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1. Citation for the state's workers' compensation statute.

The Workers' Compensation Act ("the Act"), the Act of June 2, 1915, P.L. 736, No. 338, 77 P.S. § 1 et seq., was amended by both the Act of July 2, 1993, P.L. 190, No. 44 (Act 44) and the Act of June 24, 1996, P.L. 350, No. 57 (Act 57). Note: These were significant amendments to the statute on July 2, 1993 and on June 24, 1996. The 1996 Amendments were intended to address the rising costs of workers' compensation in the Commonwealth while preserving the rights of employees to be adequately compensated for work-related injuries.

The Act applies to any injury occurring within the Commonwealth of Pennsylvania. The Act will also apply where claimant's employment is principally located in Pennsylvania or where claimant is working under a contract of hire made in Pennsylvania.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

"Employee" includes all natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer. Except as provided by the clause (c) of section 302 and sections 305 and 321 of the Act, every executive officer of a corporation elected or appointed in accordance with the charter and by-laws of the corporation, except elected officers of the Commonwealth or any of its political subdivisions, is an employee of the corporation. An executive officer of a for-profit or nonprofit organization who serves voluntarily and without remuneration may elect to exempt himself from coverage of the Act. Section 104 of the Act, 77 Pa. C.S. § 22.

Whether an employer-employee relationship exists is a question of law to be decided on the specific facts of each case. *See* 3D Trucking Co. v. Workers' Compensation Appeal Bd. (Fine), 921 A.2d 1281 (Pa. Cmwlth. 2007). An employer-employee relationship exists where the alleged employer possesses the right to select the employee; the right and power to discharge the employee; the power to direct manner of performance; and the power to control the employee. B&T Trucking v. Workers' Compensation Appeal Bd. (Paull), 815 A.2d 1167 (Pa. Cmwlth. 2003). Furthermore, an employer's payment of wages and payroll deductions are significant factors in determining whether an employer-employee relationship exists. *See* Red Line Express Co. Inc. v. Workmen's Compensation Appeal Bd. (Price), 138 Pa. Commw. 375, 588 A.2d 90 (Pa. Cmwlth. 1991). (under lease agreement, lessor company paid driver's wages, made payroll deductions and paid driver's workers' compensation insurance).

An injured employee may be eligible for benefits for injuries sustained traveling to *or* from work if:

A. The employment agreement between a claimant and employer included transportation to and from work;

B. The employee has no fixed place of work;

C. The employee is injured while on a special assignment for the employer; or

D. Special circumstances indicate that the employee was furthering the business of the employer.

The Pennsylvania Supreme Court has held that a temporary employee, who is employed by an agency, never has a fixed place of work. The Court went on to hold that when an agency employee travels to an assigned workplace, the employee is furthering the business of the agency. Therefore, as a matter of law, such a claimant has no fixed place of work and her injury occurred while she was in furtherance of her employer's business. *See* Peterson v. Workmen's Compensation Appeal Bd. (PRN Nursing Agency), 528 Pa. 279, 597 A.2d 1116 (1991).

However, in Mackey, the claimant was not entitled to benefits pursuant to the "No Fixed Place Of Work" exception because although she worked for a temporary agency, her assignment, as a home health nurse, was for all actual and practical purposes a permanent assignment requiring her to drive to the same location every day, which she had done for one and a half years.

Therefore, the claimant who was involved in a motor vehicle accident on her way driving directly from her home to her patient's home was not in the course and scope of employment because she had a fixed place of employment. Mackey v. Workmen's Compensation Appeal Bd. (Maxim Healthcare Servs.), 989 A.2d 404 (Pa. Cmwlth. 2010). There were no facts of record upon which the court could conclude that at the time of the accident, the employee was acting as anything other than a commuter on her way to work. In the absence of proof of special circumstances, the fourth exception to the "coming and going" rule did not apply.

Wawa explained that with regard to the fourth exception, the special circumstances entitling an employee to benefits for injuries sustained during a commute must involve an act in which the employee was engaged by order of the employer, express or implied, and not simply for the convenience of the employee. Thus, the 'special circumstances' involve some effort on the part of the employee, requested by the employer, which is involved in either going to or coming from work. Wawa v. Workmen's Compensation Appeal Bd. (Rodgers), 2011 Pa. Commw. Unpub. LEXIS 810. (Manager instructed Claimant not to occupy a parking space in the employer's lot thus requiring Claimant to park further away down the street from the work location which resulted in a slip and fall on ice while Claimant was walking to work).

3. Identify and describe any "statutory employer" provision.

Five distinct elements define a statutory employer: (1) contract with owner of land or one in the position of an owner; (2) premises occupied or under the control of the contractor seeking statutory employer status; (3) subcontract made by contractor; (4) part of the contractor's regular business is entrusted to the subcontractor under the contract; and (5) an employee of the subcontractor is injured on the premises. Any employer who is in the possession or control of the premises and who permits employees of a subcontractor on the premises is generally referred to as a "statutory employer" and is liable to pay compensation to employees of a subcontractor unless the subcontractor has workers' compensation coverage. Section 302(b) of the Act, 77 Pa. C.S. § 462. However, a statutory employer who is required to pay compensation has a right to indemnification from the subcontractor who is primarily liable.

4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

Injuries are deemed compensable when arising in the course and scope of employment and related thereto, unless an exclusion applies. "An injury to an employee, regardless of his previous physical condition, arising in the course of his employment and related thereto" need not be pinpointed to a specific event or definable incident. It includes aggravation, reactivation,

acceleration or death resulting from the injury. Persons exposed to a serious risk of contracting a disease which is known to be highly contagious or infectious and potentially deadly are "injured" for purposes of workers' compensation. Section 301(c)(1) of the Act, 77 Pa. C.S. § 411(1). Classes of compensable injuries include:

1. Accidental injuries, which consist of conventional accidents, unusual exertion, unusual pathological result and improper medical treatment

2. Cumulative trauma injuries (e.g., carpal tunnel syndrome and repetitive motion injuries)

3. Aggravations of pre-existing conditions)

4. Occupational diseases as defined in Section 108 of the Act

5. Work-related diseases that are not defined as occupational diseases

6. Work-related aggravations of pre-existing diseases

7. Work-related infections

8. Recurrences

9. Heart attacks

10. Systemic reactions

11. Psychological injuries

12. Premises injuries

B. Occupational disease (including respiratory and repetitive use).

There are two basic occupational disease laws, The Pennsylvania Workers' Compensation Act § 101 *et seq.,* 77 Pa. C.S. § 101 *et seq.*, and the 1939 O.D. Act, 77 Pa. C.S. § 1201 *et seq.* "Compensable" occupational diseases are limited to the following:

1. Poisoning by arsenic, lead, mercury, manganese, or beryllium

2. Poisoning by phosphorous

3. Poisoning by methanol, carbon bisulfide, carbon monoxide, hydrocarbon distillates, halogenated hydrocarbons, toluene diisocyanate or any preparations containing these chemicals

4. Poisoning by benzyl or by nitro, amido, or amino derivatives of benzyl

5. Caisson disease (compressed air illness)

6. Radium poisoning or disability

7. Poisoning by, or ulceration from chromic acid, or bichromate of ammonium, bichromate of potassium, or bichromate of sodium

8. Epitheliomatous cancer due to tar, pitch, bitumen, mineral oil or paraffin

9. Infection or inflammation of skin due to oils, cutting compounds, lubricants, dust, liquids, fumes, gases or vapor

10. Anthrax occurring in any occupation involving the handling of, or exposure to wool, hair, bristles, hides, or skins, or bodies of animals either alive or dead

11. Silicosis, in any occupation involving direct contact with, handling of, or exposure to the dust of silicon dioxide

12. Asbestosis and cancer resulting from direct contact with, handling of, or exposure to the dust of asbestos in any occupation involving such contact, handling or exposure

13. Tuberculosis, serum hepatitis or infectious hepatitis

14. All other occupational diseases to which the employee is exposed by reason of the employment, which are causally related to the industry or occupation, and the incidence of which is substantially greater in that industry or occupation than in the general population

15. Diseases of the heart and lungs after four years or more of service in fire fighting for the benefit or safety of the public

16. Byssinosis

17. Coal worker's pneumoconiosis, anthraco-silicosis and silicosis

Complete or partial noise induced hearing loss may be compensated under the Act. Section 306(c)(8) of the Act, 77 Pa. C.S. § 513. For all claims filed under Act 1, a percentage of hearing loss is assessed using an audiometric testing in conjunction with the American Medical Association guidelines.

5. What, if any, injuries or claims are excluded?

A. Intentionally self-inflicted injury or death – The burden is on the employer to prove that the death was a suicide or that the injury was self-inflicted. However, if the suicide occurred after a work-related injury, the injury caused the employee to be dominated by a disturbance of the mind so severe as to override normal rational judgment, and the disturbance resulted in the suicide, it may be compensable. Halvorsen v. Workmen's Compensation Appeal Bd. (Congoleum Corp.), 159 Pa. Commw. 35, 632 A.2d 973 (Pa. Cmwlth.1993), *alloc. denied*, 537 Pa. 636, 642 A.2d 488 (Pa. 1994). *See* Section 301(a) of the Act, 77 Pa. C.S. § 431.

B.

B. Injuries resulting from the employee's violation of the law – The employer must prove that the violation caused the injury. If the violation of law is only a summary offense, compensation may not be excluded.

C. Injuries resulting from the employee's illegal use of drugs – This category of injuries was

specifically excluded from coverage under Section 301(a) of the Act as a type of violation of law by the 1993 Amendments to the Act (Act 44). The employer must prove that the illegal use of drugs caused the injury.

D. Injuries resulting from the employee's intoxication – In cases where the injury or death is caused by intoxication, no compensation shall be paid if the injury or death would not have occurred but for the employee's intoxication. The burden of proof is on the employer to establish this fact.

E. Injuries caused by personal animosity and physical assault - Intentional injuries by a third person because of personal reasons and not directed against him as an employee or because of his employment are not compensable. Section 301(c)(1) of the Act, 77 Pa. C.S. § 411(1); Haas v. Brotherhood of Transportation Workers, 158 Pa. Super. 291, 44 A.2d 776 (1945). See Helm v. Workmen's Compensation Appeal Board (U.S. Gypsum Co.), 139 Pa. Commw. 587, 591 A.2d 8, 10 (Pa. Cmwlth. 1991) (The burden of proving that the injury was for reasons personal to the assailant rests with the employer.). *See also* LeDonne v. Workers' Compensation Appeal Bd. (Graciano Corp.), 936 A.2d 124 (Pa. Cmwlth. 2007) (Employer needed only to produce evidence to show that Decedent was killed for reasons unrelated to his work.).

F. The 1993 Amendments exclude injuries sustained while the employee is operating a motor vehicle provided by the employer if the employee is not otherwise in the course of employment at the time of the injury. Section 301(c)(1) of the Act.

6. What psychiatric claims or treatment are compensable and is PTSD a compensable diagnosis?

There are three categories into which mental claims fall. In a ***physical/mental claim***, a claimant must prove by unequivocal medical evidence that the work-related physical trauma or stimulus resulted in the mental illness. School Dist. of Phila. v. Workmen's Compensation Appeal Board (Coe), 163 Pa. Commw. 89, 639 A.2d 1306 (Pa. Cmwlth 1994). *See* Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette), 954 A.2d 726, 2008 Pa. Commw. LEXIS 336 (claimant has the burden of establishing, by unequivocal medical evidence – i.e. the medical expert, after providing a foundation, testifies that in his professional opinion that he believes a certain fact or condition exists, that his mental injuries developed as a result of his initial physical injury); Donovan v. Workers' Compensation Appeal Board (Academy Med. Realty), 739 A.2d 1156 (Pa. Cmwlth. 1999) (claimant is required to show that the physical stimulus caused the mental injuries); Gulick v. Workers' Compensation Appeal Board (Pepsi Cola Operating Co.), 711 A.2d 585 (Pa. Cmwlth. 1998) (claimant is not required to show abnormal working conditions).

