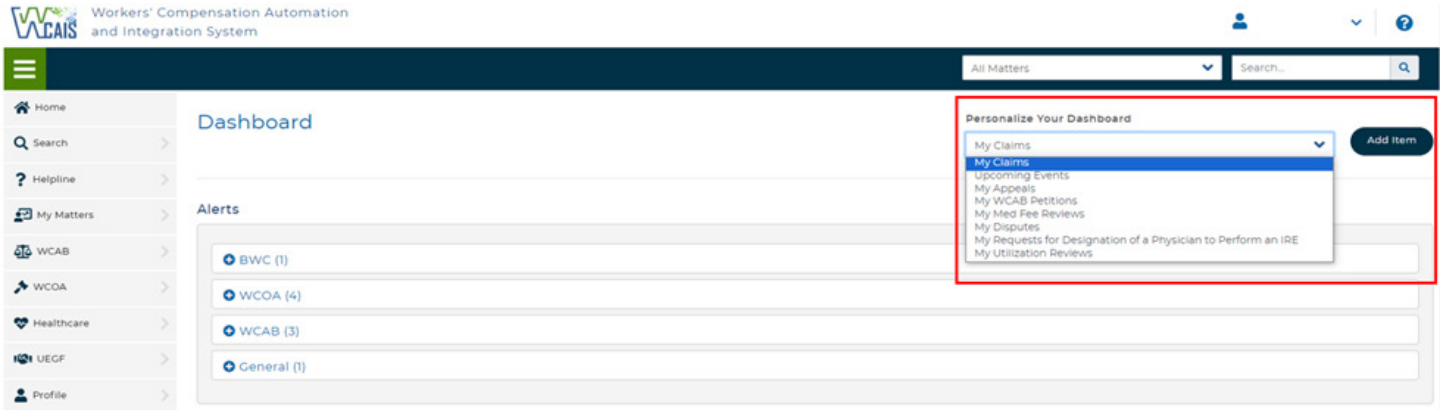
WCAIS

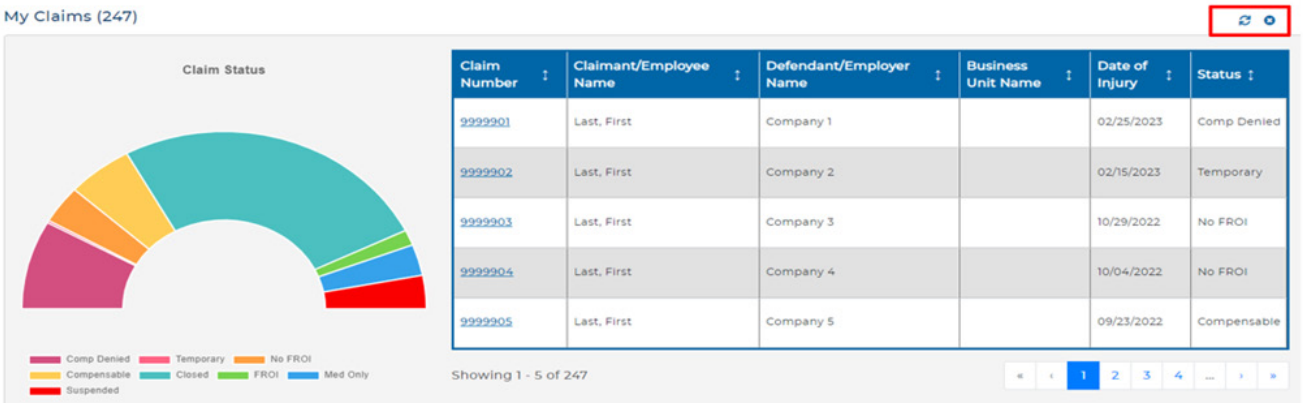
Workers' Compensation Automation and Integration System

Did you know, you can customize your WCAIS Dashboard?

Follow these steps, the next time you log in:

- Proceed to WCAIS Dashboard > Personalize Your Dashboard > select a widget from the drop down > Select Add Item
- Scroll down on your Dashboard and watch the information populate right in front of you!





To remove your personalized widget from the Dashboard, click on the X in the upper right-hand corner. These steps may be repeated, as often as you wish.

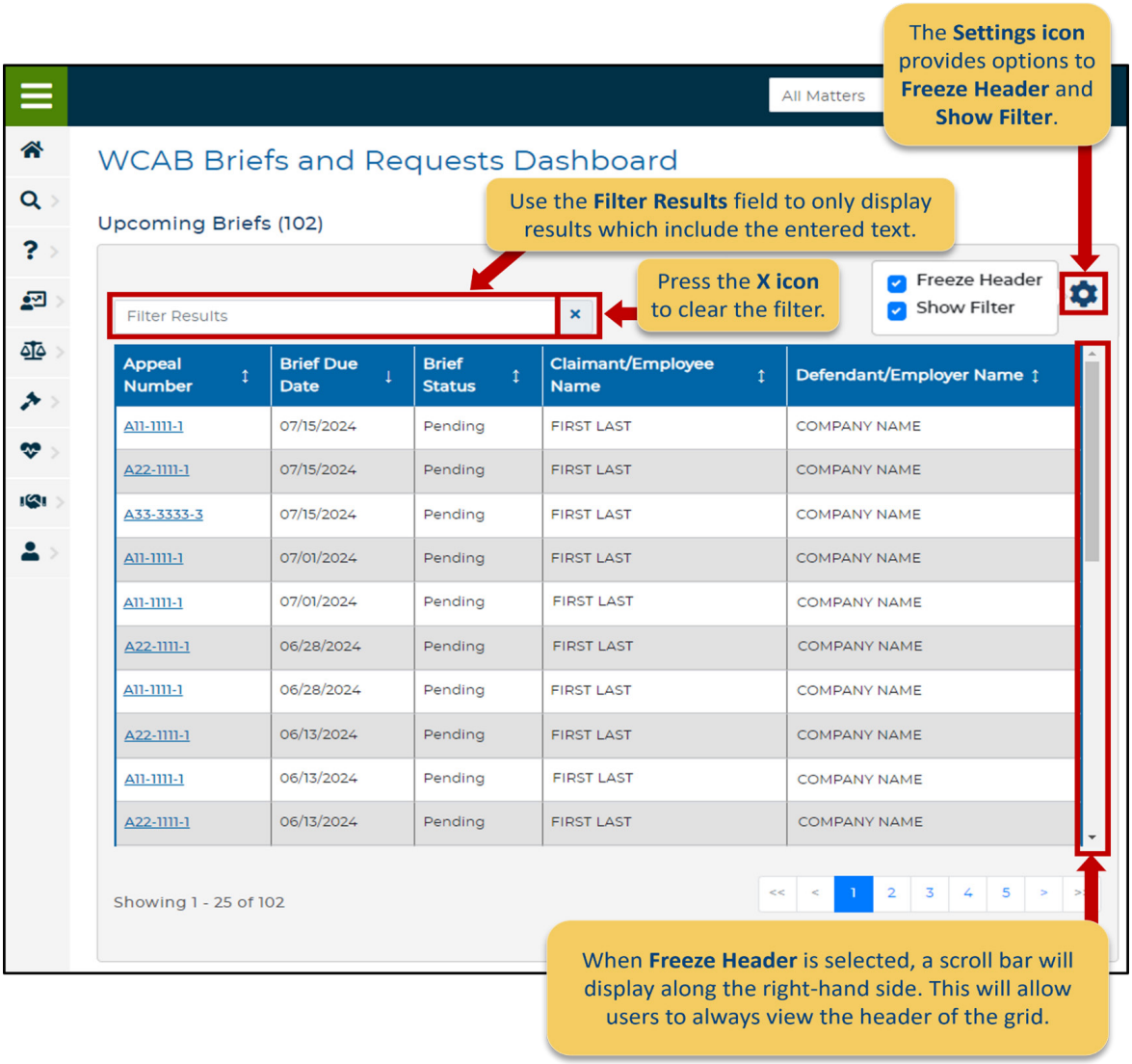
WCAIS (Cont'd.)

