Tom Wolf | Governor

Jennifer Berrier | Acting Secretary

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY
BUREAU OF WORKERS' COMPENSATION

News & Notes

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"Serving all Pennsylvanians"

Spring 2021

Register Now for the PA Workers' Compensation Virtual Conference

The 20th Annual Pennsylvania Workers' Compensation Conference will be held on **May 17-18, 2021 via virtual platform.** This year's event will focus on the future of Workers' Compensation. Come to this exceptional and popular conference for updates on significant and timely subjects such as:

- COVID-19
- Active Shooter
- Workplace Security
- 50 Tips in 50 Minutes
- Workers' Compensation Game Show
- Medical Cost Regulations – Parts 1 and 2
- Uninsured Employer Guaranty Fund/Compliance Update
- Role of Nurse Practitioner & Physicians' Assistant in Treatment of Injured Worker

Nearly 1,400 people registered to attend the 2019 conference, representing employers, case managers, third-party administrators, defense/claimant counsel, labor, and others. Attendance to this event promises a sharing of practical, useful, and timely information to attendees of the workers' compensation community. As in the past, session materials will be available on the Labor & Industry website after the conference.

Questions?
800-482-2383 (Toll Free Inside PA)
717-772-4447 (local and Outside PA)
Email: ra-li-bwc-helpline@pa.gov

Conference Details

Register Here

16th Annual Kids' Chance of PA Golf Outing and Online Auction – Going Statewide!

The Annual PA Workers' Compensation Conference is going virtual this year, and so is the Annual Kid's Chance of PA Golf Outing (historically held at Hershey Country Club) – at least partially! Plus, we're adding another opportunity to participate in our phenomenal Kid's Chance online auction to complement the golf outing! The Kids' Chance of PA golf and online auction, both to be held in conjunction with the virtual conference in May.

Regional golf outings will be held at exclusive clubs round the state where foursomes will play and submit their scores electronically, for a final statewide tally. Awards will be given much like an in-person event, and winners will be announced during our information session at the virtual conference.

The online auction will go live before, and simultaneously with, the golf outings, and is open to anyone who registers to participate. This provides greater opportunities for those who do not golf, or who live outside of PA to support Kid's Chance of PA.

With your support, we can make this event as successful as past events in fulfilling our mission – to provide scholarships to children with a parent who is deceased or severely injured as the result of a work-related injury. Last year, we gave 53 scholarships totaling $151,250 to deserving students.

Additional updates and registration information will be provided on our website and by email. Please visit our website for more information on both events: https://www.kidschanceofpa.org.

For specific questions, please contact Lloyd Brown Lloyd.Brown@wawa.com (for golf information) or Kathy Del Pizzo at info@kidschanceofpa.org.

Thank you for your support of children of PA workers!

Inside This Issue

News & Notes is a quarterly publication issued to the Pennsylvania workers' compensation community by the Bureau of Workers' Compensation (BWC) and the Workers' Compensation Office of Adjudication (WCOA). 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 Pennsylvania workers' compensation system will find this publication interesting and informative, and we invite your input regarding suggested topics for inclusion in future publications. Suggestions may be submitted to RA-LIBWC-NEWS@pa.gov.

- Marianne H. Saylor, Director Bureau of Workers' Compensation (BWC)
- Joseph DeRita, Director Workers' Compensation Office of Adjudication (WCOA)

PA Training for Health & Safety (PATHS)
Your No-Fee Safety Training Resource

The Pennsylvania Training for Health and Safety (PATHS) program makes safety resources and training more accessible to employers and employees everywhere. In 2020, PATHS conducted 596 training sessions for more than 48,000 individuals in 48 states and 14 countries.

Safety training on 218 topics are available for employers, most free of charge. These trainings apply to all health & safety concerns within the workplace, including substance abuse and opioid abuse-related topics. Training is aimed at reducing business costs in Pennsylvania and saving lives.

Questions? Email PATHS at ra-li-bwc-paths@pa.gov, or visit our website at www.dli.pa.gov/PATHS.

