# What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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# Pennsylvania Workers' Compensation


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## *The Court Invalidates the Results of an IRE Because the IRE Physician Did Not Use the Most Recent Edition of the AMA Guides.*

*John Stanish v. W.C.A.B. (James J. Anderson Construction Company)*; 1870 C.D. 2009; filed December 7, 2010; by Senior Judge Flaherty

Following the claimant's work injury, the employer requested an Impairment Rating Examination (IRE) within the time frame that would allow the employer to obtain self-executing relief. The results of the evaluation were that the claimant had a 13% impairment, and the employer issued form LIBC-764, changing the claimant's status from total disability to partial disability. The claimant challenged the IRE by filing a Petition for Modification and arguing that the IRE was not valid since the 5th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) was used and not the most recent 6th Edition.

The Workers' Compensation Judge denied the claimant's petition, concluding that the IRE physician used the 5th Edition of the AMA Guides because the Bureau informed all IRE physicians that the 5th and 6th Editions would be accepted until August 31, 2008. In addition, the Workers' Compensation Judge concluded that the claimant failed to present evidence to support a finding that his impairment rating was equal to or greater than 50%. The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court vacated the Workers' Compensation Judge's decision, holding that §306 (a.2) (1) mandated that the degree of impairment be determined based upon an evaluation pursuant to the most recent edition of the AMA Guides. While the court considered the Bureau's decision to phase in the use of the newest edition of the AMA Guides as reasonable, they nevertheless found it inconsistent with the Act. The court directed the Workers' Compensation Judge to allow the employer to have the claimant submit to a new IRE for calculation of impairment under the most recent edition of the AMA Guides. The court also indicated that the employer would still have the right to self-executing relief since they acted in reliance on the Bureau's directive in scheduling the first IRE. **II**

## *Although the Claimant's Petition to Review Was Not Filed Within Three Years of the Last Payment of Compensation, the Employer's Petition to Terminate Benefits Was. Therefore, the Workers' Compensation Judge Did Not Err in Expanding the Claimant's Injuries.*

*Pizza Hut, Inc. v. W.C.A.B. (Mahalick)*; 996 C.D. 2010; filed January 20, 2011; by Senior Judge Friedman


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The claimant sustained a work-related injury on January 31, 2003. Thereafter, the claimant received workers' compensation benefits pursuant to a Notice of Compensation Payable (NCP) issued by the employer. The NCP described the work injury as a strain/sprain of the lower back. The claimant's benefits were later suspended as of March 26, 2003, based on a return to work at that time.

The employer then filed a Petition to Terminate the claimant's benefits. The claimant filed a Review Petition on December 16, 2006, seeking to amend the description of the work injury to include "lower back bulging discs and facet arthropathy."

The Workers' Compensation Judge granted the claimant's Review Petition, and the Appeal Board affirmed. The employer then appealed to the Commonwealth Court, arguing that the claimant's Review Petition was time barred under Section 413 of the Act and the case of *Fitzgibbons v. W.C.A.B.* (*City of Philadelphia*), 999 A.2d 659 (Pa. Cmwlth. 2010) since it was not filed within three years of the last payment of compensation.

The Commonwealth Court, however, rejected the employer's argument and upheld the decisions issued below. The court held that, although the claimant did not file her petition until December 16, 2006, more than three years from the most recent payment of compensation, the employer filed the Termination Petition within the three-year period under §413 and that under the Supreme Court's holding in *Cinram Manufacturing, Inc. v. W.C.A.B. (Hill)*, 601 Pa. 524, 975 A.2d 577 (2009), a Workers' Compensation Judge may correct an NCP during a termination proceeding under §413 of the Act without the claimant filing a separate petition to support a corrective amendment. **II**

## *A Report Issued by the Employer's Medical Expert That Contained a Critical Typographical Error Is Not Competent Evidence to Support a Workers' Compensation Judge's Expansion of the Claimant's Injuries.*

*City of Pittsburgh and UPMC Benefit Management Services, Inc. v. W.C.A.B. (Wilson)*; 235 C.D. 2010; filed January 20, 2011; by Judge Leavitt

Following the claimant's work injury, the employer filed a Petition to Terminate the claimant's benefits. The claimant challenged the petition and also filed a Review Petition, seeking to expand the nature of the work injury to include aggravation of a pre-existing degenerative cervical condition.

During litigation, the employer conducted the deposition of their medical expert, who gave the diagnosis of thoracic and cervical strain, superimposed on spondylosis. The employer's expert explained that by "superimposed" he meant that it existed in the same area of the body as the cervical strain. It was the expert's opinion that the claimant was fully recovered from her work injury and that the work injury did not cause an aggravation of pre-existing cervical disc disease. However, on cross-examination, the employer's doctor did admit that a report he issued following his IME stated, "I do feel that this work injury caused an aggravation of the pre-existing degenerative condition."