In a ***mental/physical claim***, a claimant must establish by objective evidence that the injury arose

from abnormal working conditions and not merely a subjective reaction to a normal working condition. *See* Farmery v. Workers' Compensation Appeal Bd. (City of Philadelphia), 776 A.2d 349 (Pa. Cmwlth. 2001) (a claimant employed in a highly stressful job must show that the event giving rise to the mental injury is so much more stressful that it is abnormal even for that job). Additionally, the claimant must prove by unequivocal medical evidence the causation between the psychological stimulus and the physical injury.

In a ***mental/mental claim***, a claimant has a higher burden of proof, and must prove by objective evidence that a psychic injury was suffered, was causally related to his/her job, and that the injury resulted from more than a subjective reaction to a normal working condition. Scott v. Workers' Compensation Appeal Bd. (Jeans Hospital), 732 A.2d 29 (Pa. Cmwlth. 1999); McCarron v. Workers' Compensation Appeal Bd. (Delaware County DA's Office), 761 A.2d 668 (Pa. Cmwlth. 2000), *alloc. denied*, 565 Pa. 679, 775 A.2d 811 (Pa. 2001). *See also* Wilson v. WCAB (Aluminum Co. of Am.), 542 Pa. 614, 669 A.2d 338, 343 (Pa. 1996) (in classifying working conditions as normal or abnormal, a bright line test or a generalized standard is not employed and instead the specific work environment of the claimant is considered).

A detailed discussion of the law relating to mental illness is set forth in Martin v. Ketchum, Inc., 523 Pa. 509, 568 A.2d 159 (Pa. 1990). A heightened burden of proof exists for mental/mental cases, requiring that work-related stress be caused by actual objective abnormal working conditions as opposed to subjective, perceived or imagined employment events. *See* Martin; Washington v. Workers' Compensation Appeal Bd. (Commonwealth/State Police), 11 A.3d 48, 55 (Pa. Cmwlth. 2011).

The determining factor is what is extraordinary or abnormal for a person in the same "line of work". When an individual Claimant employed as a police officer has not previously encountered a particular type of event one may expect a police officer to become involved in, that experience is merely "subjectively abnormal for the Claimant." Payes v. Workers' Compensation Appeal Bd. (Commonwealth/State Police), 5 A.3d 855 (Pa. Cmwlth. 2010) (this case is currently being appealed before the Pennsylvania Supreme Court), *alloc. approved*, 610 Pa. 402, 20 A.3d 1182 (Pa. 2011).

In RAG (Cyprus) Emerald Res., L.P. v. Workers' Compensation Appeal Bd. (Hopton), 590 Pa. 413, 912 A.2d 1278 (Pa. 2007), claimant asserted that a co-worker's homosexual comments aggravated his PTSD, which was a pre-existing condition. The Supreme Court held that the pre-existing nature of the injury does not disqualify him from receipt of compensation. Furthermore, in footnote 10, the Court cautioned that it could envision that both a single incident could constitute an abnormal working condition, if sufficiently severe and unusual in the context of the relevant working environment, and a relatively minor conduct could result in a determination of abnormal working conditions if that conduct is imposed repeatedly and is demonstrably unusual in that environment.

See Cmty. Empowerment Ass'n v. Workers' Comp. Appeal Bd. (Porch), 962 A.2d 1 (Pa. Cmwlth. 2008) (whether something is a religious issue or a cultural issue is not the ultimate question; rather, the pivotal questions are whether it can be said that the events that have been described constitute abnormal working conditions and whether the mental injuries were caused, in part, by these events developed from subjective reactions to normal working conditions).

In PA Liquor Control Bd. v. Workers' Compensation Appeal Bd. (Kochanowiez), 29 A.3d 105 (Pa. Cmwlth. 2011) (en banc), the claimant, who had worked at the employer's retail store, was diagnosed with post-traumatic stress disorder after an armed robbery at the store. On appeal, the employer argued that the WCJ erred in granting the claimant's claim petition because the employer presented evidence that the armed robbery was "normal" for the industry. The WCJ found the employer provided the claimant with training on workplace violence, some of which was specifically geared toward robberies and thefts. The claimant admitted he attended training and received educational booklets. Given these findings and prior decisions, the court found the claimant could have anticipated being robbed at gunpoint. The employer presented uncontested evidence of 99 robberies of its southeastern Pennsylvania retail stores since 2002, which equated to more than one per month. There had been four retail liquor store robberies in close proximity to the claimant's store within weeks of the robbery at the store. Given the frequency the employer's stores had been robbed and the proximity of recent incidents, the court held that robberies were a normal condition of retail liquor store employment.

7. What are the applicable statutes of limitations?

A claim petition for benefits for injury or death must be filed within **three years** after the date of injury or death. Section 315 of the Act, 77 Pa. C.S. § 602. Where an employee is exposed to continuing trauma, e.g. carpal tunnel, the statute of limitation period begins to run on the last day of the cumulative injury, usually the last day of work. Section 315 of the Act has been held to be a statute of repose. *See* Sharon Steel Corporation v. Workmen's Compensation Appeal Board (Myers), 670 A.2d 1194 (Pa. Cmwlth.), *alloc. denied*, 544 Pa. 679, 678 A.2d 368 (1996).

For hearing loss cases, the claim must be filed within three years of the last date of exposure or the date of trauma. Under the old law, the three year statute began running from the date on which a claimant was advised by a doctor that his hearing loss was complete for all practical intents and purposes and was work-related.

Petitions to Reinstate Compensation Benefits following a termination of workers' compensation benefits must be filed within three years of the last date of payment of compensation. Section 413(a) of the Act, 77 Pa. C.S. § 772. Note: A reinstatement petition that is filed within three years of the date when the employer last paid the claimant compensation is timely, even though the effective date of termination is more than three years prior to the filing of the reinstatement

petition. Flannigan v. Workers' Compensation Appeal Bd. (Colt Industries), 726 A.2d 424 (Pa. Cmwlth. 1999).

In calculating this 500 week period for the purpose of gauging the timeliness of a reinstatement petition, periods of suspension are included with periods where partial disability benefits are paid. Kane v. Workers' Compensation Appeal Bd. (Glenshaw Glass Co.), 940 A.2d 572 (Pa. Cmwlth. 2007), *alloc. denied*, 598 Pa. 770, 956 A.2d 437 (2008).

Where a claimant has been paid partial disability benefits pursuant to a supplemental agreement, he/she must file a Petition to Reinstate Compensation Benefits within three years after the final payment of the 500 week partial disability period. Stewart v. Workers' Compensation Appeal Bd. (Pa. Glass Sand/U.S. Silica), 756 A.2d 655 (Pa. 2000); Romanowski v. Workers' Compensation Appeal Bd. (Precision Coil Processing), 944 A.2d 127 (Pa. Cmwlth. 2008).

8. What are the reporting and notice requirements for those alleging an injury?

Notice must be given by an employee within 21 days of the work-related injury or no compensation will be due until notice is given. If notice is not given within 120 days after the occurrence of an injury, no compensation will be allowed. Section 311 of the Act, 77 Pa. C.S. § 663. The employer or an agent of the employer must be informed that the employee sustained an injury in the course of his employment on or about a specified time and at or near a place specified. Section 312 of the Act, 77 Pa. C.S. § 632. Notice in person or by mail to an agent of the employer at the place of business, by the employee or someone on his or her behalf, is sufficient. Section 313 of the Act, 77 Pa. C.S. § 633.

Notice periods do not begin to run until the employee knows or by the exercise of reasonable diligence should have known that the disability was caused by the injury or the occupational disease. Section 311 of the Act, 77 Pa. C.S. § 631.

The ***reasonable diligence*** standard is an objective standard. The elements of knowledge the claimant must possess in order to trigger the running of the notice period are (1) knowledge or constructive knowledge (2) of disability (3) which exists, (4) which results from an occupational disease [or injury], and (5) which has a possible relationship to the employment. Allegheny Ludlum Corporation v. Workers' Compensation Appeal Bd. (Holmes), 608 Pa. 670, 13 A.3d 480 (Pa. 2010).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury – Intentionally self-inflicted injury or death is not compensable. The burden of proof that a death was a suicide is on the employer. Section 301(a) of the Act, 77 Pa. C.S. § 431.

B. Willful misconduct, "horseplay," etc. - "Horseplay" may be compensable, when the activity is merely an innocent or inconsequential departure from work. Where the injury or death is caused by the employee's violation of law and the violation of law is either a misdemeanor or a felony, compensation is not payable even if all other requirements of the Act are met. Section 301(a) of the Act, 77 Pa. C.S. § 431. The employer must establish a causal connection between the violation of law and claimant's injuries. Burns v. Workers' Compensation Appeal Bd. (State Pipe Services, Inc.), 654 A.2d 81 (Pa. Cmwlth. 1995).

C. Injuries involving drugs and/or alcohol - The 1993 amendments to Pennsylvania's Workers' Compensation Act provide that injuries that would not have occurred but for the intoxication of the employee are excluded. Section 301(a) of the Act, 77 Pa. C.S. § 431. An employer or insurer asserting an employee's intoxication as an affirmative defense in the workers' compensation context must establish that the intoxication was "the cause in fact," as opposed to the proximate cause or substantial factor, of the injury, and the workers' compensation judge makes this determination. Clear Channel Broad. v. Workers' Compensation Appeal Bd. (Perry), 938 A.2d 1150 (Pa. Cmwlth. 2007) *citing* Mahon v. Workers' Compensation Appeal Board (Expert Window Cleaning), 835 A.2d 420, 429 (Pa. Cmwlth. 2003).

The employer's sole burden is to convince a fact finder by competent and substantial evidence that claimant would not have fallen and sustained his injuries had he not been intoxicated. It is up to the fact finder to infer from the evidence as a whole whether a claimant's intoxication caused his injury. Thomas Lindstrom Company, Inc. v. Workers' Compensation Appeal Bd. (Braun), No. 1815 C.D. 2009, 13 A.3d 480 (Pa. 2010) (decision by Judge Pellegrini, April 13, 2010).

10. What, if any, penalties or remedies are available in claims involving fraud?

The fraud provisions include nine specific offenses that could result in prosecution of an employee, employer/insurer or healthcare provider. New offenses include intentional failure to file reports required under Section 311.1 of the Act, 77 Pa. C.S. § 631.1 and intentional failure to file reports of employment or receipt of total or excessive partial disability benefits while employed or receiving wages.

Civil penalties of up to $5,000 for the first offense, $10,000 for the second offense and $15,000 for each subsequent violation can be issued. Penalties are awarded to the prosecuting authority. That authority can enter into an agreement with an individual where a civil penalty is paid with no admission of guilt with this agreement not being admissible in a subsequent civil or criminal proceeding. There is a five year statute of limitations after the commission of a fraudulent act.

In March 1996, Pennsylvania's Insurance Fraud Section was formally launched to aggressively investigate and prosecute schemes that cost as much as 25 cents of every insurance dollar paid by Pennsylvanians. The Insurance Fraud Section is located at 16th Floor Strawberry Square; Harrisburg, PA 17120 and can be reached by phone: 717-787-0272 or fax: 717-705-0741. An Insurance Fraud Referral Form can be obtained from the Office of the Attorney General's web site at http://www.attorneygeneral.gov/complaints.aspx?id=2903.