Workplace Safety Committee Certification
$821 million and counting

More and more employers are discovering that safety really does pay. Employers who follow Pennsylvania's workplace safety committee requirements and regulations can apply for state certification and receive annual 5 percent discounts on workers' compensation insurance premiums. Application is made through the Pennsylvania Department of Labor & Industry, Bureau of Workers' Compensation, Health & Safety Division.

The basic committee requirements for certification include that a minimum of two employee representatives and two employer representatives meet monthly and that the committee be in operation and in compliance with requirements for at least six months prior to submitting an initial application.

More than 12,780 workplace safety committees already certified in Pennsylvania and representing over 1.6 million employees have accumulated more than $821 million in total savings just from the 5 percent workers' compensation insurance premium discounts. That is money being reinvested to expand businesses and implement further safety and prevention efforts.

In addition to the 5 percent workers' compensation insurance premium discount, certified workplace safety committees help reduce the employer's cost of workers' compensation insurance by identifying workplace hazards, reducing injuries, and reducing claims.

In an increasingly competitive business climate, any opportunity to save money is welcomed. A workplace safety committee not only improves the safety of your operations, but also adds to the bottom line and clearly shows employees that management cares about their well-being. When that's the case, everybody wins.

For more information on setting up a workplace safety committee for your business and to learn more about the program and requirements, visit Workplace Safety Committee Certification Resources.

The bureau has published revised guidance on the COVID-19 relief measures extended to workplace safety committees. Our objective is to assist committees returning to compliance with certification standards. An active safety committee plays a critical role in COVID-19 prevention and recovery.

Questions? Email Health & Safety at ra-li-bwc-safety@pa.gov.

It's Time to Apply
2021 Governor's Award for Safety Excellence

If you are proud of your safety and prevention program for its impact on reducing employee injuries, please consider applying for the Governor's Award for Safety Excellence. The purpose of the award is to recognize outstanding prevention programs and the superior efforts that make these programs so successful.

Companies can nominate themselves or be nominated by a third-party. All nominations must be submitted by June 1st to be considered for the current calendar year.

For more information and to download the nomination form visit the GASE webpage.

Email nomination forms to ra-li-bwc-safety@pa.gov and include 'GASE Nomination Form' in the subject line. Email GASE Coordinator at barbawhite@pa.gov.

Supersedeas Fund Reimbursement (SFR) Assessment

In 2020, the SFR assessment was higher than in previous years due to successful efforts made to process a backlog of pending applications for SFR during calendar year 2019. SFR assessments are based, in part, on the amount of reimbursement awarded during the previous calendar year. Cleaning up the backlog of requests in 2019 resulted in a larger number of approved reimbursements than in years past; thus, an increase in assessment revenue for the 2020-21 fiscal year.

- Below is the total assessment for SFR for 2019, 2020, and based on early indications what is projected for the 2021 Supersedeas Fund assessment:
    - 2019 Assessment - $36,843,922.85
    - 2020 Assessment - $22,321,806.05
    - 2021 Estimated Assessment - $23,000,000

2019 Medical Accessibility Study Executive Summary Available

The 2019 Medical Accessibility Study Executive Summary has been posted and is available here.

2021 Fee Schedule Part B Available

The 2021 Fee Schedule Part B has been posted and is available here.

Online Filing of Bureau Documents Now Requested

Please file your bureau document by uploading to WCAIS rather than mailing the document. Uploading forms will enable the bureau to expedite the processing of all forms:

- Agreement for Compensation for Disability or Permanent Injury (LIBC-336)
- Supplemental Agreement for Compensation for Disability or Permanent Injury (LIBC-337)
- Agreement for Compensation for Death (LIBC-339)
- Agreement to Stop Weekly Workers' Compensation Payments (LIBC-340)
- Third Party Settlement Agreement (LIBC-380)
- Notification of Suspension or Modification (LIBC-751)
- Statement of Wages (both LIBC-494A and LIBC-494C)
- Notice of Workers' Compensation Disability Status (LIBC-764)
- Marriage or Death Certificates

All documents listed above must be uploaded to WCAIS using the Actions Tab located within your claim. This can be completed by clicking on the *Upload Documents* link and selecting the appropriate document type from the dropdown list.