The employer's expert testified that this was a typographical error and that the report should have read, "I do ***not*** feel that the . . . injury caused an aggravation . . .." He, therefore, issued a corrected report after the typo was brought to his attention by employer's counsel.

The Workers' Compensation Judge granted the Review Petition based on the employer's expert's first report diagnosing a cervical strain superimposed on a pre-existing condition, the report which contained the typographical error. The Appeal Board affirmed. The employer appealed to the Commonwealth Court, arguing that there was not competent evidence to support the finding that the claimant suffered an aggravation of her cervical disease.

The Commonwealth Court agreed and reversed the Workers' Compensation Judge's decision. The court concluded that the Workers' Compensation Judge relied upon a typographical error, which could not be competent evidence. The court noted that reading the IME report in its entirety made it clear that the expert never expressed an opinion that the claimant suffered an aggravation. The court concluded that there was overwhelming evidence that the expert's true opinion was that the claimant did not suffer an aggravation and that the Workers' Compensation Judge's focus on one sentence, and refusal to accept the correction, was capricious and impermissible. **II**

## *An Employer Is Not Precluded from Seeking a Termination or Suspension of Benefits on a Date Prior to the Date of the Notice of Compensation Payable.*

*City of Philadelphia v. W.C.A.B.. (Butler)*; No. 1245 CD 2009; (Pa. Cmwlth. December 16, 2010); Judge Leavitt for En Banc Court

The claimant was injured in a car accident while working as a probation officer. She began treating with a panel chiropractor, who subsequently found her to be fully recovered from the work-related strains and sprains as of October 19, 1995. However, the claimant continued to complain of head and back pain, so the panel physician arranged for a second opinion, which also concurred that the claimant was fully recovered. The employer issued a Notice of Compensation Payable on November 7, 1995, listing the accepted injuries as bruises to the head, back and neck.

The employer filed a Petition to Terminate and, in the alternative, a Suspension Petition since the claimant received salary in lieu of compensation benefits. The Workers' Compensation Judge found that the claimant was fully recovered as of October 20, 1995, and granted the Termination Petition. The Suspension Petition was dismissed as moot. The claimant appealed, and after a remand to correct a procedural matter, the Appeal Board affirmed.

The Commonwealth Court reversed, finding that the employer had to prove full recovery after the date the NCP was issued, not before, based on a sentence in the case of *Beisel v. W.C.A.B. (John Wannamaker, Inc.)*, 465 A.2d 969 (Pa. 1983) that stated, "The employer has the burden of showing the claimant's disability has changed after the date of the agreement or notice of compensation payable." The court also remanded the case for a decision on the Suspension Petition.

On remand, the Workers' Compensation Judge granted a suspension as of the date that the employer offered the claimant a position within her pre-injury wages following the treating physician's clearance for work in September 2007. The claimant appealed, and the Appeal Board reversed on the basis that the employer was required to show that the claimant's physical condition improved after the issuance of an NCP, even though the effective date of the suspension postdated the issuance of the NCP.

The Commonwealth Court addressed the issue of how the date of the NCP affects the employer's ability to terminate or suspend benefits. The court first noted that the NCP did not identify a starting date of compensation or that the claimant was unable to work when the NCP was issued. Of significance, the court held that preventing an employer from proving a full recovery prior to the date an NCP is issued will discourage employers from issuing NCPs and lead claimants to file claim petitions. Since the employer proved that the claimant had recovered from the work-related injury identified in the NCP, it was entitled to a termination of benefits as of that date, regardless of the date the NCP was issued. The majority disagreed that the single sentence in *Beisel* requires that a termination or suspension could only be obtained after the date of the NCP, noting that the holding in *Beisel* was limited to an employer bound by the contents of the NCP. **II**

## *A State Police Officer Involved in the Horrific Death Scene Investigation of an Infant Failed to Establish Abnormal Working Conditions in Order to State a Claim for Psychological Injury.*

*Washington v. W.C.A.B. (Commonwealth of Pennsylvania)*; No. 476 CD 2010; (January 5, 2011); Senior Judge Kelly

The claimant, an investigator for the Pennsylvania State Police, was involved in homicide investigations by providing forensic and photographic services. One case he investigated ("Baby Jane Doe") involved a baby girl found in a plastic big near a one-room school house who had been burned with her throat cut. The claimant photographed the remains at the crime scene and also attended and photographed the autopsy. The claimant stopped working for the employer some time later, claiming he developed post-traumatic stress disorder as a result of his investigation in the Baby Jane Doe case. He testified that following that investigation, he would cry and suffer nightmares and tried to commit suicide. After hearing testimony on whether the activities of an investigator involved abnormal working conditions, the Workers' Compensation Judge denied the Claim Petition, finding that the claimant's activities at the Baby Jane Doe investigation were normal, routine activities related to his job and drawn precisely from the job description.