11. Is there any defense for falsification of employment records regarding medical history?

While the falsification of employment records regarding medical history is not an affirmative defense, such evidence can be used to impeach the employee's credibility. Further, a Judge may not rely upon the testimony of a medical expert who based his opinion upon a false medical history. Newcomer v. Workmen's Compensation Appeal Bd. (Ward Trucking Corp.), 547 Pa. 639, 692 A.2d 1062 (Pa. 1997); Department of Corrections, SCH-Retreat v. Workers' Compensation Appeal Bd. (Richardson), 788 A.2d 1041(Pa. Cmwlth. 2001), *alloc. denied*, 798 A.2d 1292 (Pa. 2002). The fact that a medical expert did not have all of the claimant's medical records in formulating his opinion only goes to the weight of the expert's testimony, not its competency. Coyne v. Workers' Comp. Appeal Bd. (Villanova Univ. & PMA Group), 942 A.2d 939, 954 (Pa. Commw. Ct. 2008); DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Markets, Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007); Samson Paper Co. v. Workers' Compensation Appeal Board (Digiannantonio), 834 A.2d 1221 (Pa. Cmwlth. 2003)

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

Employment related social and athletic activities may be compensable under Pennsylvania law. Where an employer sponsored league softball team included a post-season banquet, awards and team jackets, the team captain who was injured while picking the jackets up off premises was held not to be in the course and scope of employment. Duffy v. Workmen's Compensation Appeal Bd. (Arco Chem. Co.), 664 A.2d 699 (Pa. Cmwlth. 1995). An employer run gym on the premises that employees were encouraged, but not required to use, was held to be an activity in the course of employment. Stanner v. Workmen's Compensation Appeal Bd. (Westinghouse Electric Co.), 146

Pa. Commw. 92, 604 A.2d 1167 (Pa. Cmwlth. 1992). A charity volleyball game organized by an employer-sanctioned employee association and encouraged by the employer is in the course of employment. PSFS/Meritor Financial v. Workmen's Compensation Appeal Bd. (Walker), 145 Pa. Commw. 433, 603 A.2d 692 (Pa. Cmwlth. 1992). *See* Dandenault v. Workers' Compensation Appeal Bd. (Philadelphia Flyers, Ltd.), 728 A.2d 1001 (Pa. Cmwlth. 1999).

13. Are injuries by co-employees compensable?

If the injury is sustained during the course and scope of employment because of an act or omission by a co-employee, it will be compensable. Arguments or disputes which arise out of the employment relationship are deemed to occur in the course or employment and thus prevent any cause of action against the employer or co-employee. Repco Products Corp. v. Workmen's Compensation Appeal Bd., 379 A.2d 1089 (Pa. Cmwlth. 1977); Hammerstein v. Lindsay, 440 Pa. Super. 350, 655 A.2d 597 (1995). If an injury occurs off the employer's premises, the Claimant must prove that the injury arose in the course of employment and the injury was related to the employment. Camiolo v. Workers' Compensation Appeal Bd. (American Bank Notes), 722 A.2d 1173 (Pa. Cmwlth. 1999) (although work-related animosity led to the injury, petitioner was not acting in furtherance of his employer's interests when the injury occurred); Penn State Univ. v. Workers' Compensation Appeal Bd. (Smith), 15 A.3d 949 (Pa. Cmwlth. 2011) (typically, a claimant who is at lunch and sustains an injury off the employer's premises is not acting in furtherance of the employer's business).

14. Are acts by third parties unrelated to work, but committed on the premises, compensable (e.g. "irate paramour" claims)?

No. Intentional injury by a third person because of personal reasons is not compensable. Section 301 of the Act, 77 Pa. C.S. § 411(1).

BENEFITS

15. What criterion is used for calculating the average weekly wage?

The average weekly wage is computed as of the date of injury, not the date of disability. In calculating wages in a 13-week calendar quarter, only wages earned before the injury may be used, and the last 13-week period should end with the last completed pay week prior to the injury. Connors v. Workmen's Compensation Appeal Bd. (B.P. Oil), 663 A.2d 887 (Pa. Cmwlth. 1995).

The Act provides that for injuries on or after June 24, 1996, where wages are fixed by the week, that amount will be the average weekly wage. If the wages at the time of the injury are fixed by the month the average weekly wage shall be the monthly wage multiplied by 12 and divided by 52. Finally, where at the time of the injury the wages are fixed by the year, then the average weekly wage shall be the yearly wage divided by 52.

If wages are not fixed by any manner described above, the average weekly wage is calculated by taking the average of the highest three of the last four consecutive periods of 13 calendar weeks in the 52 weeks immediately preceding the injury. Section 309(d) of the Act, 77 Pa. C.S. § 582(d). In determining the average weekly wage for each of the four periods, the wages, weekly board/lodging, weekly federal reported gratuities and any bonus, incentive or vacation earned in the 13 weeks of the period added and then divided by 13.

Where the employee is not employed by the employer for at least three consecutive periods of 13 calendar weeks in the 52 weeks immediately preceding the injury, then the average weekly wage is calculated by dividing by 13 the total wages earned with the employer for any completed period of 13 calendar weeks preceding the injury and by averaging the total amounts earned during those periods.

The employee who has worked less than a complete period of 13 calendar weeks that does not have a fixed weekly wage, shall have his average weekly wage calculated based on the hourly wage rate multiplied by the number of hours the employee was expected to work per week under his employment agreement. It must be noted that the Act does not define the term "hourly wage." In Triangle Bldg. Ctr. v. Workers' Compensation Appeal Bd. (Linch), 560 Pa. 540, 548, 746 A.2d 1108, 1112 (2000), the Court noted that it was the "General Assembly's intention that the baseline figure from which benefits are calculated should reasonably reflect the economic reality of a claimant's recent pre-injury earning experience, with some benefit of the doubt to be afforded to the claimant in the assessment." A claimant's hourly wage is a question of fact for the WCJ. Mullen v. Workers' Compensation Appeal Bd. (Mullen's Truck & Auto Repair), 945 A.2d 813 (Pa. Cmwlth. 2008); Lahr Mech. & State Workers' Ins. Fund v. Workers' Compensation Appeal Bd. (Floyd), 933 A.2d 1095 (Pa. Cmwlth. 2007).

The average weekly wage for employees that are exclusively seasonal is calculated by taking one-fiftieth of the total wages the employee earned from all occupations during the 12 calendar months preceding the injury.

The terms "average weekly wage" and "total wages" as used in Section 309 of the Act include boarding and lodging received from the employer, gratuities recorded to the United States IRS

only if they are reported to the IRS for federal income tax purposes. Additionally, fringe benefits provided by the employer are excluded from wage calculations. Bonuses, incentives or vacation payments earned annually are divided by 52 and then added to regular wages.

Employer's characterization of its payments to Decedent as mere reimbursement for "out-of-pocket expenses," rather than for board and lodging does not defeat the express statutory language of section 309(e) of the Act. Lennon v. Workers' Compensation Appeal Bd. (Epps Aviation, Inc.), 934 A.2d 153, 155-156 (Pa. Cmwlth. 2007). *See* Arthur Shelley Trucking v. Workmen's Compensation Appeal Board (Bregman), 114 Pa. Commw. 138, 538 A.2d 604 (Pa. Cmwlth. 1988) (the mere fact that the employer termed the initial payments as reimbursement for expenses rather than wages cannot defeat the express statutory declaration that 'board and lodging' must be included as wages for purposes of compensation).

For injuries occurring on or before June 23, 1996, the form LIBC-494A (Statement of Wages) must be completed. For injuries occurring on and after June 24, 1996, the form LIBC-494C (Statement of Wages) must be completed.

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

The benefit rate for temporary total is calculated based upon the workers' compensation rate schedule up to the maximum compensation payable for a given year. Pursuant to the Workers' Compensation Act, Section 105.1, the Department of Labor & Industry has determined the statewide average weekly wage for injuries occurring on and after January 1, 2009, shall be $836.00 per week. For purposes of calculating the update to payments for medical treatment rendered on and after Jan. 1, 2009, the percentage increase in the statewide average weekly wage is 3.6 percent.

For injuries that occurred after August 31, 1993, there are provisions for the calculation of minimum compensation. There are minimum and maximum adjustments provided in the Act, and the benefit rate is set using the annual maximum in place at the time of injury. The maximum is based on the Department of Labor and Industry's calculation of the statewide average weekly wage. Benefits rates will be the lower of 50% of the statewide average weekly wage or 90% of the claimant's average weekly wage.

Rate schedules are changed yearly by the Bureau. To view a complete list of rate schedules, go to: http://www.dli.pa.gov/Businesses/Compensation/WC/claims/Pages/Statewide-Average-Weekly-Wage-(SAWW).aspx#newer

For example, for injuries occurring on and after January 1, 2021, if a claimant's average weekly wage is between $1,695.00and $847.51 , they will receive compensation benefits in the amount of 2/3 of their average weekly wage. If the claimant's average weekly wage is between $847.50 and $627.78, they will receive compensation benefits in the amount of $565.50per week. If the claimant's average weekly wage is equal to or less than $627.77, they will receive 90% of their average weekly wage in compensation benefits. The maximum benefit for a 2021 injury is $1,130.00.

The benefit rate for partial disability is two-thirds of the difference between the pre-injury average weekly wage and the earning power, not to exceed the applicable maximum compensation rate for total disability. There is no minimum compensation rate for partial disability. Section 306(b) of the Act, 77 Pa. C.S. § 512.

For injuries prior to June 24, 1996, the extent of partial disability is measured by the loss of earning power. Section 306(b) of the Act, 77 Pa. C.S. § 512. The employer must first establish that disability has changed or been reduced and that work is available to claimant, which claimant is capable of performing. Celio v. Workmen's Compensation Appeal Bd. (Canonsburg Gen. Hosp.), 531 A.2d 552 (Pa. Cmwlth. 1987).

For injuries on and after June 24, 1996, the definition of earning power has changed. "Earning power" is determined by the work the employee is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area. Section 306(b)(2) of the Act, 77 P.S. § 512. In order to establish earning power, an insurer may demonstrate an employee's earning power by providing expert opinion evidence relative to the employee's capacity to perform a job. The evidence must include job listings with agencies of the Department, private job placement agencies and advertisements in the usual employment area within this Commonwealth. Preliminarily, the employer is required to offer the claimant a specific vacancy if such a vacancy exists. If such a vacancy does not exist, then earning power can be established through the use of a labor market survey.

17. How long does the employer/insurer have to begin temporary total disability benefits from the date disability begins?

The employer must begin compensation payments within 21 days after notice or knowledge of the employee's disability. The employer may make payment pursuant to a Notice of Temporary Compensation Payable (form LIBC-501) or a Notice of Compensation Payable (form LIBC-495).

If the employer is uncertain as to the compensability of a claim or the extent of its liability, they may initiate compensation for a period of 90 days from payment is to begin without prejudice pursuant to a Notice of Temporary Compensation Payable filed with the Department of Labor and Industry and sent to the employee. This Notice is not an admission of compensability by the employer. If the employer ceases making payments, a Notice Stopping Temporary Compensation (form LIBC-502) and a Notice of Denial (form LIBC-496) must be sent to the employee and filed with the Department no later than five days after the last payment. Should the employer fail to file the requisite notices of cessation of payment, the employer is deemed to have admitted compensability and the Notice of Temporary Compensation Payable is converted into a Notice of Compensation Payable. Section 406.1 of the Act, 77 Pa. C.S. § 717.1.

If a work-related injury has occurred but the employee does not have a wage loss, a Notice of Compensation Payable (form LIBC-495) should be filed. The box for compensation only for medical treatment must be checked. Note: Numbers 1 through 5 on the form should not be completed.

If the employee's claim is contested, the employer or its insurance carrier must file a Notice of Denial (form LIBC-496) the employer must notify the employee or dependents within 21 days, stating the grounds for denial. Section 306(a) of the Act, 77 Pa. C.S. § 511.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out ___ days before recovering benefits for the first ___ days)?