If you cannot locate the form you wish to upload in the list on the Actions Tab located within your claim, you may upload any other forms in WCAIS 24/7 on the Documents and Correspondence Tab using the *Upload Documents* link.

Both tabs offer a free-form text box which allows you to enter your description of choice to identify the document you are adding to the claim.

If you have questions about uploading a document to a claim, staff are available to help. You may submit a customer service ticket using the category of WCAIS and the subcategory of Generating/Uploading Documents or call our Helpline at 1-800-482-2383.

WCAIS Digital Transformation for Self-Insurance

WCAIS began the first step of digital transformation with the Records/Subpoena Request Dashboard. The digital transformation initiative will continue over the next several years as all of WCAIS is transformed.

This new platform will enhance user interface, provide faster responsiveness, while retaining the existing functionality of current screens.

If you are a self-insurance user, the self-insurance screens within WCAIS will transform into the new digital platform on Friday, June 25, 2021.

New WCIO Nature of Injury Code

The Workers' Compensation Insurance Organizations (WCIO) has approved the addition of a new COVID-related Nature of Injury Code:

- 38 for an "Adverse reaction to a vaccination or inoculation".

Also, the definition of a Cause of Injury codes was expanded:

- 82 – Absorption, Ingestion, or Inhalation, NOC – Not otherwise classified in any other code. Applies only to non-impact cases in which the injury resulted from inhalation, absorption (skin contact), ingestion of harmful substances, or vaccinations.

Pennsylvania's system has been updated to accept these codes for reporting COVID-19 claims. The International Association of Industrial Accidents, Boards, and Commissions (IAIABC) recommends that EDI reporting and collection systems be modified to recognize these new codes.

Are You Filing EDI Transactions and Forms as Required?

Section 121.3 of the Rules and Regulations of the PA Workers' Compensation Act requires that once a claim is accepted, each subsequent event, including decisions rendered, must have an EDI transaction to reflect the modification, suspension, and/or closure of the claim in WCAIS. In addition to the EDI transactions, all subsequent documents shall be sent to the claimant and bureau as required by the regulations.

Sections 406.1 (a) and 406.1 (c) of the PA Workers' Compensation Act require the denial or acceptance of an injury within 21 days of the employer's knowledge of the disability. The 21-day filing requirement is met by filing either an accepted EDI transaction to generate the Notice of Compensation Payable (LIBC-495), Notice of Temporary Compensation Payable (LIBC-501), Notice of Compensation Denial (LIBC-496), or by filing an Agreement for Compensation for Disability or Permanent Injury (LIBC-336).

Additional information on calculating the 21-day claim events, or EDI sequencing is available on the bureau's website. Any questions about filings may be directed to bureau staff via a WCAIS customer service ticket using the Category of "EDI" and a sub-category of "Miscellaneous".

YouthRules!

The *YouthRules!* initiative promotes positive and safe work experiences for teens by providing information about protections for young workers to youth, parents, employers, and educators. Through the YouthRules! initiative, the U.S. Department of Labor and its partners promote positive and safe work experiences that help prepare young workers in the 21st-century workforce.

From the YouthRules! website you can quickly access information about federal and state labor laws that apply to young workers. The website educates teens on the rules, and provides information for parents, educators, and employers.

As part of the *YouthRules!* initiative, the U.S. Department of Labor and its partners develop and distribute informational materials, provide training on federal and state rules governing young workers, increase awareness through public service announcements, and develop other tools designed to increase compliance with federal and state laws. The Wage and Hour Division (WHD) is committed to providing employers with the tools they need to operate in compliance with the variety of labor laws enforced by the division. WHD offers a number of useful compliance resources intended to provide employers with readily accessible, easy-to-understand information relevant to both their rights and to their responsibilities under the law. From our interactive E-laws advisor to a complete library of free, downloadable workplace posters, this site offers employers critical information to guide them toward operating their businesses in full compliance with federal labor regulations. View available resources for employers.

A View from the Bench

Kesselring v. WCAB (Pocono Medical Center and Qual-Lynx), 1786 C.D. 2019, filed Jan. 22, 2021, 2021 WL 223247 (unreported, Pa. Commw. 2021).