WCAIS Digital Transformation of WCAB Screens

The Digital Transformation of WCAB screens (including Appeal and WCAB Petition Summary, File WCAB Appeal/Petition Process, WCAB Briefs and Requests Dashboard, Search Appeal or Search WCAB Petition screens), and related screens took place in the Workers' Compensation Automation and Integration System (WCAIS)!

Please share this information with all WCAIS users in your offices, including clerical assistants, paralegals, and administrators. The WCAB screens will be transformed into a modern user experience. The screens and process flows will reflect the color scheme, look, and feel of the previously transformed WCOA screens. The original content and fields displayed on these screens will be preserved.

Digital Transformation Gear Icon provides options to freeze the grid's header or display a filter field



2023 Workers' Compensation & Workplace Safety Annual Report Available Now!

https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/individuals/workers-compensation/publications/documents/2023%20wc%20annual%20report.pdf

2025 Workers' Compensation Conference

The 24th Annual Pennsylvania Workers' Compensation Conference will be held on May 29-30, 2025 at the Hershey Lodge & Convention Center in Hershey, PA.

Special Funds

Special Funds play a unique role in workers' compensation. This highly dedicated team is accountable for the administrative review and reimbursement of approximately 1140 Supersedeas Fund Reimbursement (SFR) Applications a year, totaling approximately $26.5 million yearly in assessments. In addition, they are responsible for distribution of Occupational Disease Act and Subsequent Injury benefit payments to claimants and quarterly reimbursements to insurers with eligible claims under Section 305.1 and Section 306(h) of the Workers' Compensation Act. Since the inception of WCAIS, this small but mighty team has quietly celebrated multiple accomplishments and undergone some tremendous transformations.

By far, the largest accomplishment comes in the form of increased communication with Special Funds stakeholders. This has led to the resolution of several outstanding 305.1 and 306(h) reimbursable claims and the creation of several trainings and training documents. In addition, the average time from submission to receipt of SFR reimbursements has decreased by 25 percent. These accomplishments have allowed for more streamlined budgeting, more efficient processing, and improved stakeholder relations.

If you'd like to be part of this change, we invite you to join us at our next quarterly stakeholder meeting in Fall 2024. Contact us at ra-libwc-sfr-sub-que@pa.gov to be added to our email list.

Claims

Using the LIBC-751, Notification of Suspension or Modification, for EDI Filers

The LIBC-751, Notification of Suspension or Modification, is a unilateral form that must be filed with the bureau and the injured worker within 7 (seven) days of the benefits' suspension or modification. If the benefits are suspended, an SROI S1 should be submitted on the claim in WCAIS; otherwise, if the benefits are modified, an SROI RE would be submitted.

The LIBC-751 only applies on claims where indemnity benefits are accepted (not temporary), which in WCAIS is "Compensable" status. Therefore, if the claim is in any of the following statuses in WCAIS, an EDI transaction(s) may be needed before the LIBC-751 becomes applicable:

- Closed
- Suspended
- Suspended-ACSR
- Temporary
- Comp Denied
- FROI
- No FROI
- FROI-Cancelled
- Medical Only

To aid adjusters with their 751 filings, the bureau is adding new prompts when adjusters upload the LIBC-751. The new prompts will remind adjusters if the claim status is one of the above non-applicable statuses. Once prompted, the adjuster should review the claim information, such as accepted EDI transactions and forms, to determine what is needed before the LIBC-751 should be submitted.

For more information on the LIBC-751, please refer to Section 121.17 of the Filing Regulations.

EDI Tip - Suspension Rejections

File an SROI Sx (generic suspension transaction) when suspending lost time benefits after an NCP, Agreement, or Decision. The Bureau of Workers' Compensation sees several inappropriately filed Sx transactions.

Below are a few tips you can use to prevent Sx rejections:

1. Use the WCAIS claim status as a guide! If the claim is not in Compensable status (the Agreement to Compensate code is L, and the Claim Type code is I), you should not be filing an SROI Sx.
2. Match the Sx to a form. It may not be appropriate to file the SROI Sx if you don't have a Supplemental Agreement for Compensation or Permanent Disability (LIBC-337), a Notification of Suspension or Modification (LIBC-751), or a Decision Suspending Benefits.

Remember, an Sx rejection will occur if you don't have ongoing indemnity benefits in WCAIS because there is nothing to suspend.

Claims (Cont'd.)

You may direct requests for your company's recent individual associated rejections or any questions on this topic to the EDI Section using the Customer Service feature in WCAIS (Category of EDI and Subcategory of Miscellaneous).

EDI Tip - Partial Denial after a Full Denial; How do I handle this scenario?

To accept medical benefits after issuing a Notice of Workers' Compensation Denial (NCD), adjusters should file an SROI PY to identify what they accept rather than what they continue to deny; a SROI PD is not applicable.

It's important to note that the SROI PD is only used in specific conditions. It's the correct transaction to report medical-only benefits and forms on a claim when the adjuster is transitioning from a lost-time temporary to a medical-only temporary or a medical-only NCP. Understanding the correct use of the SROI PD can aid adjusters in their decision-making process.

Healthcare

One-on-One Personal Training

The Healthcare Services Review Division offers one-on-one personal training for individuals filing online Medical Fee Review Applications in WCAIS for healthcare professionals, healthcare providers, and their attorneys or billers

.
These trainings provide step-by-step instructions on the following:

- How to file a new application for medical fee review
- How to resume a draft application for medical fee review
- Completing all sections of the medical fee review
- What happens after the medical fee review has been submitted

If interested, please contact the us at ra-li-bwc-hcsrd@pa.gov. We look forward to hearing from you!

Health & Safety

PATHS will offer more than 60 training sessions in November to raise awareness of hunting safety, aggressive driving and road rage, and our newest topic - carbon monoxide poisoning. Click on the links below to view the training objectives and to register.

