COUNTERPOINT

AN OFFICIAL PUBLICATION OF THE PENNSYLVANIA DEFENSE INSTITUTE

An Association of Defense Lawyers and Insurance Executives, Managers and Supervisors APRIL 2018

TINCHER '2' PROVIDES CLARITY FOR YOU

By Jim Beck Esquire, Reed Smith; Scott Toomey Esquire, Littleton Park Joyce Ughetta & Kelly and Bill Ricci Esquire, Ricci, Tyrrell, Johnson & Grey

THE CONTEXT OF THE *TINCHER II* DECISION

On February 16, 2018, a unanimous 3-judge panel of the Pennsylvania Superior Court in *Tincher v. Omega Flex, Inc.,* ___ A.3d ___, No. 1285 EDA 2016 (Pa. Super. Feb. 16, 2018) (*"Tincher II*") held, following the Pennsylvania Supreme Court's prior landmark ruling in the same case, *Tincher v. Omega Flex, Inc*., 104 A.3d 328 (Pa. 2014) ("*Tincher I*")*,* that in a strict product liability case it is "fundamental error" to use an *"Azzarello"* jury charge employing the now-overruled "any element" defect test and informing the jury that the defendant manufacturer was the "guarantor" of product safety.

As we all know too well, in *Azzarello v. Black Bros. Co*., 391 A.2d 1020 (Pa. 1978), the Pennsylvania Supreme Court held that: (1) it was improper to introduce negligence concepts into a strict liability case; (2) it was for the Court, not the jury, to determine whether a product was "unreasonably dangerous" under the Second Restatement – thereby ushering in the anomalous era of the trial judge as social policy "engineer"; (3) the seller is "the guarantor" of the product's safety; and (4) a jury may find a defect "where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for its intended use." *Azzarello*, 391 A.2d at 1025-27. *Azzarello* eliminated the core "unreasonably dangerous" element of §402A from the jury's consideration because "that language rings of negligence," 391 A.2d at 1025.

For thirty-six years following *Azzarello*, the devolution of coherent products liability jurisprudence continued. *Azzarello* was interpreted to prohibit *any* use of negligence-based language or theories in a product liability trial in Pennsylvania. *See, e.g., Lewis v. Coffing Hoist Div. Duff-Norton Co.,* 528 A.2d 590, 593 (Pa. 1987) ("besides holding that a product is defective when it leaves the supplier's control lacking any

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The Whole Is NOT Greater Than Its Parts – Third Circuit Applies Component-Level Analysis To Preemption Of Hybrid Medical Devices

By Robert J. Aldrich, III of Marshall Dennehey Warner Coleman & Goggin

The Medical Device Amendments of 1976 call for federal oversight of medical devices, which varies with the type of device at issue. The most stringent oversight is reserved for a Class III medical device, which is one used in sustaining human life, one of substantial importance in preventing impairment of human health, or one that presents a potential unreasonable risk of illness or injury. As a result, Class III devices undergo a rigorous pre-market approval process before the Food and Drug Administration (FDA) will allow them to be sold and used. Unlike the rigorous Class III process, Class I and Class II devices are subject to a limited review. In exchange for compliance with the strictest mandates, Congress afforded Class III device manufacturers express preemption from state laws imposing requirements that are different from, or in addition to, the federal requirements established via the pre-market approval process. Based on Congress' express preemption, courts throughout our nation have preempted all types of state-law claims, including manufacturing defect, design defect, failure to warn, breach of express and implied warranty, and fraud. For a thorough breakdown, see *Riegel v. Medtronic*, 552 U.S. 312 (2008).

For many years, the preemption defense has served as a Goliath in the courtroom. Class III device manufacturers may wield the preemption defense as a mighty sword during the pleadings stage to obtain an early victory and avoid the high costs of discovery and trial. In

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element necessary to make it safe for its intended use, we also concluded [in *Azzarello],* if not expressly then certainly by clear implication, that negligence concepts have no place in a case based on strict liability").

The Pennsylvania Supreme Court's 2014 decision in *Tincher 1* expressly overruled *Azzarello*, 104 A.3d at 335, and revived Pennsylvania as a Restatement of Torts (Second), §402A jurisdiction.

Tincher I emphasized that the "defects" and "unreasonably dangerous" aspects of products liability cannot and should never have been "*divorced*" from each other. 104 A.3d at 380. "The notion of 'defective condition unreasonably dangerous' is the normative principle of the strict liability cause of action." *Id.* at 400. Thus, *Tincher I* returned a threshold "unreasonably dangerous" product defect determination to the jury. *Id.* at 406-08.

The procedural history that led to the *Tincher II* decision is illuminating. In a nutshell, Omega Flex appealed from the judgment entered in favor of the Tinchers following a jury trial, and the denial of its post-trial motions. Prior to the original trial, Omega Flex filed a motion to have the Trial Court give jury instructions based on Sections 1 and 2 of the Third Restatement of Torts: Products Liability (1998), rather than on the *Azzarello*-based "Lite" version of the Restatement (Second) of Torts. With *Azzarello* still the law, hat request was denied. The jury then found in the Tinchers' favor, and the appellate path ultimately led to the Pennsylvania Supreme Court and the consequent 2014 "*Tincher* paradigm."

In this most recent appeal, following the Pennsylvania Supreme Court's 2014 remand order, Omega Flex claimed it was entitled to a new trial because *Tincher I* held that the trial court's jury instruction contained a fundamental misstatement of the governing law. Plaintiffs countered that the voluminous evidence adduced at trial would have led a jury to the same conclusion of defect, regardless of the Court's charge on the law. The trial court bought it, hook, line and sinker.

Unlike the trial court, the Superior Court did not agree with the plaintiffs, and instead vacated the judgment, reversed the order of the Trial Court denying post-trial relief, and remanded the case for a new trial. "[T]he trial court had no authority to deny a new trial on the basis of its own speculation about what the jury would do under the Supreme Court's new formulation of the law." *Slip op.* at 27.