In an unreported decision, the Commonwealth Court affirmed the decision of the Workers' Compensation Judge (WCJ) denying the claimant's review and reinstatement petitions.

Claimant was employed as a hospital cytotechnologist. She sustained a work injury in 2015 of a fractured right wrist and coccyx. Employer voluntarily accepted the claim. As a result of the work injury, the claimant was off work for a period of time, and then returned to work with modifications. Employer filed a notification of suspension or modification of benefits modifying claimant's benefits based upon her return to work. Claimant did not challenge the notification.

Ten months later, claimant was involved in a verbal altercation at work regarding her vacation time. She completed her shift that day, but then did not return for her next scheduled shift. She thereafter provided an off work slip from an internal medicine specialist, and then filed a Reinstatement Petition alleging worsening of her condition due to her work injury. She also filed a Review Petition seeking to expand the description of her injury to include right hand complex regional pain syndrome (CRPS). Employer presented testimony from claimant's supervisors regarding the tumultuous meeting. They also testified that claimant had never theretofore complained that she could not perform her regular work tasks before she left work. Employer also presented two IME opinions. One doctor opined that she did not have CRPS and had fully recovered. The other IME doctor did not believe claimant had fully recovered but was able to work without restriction. Claimant testified to a worsening of her condition and presented the opinion of her treating surgeon, who defended his diagnosis of CRPS.

The WCJ credited the employer's lay witnesses and the first IME physician and denied both of claimant's petitions. The WCJ did not make credibility findings regarding the second IME physician's opinions. The Appeal Board affirmed.

The Commonwealth Court affirmed. Claimant's assertion that she had worsened had been discredited, and substantial evidence support the WCJ's finding that claimant had separated herself from her job over her displeasure with the meeting and vacation scheduling. On the issue of CRPS, the WCJ could legitimately credit the IME physician over the treating physician. The court did not find it to be reversible error that the WCJ did not make credibility findings regarding the opinions of employer's second IME doctor, because the WCJ had not terminated benefits, and both physicians opined that claimant was capable of full duty work.

Findlay Township v. WCAB (Steele), 6 C.D. 2020, filed Jan. 7, 2021 WL 57857 (unreported, Pa. Cmwlth. 2021).

In Findlay Township v. WCAB (Steele), the Commonwealth Court held the testimony of the claimant's medical expert legally competent to support the Workers' Compensation Judge's finding that the decedent, Roy Steele, was entitled to total disability benefits pursuant to Section 301(c)(1) of the Act. Additionally, the court rejected employer's argument that decedent's widow, Cheryl Steele, failed to establish claimant was not exposed to a hazard related to his disease, i.e., lung cancer, within 300 weeks before his death. Decedent was a volunteer firefighter with the township's volunteer fire department. Claimant filed a lifetime claim petition on decedent's behalf and a fatal claim petition. Claimant alleged decedent's cancer was caused by exposure to carcinogens recognized as Group 1 carcinogens by the International Agency for Research on Cancer (IARC). Claimant presented testimony from co-workers that claimant was exposed to smoke, soot, and diesel fumes, even after his 2009 cancer diagnosis. Claimant's medical expert opined that claimant's exposure was a substantial contributing factor to his cancer diagnosis. The court concluded that the testimony of the co-workers, found credible by the judge, was sufficient to support the finding concerning claimant's exposure. The court found claimant's expert's opinion competent under Section 301(c)(1). The expert did not opine as to the overall risk of lung cancer in the occupation of firefighting. Rather, the expert opined the exposure was a substantial contributing factor to decedent's cancer diagnosis based upon his expertise and the evidence. In so doing, he utilized the differential diagnosis method, which involves listing all possibilities in terms of diseases and causes, and then elimination of causes until a final or most probable diagnosis is reached. The court observed the differential diagnosis method is a generally accepted methodology among the medical community for diagnosis and treatment of lung cancer.