NOVEMBER

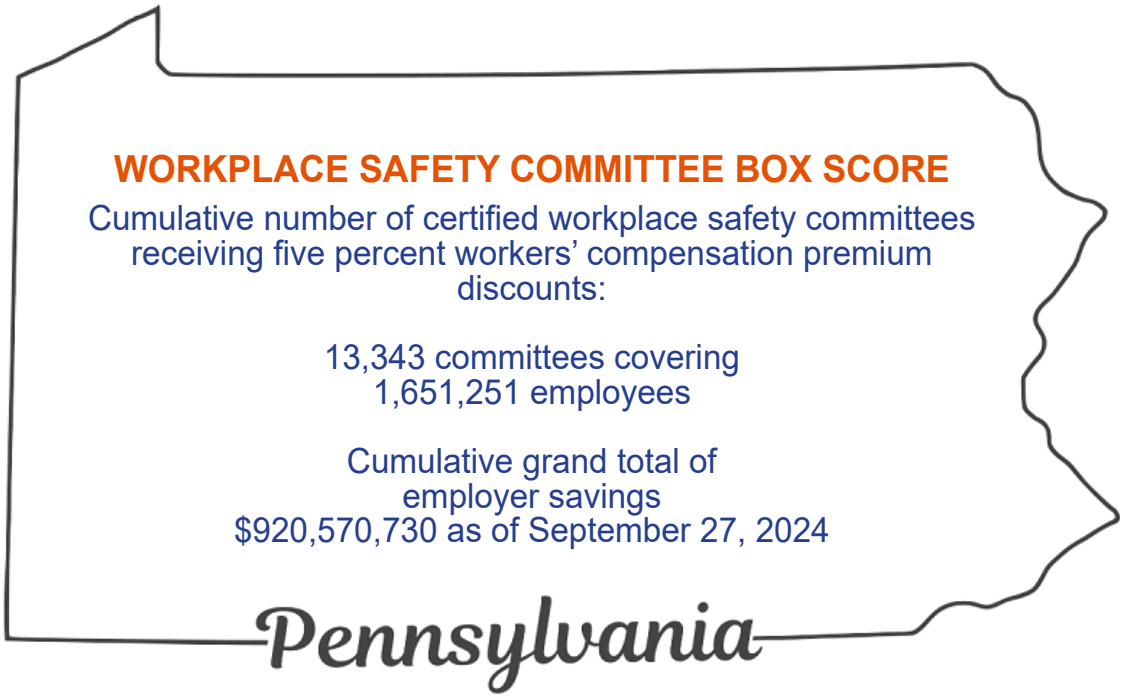
1	Electrical Extension Cord Safety	10:00-10:30 a.m.
1	Aggressive Driving & Road Rage	11:00-11:30 a.m.
13	Carbon Monoxide Poisoning	9:30-10:30 a.m.
14	Hunting Safety	11:00-12:00 p.m.
18	Active Shooter Awareness	1:30-2:30 p.m.

WORKPLACE SAFETY COMMITTEE (WSC) CERTIFICATION

6	WSC Certification Renewal	1:30-2:45 p.m.
14	WSC Certification Initial	1:30-3:00 p.m.
21	WSC Certification Renewal	9:30-10:45 a.m.
26	WSC Certification Renewal	9:30-10:45 a.m.

PATHS is a statewide service providing employers and employees easy access to cost-effective health and safety resources. Services provided by PATHS will enable participants in the workers' compensation system to create safer, incident-free workplaces.

Training can be provided onsite by request, or you may register for online webinars on various topics through the PATHS Training Calendar. Visit our website Health & Safety Division | Department of Labor and Industry | Commonwealth of Pennsylvania for various safety-related resources.



Kids' Chance of PA

Hope, opportunity, and scholarships for kids of injured workers.

At Kids' Chance of Pennsylvania, we're dedicated to helping our kids who need it most – those who need assistance for college or vocational education because a parent was killed or seriously injured in a work-related accident. The hardships created by the death or disability of a parent often include financial ones, making it difficult for deserving young people to pursue their educational dreams.

Since its inception in 1997, Kids' Chance of PA has awarded over 1,000 scholarship grants to eligible students of more than $2.6 million in tuition assistance. During the 2023-2024 academic year, we awarded $188,000 in scholarships to 40 students. Through our involvement with the PHEAA/PATH program, two thirds of our recipients are eligible and received additional funds to relieve their financial burden!

Kids' Chance of Pennsylvania scholarships are made possible by the generous contributions of our scholar sponsors, corporate and community partners, and donors. Donations can be made online, and by check, or through corporate donation programs like United Way or SECA. We are proud to announce the establishment of endowment funds to support our scholarship program now and well into the future! Information on how to send direct donations to the long-term endowment fund will be available on our website, www.kidschanceofpa.org, by contacting us via email at info@kidschanceofpa.org, or by telephone at (215) 302-3598.

In addition to the donation sources listed above, Kids' Chance of Pennsylvania holds several fundraising events throughout the year, such as our annual golf outings in Hershey and Plymouth Meeting and our 5K Run/1-Mile Fun Walk in Pittsburgh. We held a Silent Auction and a Classic and Exotic Car Show last fall.

New for 2024, we are developing a Student Engagement Committee to explore additional ways that we can support our recipients with their future career aspirations after they graduate.

We need your help in spreading the message of Kids' Chance of Pennsylvania! If the family has young children, we have a Planning for the Future database where we store this information and reach out to the family when the children are old enough. Our mission is about supporting as many students as possible, and we need you to do that. Please reach out and we will send you information to pass on, or you can direct the family to our website – https://kidschanceofpa.org. Thank you for doing your part to help us give #moremoneyformorekids!

Every year, millions of teens work in part-time or summer jobs that provide great opportunities for learning important life skills and acquiring hands-on experience. Federal and state rules regarding young workers strike a balance between ensuring sufficient time for educational opportunities and allowing appropriate work experiences.

Information about YouthRules! can be found at https://www.youthrules.dol.gov/.

For information about the laws administered by the Wage and Hour Division, log on to https://www.dol.gov/whd/regs/compliance/whdfs43.pdf, or call the Department of Labor's toll-free helpline at 866-4USWAGE.

A View From the Bench

Conrad v. Department of Transportation (WCAB), 310 A.3d 1274 (Pa. Cmwlth. 2024)

In *Conrad v. Department of Transportation (WCAB),* the Commonwealth Court held that Act 111 did not violate Article III, Section 32 of the Pennsylvania Constitution, which provision is a proscription against local or special laws. The court further held that the failure of the IRE physician to review claimant's recent medical records and diagnostic studies did not render the IRE invalid but was a credibility determination to be rendered by the workers' compensation judge (WCJ), and, therefore, not subject to review by the court.

The underlying facts establish that claimant sustained a low back injury in 2005. In 2011, claimant underwent an IRE, and his disability status was modified to partial disability status effective Sept. 20, 2011. Claimant then filed a Reinstatement Petition alleging that the impairment rating was invalid and unconstitutional based upon *Protz* and its progeny. The WCJ reinstated claimant's total disability benefits as of Sept. 20, 2011. The Workers' Compensation Appeal Board (WCAB) affirmed, but amended the effective date to Nov. 1, 2016, the date claimant filed his Reinstatement Petition.