According to the unanimous *Tincher II* panel, "there is no question" that the *Azzarello* charge given during the trial was "incorrect:"

The charge [that was given] contained all of the product liability law under *Azzarello* that the Supreme Court has now disapproved, including a definition equating a defective product with one that "leaves the suppliers' control lacking any element necessary to make it safe for its intended use," and a declaration that a manufacturer "is really a guarantor of [a product's] safety . . . "

Id. at 18. "There is no question that the error was fundamental to the case. It dealt with the principal issue disputed by the parties – whether there was a defect." *Id.* at 25. Indeed, the decision below was the "paradigm" of reversible error:

An *Azzarello* "any element / guarantor" charge "fail[s] to conform to the applicable law, as stated in *Tincher,"* *Id.* at 20. "The trial court gave a charge under law that the Supreme Court has explicitly overruled in this very case. Such a charge would appear to be a paradigm example of fundamental error."

***Id.* at 23 (**emphasis added**).**

In addition, the Pennsylvania Superior Court's *Tincher II* opinion states:

- "If an incorrect definition of 'defect' under *Azzarello* calls for a new trial, an incorrect definition of 'defect' under *Tincher* should call for the same result." *Tincher II*, *slip op*. at 22-23.
- "The trial court's declaration that the new legal reformulation resulting from the Supreme Court's thorough and extensive decision . . . can cause no change to the verdict undervalues the importance of the Supreme Court's decision." *Id.* at 27 (emphasis added).
- "The Supreme Court said nothing in *Tincher I* to suggest that mere proof of a 'defect' under post-*Azzarello* strict liability law would be sufficient to prove an "unreasonably dangerous defective condition" under *Tincher I's* new formulation." *Id.* at 28.
- "The Supreme Court's statement that the 'question of whether a party has met its burden of proof' may properly be removed from a jury's consideration" . . . was referring only to a trial court's ability to decide 'a dispositive motion.'" *Id.* at 29.
- That the jury may have heard evidence about risk and utility during the trial does not mean that it rendered a verdict based on the risk/utility standard adopted

by the Supreme Court as one way to find a product defective. ***In fact, the verdict could not mean that, because the jury was never instructed to make findings under such a standard. Rather than being asked to balance risks and utilities, the jury was told only to find whether [product] "lacked any element necessary to make it safe" – regardless of whatever reasonable risk/utility considerations might have gone into the decision to market [product] without such an element.**" Id*. at.26 (emphasis added).

The Pennsylvania Superior Court's *Tincher II* opinion concludes with the following critical statement:

In effect, the trial court seemed to conclude that because it believes there is sufficient evidence in the record to support a verdict for plaintiffs under the new *Tincher* standards, a new trial is not required. But, as the Supreme Court specifically instructed in *Tincher* itself, that is not a proper basis for decision. The Tinchers asked the Supreme Court to forgo resolving the issues presented to it because, they said, there was so much evidence supporting liability that any change in the law would not change the outcome. The Supreme Court rejected that suggestion, explaining that a verdict has meaning only considering the charge under which it was delivered: *"a trial court's charge defines the legal universe in which a jury operates for purposes of the verdict." Tincher, 104 A.3d at 347 . . . The bare litmus of sufficiency review cannot correct the fundamental error in the instructions to lay jurors concerning just what it is they are deciding. Id. The trial charge based on law overruled in this case was fundamental error. Omega Flex therefore is entitled to a new trial.*

Id. at 29-30 (emphasis added).

In sum, in a precedential opinion, *Tincher II* has unequivocally resolved the following:

- *Tincher I* overruled *Azzarello,* and after thirty-six years returned Pennsylvania to a Restatement of Torts (Second), §402A jurisdiction;
- if properly preserved, *Tincher I* is retroactively applied to cases previously filed and tried;
- in a post-*Tincher* product liability trial, it is fundamental and reversible error for a trial court to give an Azzarello "any element / guarantor" jury charge, and doing so in and of itself requires a new trial; and
- proof of "defect" under Restatement of Torts (Second), §402A requires that the product be "unreasonably dangerous" and the jury must be instructed accordingly.

THE RAMIFICATIONS OF *TINCHER II* FOR THE "DEBATE" REGARDING SUGGESTED JURY INSTRUCTIONS

In June 2016 - for reasons known only to the drafters, since nobody else was consulted - the Pennsylvania Bar Institute published a series of new, post-*Tincher I* Suggested Standard Jury Instructions that retained most of the *Azzarello* language. For that and other important reasons, the Pennsylvania Defense Institute (using a panel of some of the most experienced and knowledgeable product liability practitioners in the state) prepared and published *alternative* Suggested Jury Instructions for use in Product Liability cases in September 2017 that faithfully follow *Tincher I*. Of critical importance, The PDI *Tincher I*-based alternative Suggested Jury Instructions were expressly approved by the Philadelphia Association of Defense Counsel and were recently given to a jury by a Philadelphia trial judge.

Tincher II settled any debate over which competing set of suggested instructions was correct. The PBI Suggested Standard Jury Instructions are now expressly disapproved in *Tincher II,* on the critical definition of "defect*." Tincher II* is controlling precedent that the PDI / PADC view is correct, and that using the PBI definition of defect is "fundamental" – and thus reversible – error.

THE RAMIFICATIONS OF TINCHER II FOR THE "FRUITS OF THE POISONOUS *AZZARELLO* TREE"

By reiterating the prescripts of the *Tincher I* construct ***in the same case**, Tincher II* paves the way, legally and logically, for allowing jurors in a Pennsylvania products liability trial to hear and evaluate evidence that had for three decades been excluded from their consideration by Pennsylvania Supreme Court decisions expressly grounded in the now-repudiated *Azzarello* quarantine of anything that hinted at "negligence." *See, e.g., Lewis v. Coffing Hoist Div., Duff-Norton Co*., 528 A.2d 590, 593 (Pa. 1987).

There can thus be no ***doctrinal*** justification for per-se exclusion of *any* of the following categories of evidence, assuming relevance to the issues in a particular case:

- a product's compliance with government standards and regulations;
- a product's compliance with industry standards and regulations;
- a product's compliance with design and performance standard independent professional organizations;
- industry customs and practice;
- state-of-the-art at the time the product was sold;
- causative conduct on the part of the plaintiff and others; and
- the plaintiff's contributory negligence.

This type of evidence obviously informs the jury's evaluation of the design choices made by the manufacturer and the consequent integrity of the product.

