

## PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

**An insurance company that paid the medical expenses for a firefighter claimant with cancer can include expenses paid prior to the passage of Act 46 as a recoverable lien. The company's "Statement of Benefits" was sufficient evidence of the lien.**

*City of Philadelphia v. WCAB (Knudson)*, No. 675 C.D. 2016; Filed July 3, 2017; Judge

Brobson

The claimant, a Philadelphia firefighter, filed a claim petition for benefits under Section 108(r) of the Act. During litigation of that petition, the claimant's health insurer (IBC) submitted a document, "Statement of Benefits," listing the medical expenses they paid as evidence to support its lien. In the decision granting the claim petition, the Workers' Compensation Judge determined that only medical expenses for services provided after the effective date of Act 46 (which designated cancer in firefighters as an occupational disease) were reimbursable.

IBC appealed this aspect of the judge's decision to the Workers' Compensation Appeal Board. The employer filed a cross appeal, challenging IBC's right to a lien and the sufficiency of the proof offered in support of that lien. The Board affirmed the judge's decision that IBC's evidence for the lien was sufficient. However, the Board reversed the judge's decision limiting IBC's recovery to medical expenses to services given after Act 46's effective date.

The employer appealed to the Commonwealth Court, arguing that IBC's lien could only attach to medical expenses incurred after the effective date of Act 46 and that the single document IBC submitted into evidence (Statement of Benefits) was insufficient evidence of its lien. The Commonwealth Court disagreed and affirmed the Appeal Board. As the court pointed out, Act 46 clearly states that the Act shall apply to

claims filed on or after the effective date of the section. The claimant filed his claim petition on June 13, 2012, after the passage of Act 46 in 2011. Additionally, the court held that the evidence presented by IBC in support of its lien was sufficient, noting that the employer, on the record before the Workers' Compensation Judge, waived any hearsay objections to the Statement of Benefits. It appeared to the court as though the employer chose to raise questions about these documents for the first time before the Board. ||

**An employer is entitled to subrogation under the Act even if the employer was contesting a claim petition at the time third party settlement funds were distributed.**

*Anthony Kalmanowicz v. WCAB (Eastern Industry, Inc.)*; No. 1790 C.D. 2016; Filed July 7, 2017; Judge Brobson

In his claim petition, the claimant alleged he sustained multiple injuries in a work-related motor vehicle accident. While this petition was pending, the claimant entered into a settlement agreement with a third party to resolve his case for \$15,000 and netted, after attorney's fees and costs, \$9,498.25. Later, the Workers' Compensation Judge granted the claim petition.

The employer consequently filed a petition seeking recovery of its lien. However, the judge dismissed this petition, concluding that at the time of the claimant's settlement of the third-party claim, the employer had not accepted the work injuries.

The employer appealed, and the Appeal Board reversed. The claimant then appealed to the Commonwealth Court, where he argued that the employer's contest of the claim petition at the time third-party settlement funds were distributed prohibits the employer from recovering its lien under the Act. The court rejected this argument, holding the employer did not waive its rights to subrogation under Section 319 of the Act by contesting the claim petition. ||

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## The Construction Workplace Misclassification Act cannot apply retroactively to determine whether the claimant was an independent contractor and cannot function merely as a guide to determine who qualifies as an independent contractor.

*D&R Construction v. WCAB (Suarez, et al); Nos. 1558 C.D.2016 and 1578 C.D. 2016; Department of Labor and Industry, Bureau of Workers' Compensation, Uninsured Employers Guaranty Fund v. WCAB (Suarez, et al.); 1574 C.D. 2016 and 1575 C.D. 2016; Filed Aug. 1, 2017; Judge Hearthway*

This case involved a claim petition filed against D&R Construction for work injuries sustain by the claimant on August 28, 2010. It was D&R's position that the claimant was an independent contractor, not an employee.

Thereafter, the claimant filed a petition against the Uninsured Employers Guaranty Fund, raising the same allegations. The Workers' Compensation Judge dismissed this petition, finding that the claimant is an independent contractor. However, on appeal, the Board reversed and held that the claimant is an employee. In doing so, the Board relied on the Construction Workplace Misclassification Act (CWMA), stating that the factors listed in the Act were "instructive."