No compensation is paid during the first seven days after disability begins, but if disability exceeds fourteen days, compensation is paid for the first seven days. Section 306(e) of the Act, 77 Pa. C.S. § 514. After the waiting period, compensation is paid for the duration of total disability. Section 306(a) of the Act, 77 Pa. C.S. § 511.

19. What is the standard/procedure for terminating temporary benefits?

When the employee fully recovers from the work injury, the employer is entitled to file a Termination Petition or have the employee sign a Final Receipt (form LIBC-340). The employer is entitled to a special supersedeas hearing if the Termination petition alleges a full recovery and includes an affidavit from the physician who examined the employee within twenty-one (21) days upon the Petition. The special supersedeas hearing will be held within twenty-one (21) days of the assignment of the petition to a judge. The judge must rule within seven (7) days following the hearing of all evidence on a supersedeas request whether benefits should be suspended during

the pending litigation.

In a Termination Petition, burden lies with the Employer to prove through medical evidence that all of the employee's disability has ceased. Koszowski v. Workmen's Compensation Appeal Bd. (Greyhound Lines, Inc.), 141 Pa. Commw. 253, 595 A.2d 697 (Pa. Cmwlth. 1991). Where an employer alleges the existence of an independent cause of Claimant's continuing disability unrelated to the work injury, the burden remains on employer to prove that such cause exists. Beissel v. Workmen's Compensation Appeal Board (John Wanamaker, Inc.), 502 Pa. 178, 465 A.2d 969 (1983); City of Philadelphia v. Workers' Compensation Appeal Board (Fluek), 898 A.2d 15 (Pa. Cmwlth.), *alloc. denied*, 590 Pa. 662, 911 A.2d 937 (2006). Where claimant's injuries were previously adjudicated, an employer cannot, in a later action, concede that the claimant is still suffering from those injuries, but that those injuries are not work related. However, earlier opinions of doctors are not "prior determinations" of the nature and extent of the injury as contemplated by the Court in *Lewis* and *Hebden*. Paul v. Workers' Compensation Appeal Bd. (Integrated Health Servs.), 950 A.2d 1101, 1106 (Pa. Cmwlth. 2008).

20. **Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

No.

21. **What disfigurement benefits are available and how are they calculated?**

Disfigurement of the head, neck or face, if serious, permanent and unsightly, and not usually incidental to the employment, is compensated for a period not exceeding 275 weeks as determined by agreement of the parties, or set at the discretion of the Referee after a hearing. Section § 306(c)(22) of the Act, 77 Pa. C.S. § 513(c)(22). A workers' compensation judge in Pennsylvania has the discretion to award benefits based upon personal observation of the claimant's facial and neck scars, despite documentation of a more limited area of disfigurement. LTV Steel Co. v. Workmen's Compensation Appeal Bd. (Hawk), 161 Pa. Commw. 632, 638 A.2d 292 (Pa. Cmwlth. 1994).

22. **How are the permanent partial disability benefits calculated, including the minimum and maximum rates?**

A. **How many weeks are available for scheduled members/parts, and the standard for recovery?**

Compensation is payable for loss (amputation) or permanent loss of use of members of the body, complete loss of hearing in one or both ears, loss of vision in one or both eyes, and disfigurement. Section 306(c) of the Act, 77 Pa. C.S. § 513, defines the categories of specific loss and disfigurement. Compensation for specific loss is paid without regard to loss of earning power and regardless of whether claimant loses time from work.

Compensation for loss of use requires that the loss be permanent but does not require a 100% uselessness. The practical intents and purposes test requires that the loss be more severe and would prevent the employee from using the injured member in employment (the so-called "industrial loss"). Section 306(c) of the Act, 77 Pa. C.S. § 513(c).

Schedule:

Member	Maximum Weeks
Hand	335
Forearm	370
Arm	410
Foot	250
Lower Leg	350
Leg	410
Eye	275
Loss of Hearing	
One Ear	60
Both Ears	260
Thumb	100
Index Finger	50
Middle Finger	40
Ring Finger	30
Little Finger	28
Great Toe	40
Any other toe	16

Section 306(c) of the Act, 77 Pa. C.S. § 513(c). In addition to the payments listed above, payment of a healing period shall be made in accordance with Section 306(c)(25) of the Act.

The loss of use of an eye is determined on the basis of the claimant's eyesight without the use of corrective lenses. Addy Asphalt Co. v. Workmen's Compensation Appeal Bd. (Sebastianelli), 591 A.2d 11 (Pa. Cmwlth. 1991). *See* Agnello v. Workers' Compensation Appeal Bd. (Owens-Illinois), 907 A.2d 676, 679 (Pa. Cmwlth. 2006) (because corrective lenses were not a permanent procedure, whether the claimant suffered loss of use of that eye was determined based on his uncorrected vision, but had surgery and/or a medical procedure been an option and the claimant refused, the outcome would have been different).

B. Number of weeks for "whole person" and standard for recovery.

Pennsylvania does not compensate for percentage of disability for the "whole person." Pennsylvania is a wage loss state.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

Under Pennsylvania law, employers have no obligation to offer vocational benefits.

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

Total disability is not defined under Section 306(a) of the Act, 77 Pa. C.S. § 511. It is a concept for the determination of the benefit rate. If the injury occurred prior to June 24, 1996, a claimant is totally disabled if he/she is unable to perform the job held at the time of injury or is unable to performing any and all occupations. If the injury occurred on or after June 24, 1996, total disability is paid if, after an examination, it is determined that a claimant's impairment rating is equal to or greater than 50 percent under the American Medical Association's guidelines.

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

Burial expenses in the amount of $1,500.00 are payable for an injury occurring on or after February 3, 1975. Funeral expenses were increased from $1,500.00 to $3,000.00 for deaths occurring on

or after August 31, 1993. Section 307 of the Act provides for payment of various percentages of the pre-injury average weekly wage of the employee to the various classes. However, in the case of death benefits the pre-injury wage cannot be less than 50% of the statewide average weekly wage in effect on the date of the injury that resulted in the death. Section 307 of the Act, 77 Pa. C.S. § 561.

B. Dependency claims.

Where death results from an injury within 300 weeks from the date of the injury, benefits are available. The claim is considered independent and not conditioned on the right of the employee at the time of death. Even if the employee is receiving compensation for an injury, all elements of liability for the death claim are independent and must be established. Lifetime benefits may be covered in a death petition even though no lifetime petition was filed. The rights of dependents to receive lifetime benefits has been further extended to permit dependents to file a separate petition even though no lifetime benefits were paid.

Recipients of death benefits generally include a spouse, and children under the age of 18. The amount of benefits is determined by the Act in effect on the date of the injury. Various percentages of the pre-injury wage of the deceased will be payable to various classes of recipients. A spouse is entitled to benefits for life unless he or she remarries, in which case the spouse will receive a "dower" or 104 weeks as a lump sum. Section 301(c)(1) of the Act, 77 Pa. C.S. § 411(1).

In order to succeed in its Termination Petition, Employer has the burden of establishing Claimant and her live-in boyfriend had entered into a common law marriage. Reliance on any presumption of common law marriage based on proof of cohabitation and reputation was unavailable to Employer. PPL v. Workers' Compensation Appeal Bd. (Rebo), 5 A.3d 839 (Pa. Cmwlth. 2010) *alloc. denied,* 610 Pa. 623, 21 A.3d 1195 (Pa. 2011).

26. What is the criteria for establishing a "second injury" fund recovery?

Where the employee suffers a second specific loss of certain types after having suffered a similar previous loss (even not work-related) and total disability results, compensation for total disability is paid by the Commonwealth during the period of total disability following the expiration of specific loss payments for the second injury. Section 306.1 of the Act, 77 Pa. C.S. § 516. These benefits are paid out of a Subsequent Injury Fund maintained by the Commonwealth from annual assessments on insurers. Section 306.2 of the Act, 77 Pa. C.S. § 517. Hearing loss is not covered by the Subsequent Injury Fund. Golden Bay Earthquakes v. Workmen's Compensation Appeal Bd. (Brooks), 129 Pa. Commw. 236, 565 A.2d 212 (Pa. Cmwlth. 1989), *alloc. denied*, 527 Pa. 620, 590 A.2d 760 (Pa. 1990). Subsequent injury claims under Section 306.1 of the Act, 77 Pa. C.S. § 516,

must be filed within the same period of time as is specified in Section 305 of the Act, 77 Pa. C.S. § 602.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations?

The Pennsylvania Workers' Compensation Act permits resumption of benefits where benefits have been suspended or terminated provided there is: (1) recurrence of disability after full recovery; (2) recurrence of disability after return to pre-injury job with residual disability; (3) recurrence of disability after return to modified work with residual disability; or (4) recurrence of disability after commutation. Sections 413(a) and 434 of the Act, 77 Pa. C.S. § 772 and §1001.

Petitions to Reinstate Compensation Benefits following a termination of workers' compensation benefits must be filed within three years of the last date of payment of compensation. Section 413(a) of the Act, 77 Pa. C.S. § 772. *See* Chinh Huynh v. Workers' Compensation Appeal Bd. (Hatfield Quality Meats), 924 A.2d 717 (Pa. Cmwlth. 2007) (to establish a causal connection between his current condition and the prior work-related injury, a claimant must produce evidence that his disability has increased or recurred after the date of the termination and that his physical condition has actually changed in some manner).

Petitions to Reinstate Compensation Benefits filed after 500-week suspension are untimely. Cozzone v. WCAB (PA Municipal/East Goshen Twp.. That Court held that because the claimant did not file a Petition for Reinstatement during the period in which compensation for partial disability was payable nor did Claimant petition for reinstatement within three years after his most recent payment, claimant did not retain the right to Petition for reinstatement. *Id.*

To establish entitlement to a reinstatement of workers' Compensation benefits following a return to work in a suspended status, the burden rests with the claimant to prove that (1) through no fault of his/her own, his/her earning power has once again been adversely affected by his/her disability; and (2) the disability which gave rise to the original injury continues. Magulick v. Workers' Compensation Appeal Bd. (Bethlehem Steel Corp.), 704 A.2d 176 (Pa. Cmwlth. 1997); Klarich v. Workers' Compensation Appeal Bd. (RAC's Ass'n), 819 A.2d 626 (Pa. Cmwlth. 2003). The Pennsylvania Supreme Court recently removed the "through no fault of his own" construct from its analysis and clarified that the employer may rebut the claimant's evidence in suspended benefits reinstatement cases under Section 413(a) "by showing . . . some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in this Court's decisional law." Trevdan Bldg. Supply & Compservices v. Workers' Compensation Appeal Bd. (Pope), 9 A.3d 1221, (Pa. Cmwlth. 2010), *citing* Bufford v. Workers' Compensation Appeal Bd. (N. Am. Telecom), 2 A.3d 548, 558 (Pa. 2010). Once a claimant testifies that her work-related injury continues, the burden shifts to the employer to show the contrary, and when an employer fails to

do so, the claimant's testimony, if credited by the WCJ, is sufficient to support a reinstatement of suspended benefits. Latta v. Workmen's Compensation Appeal Board (Latrobe Die Casting Co.), 537 Pa. 223, 642 A.2d 1083 (1994).

Where a claimant has been paid partial disability benefits pursuant to a supplemental agreement, he/she must file a Petition to Reinstate Compensation Benefits within three years after the final payment of the 500 week partial disability period. Stewart v. Workers' Compensation Appeal Bd. (Pa. Glass Sand/U.S. Silica), 756 A.2d 655 (Pa. 2000).

It must be noted that the burden of proof is different when a modification of benefits occurs due to the claimant's bad faith. Griffiths v. Workers' Compensation Appeal Bd. (Red Lobster), 760 A.2d 72 (Pa. Cmwlth. 2000). Specifically, where a claimant's benefits are modified due to bad faith conduct, the claimant must establish his medical condition worsened to the point he can no longer perform the employment previously found available. Ward v. Workers' Compensation Appeal Bd. (City of Philadelphia), 966 A.2d 1159 (Pa. Cmwlth. 2009); Nabisco Brands, Inc. v. Workmen's Compensation Appeal Bd. (Almara), 706 A.2d 877 (Pa. Cmwlth. 1998).