CLARITY!

All products liability practitioners in the Commonwealth of Pennsylvania owe a debt of gratitude to the Pennsylvania Superior Court for shining the light of clarity on the ***Tincher I*** construct. The message – going forward, let the jurors decide.

The Whole Is NOT Greater

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recent years, however, new liability theories are raised in order to circumvent express preemption. One example, which I have written on previously, is a claim of negligent advice of the device sales representative.

Another attempt to circumvent preemption was raised recently in *Shuker v. Smith & Nephew, PLC*, 2018 U.S. App. LEXIS 5160, 2018 WL 1096185 (3d Cir. Mar. 1, 2018). In *Shuker*, the United States Court of Appeals for the Third Circuit was faced with the question of how to apply express preemption to a "hybrid" medical device, *i.e.*, one that is comprised of both Class II and Class III components. The plaintiff channeled his inner Aristotle and argued that "the whole is greater than the sum of its parts" – in other words, that express preemption should be analyzed at the level of the entire system and, if the entire hybrid is not Class III, than there is no preemption. The Third Circuit, instead, found in favor of a component-level analysis.

The relevant facts are as follows. The plaintiff underwent a total hip replacement in 2009. The hip-replacement system contained multiple components, all manufactured by the defendant. One component replaced the top of the plaintiff's thighbone while another rested on his hip socket. These components were Class II devices. The final component, the R3 metal liner, was a Class III device. The R3 metal liner connected the Class II devices and sat atop the Class II hip-socket component.

The plaintiff began developing increasing pain and discomfort about 2 years after his hip replacement. His surgeon performed an aspiration procedure that revealed metallic debris within his body, thereby indicating that his pain was caused by degeneration of the device and his sensitivity to metal. Subsequently, the plaintiff underwent a few surgeries to replace the R3 metal liner and the hip-replacement system. The plaintiff later filed a complaint, and the defendant manufacturer ultimately filed a motion for summary judgment to dismiss the plaintiff's negligence, strict liability, and breach-of-implied-warranty claims based on express preemption.

In determining whether the plaintiff's claims were preempted, the Third Circuit began by explaining that SCOTUS, in *Riegel*, prescribed a two-step framework: (1) "'whether the Federal Government has established requirements applicable' to the specific 'device' at issue"; and (2) "'whether the [plaintiffs'] claims are based upon [state] requirements with respect to the device that are 'different from, or in addition to,' the federal ones, and that relate to safety and effectiveness.'" The Third Circuit pointed out that, traditionally, the first step of *Riegel*'s two-step framework was relatively straightforward because there was no dispute over the "device" to which it applied. However, in this case, the question was posed for the first time: "Do we analyze express preemption at the level of the system or the component?" This issue was one of first impression not only for the Third Circuit but also for all other Courts of Appeals throughout our nation.

The Third Circuit found in favor of scrutinizing hybrid systems at the component-level for 3 specific reasons. First, federal statutes governing medical devices define the term "device" broadly and encompass not only instruments, machines, and implants, but also include any component, part or accessory. Second, the Federal Food, Drug, and Cosmetic Act supports a component-level analysis, as its provision for off-label use contemplates that devices might be broken down into parts and used separately by third parties. Third, the FDA stated in their amicus brief, which the court requested they file, that the preemption analysis must be evaluated at the component level.

The Third Circuit held that the plaintiff's claims were preempted, finding that the heart of the claims challenged the safety and effectiveness of the R3 metal liner and were intended to impose non-parallel state law requirements on this Class III component. The takeaway is that federal preemption applies when a "hybrid" device contains at least one Class III component and the heart of a plaintiff's state-law claim is focused on that component. It is therefore important to dissect the claims against a hybrid device at the outset and raise express preemption as a defense at the earliest opportunity.

"Code Blue" for Kachinski and Its Progeny

By Thomas R. Bond, Esquire and Andrea P. Nicholson, Esquire***

Prefatory Remarks by Tom Bond:

By the time I withdrew from my longtime, Philadelphia-based regional defense firm in 2011, I had spent approximately 38 years as a defense workers' compensation practitioner. Just as was the case in my law school years, I approached each new workers' compensation opinion as if it were a story of sorts. I would write an abbreviated summary for the interesting and significant cases I came across on a small index card and, without fail, place it in a neatly categorized file box... I admit, I was and remain somewhat of a nerd! However, these cards proved to be invaluable in preparation of speeches, proposed findings and briefs.

Well, anyway, when I retired thinking I would never, ever return to the practice of law, I threw away all of my precious case summaries. By that time, I had accumulated at least six boxes of cards. As those of us who concentrate our practices in this field of the law know, the appellate courts hand down a considerable number of reported decisions each year.

One category in my file box was that of "Work Availability." As you can well imagine, I had a **bunch** of index cards for this category. Alas, I no longer have them, but I remember distinctly that my summations reflected a body of law

fraught with considerable uncertainty, and dangerous "pitfalls," especially for defense practitioners. The judiciary fashioned a significant number of requirements that had to be met before claimant work availability could be established. It should be noted that no statutory provisions existed in the Act from which the courts could build.

Having trashed my index cards, I cannot go into great detail concerning these old cases. Heartbreaking isn't it! So, I am just going to take the liberty of a short-cut and remind you that under the judicial thinking of the frequently cited case of *Kachinski* v. *Workmen's Compensation Appeal Board (Vepco Const. Co.)*, 532 A.2d 374 (Pa. 1987) claimants were duty-bound to demonstrate good faith in following through on appropriate job referrals, and, if the referral failed to result in a job for the claimant, his or her benefits would continue.

The New Standard: Establishment of "Earning Power" under Section 306 of the Act:

This all changed in In 1996 when Act 57 amended Section 306 of the Act to provide that partial disability compensation benefits be based on the difference between the claimant's pre- injury wage and her or his "earning power." Earning power was defined as the work the employee is capable of performing **based upon expert opinion evidence including job listings with agencies of the department, private job placement agencies, and advertisements in the usual employment area**. This Section also provided that partial disability "shall apply" if the claimant "is able to perform his previous work or can, considering [her or his] **residual productive skill, education, age and work experience**, engage in any other kind of substantial gainful employment which **exists** in the usual employment area where the claimant lives in Pennsylvania." (Emphasis provided by author).