The issues presented to the Commonwealth Court on appeal were whether the Board erred in retroactively applying the CWMA to determine whether the claimant was an independent contractor and whether the Board erred in considering the CWMA as guidance for the common law analysis to determine who qualifies as an independent contractor. The court held that the CWMA, enacted on October 13, 2010, could not apply retroactively to this August 28, 2010, injury. According to the court, the CWMA altered the elements of proof required to establish an independent contractor's status in the construction industry, which was a substantive change affecting substantive rights. Additionally, the CWMA contains no language expressly stating that it may apply retroactively. Thus, the court found that the Board's retroactive application of the CWMA was improper.

Additionally, the court held that the CWMA could not function as mere guidance in determining whether an individual in the construction

industry is an employee or an independent contractor. The CWMA establishes mandatory criteria. The absence of any one criterion negates independent contractor status, and the individual is deemed an employee. **II**

## Permanency is a required element for burden of proof in a claim for specific loss benefits for the loss of use of the right index finger.

*Carlos Urena Morocho v. WCAB (Home Equity Renovations, Inc.); No. 1393 C.D. 2016; Filed: Aug. 3, 2017; Judge Hearthway*

The claimant injured to his right hand (including injuries to his thumb, index and middle fingers) while using a table saw in the course and scope of his employment. He filed claim petitions against the employer and the Uninsured Employers Guaranty Fund seeking benefits, including benefits for loss of use of the right index finger.

The claimant testified about the difficulties he was experiencing using his right index finger. He submitted medical records, which showed that emergency surgery was performed on the finger. The procedure was an open reduction internal fixation and a distal interphalangeal fusion of the finger. He also submitted a report from the surgeon, which stated that the claimant had effectively lost the function of the index finger, "at this time," for all intents and purposes.

The Workers' Compensation Judge found that the claimant sustained the permanent loss of use of his right index finger. He awarded specific loss benefits, consisting of 50 weeks of compensation plus a six-week healing period. The employer and the Fund appealed to the Appeal Board. They argued that the judge erred in finding that permanent loss of use of the right index finger was sustained. The Board agreed and reversed the judge's decision.

The claimant appealed to the Commonwealth Court, which affirmed the decision of the Board. The court noted that the report from the claimant's medical expert stated that the claimant lost function of his index finger "at this time." The court agreed that the record lacked competent medical evidence of permanency. Therefore, it held that the claimant was not able to meet his burden of proof. **II**

## NEWS FROM MARSHALL DENNEHEY

**Tony Natale** (Philadelphia) successfully defended a pair of cases involving opioid mediations. In the first case, Tony represented a national investment corporation in an action involving the efficacy of opioids. The claimant was admittedly addicted to the medication. Medical expert evidence was presented by the parties as to the ill effects of the drug. The Workers' Compensation Judge found that the ongoing use of opioids was unreasonable and that the prescription bills were not payable. In the second case, a vehicle had struck the claimant during the course and scope of employment. Years later, he began filling prescriptions for opioid medication. Tony presented medical evidence that the medication was not necessary in relation to the injury. The judge found that the nature of the injury did not warrant the use of opioids, and the medical bill payments for opioid medication were found not to be payable.

**Michele Punturi** (Philadelphia) was successful before the Workers' Compensation Appeal Board in reversing a decision of a

Workers' Compensation Judge to reinstate the claimant's benefits to total disability. Michele was able to convince the Appeal Board that the claimant's evidence that her condition worsened did not support either a specific time or reason for any alleged change in her condition. Michele also established that the claimant's visits with the treating physician had decreased and that the claimant never told the IME physician or the main treating physician of any worsening at the time she was claiming so.

In another matter successfully handled by **Michele**, she prosecuted a termination petition and defeated a penalty petition on behalf of a township. The claimant had injured his lower back in 2003. He was claiming that injury, which had been accepted as a soft tissue injury and as a sprain/strain at the time, was the cause of his current back problems. A prior termination petition had been filed and denied in 2012 based upon a subsequent review of medical records and an updated

IME. With the second termination petition, Michele was able to establish through the credible testimony of a board certified orthopedic surgeon that the current back condition was in no way causally related to the previous work injury and that the plaintiff was fully recovered from that injury. Michele also defeated the claimant's penalty petition. She established that an additional provider, who was rendering the treatment being denied, made a diagnosis beyond lumbosacral sprain/strain. When he determined his bills were not going to be paid, he added the lumbosacral sprain/strain to the diagnosis. It was shown that the claimant failed to meet his burden of proof because he did not submit the appropriate documentation establishing any penalty. In addition, it was noted the claimant had fully recovered several months prior to the medical treatment at issue.