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Jessieco, Inc./Donegal Mut. Ins. Co., v. WCAB (McCutcheon), No. 1172 C.D. 2019, filed Jan. 6, 2021, 2021 WL 48725 (unreported, Pa. Cmwlth. 2021)

In Jessieco, Inc./Donegal Mut. Ins. Co., v. WCAB (McCutcheon), the Commonwealth Court quashed an employer's appeal as untimely. Employer appealed from the board decision upholding the Workers' Compensation Judge's grant of fatal claim benefits. Employer's counsel originally mailed its appeal from the board's decision to the board's address. The post office returned the appeal as undeliverable.

By that time, more than 30 days from the board's opinion had elapsed. Employer then mailed the appeal to the proper address for the court, which docketed the appeal. In its opinion quashing the appeal, the court stated the appeal was untimely and the expiration of time deprived the court of jurisdiction. The rules of appellate procedure do not permit the court to enlarge the time for filing an appeal. The court noted that the board's opinion and order included a notice setting forth the procedure for appealing to Commonwealth Court, including the proper address and time requirements.

CASE SUMMARIES

On Jan. 6, 2021, the Commonwealth Court in ***Malone v. Workers' Comp. Appeal Bd. (City of Philadelphia), (No. 22 C.D. 2020; 2021 WL 49929)***, upheld a Workers' Compensation Judge's ("Judge's") decision denying a firefighter's claim that his prostate cancer is an occupational disease under the Workers' Compensation Act ("Act"). Pursuant to section 108(r) of the Act, occupational diseases include cancer suffered by firefighters caused by exposure to a known carcinogen recognized as a Group 1 carcinogen by the International Agency for Research on Cancer ("IARC"). Under section 301(f), a firefighter obtains a rebuttable presumption that his cancer is work-related provided he shows (1) employment of four or more years in continuous firefighting; (2) direct exposure to an IARC Group 1 carcinogen; and (3) that he passed a physical prior to engaging in firefighting duties that did not reveal the presence of cancer. In City of Philadelphia Fire Dep't v. Workers' Comp. Appeal Bd., 195 A.3d 197, 208 (Pa. 2018) (Sladek II), the Supreme Court held that firefighters must *first* establish a general causative link between their type of cancer and a Group 1 carcinogen *and then* meet the other three conditions mentioned above before benefiting from section 301(f)'s presumption of causation.

In Malone, the judge found claimant's testimony of his firefighting duties and exposure to smoke and diesel exhaust "wholly credible." She did not, however, find that claimant's evidence met his initial burden of demonstrating that any IARC Group 1 carcinogen are known to cause prostate cancer. In this regard, the judge found employer's two medical witnesses credible, while finding that claimant's medical witness' opinion "has no credible scientific or epidemiologic basis." In affirming the judge's denial of the firefighter's claim, the Commonwealth Court notes that claimant did not argue that the judge's findings lack substantial evidence. The court also notes that the judge provided a reasoned explanation for rejecting claimant's medical witness. Thus, the Commonwealth Court concludes that claimant had not met his initial burden under Sladek II of demonstrating general causation and therefore his prostate cancer is not an occupational disease under section 108(r) of the Act. Because claimant did not meet his initial burden, his proving the existence of the other three conditions under section 301(f) did not entitle him to the presumption of causation found in that section.

On Jan. 6, 2021, the Commonwealth Court in ***Daisy Rodriguez v. Workers' Comp. Appeal Bd. (Adecco Group North America), (No. 869 C.D. 2019; 2021 WL 49966)***, upheld an Appeal Board decision overturning a judge's grant of a medical provider's penalty petition for employer's failure to pay medical bills. Employer had filed a medical-only notice of compensation payable ("Med Only NCP") for a strain/sprain of the low back and left knee. A claim petition was filed, which ended with a different judge finding that claimant did not sustain any injuries beyond those acknowledged on the Med Only NCP and that all benefits were terminated as of April 8, 2015. Employer responded to the medical provider's subsequently filed penalty petition by averring that the provider was seeking payment for bills not causally related to the judicially accepted work injury; employer however never filed a utilization review request. The judge issued a decision ordering employer to reimburse provider $34,341.93 and its litigation costs.