Pennsylvania Supreme Court interpretation of these new statuary changes first occurred in 2013 in the case of *Phoenixville Hospital* v. *Workers' Compensation Appeal Board (Shoap)*, 81 A.3d 830 (Pa. 2013). The issue before the Court was whether a modification of benefits, and a change in disability status from total to partial, could be based on a showing of existing suitable jobs for a claimant despite the fact that her application for the specific jobs openings did not result in any offers of employment.

The Court held that the Employer had successfully established the existence of suitable work for the Claimant through the testimony of a certified rehabilitation counselor. The Court stressed that expert opinion evidence under Section 306 (b) functions not only as a means of demonstrating that there are open jobs that exist within claimant's limitations, but also as a mechanism for providing the claimant with notice of the existence of these jobs, which thus provides Claimant with a serious opportunity to secure employment.

The Court remanded the case to the WCJ in order to provide the Claimant with the opportunity present evidence regarding her actual experience in applying for the work identified in the Employer's labor market survey. This evidence would then be considered by the WCJ in determining whether the labor market survey was relied upon unsubstantiated, erroneous, conflicting, false, or misleading information. Additionally, the court stated the Claimant should have the opportunity to show that the employers rejected her job application because the work was incompatible with Claimant's residual productive skills, education, age, or work experience.

Two reported en banc decisions recently reported by the Commonwealth Court of Pennsylvania have revisited and expanded upon the *Phoenixville Hospital* standards for proving earning capacity via a labor market survey and earning power assessment.

In *Laurie Valenta v. Workers' Compensation Appeal Board (Abington Manor Nursing Home and Rehab and Liberty Insurance Company),* No. 1302 C. D. 2016, Filed: December 7, 2017; Opinion by Judge McCullough, the Claimant sustained compensable orthopedic injuries encompassing a number of upper bodily areas on October 2, 2002.The Employer commenced paying her temporary total disability benefits under Section 306(a) of the Act.

In 2014, the Employer commissioned a labor market survey and earning power assessment (LMS/EPA) resulting in the identifications of six jobs available to Claimant with weekly pay ranging from $320-$420.

The Employer proceeded to file a modification petition seeking to reduce Claimant's wage loss benefits.

The Employer presented the medical testimony of Eugene Chiavacci, M.D., a Board-certified orthopedic surgeon. This physician, having examined Claimant on two occasions, delineated the physical restrictions he would place on the Claimant.

The Employer also submitted the testimony of Robert Smith, author of the labor market survey and earning power assessment (LMS/EPA) report. He stated that he was a rehabilitation specialist. He noted that Claimant was a high school graduate, and had taken some coursework at the community college level. He further stated that the Claimant also had training to become a licensed practical nurse (LPN), and, once qualified as an LPN, worked as a charge nurse and a private duty LPN. Smith opined that, with the Claimant's educational and vocational background, she was capable of working a semi-skilled to skilled job. He then identified six specific positions he believed were appropriate for Claimant. Smith concluded that the Claimant's weekly earning power was in the range of $320-$420.All six positions, most of which fell within the vocational category of customer service, were approved by Dr. Chiavacci, who stated that the Claimant was physically capable of performing them.

The Claimant testified that the level of pain caused by her compensable injuries was severe, requiring her to take such medications as OxyContin, Oxycodone, Flexeril, Lyrica, and Cymbalta. She also testified that she had received injections to her arm, neck, and back for pain relief. The Claimant additionally stated that her pain medications made her drowsy and she would feel the need to fall to sleep. The Claimant also testified

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that she applied to all six positions, but had not been offered any of them.

The Claimant presented the testimony of her treating physician, Dean Mozeleski, M.D. His diagnosis was "chronic neck and left shoulder pain, chronic cervical radiculitis, and chronic neck and upper thoracic scapular pain." In reviewing the six positions that had been located for the Claimant, he concluded that they were not suitable for her because they required repetitive movements even when sitting, which the Claimant could not perform.

The Claimant also presented the testimony of Carmine Abraham, a certified vocational expert qualified under the Act. She testified that she was able to personally meet with employees of four of the five companies identified as having positions available to Claimant. Abraham testified that, because of the Claimant's limited computer skills and inability to stand for prolonged periods of time, these positions were not suitable. The WCJ found it significant that Claimant "candidly admitted" to applying to a total of sixteen positions that she found on her own via newspaper ads, including a 12-hour shift position at True Horse, a cleaning position at Sovereign Bank , a nursing position at Comfort Keepers, and a position as a crossing guard.

The WCJ found Dr. Chiavacci and Mr. Smith to be more credible than the opposing expert witnesses. Accordingly, the WCJ found that the Claimant had a weekly earning capacity of $320, which resulted in a wage loss of $886.71, thereby entitling her to partial disability benefits of $591.14 per week.

The Court opined that this was a case of first impression regarding the rights of claimants and employers under Section 306 (b) of the Act subsequent to the Supreme Court's decision in *Phoenixville Hospital, supra.The* Claimant advanced the argument that the fact she was not able to secure any of the positions supported the conclusion that Employer had not established a restoration of her earning capacity and the modification petition should have been denied.

The Employer countered that Claimant's testimony of unsuccessful applications to the positions is relevant, but not dispositive; that is, the WCJ shall admit evidence of Claimant's unsuccessful efforts, *but he or she is not automatically compelled to reject the earning capacity conclusion set forth in the LMS/EPA (Emphasis supplied).* The Claimant maintained that the LMS/EPA was based on incorrect information in that the jobs listed were not open and available to her when she applied because she was either turned down, told the position was unavailable, or unable to reach the contact person.

The Court, in upholding the decision of the WCJ to modify the Claimant's benefits, stated that, while evidence of the unavailability of these positions was "relevant," it was not "dispositive" with regard to the question of the earning power of the Claimant. The Court upheld the finding of the WCJ that Claimant had failed to show that the jobs were not vocationally suitable, or not open and available.