**Judd Woytek** (Allentown) obtained a favorable decision and order denying benefits in a Federal Black Lung claim that had been pending since 2003. The matter was most recently before the Administrative Law Judge on a remand from the Benefits Review Board on the sole issue of whether the miner's medical expert's testimony was sufficient to establish that the miner was suffering from coal workers' pneumoconiosis. Judd persuasively argued to the judge that the claimant's medical expert failed to offer a well-reasoned or well-documented opinion that the miner had developed coal workers' pneumoconiosis as the result of his 37 years of working in the coal mines. The judge denied the claim for benefits, which could have potentially been retroactive. ||

## NEW JERSEY WORKERS' COMPENSATION

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Dario J. Badalamenti

### Addressing the petitioner's burden of proving an increase in disability when seeking additional compensation benefits following an earlier award.

*Kalucki v. United Parcel Service*, Docket No. A-3486-15T3, 2017 N.J. Super. Unpub. LEXIS 2077 (App. Div., decided Aug. 15, 2017)

The respondent employed the petitioner in a clerical position. On June 24, 2009, the petitioner received a workers' compensation award for permanent disability of the neck, left shoulder and bilateral wrists arising from injuries sustained while in the employ of the respondent. Later, the petitioner returned to his employment with the respondent in the same capacity and without any restrictions.

In 2010, the petitioner filed a reopener of his prior workers' compensation claim, alleging a worsening of his disability. Among other things, he testified that his neck and left shoulder were more restricted in range of motion, his shoulder ached and was numb to the touch, and there was an aggravation of his carpal tunnel syndrome, with numbness and loss of grip and strength of the left hand.

The Judge of Compensation heard testimony from the petitioner and the respondent's medical experts. The judge reasoned that, if the petitioner's pain and complaints were increasing to the level to which he testified, he would have sought medical treatment and requested some accommodation from the respondent in terms of either changing his duties or work hours. The failure to seek either medical treatment or work accommodations of any sort, in the judge's opinion, was inconsistent with his allegations of increased disability. As to the testimony of the petitioner's and the respondent's medical experts, the judge found that, despite a finding of over 100 percent disability on a combined basis, the petitioner's expert's report contained many objective findings evidencing no change in condition since his prior award. Rather, the judge found that the respondent's expert's finding of no increase in disability was

more credible, based as it was on the objective medical findings. After considering the petitioner's testimony, as well as the testimony of the medical experts, the judge denied the petitioner's claim. This appeal ensued.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Perez v. Pantasote, Inc.*, 95 N.J. 105 (1984). In *Perez*, the court held that a claimant must satisfy the general principles of workers' compensation law, which require that disability is established by appropriate objective evidence and that disability cannot be based solely upon subjective complaints of a present level of incapacity. As the Appellate Division reasoned:

Although claimant testified that he had experienced an increase in . . . subjective symptoms, the judge had a reasonable basis to conclude that those subjective claims . . . were not sufficiently corroborated by objective proof.

The Appellate Division concluded there was more than sufficient proof in the record to sustain the Judge of Compensation's conclusion that the petitioner did not meet his legal burden of proving increased disability of his neck, left shoulder and carpal tunnel syndrome. ||

### SIDE BAR

On appeal, the petitioner had argued that the Judge of Compensation unfairly gave more credence to the respondent's medical expert because he, unlike the petitioner's examining physician, was a board-certified orthopedist. In finding that the judge reasonably took into account the respondent's expert's board certification, the Appellate Division concluded that:

[a]lthough we surely would not endorse a per se principle that medical experts who are board-certified are invariably more credible than expert physicians who are not, the compensation judge did not espouse such a rigid principle in this case. Instead, the judge cited the board certification as one of several factors in his credibility assessment.