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In upholding the Appeal Board's reversal of the judge's decision, the Commonwealth Court notes that the provider was in essence litigating a fee review before the judge and that there was no evidence of record of the provider's having filed a fee review request. If a provider was able to settle a fee review dispute via a penalty petition, the court asserts, the fee review provisions of the Act would be rendered meaningless. Thus, a provider must file for fee review prior to filing a penalty for non-payment of its bills. Since that did not happen here, the Commonwealth Court concludes that the judge could not consider the merits of the penalty petition. In reaching its conclusion, the court did not consider the effect, if any, of employer's decision to not file a utilization review request on employer's averment that the bills are not causally related to the accepted injury.

On Jan. 5, 2021, the Commonwealth Court in ***Indemnity Ins. Co. of North America v. Bureau of Workers'Comp. Fee Review Hearing Office (Insight Pharmacy), (No. 696 C.D. 2018; 2021 WL 28000)***, affirmed the decision of a Fee Review Hearing Officer ordering insurer to pay provider Insight Pharmacy $6,336.02, plus interest, for a compound medical cream dispensed claimant. Pursuant to Section 306(f.1)(3)(vi)(A) of the Act, reimbursement for prescription drugs is limited to 110% of the average wholesale price ("AWP") of the drug, calculated on a per unit basis, as of the date the drug is dispensed. Although AWP is not defined in the Act, 34 Pa. Code § 127.131(b) states that pharmacies and insurers can mutually agree on which nationally recognized schedule to use in determining a drug's AWP and that the bureau may use any of the nationally recognized schedules to determine a drug's AWP. The bureau uses the *Red Book* published by Truven Health Analytics to determine the AWP of prescription drugs. In a fee review dispute, it remains an insurer's burden to establish by a preponderance of the evidence that it has properly reimbursed the provider.

Before the hearing officer, insurer offered an affidavit stating that its previous $305.92 payment to the pharmacy exceeded the cream's actual AWP and was more than the cream's average retail price. The hearing officer rejected the affidavit as not credible because, for example, it contained a mathematical error, proposed a unit price for only one of the six ingredients making up the compound cream and did not articulate what the actual AWP is for any other ingredient in the cream. The Commonwealth Court agreed that insurer did not produce evidence sufficient to meet its burden of proving that it properly reimbursed the pharmacy.

Insurer next argues that 34 Pa. Code § 127.131 is incompatible with the Act because it authorizes the use of the *Red Book*, which does not report the actual AWP of pharmaceuticals. Since there is no readily available resource from which to get the actual AWP, insurer maintains that the "best proxy" is to use the average retail price. The court rejected this argument because the legislature could have amended the Act to define AWP to mean average retail price, but chose not to do so. Additionally, insurer could have produced evidence to support a calculation of an AWP more accurate than the one furnished by the *Red Book* but did not proffer such proof to the hearing officer.

Finally, insurer argues that 34 Pa. Code § 127.131 unconstitutionally delegates legislative authority to private persons, citing ***Protz v. Workers' Comp. Appeal Bd. (Derry Area School District), 161 A.3d 827 (2017)***. The court dismissed insurer's claim noting that the regulation does not preclude an insurer from offering a nationally recognized schedule other than the *Red Book* and that insurer was not prevented by the regulation from making a case before the hearing officer for the use of an actual AWP to reprice the pharmacy's invoice.

Kinzler v. WCAB (Ass'n for Vascular Access), ___ A.3d ___, 2021 WL 45453 (Pa. Commw. 2021)

The Commonwealth Court held that an employer was entitled to subrogation out of the now-deceased injured worker's third-party recovery not only with regard to lifetime TTD which the worker actually collected but, as well, with regard to a specific loss award that was ultimately collected, after her death, by a dependent.

A worker, Kinzler, was on a work trip when she sustained an injury; employer paid benefits voluntarily. She then sued a third-party and received a settlement of over $4 million. Kinzler, who was diabetic, developed health issues and her lower leg was amputated. As a result, while receiving TTD, she became entitled to specific loss of her lower leg (350 weeks). She then died while still receiving TTD – of *non*-injury-related causes. When such a scenario unfolds, Section 306(g) of the Act provides that payments of compensation for specific loss are payable to dependents.