Let us now turn our attention to *Dennis Smith v. Workers' Compensation Appeal Board (Supervalu Holdings PA, LLC)*, No. 796 C.D. 2016; Filed: January 5, 2018; Opinion by Judge Simpson. The Claimant sustained compensable work injuries to his head and neck in of February 2011.Pursuant to a notice of compensation payable (NCP), the Claimant began receiving temporary total disability benefits at the rate of $661.67 per week based upon an average weekly wage (AWW) of $992.50.In November 2013, the Employer, based upon supportive medical and vocational evidence, filed a modification petition seeking to modify the Claimant's benefits as of April 28, 2013.

The Employer presented the testimony of Nikki Davies (Davies) who opined that, based upon her analysis of Claimant's transferable skills and her interview with the Claimant, she was able to identify five open and available positions within Claimant's vocational and medical restrictions, and which were located within the Claimant's geographic area. Davies further testified that the physical requirements of the positions she located were within the physical restrictions placed on the Claimant by Jeffrey A. Baum, M.D., the physician who testified on behalf of Employer. The Claimant testified that he applied for these various positions, as well as numerous other positions totaling 16 in number on his own, however none of the potential employers offered him employment.

The WCJ accepted Vocational Counselor's testimony as credible and persuasive. The WCJ noted that, while Claimant was not hired by any of the potential employers, there was nothing in the evidentiary record to indicate that the these positions were already filled and did not exist at the time he applied for them. Consequently, based upon Davies' testimony that the five positions supported a reduced AWW of $456, the WCJ held that the Claimant was partially disabled under the Act and reduced his weekly disability rate to $394.63.

The Claimant argued that the Employer had not met the burden of demonstrating that the alleged open positions were still open and available to him within the time period where he would have had a reasonable opportunity to apply for the positions after being notified of their existence. There was evidence of the Claimant for certain positions simply mailing an application, or making an online application to the prospective employer. The Court held that such evidence, by itself, was ambiguous and suggestive of different inferences so as to amount to speculation.

Nevertheless, the claimant was interviewed for two security positions, which the Court considered to constitute sufficient evidence of the existence of open and available jobs within Claimant's vocational, physical and medical restrictions. In determining the appropriate partial disability compensation rate, the Court averaged the AWW for these positions.

Conclusion:

Valenta and *Smith* represent a sharp

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departure from the tenets of *Kachinsky* .It seems like it is a new ballgame when, in the absence of a voluntary return to suitable work on the part of the claimant, the employer can establish entitlement to a partial disability finding based on a labor market survey and timely alerts to the claimant of the work found to exist for him by a prompt service of the labor market report. While a WCJ must consider the efforts and results of Claimant's follow-up to job referrals made by the employer's vocational expert, the evidence presented is not dispositive of the case outcome.

It is not known by this author whether either or both of these cases will be appealed. It is of note the both of the claimants in these cases not only pursued the positions represented to exist for them, but also, on their own, sought out additional positions. It will be very interesting to see what the impact of these good-faith efforts will prove to be should either or both of these cases end up before the Pennsylvania Supreme Court. It is a basic premise that the Workers' Compensation Act is remedial in nature and intended to benefit the worker and, therefore, must be liberally construed to effectuate its humanitarian objectives. On the other hand, it is to be borne in mind that, without question, Act 57 provisions were intended to be of significant benefit to the business community and its expressed need for cost-containment.

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Defending Snow and Ice Claims in Pennsylvania and New Jersey

It is generally well known that in the winter months snow and ice (#SNICE) are commonplace. Yet, despite the commonness of snow and ice in this area, people still get injured as a result. Why? It's pretty simple actually. Snow and ice are slippery. A little bit of snow, ice, black ice or freezing rain can turn the roughest paved surface into a skating rink. Alas, all is not lost. An accident involving snow or ice does not mean that plaintiffs are guaranteed recoveries. This article will outline various defenses available and some precautions and practice points that property owners can utilize to protect themselves, particularly through risk transfer, against the claims and lawsuits that are a near certainty.

Defenses in New Jersey

In any negligence action, the plaintiff must prove a duty of care. With regard to snow and ice removal in New Jersey, the duty first turns on whether the premises is a commercial or residential property. New Jersey courts have long held that residential owners owe no duty to clear snow and ice from public sidewalks abutting their land. *Luchejko v. City of Hoboken*, 23 A.3d 912, 918 (N.J. 2011) (citing *Davis v. Pecorino*, 350 A.2d 51, 53 (N.J. 1975)). Commercial owners, however, are "[l]iable for injuries on the sidewalks abutting their property that are caused by their negligent failure to maintain the sidewalks in a reasonably good condition." *Luchejko*, 23 A.3d at 918 (citing *Stewart v. 104 Wallace Street, Inc.*, 432 A.2d 881, 883 (N.J. 1981)).

In *Jimenez v. Maisch*, 748 A.2d 121 (N.J.Super. App. Div. 2000), the court held that a residential property owner owed no duty to the plaintiff, a postal worker delivering mail, when the plaintiff slipped and fell on ice on the defendant's property. The court considered several factors to be determinative that no duty existed: (1) nearly 30 inches of snow had fallen in the days before the plaintiff's accident; (2) the state of New Jersey had declared a state of emergency; and (3) at least half of the defendant's neighborhood still had some snow on the residential sidewalks and driveways. The court considered the risk "obvious" and that it was contrary to a basic sense of fairness to impose a duty on the land owner in such a situation.

Since 2002, *Jimenez* has also been applied in the commercial setting. Most recently, in *Holmes v. INCAA-Carroll St. Houses Corp.*, 2015 N.J. Super. Unpub. LEXIS 1280 (N.J.Super. App. Div. June 2, 2015), the court held that the defendants were not required to remove snow in the midst of an ongoing snowstorm. The plaintiff fell on a snow accumulation outside of her apartment, which was managed by the defendants. The court held that, because there was a massive snowstorm the day before, a winter storm watch was still in effect and the public roads were still not clear in the area surrounding the defendant's property, it would have been unfair in light of the circumstances and public policy to impose a duty on the landlord.

In 2010, in *Richards v. Quality Auto. of Bloomingdale, Inc.*, 2012 N.J. Super. Unpub. LEXIS 1484 (N.J.Super. App. Div. June 25, 2012), the plaintiff fell on a sidewalk abutting the defendant's commercial property. The court distinguished *Jimenez* as the size of the storm in comparison was vastly smaller.