28. What situation would place responsibility on the employer to pay an employee's attorney's fees?

Counsel fees assessed as a cost against an employer may be awarded unless the employer meets its burden of establishing facts sufficient to prove a reasonable basis for a contest. Section 440 of the Act, 77 Pa. C.S. § 996. The purpose behind awarding attorney's fees under Section 440 of the Act is "to ensure that successful claimants receive compensation benefits that are undiminished by the costs of litigation," as well as "to discourage unreasonable contests of workers' claims." Wertz v. Workmen's Compensation Appeal Board (Department of Corrections), 683 A.2d 1287, 1293 (Pa. Cmwlth. 1996). *See* Boyer v. Workers' Compensation Appeal Board (First Capitol Insulation, Inc.), 740 A.2d 294, 296 (Pa. Cmwlth. 1999) (finding that "[a]n award of counsel fees is the rule and excluding counsel fees is the exception, to be applied only where the employer meets its burden of presenting sufficient evidence to establish that its contest was reasonable.") (citations omitted). *See* Wood v. Workers' Compensation Appeal Bd. (Country Care Private Nursing), 915 A.2d 181, 187-188 (Pa. Cmwlth. 2007) (employer's failure to present any evidence either contrary to Claimant's medical evidence or from which a contrary inference could be drawn, other than one relating to the treating physician not being the operating physician, rendered its contest unreasonable); Jordan v. Workers' Compensation Appeal Bd. (Phila. Newspapers, Inc.), 921 A.2d 27 (Pa. Cmwlth. 2007) (unreasonable contest of claim petition where the employer did not issue an NCP even though it had no fact witnesses or medical evidence that the claimant did not suffer a work injury; rather, the employer disputed the claimant's disability during periods alleged in his claim petition); Johnstown Hous. Auth. v. Workers' Compensation Appeal Bd. (Lewis), 865 A.2d 999 (Pa. Cmwlth. 2005) (unreasonable contest of claim petition where the employer, at the time it filed its answer, had no basis to dispute occurrence of work injury, even though parties

disagreed as to length of the claimant's disability).

If the employer is unsuccessful in the litigation of a Termination, Modification or Suspension Petition, but establishes a reasonable basis for filing the Petition, counsel fees will not be assessed against the employer. Mason v. Workmen's Compensation Appeal Bd. (Wheeling-Pittsburgh Steel Corp.), 143 Pa. Commw. 539, 600 A.2d 241 (Pa. Cmwlth. 1991), *alloc. denied*, 529 Pa. 671, 605 A.2d 335 (Pa. 1992). A reasonable contest is established when medical evidence is conflicting or susceptible to contrary inferences, and there is an absence of evidence that an employer's contest was frivolous or intended to harass a claimant. Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), 863 A.2d 165, 171 (Pa. Cmwlth. 2004).

The question of reasonableness of an employer's contest is one of law resting on the findings of fact of the workers' compensation judge that are supported by substantial evidence. Jones v. Workmen's Compensation Appeal Bd., 65 Pa. Commw. 208, 442 A.2d 37 (Pa. Cmwlth. 1982); Poli v. Workmen's Compensation Appeal Board, 34 Pa. Commw. 630, 384 A.2d 596 (Pa. Cmwlth. 1978). If the only dispute is which insurance carrier shall pay benefits, a reasonable contest cannot be established. Lemon v. Workers' Compensation Appeal Bd. (Mercy Nursing Connections), 742 A.2d 223 (Pa. Cmwlth. 1999), *alloc. denied*, 562 Pa. 676, 753 A.2d 822 (Pa. 2000).

29. Are there any specific compensability requirements or applicable statutes for hybrid employees?

No. Work injuries remain compensable so long as the employee is within the course and scope of employment. This includes remote employees wherever they might be working. See, Verizon of Pa, Inc. v. WCAB (Alston), 900 A.2d 440 (Pa.Cmwlth. 2006) (Finding an employee working from a home office, who fell down stairs in her home while going to her home office was within the course and scope of her employment). The only exception are “persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer.” The key principle is employer’s control of the employee. So long as the employee is answerable to the employer for their time and work, the employee will be within the course and scope of employment, wherever the work occurs.

EXCLUSIVE/TORT IMMUNITY

30. Is the compensation remedy exclusive?

A. Scope of immunity.

77 Pa. C.S. § 481 sets forth that the liability of an employer is exclusive under the Workers' Compensation Act and that an employer, insurance carrier, their servants and agents, employees, representatives, etc. shall not be liable to a third party for damages, contribution, or indemnification unless it is expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action. *See* Virtue v. Square D Co., 887 F. Supp. 98 (M.D. Pa. 1995) (statutory employer and temporary employer is covered by exclusivity provision); Wasserman v. Fifth & Reed Hospital, 442 Pa. Super. 563, 660 A.2d 600 (1995) (may sue employer for non-work related injuries); Dennis v. Kravco Company, 2000 PA Super 319, 761 A.2d 1204 (2000) (if an injury is compensable under the Act, the compensation provided by the Act is the employee's exclusive remedy).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

The exclusivity provision of the Act essentially bars tort actions flowing from any work-related injury. However, consistent with the indemnification provision in the Act, 77 Pa. C.S. § 481(b), an employer may enter into an indemnity contract with a third party where the employer expressly assumes liability for the negligence of a third party which results in injury to the employer's employee.

Further, an employee or dependent does have the option to sue in tort or pursue a workers' compensation remedy if the employer is uninsured or not an approved self-insurer. Section 305 of the Act, 77 Pa. C.S. § 501. The 1993 Amendments (Act 44) permit restitution where an employer fails to insure.

Injuries caused by an act of a third person intended to injure an employee for reasons personal to the third person is specifically excluded from the Act. Section 301(c)(1) of the Act, 77 Pa. C.S. § 411(1).

Under the "dual capacity" doctrine, "'an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers upon him obligations independent of those imposed upon him as employer.'" Budzichowski v. Bell Telephone Co. of Pennsylvania, 503 Pa. 160, 167, 469 A.2d 111, 114 (Pa. 1983). (quoting from 2A Larson, WORKMEN'S COMPENSATION LAW, § 72.80). *See* Tatrai v. Presbyterian University Hosp., 497 Pa. 247, 439 A.2d 1162 (Pa. 1982). In order for an employer to be subject to suit to waive its statutory immunity, it must expressly assume liability for damages, contribution or indemnification in a written contract and the interpretation of those indemnity provisions are to be construed against the party seeking protection from liability or indemnification from the employer. Snare v. Ebensburg Power Co., 431 Pa. Super. 515, 637 A.2d 296 (1993) (general language was insufficient for employer to waive the protection of the Workers Compensation Act); Bester v. Essex Crane Rental Corp., 422 Pa. Super. 178, 619 A.2d 304 (1993); Morgan v. Harnischfeger Corp., 791 A.2d

1273 (Pa. Cmwlth 2002) (blanket indemnity clauses will not create liability).

31. Are there any penalties against the employer for unsafe working conditions?

None in the Act. Unsafe conditions may subject the employer to fines by OSHA, in addition to third party suits for intentional acts or knowledge attributable to the employer which was withheld from employees concerning an unsafe working environment.

32. What is the penalty, if any, for an injured minor?

Rights to compensation are not affected if a minor is employed or permitted to be employed in violation of laws relating to minors or if the minor obtains employment by misrepresenting his or her age. Section 301(b) of the Act, 77 Pa. C.S. § 421. If a minor is employed in violation of Pennsylvania Child Labor law, 50% of the compensation rate may be awarded as a penalty and must be paid by the employer. Section 320 of the Act, 77 Pa. C.S. § 672.

33. What is the potential exposure for "bad faith" claims handling?

For actions claiming fraud in the carrier's handling of the compensation claim, the Act provides remedial provisions. *See* 77 Pa. C.S. § 701-797. The Supreme Court of Pennsylvania has held that the exclusivity provisions of the Workmen's Compensation Act "prohibit a tort action against the agents of the insurance carrier for injuries allegedly caused by their actions in handling the employee's compensation claim." Alston v. St. Paul Ins. Companies, 531 Pa. 261, 262, 612 A.2d 421, 421 (Pa. 1992). The Court has further indicated that the agents encompass “those individuals or entities who perform or assist in performing the functions of the insurance carrier in handling workmen's compensation claims as agents or employees of the carriers.” Id., 612 A.2d at 423.

As breach of contract claims do not seek redress for an "injury" as defined in the Act, the immunity provisions of the Act do not apply and claimant's claim for breach of contract is not barred either. 77 P.S. § 411(1).

The Pennsylvania Supreme Court has reconsidered the issue of intentional acts where the employer concealed, altered, or intentionally misrepresented information related to the work-related injury which resulted in aggravation of the injury. Liability under the Act is not afforded to compensation or insurance carriers or their agents when their negligent acts result in harm to an employee from a separate, non-work-related injury. Taylor v. Woods Rehab. Serv., 2004 PA Super 89, 846 A.2d 742, 746 (Pa. Super. 2004) Of note, post-injury emotional disorders or aggravations

related to an insurance company's modification or termination of benefits do not constitute a compensable injury under the Act because they are not related to the work injury nor do they occur in the course and scope of employment. Gulick v. Workers' Compensation Appeal Board (Pepsi Cola Operating Co.), 711 A.2d 585 (Pa. Cmwlth. 1998).

The immunity of the employer has further been eroded where there was improper use of shock therapy on an employee who prior to the work-related injury suffered from post-traumatic stress syndrome. Taras v. Wausau Insurance Co., 412 Pa. Super. 37, 602 A.2d 882 (1992) (nurse acting on behalf of insurer allegedly told employee he had to undergo electroshock therapy in order to continue his eligibility for benefits). *See* McGinn v. Valloti, 363 Pa. Super. 88, 525 A.2d 732 (1987) *alloc. denied*, 517 Pa. 618, 538 A.2d 500 (1988) (employee's allegations that defendant's intentional fraudulent misrepresentation that she would be fired from her job if she sought independent medical advice was outside the scope of the protection guaranteed the employer under the Worker's Compensation Act); Martin v. Lancaster Battery Co. Inc., et al., 530 Pa. 11, 606 A.2d 444 (Pa. 1992) (employer intentionally withheld and altered blood test results for lead, causing aggravation of claimant's injury).

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The Pennsylvania Workers' Compensation Act provided for penalties against employers/insurers for delay in payment or for stopping payment of compensation without an appropriate Court Order or documentation under Section 435 of the Act. The amendments enacted by the legislature on June 24, 1996 (Act 57) in Section 435 increased penalties on employers/insurers up to 50%. Exclusivity provisions of the Worker's Compensation Act precluded employee's claim of bad faith conduct against the workers compensation insurer arising from the insurer's refusal to pay benefits and its general claims handling. Winterberg v. CNA Ins. Co., 868 F. Supp. 713 (E.D. Pa. 1994), *affirmed,* 72 F.3d 318 (3d Cir. Pa. 1995).

34. What is the exposure for terminating an employee who has been injured?

An employee can be terminated where the basis for the termination is wholly unrelated to the work-related injury, i.e., violation of company policy. The termination of an employee who is currently receiving partial disability benefits while working at a reduced wage entitles the employee to petition for immediate reinstatement of total disability benefits. The termination of an employee who is receiving temporary total disability benefits could result in a suit for wrongful termination against the employer. Section 306(a) of the Act, 77 Pa. C.S. §511; Shepherd v. Workmen's Compensation Appeal Bd., 66 Pa. Commw. 101, 443 A.2d 862 (Pa. Cmwlth. 1982).