(more)


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After the Workers' Compensation Judge's decision was affirmed by the Appeal Board, the Commonwealth Court confirmed that the burden of proof in a psychological injury claim not stemming from a physical injury is that the injury was more than a subjective reaction to normal working conditions. The court reviewed the established law that the job of a police officer is one that is inherently highly stressful. In affirming the Workers' Compensation Judge's decision, the court noted that the findings that the claimant's investigations in the Baby Jane Doe case were not abnormal or out of the ordinary for a forensic services investigator were supported by substantial evidence. In so holding, the court also rejected the claim of an aggravation of a pre-existing mental disorder, including depression, as the claimant was still required to demonstrate that his post-traumatic stress disorder was more than a subjective reaction to normal working conditions. **II**

## *Minimal Findings Identifying the Basis of a Workers' Compensation Judge's Decision on the Credibility of a Treating Physician and a Claimant's Disability Are Sufficient to Uphold a Claim Petition.*

*Shannopin Mining Company v. W.C.A.B. (Sereg)*, No. 1185 CD 2010; (Pa. Cmwlth. January 6, 2011); Opinion by Judge Butler

The claimant, who received 500 weeks of partial disability benefits for coal workers' pneumoconiosis, petitioned for total disability benefits, which were granted by the Workers' Compensation Judge on the basis of the claimant's medical evidence. On appeal, the employer argued that the Workers' Compensation Judge did not issue a reasoned decision and that the claimant had voluntarily removed himself from the work force by retiring.

The Commonwealth Court dismissed the argument involving a reasoned decision, finding that the Workers' Compensation Judge—after several remands—cited the results of a treadmill test in concluding that there was an objective basis for crediting the treating physician's testimony and noted that the Workers' Compensation Judge had appropriately considered the employer's medical testimony. Without directly addressing the voluntary retirement issue, the Workers' Compensation Judge found that the claimant was totally disabled from his employment when he retired, which the court found sufficient. **II**

## *A Fee Review Petition Is Held to Be Timely When Filed Within 90 Days of Billing Date.*

*Fidelity & Guaranty Insurance Company v. Bureau of Workers' Compensation (Community Medical Center)*; No. 1766 CD; filed October 29, 2010; by Judge Brobson

The claimant's treating physician disputed the insurer's payment of services by filing an application for fee review under section 306(f.1) (5) of the Act 85 days after the original billing date. The Bureau granted the fee petition. The insurer requested a *de novo* hearing, and the Hearing Officer found that the fee application was timely filed within 90 days. On appeal, the insurer argued that the provider failed to file its application within 30 days of the disputed treatment as provided by the Act and that the 90-day period specified in the regulations improperly extends the filing period.

The court held that the statute allows a provider to file an application for fee review within the 30 days following a dispute notification or, alternatively, within the 90-day time period following the original billing date of treatment. Further, the court noted that a provider still has 30 days following the insurer's notification of the denial of a resubmitted bill to file an application for fee review. The court found that the Bureau regulations involving fee review properly interpret and are consistent with the Act. **II**


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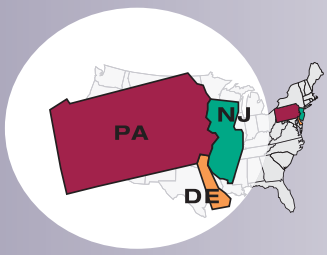


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# New Jersey Workers' Compensation

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## *Exclusions From the Definition of "Employment" Under the New Jersey Workers' Compensation Act: "Casual Employees" and "Independent Contractors."*

*Burgos v. RJS Associates Landscaping, Inc.*, Docket No. A-2496-09T2, 2010 N.J. Super. Unpub. LEXIS 2953 (App. Div., Decided December 10, 2010)

The petitioner, a tree service technician, was a full-time employee of a tree service company who occasionally did subcontracting work for the respondent. During a long period of time during which the employer had no work, the petitioner solicited work for himself directly from the respondent. The respondent was generally unable to assist the petitioner in this regard as his business was small and tree service was not part of his day-to-day operations. However, on January 26, 2008, the respondent contacted the petitioner to advise that the respondent's neighbor required the removal and trimming of some trees on their property. The petitioner agreed to perform the work. The petitioner and the respondent did not speak about compensation or from whom the petitioner was to receive payment. On the scheduled day, the petitioner met at the respondent's home. The petitioner brought with him his own professional equipment including a saddle, a body lanyard, climbing line, lowering line, snaps and a handsaw. The respondent provided the petitioner with a chainsaw. The respondent accompanied the petitioner to his neighbor's residence and explained to the petitioner the work he was to perform. The respondent then left the premises. Shortly after beginning work, the petitioner fell from the tree and sustained injuries.