Jimenez's principles were also applied in *DeLucca v. Givaudan Roure Corp.*, 2010 N.J. Super. Unpub. LEXIS 1711 (N.J.Super. App. Div. July 23, 2010). In that case, the plaintiff, a truck driver, originally pulled his truck into the loading dock area at the defendant's property at 4:00 a.m. without incident. When he returned to the dock at 2:30 p.m., he slipped and fell on ice on the dock. Citing *Jimenez*, the court held that, while the owner of the property had a non-delegable duty to provide safe conditions for those individuals entering the site and utilizing its property, because it was not their contractual duty to remove snow at the time of the incident, no liability could be found.

In all, the duty analysis in New Jersey snow and ice removal cases requires a balancing of factors. The duty analysis is "highly fact specific" and, thus, a determination that should be made by the court. *Jimenez v. Maisch*, 748 A.2d at 124 (citing *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1116 (N.J. 1993)).

Defenses in Pennsylvania

In Pennsylvania, although possessors of land are typically responsible for keeping their property free from dangerous conditions, the law does not impose a duty on possessors to protect against "general slippery conditions" that occur during winter. *Rinaldi v. Levine*, 176 A.2d 623 (Pa. 1962). Rather, the Hills and Ridges Doctrine is frequently applied and often bars a plaintiff's claim of injury resulting from slipping and falling on snow or ice. Under the Hills and Ridges Doctrine, a plaintiff must establish that: (1) the snow and ice accumulated on the sidewalk in ridges or elevations that unreasonably obstruct travel and constitute a danger to pedestrians; (2) the property owner had actual or constructive notice of the condition; and (3) the dangerous accumulation of snow and ice caused the plaintiff's fall. *Rinaldi v. Levine*, 176 A.2d at 625.

The rationale behind the Hills and Ridges Doctrine is founded upon the realistic understanding that snowy, icy conditions are common during the winter season. Thus, "[t]o require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climactic conditions in this hemisphere." *Gilligan v. Villanova University*, 583 A.2d 1005, 1007 (Pa. Super. 1991). Under the doctrine, possessors are only obligated to act within a reasonable time to remove the snow and ice. *Morin v. Traveler's Rest Motel, Inc.*, 704 A.2d 1085 (Pa.Super. 1997).

Pennsylvania case law has established several conditions precedent before the Hills and Ridges Doctrine can be invoked. For example, the doctrine only applies when "general slippery conditions [prevail] in the community." *Tonik v. Apex Garages, Inc.*, 275 A.2d 296, 298 (Pa. 1971). *See* also *Morin v. Traveler's Rest. Motel, Inc.*, 704 A.2d 1085, 1087 (Pa.Super. 1997) (citing *Harmotta v. Bender*, 601 A.2d 837 (Pa. Super. 1987)). When a plaintiff claims to have slipped on a "localized patch of ice," or on a condition created by a defendant's negligence—such as a defective water pipe, hydrant or spigot—Pennsylvania's courts have declined to apply the doctrine to shield possessors of land from liability. *Harmotta v. Bender*, 601 A.2d at 841-842.

Further, the doctrine only applies to private and public outdoor premises, such as parking lots and walkways. In *Heasley v. Carter Lumber*, 843 A.2d 1274 (Pa.Super. 2004), for example, the Superior Court considered whether the doctrine should be extended to include circumstances where a plaintiff slips and falls in a structure partially open to the elements. The Superior Court declined to extend the scope of the doctrine, ruling that it would be "unnecessary and unwarranted."

The Hills and Ridges Doctrine is not applied where the accumulation is not natural, such as when snow is plowed or deposited into a pile that obstructs a walkway. For instance, in *Basick v. Barnes*, 341 A.2d 157 (Pa.Super. 1975), the Superior Court declined to apply the Hills and Ridges Doctrine when a woman was forced to walk in the street due to a snow bank blocking the sidewalk and berm of the road. Decades later, the Superior Court again declined to apply the Doctrine when improper snow removal or salting procedures created unnatural accumulations of ice. *Harvey v. Rouse Chamberlin, Ltd.*, 901 A.2d 523 (Pa.Super. 2006); *Liggett v. Pennsylvania's N. Lights Shoppers City, Inc.*, 75 Pa. D. & C. 4th 322, 327-28 (C.P. Beaver 2005).

Despite its limitations, courts still widely employ the Hills and Ridges Doctrine. For example, in *Alexander v. City of Meadville*, 61 A.3d 218, 225 (Pa.Super. 2012), the Superior Court affirmed the trial court's decision to grant summary judgment in favor of the business owner where a plaintiff alleged that he slipped and fell on an icy ramp. The plaintiff had alleged that, while he was walking home at 1:20 a.m. on a weekend, he slipped and fell on a smooth patch of ice covered by 1" to 2" of snow in a dip in a ramp. The Superior Court held that the property owner did not owe a duty of care to the plaintiff since he did not prove that the property owner had actual or constructive notice of the conditions because no employees worked outside of business hours. Moreover, the plaintiff's testimony that he fell on a smooth patch of ice was insufficient to establish that the snow and ice were unnavigable lumps and mounds.

In *O'Donnell v. CoGo's Co.*, 116 A.3d 678 (Pa.Super. 2014), the Superior Court utilized the Hills and Ridges Doctrine to affirm the lower court's decision granting summary judgment in favor of the defendants. Despite plaintiff's allegation that she fell on an isolated patch of ice due to the defendant's failure to properly salt the entire lot, the court acknowledged that icy conditions prevailed in the community at the time of the accident and ruled that the plaintiff failed to adduce sufficient evidence to show that the natural accumulation that caused her fall was of such a nature as to unreasonably obstruct her travel.

One year later, in *Lockman v. Berkshire Hills Assocs., L.P.*, 131 A.3d 86 (Pa. Super. 2015), the Superior Court affirmed the entry of summary judgment in favor of the defendants-property owners. There, the plaintiff fell on icy remnants from a prior storm in the midst of a new snowfall. Relying on a meteorologist's report that described an initial "significant snowfall event," followed by continued snow, sleet, freezing rain, rain, and additional snow events over the next few days, the Superior Court agreed with the trial court that generally slippery conditions prevailed throughout the community. At deposition, the plaintiff denied being able to see any bumps and hills and ridges in the ice, as the ice was flat. The Superior Court concluded that there was a sufficient basis for the trial court to determine that the plaintiff failed to meet his burden under the Hills and Ridges Doctrine; thus, summary judgment was appropriate.