Termination from employment is a possible disciplinary measure and the Court is cognizant that such action may ultimately impact a claimant's entitlement to compensation. Vista Int'l Hotel v. Workers' Compensation Appeal Board (Daniel), 560 Pa. 12, 742 A.2d 649 (1999). Where claimant has been terminated, his continued entitlement to benefits turns on whether he was terminated

for conduct tantamount to bad faith. Coyne v. Workers' Compensation Appeal Bd. (Villanova Univ. & PMA Group), 942 A.2d 939, 945-6 (Pa. Cmwlth. 2008); *See also* Shop Vac Corp. v. Workers' Compensation Appeal Board (Thomas), 929 A.2d 1236 (Pa. Cmwlth. 2007) (an "illness" can be a good cause defense to a charge of willful misconduct due to excessive absenteeism and debilitating pain from a work-related injury can also serve as good cause); Greene v. Workers' Compensation Appeal Board (Hussey Copper, Ltd.), 783 A.2d 883 (Pa. Cmwlth. 2001) (employer must present conclusive evidence that the claimant violated that policy in order to rebut any loss of earnings as being through no fault of her own). The bad faith of a claimant is a factual determination to be made by the WCJ. Champion v. Workers' Compensation Appeal Board (Glasgow, Inc.), 753 A.2d 337 (Pa. Cmwlth. 2000).

THIRD PARTY ACTIONS

35. Can third parties be sued by the employee?

Yes. Section 302(a) of the Act, 77 Pa. C.S. § 461; Poyser v. Newman & Company, Inc., 514 Pa. 32, 522 A.2d 548 (Pa. 1987) (Section 205, 77 Pa. C.S. § 72, immunizes an employee from tort actions for harm caused to a fellow employee but an exception is expressly made for the intentional infliction of harm). Note: The employer/insurance carrier has a subrogation right against the recovery of any third-party settlement proceeds.

36. Can co-employees be sued for work-related injuries?

Absent an intentional act by a third person or co-employee there is no other basis to overcome the immunity of the Act. Even a claim of intentional wrong by an employer may not overcome his immunity. Poyser v. Newman & Company, Inc., 514 Pa. 32, 522 A.2d 548 (Pa. 1987) (no exception made for the intentional infliction of harm by employer under section 303(a) of the Act, 77 Pa. C.S. § 481(a)).

Case law from the Pennsylvania Courts has distinguished intentional acts from negligent failure to act. When an employee pursues a cause of action against a co-employee alleging that the co-employee's actions on the job caused the injury, the matter will be barred by the exclusive remedy provisions of the Act unless the employee is able to produce facts demonstrating that the co-employee's conduct against the employee was for reasons personal and not connected to the employment environment. *See* Urban v. Dollar Bank, 1999 Pa. Super 33, 725 A.2d 815 (1999) (defamation and the tort of malicious abuse of process are not injuries contemplated under the Act and, as such, are not wholly barred by the exclusivity provisions of the Act). Arguments or disputes that arise out of the employment relationship are deemed to have occurred in the course

of employment and thus prevent any cause of action against the employer or the co-employee. Hammerstein v. Lindsay, 440 Pa. Super. 350, 655 A.2d 597 (1995) (employee's claims against the hospital were barred by the exclusivity provision of the Workmen's Compensation Act because appellant failed to plead facts that fell within the personal animus exception to the Act); Snyder v. Specialty Glass Products, Inc., 441 Pa. Super. 613, 658 A.2d 366 (1995) (where the allegations of a claim have as their ultimate basis an injury compensable under the Act, the claim must be considered within the framework of the statute). *See also*, 77 Pa. C.S. §481.

37. Is subrogation available?

The employer is subrogated to the rights of the employee against a third party to the extent of compensation payable by the employer. Reasonable attorney's fees and other proper disbursements incurred in obtaining the recovery or compromised settlement are pro-rated between the employer and the employee. Recoveries against third parties that exceed compensation paid by the employer are paid to the employee. Section 319 of the Act, 77 Pa. C.S. § 671. Note that an employer is entitled to a credit/grace period against future medical payment resulting from the balance of recovery from a third party recovery. Deak v. Workmen's Compensation Appeal Bd. (USX Corp.), 653 A.2d 52 (Pa. Cmwlth. 1994) (payments of medical expenses are compensation payments subject to subrogation rights against a claimant's recovery from a third party, and subject to a credit toward future compensation, where that recovery exceeds compensation paid at the time of the recovery).

Where the parties executed a Third-Party Settlement Agreement, which obliged the employer to pay its pro rata share of attorney fees and costs, and the employer was subsequently granted its Petition for Modification the employer was entitled to reimbursement from the Supersedeas Fund for the monies paid to the claimant following the execution of the Third-Party Settlement Agreement in the form of its pro rata share of attorney fees and costs over the resulting grace period in addition to the unreimbursed balance of the benefits paid to the claimant. Department of Labor & Indus., Bureau of Workers' Comp. v. Workers' Compensation Appeal Bd. (Excelsior Ins.), 987 A.2d 855, 859 (Pa. Cmwlth. 2010).

38. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

An insurer's obligation to pay a medical bill does not arise until the insurer is in possession of appropriate bills and related reports. 77 Pa. C.S. § 531(5). Amendments under Act 57 require that the employer/insurer make payments to providers within thirty days (Section 306(f.1)(5) of the Act) of receipt of bills and records unless the employer/insurer disputes the reasonableness and necessity of the treatment provided (Section 306(f.1)(6) of the Act). Medical Cost Containment Regulations §§ 127.201 and 127.202, 34 Pa. Code §§ 127.201-127.202, require providers to submit requests for payment of medical bills on either the HCFA Form 1500 or the UB92 Form. Employers

are not required to pay for the treatment billed until the bill is submitted on one of those forms. In addition, the Medical Cost Containment Regulations § 127.203, 34 Pa. Code § 127.203, requires that providers submit medical reports on appropriate forms explaining their treatment, and insurers are not obligated to pay for treatment until they receive such a report. Sims v. Workers' Compensation Appeal Bd. (Sch. Dist.), 928 A.2d 363, 369 (Pa. Cmwlth. 2007), *alloc. denied*, 596 Pa. 748, 946 A.2d 690 (2008).

Of note, in Kuemmerle v. Workers' Compensation Appeal Board (Acme Markets, Inc.), 742 A.2d 229 (Pa. Cmwlth. 1999), the Court held that a provider's failure to submit required written reports to the insurance carrier did not excuse an employer from penalties for failure to pay bills because it did not require medical reports in all instances for payment of medical services. *See* Seven Stars Farm, Inc. v. Workers' Compensation Appeal Bd. (Griffiths), 935 A.2d 921 (Pa. Cmwlth. 2007).

The determination by employer/insurer to challenge treatment as unreasonable and unnecessary requires that the employer/insurer proceed with Utilization Review Petitions, then Petitions for Reconsideration followed by Petitions for Review which are assigned to workers' compensation judges. Employees are entitled to interest in the amount of 10% on the bills from the date they were due in addition to potential penalties. Of import, an employer may not rely on a UR determination concerning the reasonableness and necessity of treatment rendered by a specific provider to justify nonpayment of medical bills for similar treatment rendered by a different provider. Schenck v. Workers' Compensation Appeal Bd. (Ford Electronics), 937 A.2d 1156, 1157 (Pa. Cmwlth. 2007).

Any employer who unilaterally stops paying an employee's medical bills based solely on causation issues, assumes the risk of exposure to possible penalty liability contingent upon a workers' compensation judge's ruling concerning the causal relationship of the medical cost. Listino v. Workmen's Compensation Appeal Bd. (INA Life Insurance Company), 659 A.2d 45 (Pa. Cmwlth. 1995). Furthermore, an employer may not avoid its obligation to pay medical bills based on sections of the Act which require the presentation of medical bills or reports prior to payment when the employer has acted to prevent the very treatment that would generate the bills or reports. McLaughlin v. Workers' Compensation Appeal Board (St. Francis Country House), 808 A.2d 285 (Pa. Cmwlth. 2002), *appeal denied*, 573 Pa. 717, 828 A.2d 351 (Pa. 2003). *See* Brenner v. Workers' Comp. Appeal Bd. (Drexel Indus.), 856 A.2d 213 (Pa. Cmwlth. 2004) (carrier must continue payment of claimant's prescription medications according to the prescription card system that it established when claimant was not required by that procedure to submit bills or reports prior to payment and was not given prior warning that she could no longer use the prescription card to obtain the medicines).

39. **What, if any, mechanisms are available to compel the production of medical information (reports and/or authorization) at the administrative level?**

The Act compels the moving party to assemble and be prepared to supply medical records and reports prior to filing a petition. Section 131.51 of the Special Rules of Administrative Practice and Procedure before Referees. Moreover, the parties must exchange medical information as part of the first hearing procedure, particularly anything intended to be used as evidence or exhibits. Section 131.52 of the Special Rules of Administrative Practice and Procedure before Referees. Additionally, the statute requires that parties exchange documents, records and discovery which are to be used in prosecution or defense of a case. Section 131.61(a) of the Special Rules of Administrative Practice and Procedure before Referees.

Subpoena power is vested in workers' compensation judges. Parties, however, can request the workers' compensation judge to issue subpoenas in a pending proceeding to compel production of medical evidence if it is relevant to the proceedings. Section 131.81 of the Special Rules of Administrative Practice and Procedure before Referees.

Additionally, Section 306(f.1)(2) of the Act requires medical providers to file periodic medical reports with the employer of the injured employee on the form prescribed by the Bureau (form LIBC-9). This section further relieves the employer from payment until a proper report is filed.

40. What is the rule on choice (a) Claimant's choice of physician; (b) Employer's right to a second opinion and/or Independent Medical Evaluation?

Employers must pay for reasonable surgical and medical services rendered by providers. This includes payment for an additional opinion when an invasive surgery may be necessary. Employers must establish a list of at least six designated healthcare providers no more than four of whom may be of a coordinated care organization and with no fewer than three being physicians. Section 306(f.1)(1)(i). The employee may obtain treatment for work-related injuries from one or more of the designated health care providers for 90 days from the date of the first visit to a designated provider. The employee may switch from one designated provider to another during this 90 day period. The employees failure to comply with choice of physician procedures relieve the employer from liability for pay for the applicable period.

Should an invasive surgery be recommended by a panel physician, an additional opinion from a healthcare provider of the employee's choice may be obtained. Section 306(f.1)(i) of the Act. If the subsequent opinion differs, the employee may choose the course of treatment to follow, with the condition that the second opinion must outline with specificity and detail the course of alternative treatment.

Section 314 of the Act requires the Claimant to submit to medical examination by an appropriate health care provider chosen by the employer or insurance carrier. A demand for examination must

be made of the Claimant. Then, if the Claimant refuses to attend or fails to attend, the employer must file a Petition to Compel Physical Examination and obtain an order from a Judge compelling the Claimant to attend the next scheduled exam. If the Claimant then fails to attend the next exam, without a reasonable excuse, the employer may file and pursue a Petition to Suspend Benefits. Whether or not the Claimant presents a reasonable excuse is a matter of discretion from each Judge. As a matter of practice, a new exam can be obtained every six months.

Claimant's healthcare provider may "participate" in the examination conducted by an employer's physician. In a concurring opinion, Mr. Justice Barr noted that legislature's enactment of 77 P.S. § 651(b) would permit the opposing expert a first-hand view of the examination process, through attendance and observation, but may not engage in any active conduct which might disturb the examining physician. Furthermore, the provider may be permitted to engage in other passive, non-disruptive activity during the exam, so long as such activity will not interfere with an employer's physician's ability to conduct an examination. Knechtel v. Workers' Comp. Appeal Bd. (Marriott Corporation), 594 Pa. 21, 23 (Pa. 2007).

41. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

Reasonable medical benefits must be made available as and when needed. These include surgical and medical services, services rendered by duly licensed practitioners of the healing arts (including chiropractors), medicine and supplies, orthopedic appliances, and prosthesis. Section 306(f.1) of the Act, 77 Pa. C.S. § 531.

42. What prosthetic devices are covered, and for how long?

Prosthetic devices and charges are recoverable. Any prosthesis prescribed by a practitioner of the healing arts is as compensable as any other medical expense. Section 306(f.1) of the Act, 77 Pa. C.S. § 531. The employer is also responsible for artificial limbs, eyes, or other prostheses of the type and kind recommended by a treating physician in connection with the injury. Associated replacement or continuing treatment and medical care, as well as training to adaptation to a prosthetic device, is the responsibility of the employer. Such costs are mandated even where there is no loss of earning power. Section 306 (f.1)(i)(ii) of the Act.

43. Are vehicle and/or home modifications covered as medical expenses?

Home and vehicle modifications are included under the medical benefits category. Such improvements are challenged on a case-by-case basis. Rieger v. Workmen's Compensation Appeal Bd. (Barnes & Tucker Co.), 104 Pa. Commw. 42, 521 A.2d 84 (Pa. Cmwlth. 1987). *See* Griffiths v. Workmen's Compensation Appeal Bd. (Seven Starts Farms, Inc.), 596 Pa. 317, 943 A.2d 242 (Pa. 2008) (specially equipped, wheelchair accessible, van for a paraplegic qualifies under the broad definition of orthopedic appliances employed in the Act, and therefore payable by the employer); Bomboy v. Workmen's Compensation Appeal Board (South Erie Heating Co.), 132 Pa. Commw. 169, 572 A.2d 248 (Pa. Cmwlth. 1990) (employer is required to provide home modifications at the employer's expense, but such modifications are limited to a one-time expenditure); Zuback v. Workers' Comp. Appeal Bd. (Paradise Valley Enterprise Lumber Co.), 2006 Pa. Commw. LEXIS 9 (January 9, 2006) (employer is required to replace an "orthopedic appliance" due to wear and tear).

44. Is there a medical fee guide or schedule, or other provisions for cost containment?

Currently, medical fee guides or schedules and other provisions for cost containment are incorporated into the Act. Section 306(f.1)(3)(i) of the Act; Title 34 Labor and Industry Part 8 Bureau of Workers' Compensation Chapter 127 Workers' Compensation Medical Cost Containment.

Briefly, the medical cost containment provisions cover calculations, medical fee updates, billing transactions, review of medical fee disputes and self-referrals. The complete Regulations can be found at http://www.pacode.com/secure/data/034/chapter127/chap127toc.html.

45. What, if any, provisions or requirements are there for "managed care"?

See answer 39.

PRACTICE AND PROCEDURE

In 2013, the Pennsylvania Department of Labor & Industry began using an electronic, web based system (WCAIS) to allow for electronic communication, online filing, and online document management and access to information. (http://www.portal.state.pa.us/portal/server.pt/community/wcais/20738)

46. What is the procedure for contesting all or part of a claim?

The employer/insurer must issue, within 21 days from an alleged occurrence, either a denial or notice of compensation payable reflecting a brief description of the reasons for the denial or the basis for acceptance of a claim. Section 406.1 of the Act, provides in pertinent part:

(a): The employer and insurer shall promptly investigate each injury reported or known to the employer and shall proceed promptly to commence the payment of compensation due either pursuant to an agreement upon the compensation payable or a notice of compensation payable as provided in section 407 or pursuant to a notice of temporary compensation payable as set forth in subsection (d), on forms prescribed by the department and furnished by the insurer. The first installment of compensation shall be paid not later than the twenty-first day after the employer has notice or knowledge of the employee's disability. Interest shall accrue on all due and unpaid compensation at the rate of ten per centum per annum. Any payment of compensation prior or subsequent to an agreement or notice of compensation payable or a notice of temporary compensation payable or greater in amount than provided therein shall, to the extent of the amount of such payment or payments, discharge the liability of the employer with respect to such case.

(c): If the insurer controverts the right to compensation it shall promptly notify the employe or his dependent, on a form prescribed by the department, stating the grounds upon which the right to compensation is controverted and shall forthwith furnish a copy or copies to the department.

A workers' compensation claim may be contested and all liability for compensation denied by the use of a Notice of Workers' Compensation Denial that must be forwarded to the employee, served on the Bureau of Workers' Compensation with a date and description of the injury and full and complete reasons for the denial of compensation within 21 days after the employer has a notice or knowledge of an employee's disability. Section 406.1 of the Act, 77 Pa. C.S. § 717.1; Bureau Rules and Regulations § 121.13.

The June 24, 1996 amendments to Pennsylvania's Workers' Compensation Act (Act 57) provided for a Notice of Temporary Compensation Payable which permits the employer/insurer to initiate compensation payments for a period not to exceed 90 days without prejudice or admission of liability where there is uncertainty as to the compensability or extent of liability for an injury.

When the employee suffers no wage loss at the outset of the claim, but medical treatment is rendered, the employee is not considered disabled under the Act. In the past, many claims representatives did not file any Bureau forms, except for the Employer's Report of Occupational Injury or Disease (form LIBC-344). As a result, courts awarded attorney fees for unreasonable contests pursuant to Section 440(a) of the Act. *See* Lemansky v. WCAB (Hagan Ice Cream Co.), 738 A.2d 498 (Pa. Cmwlth. 1999) and Waldameer Park, Inc. v. WCAB (Morrison), 819 A.2d 164 (Pa.

Cmwlth. 2003). To rectify this situation, the Bureau revised the Notice of Compensation Payable (form LIBC-495) to include a specific section to indicate that only medical bills are being paid pursuant to the Act. If this Bureau document is filed to establish a Medical Only claim, it must clearly be marked as such, or it will be counted as a lost-time claim.

In Zuchelli v. Workers' Compensation Appeal Bd. (Indiana Univ. of PA), 35 A.3d 801 (Pa. Cmwlth. 2011), the employer filed NCD admitting an injury but denying wage loss. WCJ found that the cause of the claimant's shoulder problems was not obvious and, therefore, unequivocal medical testimony was required, and the WCJ credited the employer's physician's testimony. The court also held that the employer's timely issuance of an NCD acknowledging a work injury, but disputing the claimant's disability, was proper as the claimant admittedly returned to work after the incident. There was no penalty for the employer's use of NCD.

Medical bills are always subject to review, as well as calculated wages, suggestions for medical treatment, and ongoing payment of benefits. Section 406.1 of the Act, 77 Pa. C.S. § 717.1.

47. What is the method of claim adjudication?

A. Administrative level.

The first level of adjudication is before Workers' Compensation Judges (formerly known as Referees) confirmed by the Bureau of Workers' Compensation and overseen by the Secretary of Labor and Industry for the state. Hearings are conducted in the same manner as a trial, with the exception of pre-trial hearings at which time stipulations are reached as to matters of fact and issues are narrowed. Cases may continue up to two years or longer until the conclusion of presentation of evidence by all parties.

Determinations in the form of Decisions with written orders are issued by the judges. The employee and the employer/insurer have an immediate right of appeal to the Workers' Compensation Appeal Board. An appeal must be filed within 20 days of the judge's decision.

B. Trial court.

See answer immediately above.

C. Appellate.

Appellate hearings are held initially before the Workers' Compensation Appeal Board. Further appeals are heard by the State Commonwealth Court and, in more limited circumstances, the Pennsylvania Supreme Court. *See* Pa. R.A.P. 1513.

48. What are the requirements for stipulations or settlements?

Awards of partial disability which extend until the expiration of 500 weeks can be the subject of lump sum commutations, which are subject to approval. Lump sum commutations end the employer's liability for indemnity benefits, but liability continues for medical expenses. Section 407 of the Act, 77 Pa. C.S. § 731. *See* Rollins Outdoor Advertising, et al. v. Workmen's Compensation Appeal Bd., 506 Pa. Commw. 592, 487 A.2d 794 (Pa. Cmwlth. 1985).

A commutation of benefits that provides a lump-sum payment to a workers' compensation claimant is subject to a three year statute of limitations that runs from the date of commutation which requires that a claimant file a Petition to Reinstate Total Disability within three years from the date of the commutation. Mason v. Workmen's Compensation Appeal Bd. (ACME Markets), 156 Pa. Commw. 10, 625 A.2d 1271 (Pa. Cmwlth. 1993).

The June 1996 amendments (Act 57) have added Section 449, which is known generally as the Compromise and Release section of the Act. This provision permits the parties to compromise and release any and all liability claimed to exist under the Act for an injury or death. The workers' compensation judges after the filing of a Petition with a completed Compromise and Release Form completed by the Bureau of Workers' Compensation must conduct an open hearing and then render a decision. The Compromise and Release Form addresses all phases of the claim from wage benefits to details of injury and vocational implications. The Compromise and Release Agreement requires a vocational rehabilitation evaluation of the employee which may be waived by the parties and particular emphasis must be given by the workers' compensation judge to the complete understanding and acknowledgment of the agreement by the employee. Of course, any employee must be informed of his right to legal representation in these circumstances. *See* 77 P.S. § 1000.5.

At common law, a compromise and release agreement can be set aside upon a clear showing of fraud, deception, duress or mutual mistake. Emery v. Mackiewicz, 429 Pa. 322, 240 A.2d 68, 70 (1968); Rago v. Nace, 313 Pa. Super. 575, 460 A.2d 337 (Pa. Super 1983); Greentree Cinemas, Inc. v. Hakim, 289 Pa. Super. 39, 432 A.2d 1039 (Pa. Super. 1981). The party seeking to set aside such an agreement bears the burden of proof. Hanselman v. Consolidated Rail Corp., 158 Pa. Commw. 568, 632 A.2d 607 (Pa. Cmwlth. 1993). The Court in N. Penn Sanitation, Inc. v. Workers' Compensation Appeal Bd. (Dillard), 850 A.2d 795 (Pa. Commw. Ct. 2004) saw no reason why the

test for setting aside releases at common law should not be applied to workers' compensation cases. The Court went on to note that compared to fraud, deception or duress, the test to set aside a compromise and release on the basis of mistake is more stringent. *See* Consolidated Rail Corp. v. Portlight, Inc., 188 F.3d 93 (3d Cir. 1999) (underestimating damages or entering into a settlement before damages are adequately assessed is not a mutual mistake of fact); Bollinger v. Randall, 184 Pa. Super. 644, 135 A.2d 802 (Pa. Super. 1957) (settlements are necessarily based upon facts which are then available to the parties and there is always a risk that injuries may prove to be more serious or less serious than contemplated).

49. Are full and final settlements with closed medicals available?

Yes, in a Compromise and Release Agreement.

50. Must stipulations and/or settlements be approved by the state administrative body?

Lump sum commutations must be approved by a workers' compensation judge or have unanimous approval of Workers' Compensation Appeal Board commissioners after a commutation proceeding. However, an employee's degree of disability can be documented by the issuance of a notice of compensation payable and concluded by the execution of a final receipt or supplemental agreement. Such isolated periods of disability can be managed by the employee and the employer/insurer without the intervention of the court. Section 411 of the Act, 77 Pa. C.S. § 752; Special Rules of Administrative Practice Before Referees, Section 131.91(b).

Mandatory Mediation: Mandatory Mediations are now being scheduled by all Judges pursuant to Act 147. Following are the policies to be followed:

1) If either party believes the mediation would be futile that party must write to the assigned WCJ at least 14 days before the scheduled mediation.

2) If a party needs a postponement, the request must be made to the mediating WCJ at least 14 days before the scheduled mediation. A postponement of the mandatory mediation will not extend the mandatory trial schedule.

3) A representative of the employer/insurer with authority must present at the mediation. If the representative of the employer/insurer with authority could only be present by phone the mediating WCJ must be advised in advance.