In the present litigation, pursuant to Act 111, claimant underwent a second IRE on Aug. 11, 2020, resulting in an impairment rating of 11 percent. The WCJ granted employer's Modification Petition, changing claimant's disability status to partial disability as of Aug. 11, 2020, and awarding employer a credit for prior partial disability benefits for the period from Sept. 20, 2011 through Nov. 1, 2016. Claimant appealed to the WCAB, which affirmed the WCJ's decision.

Claimant then appealed to the Commonwealth Court on two grounds. First, claimant argued that Act 111 of 2018, which reinstated the IRE procedure for injuries occurring prior to Oct. 24, 2018, was unconstitutional and could not be applied to injuries occurring prior to Oct. 24, 2018. Second, claimant argued that an IRE evaluation that does not include a review of the most recent medical records from claimant's treating physician, nor the most recent diagnostic studies is incompetent evidence sufficient to support a modification of benefits. The Commonwealth Court rejected claimant's arguments and affirmed the WCAB.

As to the first issue, claimant argued that Act 111 was unconstitutional and violated Article III, Section 32 of the Pennsylvania Constitution as it was a "special law", treating injured claimants who have been entitled to total disability for more than two years differently than those who have been eligible to total disability benefits for a lesser period of time. Claimant asserted that Act 111 created a systemic approach to changing claimants' disability benefits by focusing on impairment, rather than disability.

Initially, the Commonwealth Court provided a survey of the cases that have sanctioned the validity of the various provisions of Act 111. The court then discussed the historical underpinnings of the adoption of the prohibition against special laws, which was "to put an end to the flood of privileged legislation for particular localities and for private purpose which was common in 1873." Over the years, the underlying purpose of Article III, Section 32 has been recognized to be analogous to federal principles of equal protection claims in that "like persons in like circumstances should be treated similarly by the sovereign." However, legislative classification, which appears to be facially discriminatory may still be lawful if there is a rational relationship to a legitimate state purpose, so long as the distinctions are legitimate, and not artificial or irrelevant.

In the present matter, the *Conrad* Court held that Act 111 did not violate Article III, Section 32 of the Pennsylvania Constitution. The court noted that there was no evidence that claimant was treated any differently than other workers' compensation claimants. The requirement to submit to an IRE applied to all injured workers who received

104 weeks of total disability benefits, so there was no violation of claimant's equal protection rights. The court further noted that Act 111 had a legitimate legislative purpose, which was to reenact the IRE guidelines after the previous version was struck down by the Pennsylvania Supreme Court, and to promote "efficiency within the workers' compensation system."

The second issue on appeal focused on the challenge to the IRE physician's opinions as he did not review claimant's recent medical records and diagnostic studies when assigning an impairment rating in violation of the AMA Guides. The court dismissed this argument, noting that testimony of the IRE physician was credited by the WCJ, and the court may not revisit credibility determinations.

Accordingly, the Commonwealth Court affirmed the Opinion and Order of the WCAB.

Jackiw v. Soft Pretzel Franchise, No. 286 EAL 2023, 2024 WL 617355 (Pa. Feb. 14, 2024)

The Supreme Court granted allocator of this unreported opinion. This summary involves the Commonwealth Court's decision.

Claimant suffered an amputation of her forearm in June of 2020. The parties stipulated that claimant's Average Weekly Wage (AWW) was $322.05. However, the parties could not agree whether specific loss benefits should be calculated pursuant to Section 306(a) or 306(c) of the Act.

Section 306(a) provides for a total disability rate of 66 2/3 percent of the AWW. It also directs that, if the benefit calculated is less than fifty percent of the statewide AWW, a remedial calculation is used wherein the benefit paid is 90 percent of the AWW.

Section 306(c) of the Act sets out the schedule of compensation for specific loss. It indicates that an employee who suffers the loss of a forearm shall receive "sixty-six and two-thirds per centum of [their AWW] during three hundred seventy weeks." However, where the standard calculation for compensation for disability relating to specific loss results in an amount less than 50 percent of the statewide AWW, Section 306(a) does not specify a remedial calculation requiring that the employee receive 90 percent of her AWW, like Section 306(a) does.

The Commonwealth Court affirmed the WCJ's decision, which applied Section 306(a) of the Act to calculate the specific loss benefits, effectively limiting claimant's compensation rate to 90 percent of her AWW, using the remedial calculation of 306(a). Claimant had argued that its plain language directed that 306(c) be applied, which would result in a higher benefit of 50 percent of the statewide AWW, given the absence of the remedial calculation of 90 percent of claimant's AWW.

The court (and WCJ) relied on Walton v. Cooper Hosiery Co., 409 A.2d 518 (Pa. Cmwlth.1980). In Walton, the court applied the remedial calculation of Section 306(a) to calculate specific loss benefits, because the standard calculation would have resulted in compensation that was less than 50 percent of the statewide AWW. The court reasoned that, in passing the 1974 amendments, it was the intention of the legislature to eliminate potential disparity among similarly situated claimants. The Commonwealth Court found that the Walton Court's decision aligns with the purpose of the Act: treating claimants under both Section 306(a) and Section 306(c) equally, even where it may mean lower payments. It concluded that claimant had not provided a compelling reason to set aside 40 years of precedent in Walton.

Martinez v. Lewis Tree Serv. (Workers' Comp. Appeal Bd.), 310 A.3d 327, No. 298 C.D. 2023, 2024 WL 489375 (Pa. Cmwlth. Ct. Feb. 8, 2024).

Claimant filed a Claim Petition alleging he sustained injuries in the course of his employment as a tree trimmer as a result of a motor vehicle accident he sustained on Oct. 21, 2021, while driving home in his personal vehicle at the end of his workday. The claimant alleged

he was a traveling employee with no fixed place of business at the time of his injury.

Claimant testified that as the crew leader, he assigned trucks, trimmed trees, and drove employer's trucks to work sites. Each morning, he drove his personal vehicle to the "yard" where the employer's trucks were parked. He then took one of employer' trucks to his worksite for the day. At the end of the workday, he returned the employer's truck to the yard where he picked up his personal vehicle to drive home. The location of the employer's yard changed several times per year, depending on the location of the tree trimming jobs. There was no fixed and permanent yard for the trucks and equipment.

The WCJ denied the Claim Petition, concluding that the accident occurred while the claimant was commuting to or from his job, and the claimant did not fall within any exceptions to the "coming and going" rule. The WCAB affirmed.

On appeal to the Commonwealth Court, the claimant argued that he was a traveling employee and, thus, was entitled to the presumption that he was in the course of his employment when driving home from work. The court first pointed out that under the "coming and going" rule, injuries sustained during a commute are not compensable because they are neither on the employer's premises nor furthering its interests. However, an injury sustained while commuting can become compensable if any of the following apply:the employment contract included transportation to and from work;

(1) the employee has no fixed place of work;
(2) the employee is on a special as signment for the employer; or
(3) special circumstances are such that the employee was furthering the business of the employer.

