

Legal Updates 2024 Workers' Compensation Conference

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COURSE AND SCOPE OF EMPLOYMENT

**Lewis v. Lehigh Asphalt Paving &
Construction Co. (WCAB), 303 A.3d 893
(Pa.Cmwlt. 2023)**

- **Employee suffering a “popping” sensation while stepping into his truck after clocking out not furthering employer’s affairs.**
- **Employee could not meet the *Slaughenaupt* test as no condition of the employer’s premises caused the injury.**

**Martinez v. Lewis Tree Service (WCAB),
310 A.3d 327(Pa. Cmwlth. 2024)**

- **Employee injured in his personal vehicle on the way home from the company yard was not in course of employment when injured.**
- **Employee was not a “traveling employee” within the meaning of the Act.**

MEDICAL BILL AND PAYMENT ISSUES

**Federated Ins. Co. v. Summit Pharmacy
(Bureau of WC Fee Review Hrg. Ofc.),
308 A.3d 329 (Pa. Cmwlth. 2024)**

En banc Court holds that The Red Book values for average wholesale price for pharmaceuticals is inconsistent with Section 306(f.1) of the Act limiting reimbursement to 110% of the average wholesale price of the product.

**700 Pharmacy v. BWC Fee Review
Hearing Office, Nos. 560 CD 2020 and
617 C.D. 2020, A.3d (Pa.Cmwlt.
5/16/24)**

- **Fee review applications dismissed by Hearing Officer on the basis of prohibited self-referral**
- **Court holds that pharmacy is a provider that can seek fee review.**
- **Court affirms dismissal of fee review applications based on prohibited self-referral, even though pharmacies are not specifically listed in the Act's anti-self-referral provisions.**

Bennett v. Jeld Wen, Inc. (WCAB),
306 A.3d 949 (Pa.CmwltH.2023)

- **WCAB's decision to allow *de novo* hearing before a different WCJ after vacating prior WCJ decision upheld.**
- **After discovered evidence regarding a prohibited self-referral under the Act and Regulations supported Board action and was not an abuse of discretion.**

Schmidt v. Schmidt, Kirifides and Rassias, PC (WCAB), 305 A.3d 1137 (Pa. Cmwlth. 2023), petition for allowance of appeal granted, 658 MAL 2023 (4/30/2024)

- **Federal law would not be violated by reimbursement to an injured worker for CBD oil, which is a medicine/ medical supply.**
- **Moreover, billing forms not required for reimbursement.**

Schmidt v. Schmidt, Kirifides and Rassias, PC (WCAB), 305 A.3d 1137 (Pa.Cmwth. 2023), petition for allowance of appeal granted, 658 MAL 2023 (4/30/2024)(cont.)

- **The Court has framed the issues to include**
- **(1) if CBD and other OTC supplements are “medical services” and “medicines and supplies” under the Act as they do not require a prescription;**
- **(2) do the cost containment regulations apply to CBD oil; and**
- **(3) are the carriers required to reimburse injured workers directly and IF SO, what documentation must be provided by the injured worker.**

MONEY MATTERS

PART 1:

ATTORNEY'S FEES

**Williams v. City of Philadelphia (WCAB),
No. 277 CD 2023, A.3d (Pa.Cmwlt.
3/21/24)**

- **Employee counsel not necessarily limited to attorney's fees on past medical bills and indemnity benefits but fees may also apply to bills for future medical treatment.**
- **Court states that provider billing the employee for underpayment of bill due to fee deduction would be in violation of the Act's proscription against balance billing.**

Glenny Torres v. Amazon.com Services LLC (WCAB), No. 1398 CD 2022, A.3d (Pa.Cmwth. 4/9/24)

- **“Simply put, an *unreasonable* contest will *always* result in an award of Section 440 attorney’s fees, and a *reasonable* contest *may* result in such an award.”**
- **On review, the WCJ is expected to determine “the skill required” to litigate the claim, which the Court considers a nuanced distinction from reputation or skill set of the particular attorney.**