## DELAWARE WORKERS' COMPENSATION

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwgc.com)



Paul V. Tatlow

**On remand from the Supreme Court, the Board finds that the employer has met the burden of proof on the termination petition by showing that the claimant is capable of working and that there is work available since the evidence established that there was a prevalence of undocumented workers employed in the jobs listed on the**

### Labor Market Survey.

*Magdalena Guardado v. Roos Foods*, (IAB No. 1405006 – Decided May 18, 2017)

On November 29, 2016, this case was remanded from the Delaware Supreme Court in order to present additional evidence on the issue of whether the employer could meet the burden of showing that jobs were actually available to the claimant, an undocumented worker. The remand hearing took place before the Board on April 27, 2017. Evidence was presented on the issues of the claimant's displaced worker status, the updated Labor Market Survey and job availability for undocumented workers.

The employer presented testimony from Dr. Toohey, an Assistant Professor of Economics at the University of Delaware. His primary field of research includes labor economics and economic demography. His testimony authenticated a report entitled "Report on the Distribution of Unauthorized Immigrants Across Jobs in the Delaware Labor Market." Dr. Toohey testified that there are 28,000 unauthorized immigrants in Delaware and approximately 80% of them are employed within the state. His testimony detailed each of the jobs listed on the Labor Market Survey the number of unauthorized immigrants working in the corresponding occupation and in the corresponding industry. According to Dr. Toohey, there are thousands of undocumented workers employed in Delaware in each of the occupations and industries corresponding to the jobs listed in the Labor Market Survey. Specifically, he testified that the occupations listed in the survey included service, production, and sales and that all of these combined accounted for an estimated 14,000 unauthorized immigrants employed in Delaware. He further testified that the industries represented by the jobs listed in the Labor Market Survey collectively employ 15,000 unauthorized immigrants. Based on these findings, Dr. Toohey concluded that the unauthorized immigrant population is well represented in the positions set forth in the Labor Market Survey.

The employer also presented testimony from Ellen Lock, the vocational consultant. Her testimony showed that she was aware that

the claimant had graduated from high school in her native country of El Salvador, is able to read and write in her native language, but cannot speak English. She was also aware that the claimant was only capable of one-handed work with her dominant right hand. Ms. Lock testified that, in her opinion, the claimant was capable of finding work in the current labor market since she is a high school graduate, there is a need for Spanish-speaking employees and the jobs identified were entry level.

The claimant testified that her medical status remained the same as at the prior hearing and she had little or no use of her left wrist since it was fused. The claimant also testified that, since her arrival in the United States in 2004, she had not made any efforts to become a documented worker and did not intend to do so.

The Board noted at the outset that the parties had stipulated that the claimant's ability to do one-handed light-duty work remained unchanged. They concluded that, based on the claimant's limited education and minimal work experience as an unskilled laborer, one who now had a one-hand work restriction, she is a *prima facie* displaced worker.

The Board then addressed whether the employer could rebut that finding by showing that there were jobs available within the claimant's work capabilities. The Board accepted the Labor Market Survey evidence, concluding that it provided reliable and sufficient information regarding actual jobs available within the claimant's capabilities. They did note that the vocational consultant had not advised the prospective employers of the claimant's undocumented status, but it would have been unrealistic to expect any prospective employers to admit that they illegally hire undocumented workers. However, the Board went on to note that Dr. Toohey's testimony shows thousands of jobs were available to undocumented workers within the occupations and industries listed in the Labor Market Survey. The Board concluded that the employer provided reliable and relevant evidence of the prevalence of undocumented workers in the specific occupations and industries listed in the Labor Market Survey. Therefore, the Board found that the employer was successful in showing the appropriate nexus between the actual jobs available in the Labor Market Survey and the prevalence of undocumented workers in those job categories in Delaware. They ruled that the employer had successfully rebutted the claimant's evidence that she is a *prima facie* worker by presenting evidence of the availability of jobs within her capabilities. The Board ordered that the claimant's total disability benefits be terminated. Based on the earning capacity as documented in the Labor Market Survey as exceeding the claimant's pre-injury average weekly wage, they also ruled that the claimant was not entitled to any partial disability benefits. ||



# *What's Cooking in Workers' Comp*

Thursday, October 19, 2017 | 11:00 a.m. – 5:00 p.m.  
Chubb Hotel & Conference Center | Lafayette Hill

**MARSHALL DENNEHEY**  
**WARNER COLEMAN & GOGGIN**  
WORKERS' COMPENSATION DEPARTMENT

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