The court focused on the second exception of whether the claimant had no fixed place of work. Claimant asserted that his case was analogous to Holler v. WCAB (Tri Wire Engineering Solutions, Inc.), 104 A.3d 68 (Pa. Cmwlth. 2014), wherein the claimant was found to be a traveling employee because his work as a cable technician required traveling from one customer to another in a company vehicle. Employer countered that its "yard" provided a fixed place of work where the claimant would begin and end each workday. In support, the employee cited Mansfield Brothers Painting v. WCAB (German), 72 A.3d 842 (Pa. Cmwlth. 2013), where the claimant received job assignments at a union hall and was found to have a fixed place of employment. The employer also noted that the claimant's situation was similar to Best v. WCAB (City of Philadelphia), 2020 WL 3958236 (Pa. Cmwlth., No. 1578 C.D. 2019, filed July 13, 2020) (unreported), wherein the claimant "worked a fixed route and started and ended her day [at the same location]" and, thus, was not a traveling employee.

In this case, the court considered the facts that the claimant reported to the yard every day, from which he would travel to his job sites. The claimant drove his personal vehicle to and from his home, and started his workday from the yard. In addition, he was not reimbursed for travel expenses, nor did he store his employer's supplies at his home, distinguishing this case from Hohman v. George H. Soffel Co., 46 A.2d 475, 477 (Pa. 1946) (plumber was a traveling employee when in his personal vehicle driving to a job site, as employer delivered supplies to his home and reimbursed him for travel expenses). Citing Best and LePore v. WCAB (Full Phaze Construction, Inc.) (Pa.Cmwlth. No. 1494 C.D. 2015, filed May 11, 2016 (unreported), the court noted that a change in work location during the day or from day to day did not necessarily make an injured worker a traveling employee. Here, by reporting to the yard to begin and end his workday, "Claimant had a fixed place of work, albeit one of short duration." Consequently, the claimant did not establish that he was a traveling employee without a fixed place of employment, so his injury on his way home from work was not compensable.

***Mercer v. Active Radiator MPN, Inc. (WCAB), No. 1326 C.D. 2023, 2024 WL 2807692 (Pa. Cmwlth. June 3, 2024*)**

In Mercer v. Active Radiator MPN, Inc. (WCAB), the Commonwealth Court affirmed the board's affirmation of the WCJ's decision denying the claimant's claim petition seeking benefits for an alleged occupational disease injury concerning lead exposure.

By way of background, claimant worked as a solderer and welder for the employer, who produces radiators. He worked with lead solutions daily. He testified that he experienced soreness in his nose and nosebleeds that he thought were from the fumes created when the lead was melted. Otherwise, he did not feel unwell while working. Claimant's blood was tested every six months, with none of the tests revealing abnormal limits for acute lead exposure. In September 2017, claimant was laid off by the employer. Claimant developed anxiety and trust issues towards the end of his employment and the symptoms worsened thereafter. He also developed headaches and feelings of pressure in his face, neck, and ears. In August 2018, claimant reported to the employer that he had suffered a work-related injury due to lead exposure.

During the claim petition proceedings, claimant presented testimony of three medical experts. Dr. Andrew Newberg opined that, based on a differential diagnosis, the claimant's brain abnormalities seen on a PET scan, and his reported symptoms of difficulties with concentration, tension, irritability, balance, and memory, resulted from chronic and long-term lead exposure while he was working for the employer. Dr. Newberg acknowledged the lack of medical literature to support the use of a PET scan to diagnose lead toxicity. Dr. Idit Trope opined that the claimant's symptoms of trust issues, anxiety, and depression were caused by work-related lead exposure resulting in a neurocognitive disorder. Dr. Trope opined that the claimant's lead exposure at work was the most significant source of his issues, rather than his previous drug use. Additionally, Dr. Burton Weiss diagnosed the claimant with permanent neurocognitive disorders caused by lead exposure and adjustment disorder caused by the cognitive impairments. He opined that the lead exposure at work was the most likely source of his current condition, ruling out other factors including his past drug use, smoking, drinking, and aging.

Employer presented testimony from a fact witness and four medical experts. Safety manager, Tony Cosia, testified as to the claimant's blood tests completed from October 2015 through November 2016. The claimant's lead levels were below the set OSHA standards. Mr. Cosia acknowledged that lead is involved in the employer's work, and the employer provides training, uniforms, N-95 masks, and hand and eye protection to its employees. Mr. Cosia testified the claimant was laid off due to industry slowdown, not due to lead exposure concerns. Dr. Michael Silverman opined the claimant was physically capable of returning to work without restrictions based on his generally normal physical examination and that the claimant's lead levels were not high enough to exceed OSHA's limit. While Dr. Silverman suggested the claimant likely would be unable to return to work with the employer, specifically due to his subjective anxiety complaints, Dr. Silverman explained that this opinion was not related to any actual threat of further lead exposure. Dr. Nancy Minniti opined that the claimant's cognitive deficits were very likely related to an undiagnosed learning disability, not lead exposure. Dr. John Kashani did not find claimant's lead exposure was the cause of the claimant's current condition/symptoms given his lead levels for two years of tests while the claimant worked with the employer were not high enough or for a long enough duration. Dr. Kashani also based his opinions on the fact that the claimant showed none of the physical conditions generally associated with lead toxicity. Dr. Daniel Feinberg opined that the claimant did not sustain any cognitive or psychiatric conditions from lead exposure.

The WCJ denied the claim petition, finding that while there is no dispute that the claimant was exposed to lead at work, the claimant failed to establish that he actually had any lead toxicity or symptoms related thereto. Claimant appealed to the board, and the board affirmed the WCJ's decision, *en banc*.

Claimant appealed to the Commonwealth Court, raising seven issues on appeal. The court first upheld the WCJ's credibility determinations, found the WCJ's decision was based on substantial evidence, and found the decision was well-reasoned.

The court then addressed claimant's argument that the WCJ wrongly failed to apply the occupational disease rebuttable presumption. Section 108(a) of the Act provides that lead poisoning or toxicity is a compensable occupational disease. Section 301(e) of the Act provides a rebuttable presumption that a claimant who is employed in such occupation in which the occupational disease is a hazard, shall be presumed that the disease arose out of and in the course and scope of employment. The court focused on presiding case law that established that a claimant must first establish that he or she has *actually sustained* and *was disabled by* the occupational disease in order for the presumption to apply. The court found the WCJ did not err in declining to apply the presumption, as the court had no basis to overturn the WCJ's reasoned and supported credibility determinations that the presumption does not apply.

The court next addressed the claimant's argument that the WCJ erred by denying the claim petition when two of employer's experts, who were credited by the WCJ, acknowledged that the claimant should not return to work in a lead-oriented environment. The court rejected this argument, finding the WCJ did not err in giving more weight to the employer's experts' testimony that the claimant could resume work generally and without restrictions, in support of the WCJ's determination that the claimant was not disabled. The court acknowledged that while all experts' acknowledged that lead exposure is not good for the body, in the absence of an actual injury or occupational disease, compensation is not indicated.