NOTICE

**The Hershey Co. v. S. Woodhouse
(WCAB), 300 A.3d 529 (Pa.Cmwth. 2023)**

- **Employee did not provide timely notice under the Act that his diabetic neuropathy developed into a work-related diabetic foot ulcer ultimately requiring amputation.**
- **Specific loss benefit award reversed.**

PLEADINGS

ALSO KNOWN AS “YELLOW FREIGHT”

**Hollis v. C&R Laundry Services LLC
(WCAB), 299 A.3d 1086 (Pa.Cmwth.
2023)**

- **Description of injury as “left rotator cuff pathology” not considered to be “well plead” as required for application of *Yellow Freight* doctrine.**
- **“Pathology” not a specific medical diagnosis.**

PSYCHIATRIC INJURY

**Premium Transportation Staffing,
Inc. v. Welker(WCAB), 305 A.3d 1212
(Pa.Cmwth.2023)**

- **Employee who alleged PTSD as a result of a truck fire did not meet the requirement to show an “abnormal working condition” such that his claim was compensable.**
- **Over the road truck drivers are trained for and have an anticipation of such a risk; not considered to be the “extraordinarily unusual” event that would be compensable.**

MONEY MATTERS

**PART 2:
HOW MUCH?
HOW LONG?**

**Resources for Human Development,
Inc. v. Dixon(WCAB), 306 A.3d 1019
(Pa.Cmwth. 2023)**

**If concurrent employment is
“sufficiently intact” at the time of
the work injury, that employment
must be included in the average
weekly wage calculations.**

**C. B. Keffer v. Colfax Corp. (WCAB), 304
A.3d 422 (Pa.Cmwlth.2023)**

- **Payment of compensation after the three year statute of limitations or repose does not resurrect a claim which is time barred.**

JURISDICTION

Brown v. Gaydos, 306 A.3d 883
(Pa.Super.2023)

- **En banc Superior Court reverses grant of summary judgment.**
- **General issue of material fact concerning whether Gaydos was Brown's employer or co-employee at the time of Brown's injury.**

SPECIFIC LOSS

**Steets v. Celebration Fireworks(WCAB),
295 A.3d 312(Pa.Cmwth.2023), petition
for allowance of appeal granted 302 MAL
2023 (1/16/24)**

- **Commonwealth Court held that specific loss benefits were not payable after death of employee, because there was no qualifying dependent.**
- **Supreme Court has framed the issue as whether the Court erred in limiting receipt of specific loss benefits posthumously to only employees whose death is due to a cause unrelated to the work injury.**

**Jackiw v. Soft Pretzel Franchise (WCAB),
No. 64 CD 2022 (Pa.Cmwth.2023),
petition for allowance of appeal granted
286 EAL 2023 (2/14/24)**

- **Court holds that calculation of compensation for specific loss is to be done pursuant to 306(a) and injured employee was entitled to 90% of her wages.**
- **Dissent argues that the calculation under 306(c) is more appropriate and more accurately compensates an individual such as this employee with a significant loss.**

LIGHTNING ROUND

Elite Care RX, LLC v. Premier Comp Solutions, LLC, 296 A.3d 29(Pa. Super. 2023), petition for allowance of appeal granted 156 WAL 2023 (10/24/23)

- **Fee Review Section found that it lacked jurisdiction over third party billing agent for healthcare providers.**
- **Elite Care filed a civil complaint, which was allowed by trial court and Superior Court on the basis that claim was based in common law, not the Workers' Compensation Act.**

Herold v. Univ. of Pittsburgh of Commonwealth System of Higher Education, 291 A.3d 489(Pa.Cmwth. 2023), petition for allowance of appeal granted, 305 A.3d 957 (2023)

- **A civil action based on an occupational disease manifesting itself more than four years after the employee's last exposure to the hazard in the workplace is not barred by the exclusive remedy provisions of the Act.**

Herold v. Univ. of Pittsburgh of Commonwealth System of Higher Education, 291 A.3d 489(Pa.Cmwlth. 2023), petition for allowance of appeal granted, 305 A.3d 957 (2023)