Employer sought subrogation with regard to both TTD and the specific loss benefits, which were now

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collectable by the dependent. Before the WCJ, the dependent asserted that no subrogation could be had out of the specific loss benefits, as the obligatory "equatability" of the subrogation right was missing. The WCJ and board, however, found equatability and allowed subrogation.

The Commonwealth Court affirmed. It, too, found that equatability – the "need for some identity between the fund created by the insurance agreement [here the specific loss/disability benefits paid] and the fund created by the cause of action against the [third-party] tortfeasor" – existed in this situation. Thus, the court allowed the specific loss award as part of the lien. The court also stated that it had not "previously considered whether temporary total disability and specific loss benefits are analogous for purposes of subrogation." The court basically answers that they are; employers, in general, enjoy subrogation when the workers' compensation paid features, or featured, a specific loss.

Sorrentino v. Workers' Comp. Appeal Bd., No. 589 C.D. 2020, 2021 WL 476095 (Pa. Commw. Ct. Feb. 10, 2021)

Supersedeas on Challenge granted by implication

Claimant suffered a work injury on May 17, 2018 described on the NCP as a low back fracture. A notification of suspension issued on Dec. 6, 2018, suspended claimant's benefits as of Dec. 4, 2018. Claimant filed a timely challenge petition. Shortly thereafter, employer filed termination and suspension petitions (other petitions were filed as well). At the Jan. 9, 2019 hearing, the WCJ considered claimant's challenge petition and employer's suspension petition, termination petition, and supersedeas request. Notably, claimant requested 14 days to respond to employer's supersedeas request. The WCJ granted employer's supersedeas request without specifically addressing claimant's challenge petition or waiting the 14 days. Ultimately, the WCJ granted the termination petition, concluding that claimant had fully recovered from her work injury as of Oct. 29, 2018, over one month before claimant filed the challenge petition. Claimant appealed to the board alleging that the WCJ failed to timely rule upon claimant's challenge petition, granted employer's supersedeas before claimant's response time had expired, and failed to consider substantial medical evidence in granting the termination. The board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant presented two issues: (1) whether the board erred when it held that the WCJ issued a timely interlocutory order granting supersedeas in conjunction with the termination petition and timely ruled on claimant's challenge petition; and (2) whether the board erred when it held that the WCJ properly credited employer's doctor's testimony over claimant's doctor's testimony.

Commonwealth Court affirmed finding that, the WCJ, in granting employer's supersedeas request, by implication, effectively denied claimant's challenge petition within the time required by Section 131.50a(e) of the Board's Regulations. The court found the opinions of defendant's medical expert unequivocal and acknowledged that they may not question the WCJ's credibility determinations or reweigh the evidence.

DTE Energy Co., Inc. v. Workers' Comp. Appeal Bd., No. 418 C.D. 2020, 2021 WL 278376 (Pa. Commw. Ct. 2021)

WCJ's comments dicta so no collateral estoppel

This case has a lengthy history dating back to a 1988 leg and back injury. Claimant was paid various wage and medical benefits until wage loss benefits were suspended as of March 13, 1995. In 2014, claimant filed a penalty petition for non-payment of medical expenses. In December 2015, claimant and employer entered into a compromise and release agreement, which provided that employer remained responsible for certain medical bills incurred to treat claimant's "leg/back" work injury. The C&R agreement addressed the question of employer's liability for claimant's Aug. 9, 2014, low back fusion surgery as follows:

> *There is currently pending a petition for penalties relative to medical treatment in the nature of fusion surgery at L1-L2 through S1 performed Aug. 9, 2014. This C&R does not resolve or dispose of the issue brought by that petition, i.e., whether the Aug. 9, 2014 surgery and related expenses are causally related to the March 21, 1988 injury* and *therefore, the responsibility of employer....*

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In January 2016, the WCJ decided and denied claimant's penalty petition, finding that employer was not liable for claimant's 2014 low back surgery.