The court next addressed the claimant's argument that the WCJ should have, at the very least, granted the claim petition on the basis for the claimant's need for medical monitoring, relying on Brendley v. Dept. of L&I, 926 A.2d 1276 (Pa. Cmwlth. 2007). In Brendley, the court concluded that a claim for medical monitoring may be compensable if the claimant proves exposure to hazardous substances at a level sufficient to create a risk of future harm that can only be remedied by continued testing. Here, the court rejected claimant's arguments, finding that since the WCJ never found the claimant actually suffered from lead toxicity, there was no basis for the WCJ to grant medical monitoring. The claimant only established exposure to lead, but never at levels high enough to meet OSHA's stated minimum or even the employer's lower internal minimum.

Finally, as the claimant did not prevail on appeal, the court upheld the WCJ's refusal to award payment of claimant's counsel's litigation costs.

Lawry v. County of Butler (WCAB), (Pa. Cmwlth. No. 593 C.D. 2022, filed March 6, 2024)

The holding of the Commonwealth Court largely centers around the well-settled principle that absent a credibility determination that is "arbitrary and capricious" the WCJ is the final arbiter of credibility in workers' compensation cases.

In short summary, claimant suffered a work-related sprain/strain injury to her right thumb in June 2009. The injury was later expanded by the WCJ to include a right ulnar collateral ligament tear and reflex sympathetic dystrophy (RSD)/ complex regional pain syndrome (CRPS).

In 2019, the WCJ denied the employer's first attempt at a Termination Petition alleging full recovery as 2018. However, in July 2020,

employer later filed a second Termination Petition, this time alleging a full recovery as of June 17, 2020. This time, the same WCJ partially granted employer's Termination Petition, finding that although the claimant had fully recovered from the right thumb and right ulnar collateral ligament injuries, claimant had not fully recovered from the RSD/CRPS. In so finding, the WCJ determined employer's medical expert was not credible because the expert did not specifically address the Budapest criteria, considered the "gold standard" for diagnosing RSD or CRPS. (*See*, Kesserling v. Workers' Compensation Appeal Board (Pocono Medical Center), 247 A.3d 1194 (Pa.Cmwlth. 2021)

Employer appealed, and the board reversed, finding that the judge capriciously disregarded competent medical evidence in finding that the employer had not met its burden of proving its entitlement to a termination of benefits because its medical expert did not address the Budapest criteria for RSD/CRPS. The claimant appealed to the Commonwealth Court which reversed the board.

The court concluded that the determination made by the WCJ to reject in part the testimony of employer's medical expert was not arbitrary and capricious. In so finding, the court went into great detail to explain the WCJ's credibility determinations and even cited the WCJ's extensive knowledge of the case (remember, this is the second Termination Petition heard by the same WCJ). The court noted that although the WCJ misstated the court's holding in Kesserling, this misplaced reliance on Kesserling was minor when taken in the context of the total evidentiary record and case history. Thus, this "minor" misplaced reliance did not render the WCJ's credibility determination of employer's medical expert to be arbitrary and capricious. Consequently, the court reversed the board's decision and reinstated the decision of the WCJ.

Reading Anthracite Co. v. Oxenrider (WCAB), No. 120 C.D. 2023, 2024, WL 2925725 (Pa. Cmwlth. 2024)

West Spring was the employer who issued an NTCP that converted for this fatal injury. West Spring's carrier was Rockwood Casualty. West Spring filed a Review Petition and Joinder Petition seeking to join Reading Anthracite Company (RAC) alleging RAC was the employer when decedent was fatally injured. The WCJ denied both petitions. The WCAB affirmed the decision of the WCJ. The issues before the Commonwealth Court were framed as whether the WCJ and WCAB erred in failing to find decedent an employee of RAC or erred in failing to find decedent to be a borrowed servant. The pertinent facts show both West Spring and RAC operate coal mining businesses. West Spring employed claimant as a bulldozer operator and was scheduled to lay him off. RAC needed a bulldozer operator at their Oak Hill facility. Decedent was directed to go to Oak Hill and reported there on July 13, 2017. On July 25, 2017, decedent was fatally injured operating a bulldozer at Oak Hill. On Sept. 12, 2017, West Spring filed a Notice of Temporary Compensation Payable, paying the widow and children. The NTCP converted by operation of law with a notice of conversion sent by the bureau. On Feb. 9, 2018, RAC's carrier SWIF issued a Notice of Denial stating no policy and on Feb. 14, 2018, SWIF issued a Notice of Denial stating decedent was not an employee. On Dec. 12, 2019, Rockwood Casualty (West Spring) entered into an agreement with the widow for the fatality. On July 8, 2020, West Spring filed the joinder petition against RAC and on July 15, 2020 the review was filed by West Spring. West Spring presented deposition testimony of various employees of RAC, including the vice president and executive secretary. On Sept. 13 2021, the WCJ denied both petitions finding West Spring failed to show a material mistake of fact when the NCP was issued, and that decedent was an ongoing employee of West Spring when fatally injured. The WCAB affirmed the decision.

West Spring and Rockwood appealed to the Commonwealth Court which also affirmed the board and WCJ. The Commonwealth Court noted the following facts found by the WCJ. While working at the Oak Hill site, decedent was under the payroll of West Spring, decedent was never formally switched from West Spring to RAC, and decedent's union dues were deducted from his West Spring paychecks. Decedent was not on RAC's payroll when he died because his position was not determined to be permanent. Regarding the sufficiency of time to investigate the fatal claim by the Rockwood adjuster, the Commonwealth Court noted the WCJ found the Rockwood adjuster identified and vetted the issue of who employed decedent on the date of death at the time of issuance of the Notice of Temporary Compensation Payable and at it's conversion. The WCJ noted two years later, Rockwood entered into a signed agreement with the widow regarding benefits. The Commonwealth Court found this evidence shows decedent was an employee of West Spring when he was fatally injured.

Schmidt v. Schmidt, Kirifides & Rassias, PC (WCAB), No. 658 MAL 2023, 2024 WL 1873090 (Pa. Apr. 30, 2024)

The Pennsylvania Supreme Court granted allocatur on the Schmidt v. Schmidt, Kirifides & Rassias, PC (WCAB) case, wherein the Commonwealth Court determined that an employer can be responsible for reimbursing an injured worker's CBD oil that was obtained without a prescription from a healthcare provider. The Supreme Court will review the following three issues:

(1) Do the terms "medical services" and "medicines and supplies" as used in Section 306(f.1), 77 P.S. § 531, of the Workers' Compensation Act, include cannabinoid oil (CBD oil), specifically, as well as dietary supplements, generally, and products that may be purchased without a prescription from a healthcare provider?

(2) Do the cost containment regulations of the Workers' Compensation Act apply to CBD oil?

(3) Does Section 306(f.1) of the Workers' Compensation Act, 77 P.S. § 531, require employers/insurers to reimburse claimants, directly, for out-of-pocket expenses for "medical services" and "medicines and supplies," and if so, are claimants obligated to submit supporting documentation, such as medical records or prescriptions, or specified forms, such as HCFA forms, before they may receive such reimbursement?