The petitioner filed a claim with the Division of Workers' Compensation naming the respondent as his employer. The respondent filed an answer and simultaneously moved for dismissal of the petitioner's claim, denying that the petitioner was their employee and instead asserting that the petitioner was either an independent contractor or a casual employee excluded from coverage under the New Jersey Workers' Compensation Act. The Judge of Compensation granted the respondent's motion and dismissed the petitioner's claim. The petitioner appealed.

In affirming the Judge of Compensation's dismissal, the Appellate Division determined that the petitioner was, indeed, a casual employee under the terms of the Act. To obtain benefits pursuant to the Act, a petitioner must prove that he is an employee within the meaning of the Act. N.J.S.A. 34:15-36 broadly defines an employee as being "all natural persons . . . who perform service for an employer for financial consideration." The Act expressly exempts from its definition "casual employment," which it defines as employment:

> [1] if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or
>
> [2] if not in connection with any business of the employer, as employment not regular, periodic or recurring[.]

Here, tree services were not part of the respondent's business, and the petitioner's employment was neither regular, periodic nor recurring. Further, the Appellate Division reasoned that even if tree services were part of the respondent's ordinary business, the respondent's hiring of the petitioner was, as the Judge of Compensation had described it, akin "to an instance in which you bring in a person with special expertise to fix a plumbing or toilet problem." In light of its analysis, the Appellate Division concluded that the petitioner was a casual employee as defined by N.J.S.A. 34:15-36 and, thus, excluded from receiving workers' compensation benefits under the Act.

In finding that the petitioner was also an independent contractor, the Appellate Division relied primarily on *Lesniewski v. W.B. Furze Corp.*, 308 N.J. Super. 270 ( App. Div. 1998). In *Lesniewski*, the Appellate Division utilized two different tests—the "control test" and the "relative nature of the work test"—to determine whether a petitioner qualified as an independent contractor. The control test focuses on four factors:

> (1) the degree of control exercised by the employer over the means of completing the work;
>
> (2) the source of the worker's compensation;
>
> (3) the source of the worker's equipment and resources; and
>
> (4) the employer's termination rights.

Here, the Appellate Division found the record devoid of any evidence that the respondent either controlled or had the right to control the manner of completing the tree work, retained any right to terminate the petitioner or intended to compensate the

petitioner in any way. The Appellate Division found unconvincing the petitioner's argument that he was under the respondent's control because the respondent provided the petitioner with a chainsaw as the majority of the professional equipment used on the job was owned by the petitioner himself.

The Appellate Division's analysis of the "relative nature of the work test" yielded similar findings. As illustrated in *Lesniewski*, the relative nature of the work test examines the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business. If the petitioner is financially dependent on the respondent and plays an active role in the respondent's business, an employer-employee relationship will be said to exist.

Here, the Appellate Division found that the petitioner could satisfy neither of these standards. As the respondent did not perform tree services as part of its day-to-day business, the work that the petitioner performed could not be characterized as an integral part of the respondent's ordinary business. Further, as the respondent neither agreed to compensate the petitioner nor did the petitioner receive any compensation from the respondent, it could not be said that the petitioner was economically dependent on the respondent in any significant way. As such, the Appellate Division determined that application of the relative nature of the work test required a finding that the petitioner was indeed an independent contractor exempted from coverage under the Act. ||

# Delaware Workers' Compensation

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## *The Board Has Jurisdiction over the Issue of Whether the Parties Entered into a Valid Agreement for a Commutation of Benefits.*

*Elizabeth Browning v. Schneider National, Inc.*, (IAB Hearing #1215693) Decided 11/23/10

In Delaware, the only way to settle a workers' compensation case is by way of commutation. This case involved the interesting issue of what happens when the parties attempt to do so but run into a dispute.

The claimant had an accepted work injury to her low back that occurred on July 25, 2003, and began receiving compensation for total disability. The employer filed a petition to terminate those benefits, and the parties entered into negotiations for a commutation. However, the employer contended the agreement was for a full commutation, whereas the claimant contended it was for a commutation of the wage claim only. The claimant filed a complaint in the Chancery Court for specific performance of the alleged settlement, but the court declined to rule, finding that there was an adequate remedy at law. The employer then requested a legal hearing with the Board, and the claimant asserted the Board had no jurisdiction to hear the dispute.

The Board ruled against the claimant and concluded that the relevant statute gives it jurisdiction over any action arising under the workers' compensation law. They rejected the claimant's contention that this was merely a contract dispute between her and the employer since this overlooked the fact that the alleged settlement was with respect to workers' compensation benefits. The Board reasoned that since they must approve all commutations, there cannot be an enforceable commutation until the Board finds that one exists and approves it. The parties were directed to proceed to an evidentiary hearing with the Board to see if there had been a meeting of the minds and whether the alleged commutation should be approved. ||