The Supreme Court has framed the questions as:

(A) Whether Commonwealth Court's decision conflicts with other appellate court decisions:

(1) In failing to overrule the trial court's determination it, rather than the workers' compensation authorities, has subject matter jurisdiction over Mr. Herold's asbestos-related occupational disease claim against his employer under the ODA, and

(2) fails to uphold the express language of the Pennsylvania Occupational [*959] Disease Act, including its exclusive remedy provision; and

(B) presents questions of substantial public importance that require prompt and definitive resolution by the Supreme Court of Pennsylvania.

McHenry v. Goodyear Tire & Rubber Co., 305 A.3d 257 (Pa.Cmwth.2023)

- **Claim in Common Pleas Court permitted to proceed against employer for asbestos exposure.**
- **Court denies dismissal motion based on subject matter jurisdiction.**
- **Where employee does not meet the legal definition of disability under the Occupational Disease Act, no other recourse for his asbestosis exists.**

ADDITIONAL CASE LAW OF INTEREST

**City of Philadelphia v. Healy (WCAB),
297 A.3d 872 (Pa.CmwltH.2023)**

- **Firefighter cancer claim**
- **Benefits properly awarded even though carcinogen at issue was not added to Group 1 until after the effective date of Act 46.**
- **General Assembly did not improperly delegate its legislative authority to IARC.**

**Gonzalez v. Guizzetti Farms,
Inc.(WCAB), 297 A.3d 854 (Pa.
Cmlwth.2023)**

- **Impairment Rating Evaluation**
- **Mandatory language of Act 111 requires that employer be given credit for weeks paid under a prior (pre-*Protz*, pre-Act 111)IRE**

**Dunetz v. C.H. Sacks D.M.D.,
P.C.(WCAB), 304 A.3d 134 (Pa.
Cmwlth.2023)**

- **Impairment Rating Evaluation**
- **Reinstatement as of date of petition to reinstate proper; reinstatement not required as of date of prior modification by IRE**
- **Act 111 is applicable to injuries prior to its effective date; credit for weeks of benefits paid under a prior IRE is appropriate.**

Conrad v. Dept. of Transportation
(WCAB), No. 557 C.D. 2022,
_____ A.3d _____ (Pa. Cmwlth. 2/26/24)

- **Impairment Rating Evaluation**
- **Act 111 does not violate Pennsylvania Constitution section III, section 32's proscription against special or local laws.**

**Clark v. Keystone Lawn Spray
(WCAB), 302 A.3d 820 (Pa.Cmwth.
2023)**

- **Res judicata/collateral estoppel**
- ***Res judicata/collateral estoppel* proper where later filed petition (almost 40 years later) alleged same date of injury and same date of disability although different theory of recovery stemming from the initial injury.**

Boulin v. Brandywine Senior Care, Inc. (WCAB), 307 A.3d 845 (Pa. Cmwlth. 2024)

- **Res judicata/collateral estoppel**
- **Prior WCJ decisions on review and termination petitions were *res judicata* on subsequent *pro se* petitions arguing for the addition of other diagnoses and continued wage loss.**

Dennis v. Inglis House(WCAB), 303 A.3d 559 (Pa.Cmwth. 2023)

- **Appeal Procedure**
- **Employee did not raise WCJ's failure to award wage loss benefits on initial appeal**
- **After remand and appeal, Court holds that raising wage loss on second appeal was untimely.**
- **Issue waived because not raised at earliest opportunity.**

Wheatley v. Pyramid Hotel Group(WCAB), 309 A.3d 173 (Pa. Cmwlth. 2024)

- **Appeal Procedure**
- **WCAB affirmed in part, reversed in part and remanded to the WCJ; this decision was interlocutory.**
- **Once the decision on remand was issued, the employee had to request WCAB to finalize its prior Order within 20 days in order to file appeal to Commonwealth Court.**
- **Appeal to Commonwealth Court from initial WCAB decision was untimely.**