Claimant had a judicially compensable low back injury. The claimant filed a penalty petition alleging that the employer violated the act by failing to reimburse him for out-of-pocket expenses for CBD oil prescribed by his doctor. The WCJ found in favor of the claimant, finding both claimant and his medical expert to be credible, and finding that was using the CBD oil as directed on the packaging. Claimant purchased his CBD oil at a natural remedy store, not a pharmacy. He submitted the prescription and his receipts to the employer and was not reimbursed. The WCJ determined that claimant was not a medical provider. Further, the WCJ concluded that the HCFA forms were not required for the CBD oil, as it is not a drug and is a dietary supplement. Employer appealed the grant of the penalty petition. The WCAB reversed the decision of the WCJ for various reasons including the recent actions of the FDA admonishing some CBD suppliers for marketing violations, the potential effect on insurers by the ruling of the WCJ, and because of the billing forms required by the act. Claimant appealed the board's reversal to the Commonwealth Court. The Commonwealth Court reversed the board's decision. The court found the act requires payment of medicine and supplies with CBD oil fitting this definition. The court noted CBD oil does not contain the substance THC, which is found in medical marijuana. The court found the board disregarded the findings of the WCJ

and did not give all reasonable inferences to the prevailing party. The court concluded federal law would not be violated by requiring reimbursement of CBD oil. Finally, the court did not find the billing forms required by the act for medical providers were required to obtain reimbursement.

Erie Insurance Property & Casualty Company v. David Heater (WCAB), 2024 WL 2742112 (No. 148 C.D. 2023),

Commonwealth Court answered the question of whom notice of the work injury must be provided when the claimant is also the sole proprietor of the business. Section 311 of the Act, 77 P.S. Sec. 631, provides that "[u]nless the employer shall have knowledge of the occurrence of the injury, the employee . . . shall give notice therof to the employer within twenty-one days after the injury. . . and unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed." (emphasis added) The WCJ denied the underlying Claim Petition, concluding that claimant failed to establish that he provided timely notice of his work injury to the Insurer within 120 days of the injury's occurrence. The WCAB reversed the WCJ's decision, concluding that because claimant was the employer, notice of the work injury was simultaneous and that Section 311 does not require that notice be given to insurer – only to the employer.

In reversing the WCAB, and upholding the WCJ's denial of the Claim Petition, the court first notes that the act defines the term "employer" in 2 ways – one which does not include the employer's insurer (Section 103, 77 P.S. Sec. 21) and one which does, provided such insurer has assumed the employer's liability (Section 401, 77 P.S. Sec. 701). Thus, Section 311 is ambiguous where the injured worker and the sole proprietor/employer are the same. In trying to ascertain the legislature's intent, the court reasons that interpreting Section 311 as claimant argues creates a class of claimants – those who are sole proprietors and injured -- who are not subject to the forfeiture/loss of benefits provision of Section 311; that is because "[s]ole proprietor claimants can . . . control the investigation of their own injury by delaying notice on the insurer until the last possible moment – sometimes years after the injury, as claimant did here." Insurers are then left unable to timely investigate and defend the claim.

In sum, the court holds that when a claimant is both the injured worker and the sole proprietor/employer, the "employer" whom claimant must timely notify of a work injury under Section 311 of the Act is the insurer that bears the ultimate liability for the claim.

700 Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (State Workers' Insurance Fund), 2024 WL 2195530 (Nos. 560 & 617 C.D. 2020)

Commonwealth Court examined whether a pharmacy staffed by state-licensed pharmacists provided by an employee leasing company (Induction Works) had standing to file fee review applications on the prescriptions for compound creams it filled for workers' compensation claimants. Additionally, the court considered (1) whether drugs and pharmaceutical services are encompassed in the act's anti-referral provisions found in Section 306(f.1)(3)(iii), 77 P.S. Sec. 531(3)(iii) and (2) whether, under the facts of the case, the fee review hearing officer ("FRHO") properly denied the pharmacy's fee review applications because they originated from a prohibited self-referral.

By way of background, claimant's treating pain physicians, Doctors Purewal and Jalan, whose office is upstairs from pharmacy, wrote or supervised the prescriptions at issue. They admitted having a financial interest in pharmacy. Jason Chang, the licensed pharmacist who prepared the prescriptions at issue in the case, works for pharmacy but is employed and paid by Induction Works. Pursuant to the contract between pharmacy and Induction Works, pharmacy has the exclusive right to control and direct the employment of assigned personnel,

including with respect to the details and means by which work is accomplished by them. Induction Works has a team that sends out bills and then submits fee review applications when payment is not made on behalf of pharmacy.

The FRHO rejected, as did the Commonwealth Court, insurer's argument that because pharmacist Chang is employed by Induction Works and not pharmacy, pharmacy cannot be a provider with standing to seek fee review. In doing so, the court notes that Section 109 of the Act, 77 P.S. Sec. 29, specifically includes agents of a provider within its definition of provider. Additionally, the FRHO found that pharmacy was operating as a pharmacy (had state-licensed pharmacists dispensing medication) and that Induction Works and its billing team were acting as agents of pharmacy. Thus, pharmacy is a provider with standing to initiate fee review applications under the act.

The FRHO also rejected, as did the Commonwealth Court, pharmacy's argument that because Section 306(f.1)(3)(iii) does not specifically list pharmacists or pharmaceutical supplies, the anti-referral provision does not cover them. Importantly, however, Section 306(f.1)(3)(iii) also references "goods or services pursuant to this section." Towards that end, the court states: "[W]e read the 'goods or services' language to suggest the General Assembly did not intend to restrict the anti-referral provision's sweep only to the specific items enumerated but left a broader category open." Given that the "goods or services" language is sufficiently broad to cover drugs and pharmaceutical services and that pharmacy admitted that the prescribing physician(s) had a financial interest in it, the court affirmed the FRHO's order denying pharmacy's fee review applications on the basis that they stemmed from a prohibited self-referral.

Torres v. Amazon.com Services LLC (Workers' Compensation Appeal Board), 313 A.3d 486 (Pa. Cmwlth. 2024)

In **Torres v. Amazon.com Services LLC (Workers' Compensation Appeal Board),** the Commonwealth Court held that the claimant was entitled to a mandatory award of attorney's fees for the period in which the employer's contest was deemed unreasonable; however, a remand was required for a determination as to whether to additionally award attorney's fees for the period after the contest became reasonable. By way of background, the WCJ granted the claimant's claim petition for a closed period and awarded counsel fees of $8,850.00 to be paid by the employer. In granting the claimant's request for counsel fees, the WCJ found employer did not present a reasonable contest because there was no evidence disputing that the claimant suffered a work injury or was disabled prior to the date of employer's IME. On the employer's appeal challenging the attorney fee award in its entirety, the WCAB determined that although the employer unreasonably contested the initial phase of litigation, its contest became reasonable as of the date of the IME. Consequently, the board limited the attorney fee to include only the time expended prior to the date of the IME and reduced it to $1,710.00.