In a 2017 unpublished opinion in *Neifert*

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Defending Snow and Ice Claims *continued from page 9*

v. Speedway, LLC, 2017 Pa.Super. Unpub. LEXIS 3412 (Pa.Super. Sept. 14, 2017), the Superior Court again affirmed a trial court's decision to grant summary judgment in favor of a property owner and against a plaintiff based on the Hills and Ridges Doctrine. The plaintiff fell when the general community experienced icy conditions but did not demonstrate that the accumulations were in elevations that unreasonably obstructed his travel.

Risk Transfer in New Jersey and Pennsylvania

Risk transfer is most commonly effectuated through indemnification provisions in snow removal contracts. New Jersey's courts look at the contracts to determine if the language is clear and unambiguous. Contract language is strictly construed against the indemnitee, as the indemnitee is generally the party with the greater bargaining power and, therefore, the person with the greater interest in the indemnification provision. The law is clear that language must be included in the contract in order to be indemnified for negligent acts or omissions.

It is very common for snow removal companies in New Jersey to reserve a right to hire a snow removal sub-contractor. It is very important for snow removal companies with indemnification provisions in their contracts with landowners to have identical provisions in their subcontracts. If they do not have the same provisions, they may be faced with a situation where they are forced to defend and indemnify the landowner for negligent acts, but are precluded from seeking reimbursement from the subcontractor because the subcontract contained a more narrow indemnification.

Much like in New Jersey, Pennsylvania's courts look to the contract to determine the clear intent of the parties and require that the indemnified act be unambiguously identified in the indemnification provision. Courts also look at the type of negligent act—whether it is active or passive.

As an example of the active versus passive analysis, imagine that a landowner is responsible for clearing snow and ice from the sidewalk, and they hire a snow removal company to clear snow and ice from the parking areas. The snow removal contract contains an indemnification provision whereby the snow removal company agrees to indemnify the landowner for any and all negligent acts. On the date of loss, the plaintiff slips and falls on snow and ice that is in the parking lot. Through discovery it is learned that the snow removal company cleared the area of the fall before the incident occurred. After the parking lot was cleared, the landowner cleared the sidewalk and threw snow on the parking area, creating the dangerous condition. The landowner's negligence is active. To cause the snow removal company to indemnify the landowner would be to make them the insurer. Therefore, the indemnification provision will not be enforced against the snow removal company.

Many snow removal contracts require that the indemnitor name the indemnitee as an additional insured on a general liability policy. As a practice point, the snow removal contract should be evaluated immediately after a loss is reported to determine if there is an additional insured requirement. If there is one, the full policy, including the additional insured endorsements, should be requested from the snow removal contractor. Given the sophistication of the contract drafters, there can be a complex interplay between the insurance requirements of the contract and the indemnification provisions of the contract. Having the full policy at the outset of the litigation will allow the defense .team to fully evaluate risk transfer. For instance, in some policies there has to be a finding that the indemnitor is negligent before coverage is provided to the indemnitee. In this example, the case would have to be adjudicated before a coverage determination could be made.

With proper evaluation and planning, property owners can take the necessary steps to maximize risk transfer through clear and intentional snow removal contract drafting. When suits are filed, the available defenses should be used to protect property owners from unreasonable results. Snow, ice and the resultant claims are inevitable. Plan and prepare, then you will learn to stop worrying and love the winter weather. We leave you with the immortal genius of Irving Berlin:

Snow I'll soon be there with snow

I'll wash my hair with snow

And with a spade of snow

I'll build a man that's made of snow

I'd love to stay up with you but I recommend a little shuteye

Go to sleep . . .

And dream . . .

Of snow.

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Course and Scope of Employment – A Fact-Specific Analysis

*By Melissa S. Jackson, Esquire**

Typically, injuries occurring on an employee's commute to or from work are considered to be outside the course of employment. Conversely, injuries sustained while an employee is on the employer's premises, entering or leaving work, are generally deemed to be within the course of employment.

These are good rules to follow when determining whether an employee is in the course of his or employment when an injury occurs. However, what is the proper determination when an employee seems to be somewhere in between his or her commute and the employer's premises? The Commonwealth Court in *US Airways, Inc. v. WCAB (Bockelman)*, 612 C.D. 2017, recently decided.

In *Bockelman*, the claimant was a Philadelphia-based flight attendant, working for the employer, and the employer gave its employees, including the claimant, no directive as to how they should commute. In this matter, the claimant drove her own vehicle to the airport and parked in one of two designated employee parking lots. These parking lots are owned, operated, and maintained by the City of Philadelphia/ Division of Aviation, not the employer, for the use of all airport employees. After parking, all airport employees, including the claimant, take a shuttle bus from the employee parking lots to the airport terminal, and vice versa.

On the date of injury, the claimant departed the airport terminal after returning from a flight and proceeded to the shuttle bus stop. After boarding the shuttle bus and while attempting to place her bags on the luggage racks, the claimant slipped in water and fell backwards, injuring her left foot.

The claimant subsequently filed a claim petition, alleging that she sustained work-related injuries to her left foot as a result of the fall, and the employer, in its answer, denied that the claimant was in the course and scope of her employment when the injury occurred. Following litigation, the WCJ concluded that the claimant sustained injuries in the course and scope of her employment, and the Workers' Compensation Appeal Board affirmed.

The Commonwealth Court likewise affirmed the decision of the WCAB. In so doing, the Court, citing *WCAB (Slaugenhaupt) v. U.S. Steel Corp.*, 376 A.2d 271 (Pa. Cmwlth. 1977), noted:

Injuries may be sustained in the course of employment in two distinct situations, (1) where the employee, whether on or off the employer's premises, is injured while actually engaged in the furtherance of the employer's business or affairs, or (2) where the employee although not actually engaged in furtherance of the employer's business or affairs (a) is on the premises occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on; (b) is required by the nature of his employment to be present on his employer's premises; and (c) sustains injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

The court quickly determined that the claimant was not engaged in the furtherance of the employer's business or affairs when the injury occurred and instead shifted its analysis to the *Slaugenhaupt* test.