Specifically, the WCJ found, as fact:

> *Based on the Oct. 13, 2014 and Jan. 15, 2015 medical reports of Dr. Thomas Kramer, M.D., this WCJ finds as fact that Dr. Kramer evaluated claimant in May 2009 regarding the March 21, 1988 work injury. Dr. Kramer also performed updated record reviews regarding whether the surgery in August 2014 was related to the work injury that occurred 26 years prior. This WCJ accepts Dr. Kramer's medical opinion there is no clear-cut correlation of a need for the surgery that was performed in August 2014 to the work injury of March 1988. By May 2009, claimant had achieved his maximum degree of medical improvement and no surgery was recommended or needed. Thus, the surgery performed Aug. 19, 2014 was not related to the work injury of March 21, 1988. There is no further treatment that is necessary or that can be expected in the future relative to the low back condition as a result of the March 21, 1988 work event.*

On May 9, 2018, claimant filed another penalty petition, alleging that employer violated the Act by not paying for additional medical expenses related to claimant's 1988 work injury. In response, employer maintained that the doctrine of collateral estoppel barred claimant's new penalty petition because the WCJ in the earlier litigation found, as fact, that claimant had reached maximum medical improvement and that no further treatment was necessary for his 1988 work injury. The new penalty petition was assigned to a different WCJ. The collateral estoppel arguments were not accepted. Instead, the WCJ found the 2016 decision that no further treatment would be needed for claimant's 1988 low back work injury to be "mere dicta at best, with no legal import or binding effect". The WCJ determined that the current medical expenses were related to the 1988 work injury. Employer had to pay the bills and a 20% penalty was awarded. The WCAB affirmed and the employer presented this appeal to the Commonwealth Court.

The Commonwealth Court, affirming the WCJ and board, held that the claimant was not collaterally estopped from alleging (in 2018) that his medical treatment for his accepted back injury (in 1988) was the liability of the employer, despite the fact that, in an adjudication two years before (2016), a different WCJ had remarked that claimant's back fusion surgery (in 2014) was not work-related and indeed that claimant long ago (2009) had achieved MMI and needed no further treatment.

Those remarks, the court held, were dicta. And, this being the case, employer had violated the Act by not paying the medical bills. Further, the WCJ committed no error in ruling that employer had the burden of proof to show lack of causal connection. The NCP was still open, and employer was presumptively liable for leg and back injuries. (See *Kurtz v. WCAB (Waynesburg College)*, 794 A.2d 443 (Pa. Commw. 2002)).

Sadler v. Workers' Comp. Appeal Bd., No. 6 EAP 2020, 2021 WL 265131 (Pa. Jan. 27, 2021)

Supreme Court determines credit for pre-conviction incarceration does not convert to post-conviction incarceration

Claimant suffered a work injury on July 2, 2012 described as right pinky finger amputation and low back sprain. On Aug. 13, 2013, claimant was charged with a crime in New Jersey. Because he could not post bail, he remained incarcerated for 525 days, until Jan. 22, 2015. Since he was not convicted, claimant's workers' compensation benefits continued. Claimant then pled guilty and immediately after accepting his plea, the trial court sentenced him to 525 days of incarceration, gave him credit for time served, and immediately released him from custody.

Employer then sought suspension, arguing that claimant would be unjustly enriched were he to have the benefit of the wage loss benefits received during his incarceration now that he had been found guilty. The WCJ and board granted relief, the latter directing a future credit as against any disability benefits. Commonwealth Court, however, reversed. In its view, the workers' compensation benefits claimant received during incarceration were not benefits received "after conviction".

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A View from the Bench

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The Supreme Court has now affirmed, unanimously, on essentially the same grounds. The Supreme Court held that:

1. Because claimant was not incarcerated during any period of time after his conviction, no basis existed for termination of his benefits as a result of his incarceration;

2. The fact that claimant's pre-conviction incarceration was counted as credit against his sentence imposed for his eventual conviction did not in any respect "convert" his pre-conviction incarceration into post-conviction incarceration, so as to render him ineligible for benefits; and

3. The statute, providing that nothing in the Workers' Compensation Act shall require payment of compensation for any period during which the employee is incarcerated after a conviction, does not violate equal protection guarantees.

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