4) A Mandatory Mediation Disclosure Report must be sent to the mediating WCJ at least 5 days before the mediation. It is preferred that the Mandatory Mediation Disclosure Report be sent to the mediating WCJ by mail, especially if there are attachments.

RISK FINANANCE FOR WORKERS' COMPENSATION

51. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

All employers must carry workers' compensation insurance. Private insurers are available, as well as the state workers' compensation insurance fund which handles states administrative bodies and other employers. Section 305 of the Act, 77 Pa. C.S. § 501.

52. What are the provisions/requirements for self-insurance?

A. For individual entities.

In order to be self-insured, an employer must make application to the department, showing financial ability to pay such compensation, along with a $100.00 fee, whereon the department, if satisfied with the applicant's financial ability, will grant the application. Section 305 of the Act, 77 Pa. C.S. § 501.

B. For groups or "pools" of private entities.

The 1993 amendments include Article 8, which contains a detailed discussion of group insurance pooling. Generally, a group of "homogenous" (meaning employers who have been assigned the same classification series for at least a year or engaged in the same or similar types of business) may propose a self-insurance pool. Such groups must include five or more homogenous employers who band together in good faith for the purpose of becoming a fund. The aggregate net worth of the employers participating must equal or exceed one million dollars. Applications for homogenous employer groups are governed by detailed guidelines. Section 801 of the Act.

53. Are "illegal aliens" entitled to benefits or workers' compensation in light of The Immigration

Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?

Illegal aliens were held to be entitled to workers' compensation benefits given that they were actually employed, the absence of exclusionary language in the Act, and policy arguments against employers benefiting from hiring illegal aliens if they were to be denied coverage under the Act. The Reinforced Earth Co. v. Workers' Compensation Appeal Bd. (Astudillo), 810 A.2d 99 (Pa. 2002). Note: This case was a pre-Act 57 case and the employer had argued that due to the Claimant's illegal status, the employer could not show an earning capacity by referring him to open and available employment. The Court held that the employer does not need to satisfy Kachinski's job availability prong in order to prove entitlement to a suspension/modification. *See* Morris Painting, Inc. v. Workers' Compensation Appeal Bd. (Piotrowski), 814 A.2d 879 (Pa. Cmwlth. 2003) (an employer seeking a suspension of benefits need only demonstrate that a claimant is an unauthorized alien and that he or she has had a change in medical condition). It must be noted that an employer can only seek a suspension of weekly wage benefits and not medical benefits. Mora v. Workers' Comp. Appeal Bd. (DDP Contracting Co.), 845 A.2d 950 (Pa. Cmwlth. 2004).

In Kennett Square Specialties v. Workers' Compensation Appeal Bd. (Cruz), 31 A.3d 325 (Pa. Cmwlth. 2011), the WCJ suspended the claimant's benefits based upon a finding that the claimant was an undocumented alien worker. On appeal, the employer argued that the Board erred in determining that there was not substantial evidence in the record to support the WCJ's finding that the claimant was an undocumented alien. The WCJ's finding that the claimant was an undocumented alien, based solely upon the adverse inference that the WCJ drew from the claimant's refusal to answer the employer's questions regarding his immigration status, was not supported by sufficient evidence. While the WCJ did not err in drawing an adverse inference from the claimant's refusal to testify regarding his immigration status, the WCJ did err in relying solely on that adverse inference in finding that the claimant was an undocumented alien. Without more in the record, there was insufficient evidence to support the WCJ's finding.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act and are terrorist acts or injuries covered or excluded under workers' compensation laws?

There is no language in the Act excluding terrorist acts or injuries from coverage. However, if the terrorist was the employee, he/she would not be entitled to workers' compensation benefits on the basis that the injuries were self-inflicted.

55. How are workers' compensation settlements affected by Medicare trusts and liens?

Medicare's regulations (42 CFR 411.46) and manuals (MIM §§ 3407.7 and 3407.8 and MCM §§ 2370.7 and 2370.8) make a distinction between lump sum settlements that are commutations of future benefits and those settlements that are due to a compromise between the insurance carrier and the claimant. Medicare is a secondary payer to workers' compensation.

Set-aside arrangements are most often used in those cases in which the beneficiary is comparatively young and has an injury that seriously restricts his/her daily living activities. The Regional Office of Medicare and Medicaid can review a proposed settlement including a set-aside arrangement and provide a written opinion on which the potential beneficiary and the attorney can rely, regarding whether the workers' compensation settlement has adequately considered Medicare's interests per 42 CFR 411.46. If there is a reasonable expectation of Medicare enrollment within 30 months of the settlement date and the total settlement date being greater than $250,000.00 Medicare will review the settlement. If the claimant is a Medicare beneficiary at the time of settlement, the Centers for Medicare & Medicaid Services (CMS) should review the proposed settlement, irrespective of the dollar amount.

56. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

When an insurance carrier has paid benefits to a claimant on the basis that the injury was not compensable under the Act, the carrier may recover from the workers' compensation carrier the sums paid, provided due diligence is exercised in asserting its claim. Section 319 of the Act, 77 Pa. C.S. § 671. The recovery amount is limited to the amount actually paid by the insurance company. *See* Associated Hosp. Serv. of Philadelphia v. Pustilnik, 439 A.2d 1149 (Pa. 1981) (where a health insurance carrier had made payments based upon a contractually established formula, the carrier's subrogation right is limited to the amount it can actually prove it paid on the employee's behalf).

57. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPPA)?

The Act does not provide any requirements for confidentiality and privacy of medical records. As a practical matter, when obtaining psychological or psychiatric records, a records release is almost always required to be signed by claimant.

58. What are the provisions for “Independent Contractors”?

An independent contractor is not entitled to workers' compensation benefits because of the absence of a master/servant relationship. Employee or independent contractor status is the crucial threshold determination that must be made to determine the eligibility for workers' compensation benefits. A determination regarding the existence of an employer/employee relationship is a question of law that is determined on the unique facts of each case. The claimant bears the burden of establishing an employer/employee relationship in order to receive benefits. 77 Pa. C.S. §§ 21, 22.

In determining employee or independent contractor status, certain criteria serve as guideposts for review. These elements include control of the manner work is to be done, responsibility for result only, terms of agreement between the parties, the nature of the work or occupation or business, which party supplied the tools, whether payment is by time or by the job, whether the work is part of the regular business of the Employer, and the right to terminate the employment at any time. The primary factors to be considered are the control over the work to be completed and the manner in which it is to be performed. Guthrie v. Workers' Compensation Appeal Bd. (Travelers' Club, Inc.), 854 A.2d 653 (Pa. Cmwlth. 2004).

59. **Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?**

There are no specific provisions. However, while numerous factors are considered in determining the existence of a master-servant relationship, "the crucial test, without doubt, is whether the alleged Employer assumes the right of control with regard not only to the work to be done by the alleged employee, but also the manner of performing it." Heilner v. Workers' Compensation Appeal Bd. (Aetna Freight Lines) 393 A.2d 1085, 1086 (Pa. Cmwlth. 1978). *See* Indicia of control may include: control over the manner in which work is to be done; responsibility for result; terms of the agreement; nature of the work or occupation; skills required for performance; which party supplies the tools; whether payment is by the time or by the job; whether the work performed is part of the regular business of the Employer; and the right of the Employer to terminate employment at any time. J. Miller Co. v. Mixter, 277 A.2d 867 (Pa. Cmwlth. 1971).

In Accountemps v. Workers' Compensation Appeal Bd. (Myers), 120 Pa. Commw. 489, 548 A.2d 703 (Pa. Cmwlth. 1988), the Court addressed when one entity assigned an employee to perform work for another entity. The Accountemps Court held that the entity assigning the employee to the temporary job was the employer because that entity selected the employee for the assignment, determined the amount paid, and paid the salary. Furthermore, the borrowing employer did not have to train or instruct the employee in "how to perform the basic job because she was already in possession of a skill and special training required for the temporary assignment." G & B Packing v. Workers' Compensation Appeal Bd. (Lindsay), 653 A.2d 1353, 1359 (Pa. Cmwlth. 1995), petition for allowance of appeal granted, 665 A.2d 470 (1995). *See* Williams

v. Workers' Compensation Appeal Bd. (Global Van Lines), 682 A.2d 23 (Pa. Cmwlth. 1996).

60. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or deliver of people or property?

None. In Kelly, Claimant, a truck driver, was injured while delivering a load, for defendant, in Pennsylvania. Under the parties' lease agreement, Claimant was responsible for providing truck drivers to defendant, who specified the pick-up and drop-off points but not the delivery route. Evidence revealed that claimant, who was paid by the load, also paid his own insurance. The Judge concluded that Claimant was an independent contractor because he controlled the manner of his work performance, being only responsible for the result. Respondent did not direct Claimant to use any particular route but rather advised Claimant of where the load was to be picked up and delivered. Claimant's compensation was based on the load and he was paid the insurance. While other factors could have influenced the Judge to find that Claimant was an employee, substantial evidence existed to support the referees findings that Claimant was an independent contractor. Kelly v. Workers' Compensation Appeal Bd. (Controlled Distribution Services, Inc.), 155 Pa. Commw. 313, 625 A.2d 135 (Pa. Cmwlth. 1993).

With respect to the leased truck situation, specific indicia of control may also include: which party purchases insurance; which party selects the route to be taken; inspection requirements; method of payment; whether the lessee's name is displayed on the vehicle; the lessor's ability to contract with other shippers; and any requirement that the lessor contract the lessee on a regular basis. Shreiner Trucking Co. v. Workers' Compensation Appeal Bd. (Wagner), 97 Pa. Commw. 182, 509 A.2d 1337 (Pa. Cmwlth. 1986).

61. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices"

plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below:

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62. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?

The parties must state how they are addressing Medicare's interests, as well as conditional payments, in Paragraph 14 of the Compromise and Release Form (LIBC-755) when settling a workers' compensation case. The actual language is left to the Parties to include based on the needs of the case. The form includes a subsection on which to allocate monies towards future medical expenses.

63. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

Per Act 16 of 2016, Pennsylvania approved a medical marijuana program. The use of medical marijuana is limited to a specific list 17 medical diagnoses:

- Amyotrophic lateral sclerosis;
- Anxiety disorders;
- Autism;
- Cancer, including remission therapy;
- Crohn's disease;
- Damage to the nervous tissue of the central nervous system (brain-spinal cord) with objective neurological indication of intractable spasticity, and other associated neuropathies;
- Dyskinetic and spastic movement disorders;
- Epilepsy;
- Glaucoma;

- HIV / AIDS;
- Huntington's disease;
- Inflammatory bowel disease;
- Intractable seizures;
- Multiple sclerosis;
- Neurodegenerative diseases;
- Neuropathies;
- Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions;
- Parkinson's disease;
- Post-traumatic stress disorder;
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain;
- Sickle cell anemia;
- Terminal illness; and
- Tourette syndrome.

The list of approved conditions has been expanded since implementation of the program.

Patients must establish a bona fide relationship with a participating physician. Marijuana is limited to pills, oils, creams, tincture, liquid or vaporizable form. Marijuana flower//leaf/bud is available, but only for vaporizable consumption: smoking is not allowed. The statute specifically exempts insurers from having to cover medical marijuana treatment. 77 P.S. § 10231.2102. Employers are also free to prohibit an employee from working while taking medical marijuana for safety reasons. 77 P.S. § 10231.510. However, off-the-job use is protected. Palmiter v. Commonwealth Health Systems, Inc., __ A.3d __, 2021 WL 3507795 (Pa.Super. 2021).

Marijuana must be distributed through a licensed dispensary. There are 70+ dispensaries distributed widely throughout the state.

64. **Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

Pennsylvania does not allow recreational use of marijuana. Several localities have decriminalized possession of small amounts of marijuana, but such possession remains a civil offense.

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