On appeal to Commonwealth Court, the claimant argued even if the WCJ erred in characterizing the employer's contest after the IME as unreasonable, it was a harmless error because counsel fees were still payable under Lorino v. WCAB (Commonwealth of PA/Penn DOT), 266 A.3d. 487 (Pa. 2021). The Commonwealth Court noted Section 440 of the Act provides that in any contested case where the insurer has contested liability in whole or in part the employee in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred, provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established.

In Lorino, the Supreme Court held that when a contested case is resolved in favor of an employee, a WCJ has discretion to award or

deny attorney's fees in the face of an employer's reasonable contest. Here, the board's application of Section 440 was invalid because it stated an award of counsel fees is mandatory "unless" the employer showed a reasonable contest. However, that misstated Lorino, which held that the WCJ has discretionary authority to award counsel fees even if the employer engaged in a reasonable contest. The court reversed the board's order to the extent it automatically foreclosed the imposition of attorney's fees against the employer after its contest became reasonable. The court remanded the matter to the WCJ with instructions to grant an award of attorney's fees for the period during which the employer's contest was unreasonable, and further to exercise his discretion in determining whether to award attorney's fees for the period after the contest became reasonable. In a footnote, the court suggested it may be prudent to move away from calling Section 440 attorney's fees "unreasonable contest fees", noting this label had its genesis in pre-Lorino case law interpreting Section 440 as precluding an award of counsel fees in the face of a reasonable contest.

Williams v. City of Philadelphia (WCAB), 277 C.D. 2023 (filed March 21, 2024).

In *Williams v. City of Philadelphia (WCAB)*, 277 C.D. 2023 (filed March 21, 2024), the Commonwealth Court held that *Neves* applies to both known past medical bills and unknown future medical bills. The court further held that medical providers may not recoup directly from a claimant any portion of any payment deducted to pay a counsel fee.

The claimant sustained a work injury while working for the employer, which was acknowledged as hand and shoulder sprains by way of an Amended NCP. The claimant received wages in lieu of compensation beginning March 5, 2021. Subsequently, the claimant filed a Claim Petition on Aug. 2, 2021. Given the acceptance of the claim, this was subsequently amended to a Review Petition, which sought to expand the description of injury to include additional work-related diagnoses of carpal tunnel syndrome and was later amended again to seek lateral epicondylitis. Claimant submitted a fee agreement, which called for the payment of a 20 percent contingent counsel fee of all compensation, including medical. The claimant testified that she understood and agreed to the contingent fee agreement as it relates to both indemnity and medical benefits. She further testified that she understood that there was a theoretical possibility that the providers may seek from her directly the difference between the billed amount and the amount paid.

The WCJ granted the Review Petition in part. The WCJ found the diagnosis of carpal tunnel syndrome to be work-related. This was also recognized by the employer with the filing of a second Amended NCP issued on Dec. 10, 2021. The Review Petition was also denied in part and the WCJ did not find that claimant had a work-related diagnosis of lateral epicondylitis. The WCJ approved the fee agreement regarding claimant's indemnity benefits but not claimant's medical benefits. With respect to future medical benefits, the WCJ reasoned that these are unknown costs and that it cannot be demonstrated that claimant understands her potential future exposure and liability regarding presently unknown costs.

The claimant appealed to the WCAB, which affirmed the WCJ. Regarding the limited counsel fee award, the WCAB concluded that because the claimant's future medical expenses are unknown and speculative, the claimant could not comprehend or anticipate what her future exposure to her medical providers could potentially be. The WCAB distinguishing this case from *Neves v. WCAB (American Airlines)*, 232 A.3d 996 (Pa. Cmwlth. 2020) (*en banc*). The WCAB concluded that, notwithstanding the language of the fee agreement, claimant could not agree to a counsel fee that included 20 percent of future, unknown medical expenses. The WCAB also held that the evidence presented constituted substantial evidence to support the

WCJ's finding that claimant did not sustain work-related lateral epicondylitis.

The claimant further appealed to the Commonwealth Court. She asserted that the WCAB erred in affirming the WCJ's denial of an attorney's fee based on claimant's medical bills. Claimant further asserted that WCAB erred in affirming the WCJ's determination that claimant did not suffer lateral epicondylitis.

The Commonwealth Court held that that the WCJ's credibility determinations regarding the claimant's failure to establish lateral epicondylitis were supported by substantial evidence and were not arbitrary, capricious, or based on a misapprehension of any facts. The court noted that the WCJ thoroughly explained her reasons for crediting the employer's medical testimony, and those reasons were amply supported by the record.

As it relates to the issue regarding the fee on medical benefits, the court reviewed its decision in *Neves*, which addressed past due medical bills from a hospitalization. The court noted that the WCAB has misapplied the holding in *Neves*, by distinguishing future medical treatment. The court stated, "First, the rule from *Neves* is broad and not limited to only those medical expenses that have been actually incurred and billed at the time of a hearing before a WCJ. In many cases, including this one, at least a portion of a claimant's medical expenses are incurred *after* the claimant executes a fee agreement with his or her counsel. Very few claimants, if any, will have a complete and certain picture of their future medical treatment at the time they retain counsel, and the board's suggestion that a fee agreement, otherwise *per se* reasonable, is invalid because it is based on unknown and 'speculative' future medical expenses is untenable under *Neves* and Section 442 of the Act. We therefore reject outright the board's conclusion that, as a 'matter of law,' claimant could not agree to a 20 percent fee agreement that applies to future and yet-unknown medical expenses."

The Commonwealth Court further held that Section 306(f.1)(7), 77 P.S. § 531(7), prohibition on "balance billing" is not limited to only the difference between a provider's normal fee and the Medicare-approved reimbursement rate. Rather, it prohibits a provider from billing a claimant for *any* costs related to care provided under the act and *any* amounts reflecting the difference between the provider's charge and the amount paid. The court stated that providers may seek a fee review pursuant to Section 306(f.1)(5) of the Act, 77 P.S. § 531(5), which is the statutory vehicle afforded to providers to dispute any portion of an approved fee, and not private "balance billing" to claimants. The court held that "a medical provider that provides medical services to treat a compensable injury under the act may not recoup directly from a claimant any portion of any payment deducted to pay a counsel fee."

News & Notes is a quarterly publication issued to the workers' compensation community by the Bureau of Workers' Compensation (BWC), the Workers' Compensation Office of Adjudication (WCOA), and the Workers' Compensation Appeal Board (WCAB). The publication includes articles about the status of affairs in the workers' compensation community as well as legal updates on significant cases from the Commonwealth Court. Featured is the outstanding article entitled "A View from the Bench," in which judges from the Pennsylvania Workers' Compensation Judges Professional Association summarize recent key decisions from the Commonwealth Court that are of interest to the workers' compensation community.

We trust that stakeholders in the workers' compensation system will find this publication interesting and informative. We invite your input regarding suggested topics for inclusion in future publications. Suggestions may be submitted to RA-LIBWC-News@pa.gov.

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