First, the Court examined whether the claimant was on the employer's premises at the time of injury. In so doing, it considered whether the shuttle bus was "so connected with the employer's business as to form an integral part thereof," and the Court explained that "reasonable means of access to the workplace is considered an integral part of the employer's business, and, therefore, is part of the employer's 'premises.'"

The Court reasoned that since the parking lots and the shuttle buses, were "means of access customarily used by employees for ingress and egress," they became "such an integral part of an employer's business as to be considered part of the premises." Therefore, the Court determined that the shuttle bus, as well as the parking lots, was part of the employer's "premises".

Second, the Court analyzed whether the claimant's presence on the shuttle bus was required by the nature of her employment. Having already concluded that the claimant was on Employer's premises, the Court determined that actually getting to her exact work area was a necessary part of the claimant's employment, and therefore, her presence on the shuttle bus was required. The Court noted that whether it was a directive of the employer did not matter because the claimant's utilization of the parking lot and the shuttle bus was expected by the employer if the claimant elected to drive to work.[1]

What this means for you:

Determining whether an employee is in the course and scope of his or her employment is still a difficult and very fact-specific analysis. However, with this decision, the Court has increased the scope of an employer's premises. Therefore, employers must take care in creating directives on employee parking and transportation to and from off-site parking, as well as the selection of vendors who own, maintain, and control parking lots and means of transportation.

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ENDNOTE

[1]The Court did not address the third prong of the *Slaughenhaupt* test as there was no dispute that the condition of the shuttle bus caused the claimant's injuries.

AUTOMOBILE CASE LAW UPDATE

By Thomas A. McDonnell, Esquire, Summers, McDonnell, Hudock, Guthrie & Rauch, P.C.

PENNSYLVANIA SUPREME COURT FINDS THAT TRIAL COURT ORDER PRECLUDING PLAINTIFF'S COUNSEL FROM ATTENDING EXAM PORTION OF NEUROPSYCHOLOGICAL IME IS NOT IMMEDIATELY APPEALABLE UNDER COLLATERAL ORDER DOCTRINE

SHEARER v. HAFER., ___ A.3d ___ (Pa. 2018).

Diana Shearer was injured in a motor vehicle accident which was allegedly caused by the negligence of Scott Hafer. Ms. Shearer alleged that she had a closed head injury resulting in headaches, cognitive impairments and memory deficits. Hafer hired a neuropsychologist to conduct an IME. Ms. Shearer did not object to the IME but demanded that it be audiotaped and that her counsel be present during all phases of the examination. The IME physician objected due to concerns of potential bias and ethical principles relating to the integrity of the exam and security of the test materials. He indicated, however, that he would permit Ms. Shearer's counsel to be present during the interview portion of the exam but would not allow him to be present during the standardized testing phase of the evaluation or allow it to be audiotaped.

Ms. Shearer's counsel rejected this proposal, and Hafer's counsel filed a request for a protective order. The trial court allowed Ms. Shearer's counsel to be present during the interview phase of the exam but ruled that no individual would be permitted in the evaluation room with Ms. Shearer and the doctor during the standardized test nor could the evaluation be recorded.

Ms. Shearer appealed to Superior Court which affirmed after first finding that it had jurisdiction to hear the appeal under the collateral order doctrine. Ms. Shearer then appealed to Supreme Court which held that the collateral order doctrine had not been satisfied and therefore dismissed the appeal. The Supreme Court explained that, under Pa.R.A.P. 313, a collateral order is an order which (1) is separable from and collateral to the main cause of action where (2) the right involved is too important to be denied review and (3) the question presented is such that if review is postponed until final judgment in the case the claim will be irreparably lost. Although the Court found that the first prong of the test was satisfied, the second and third prongs were not. Ms. Shearer's counsel admitted that he did not plan on attending the exam himself but was intending to send a nurse so that he was not a potential witness at trial. The Supreme Court therefore found that it was not dealing with a constitutional issue concerning a party's right to counsel but was instead dealing with interpretation of a rule as opposed to a fundamental right.

The Court also found that the third prong was not satisfied since no rights would be irreparably lost if Ms. Shearer's counsel were precluded from attending the standardized testing portion of the exam. If Ms. Shearer were to appeal following the trial of the case and the court determined that she was legally entitled to have a representative present during the entire exam, then the court could award a new trial and allow her representative to be present during the entire exam.

PARAMEDIC NOT ENTITLED TO STACK UIM COVERAGES UNDER EMPLOYERS FLEET POLICY WHEN INJURED IN AN AMBULANCE

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA v. KOONS-GILL, ___ A.3d ___ (Pa. Super., 2018).

Dawn Koons-Gill was working as an EMT in an ambulance when it was involved in an accident with a car, leaving her with serious injuries. Selective insured the ambulance in which Ms. Koons-Gill was injured as well as five other ambulances owned by her employer. Each ambulance carried $35,000 of UIM coverage with stacking, but stacking was only available for Class 1 insureds, which were defined as named insureds and their resident relatives. Because Ms. Koons-Gill was only a Class 2 insured, the trial court found that she was not entitled to stacking. At the trial court level the case was decided on oral argument based on stipulated facts.

Ms. Koons-Gill did not file any post-trial motions after the court issued its ruling but instead immediately appealed to Superior Court. Superior Court found that Ms. Koons-Gill was required to file post-trial motions. By failing to do so, she waived any right to appeal. Regardless, Superior Court found that the trial court correctly interpreted the policy and that Ms. Koons-Gill was not entitled to stacking.

ENBANC SUPERIOR COURT HOLDS THAT TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING A CONTINUANCE WHERE PLAINTIFF'S EXPERT WAS SUDDENLY "UNAVAILABLE"

RUTYNA V. SCHWEERS, ___ A. 3d ___ (Pa. Super. 2018)

This professional negligence case has a long and complex procedural history, including a history of both parties requesting continuances as well as issues with expert reports. The original case involved a medical negligence claim. The instant case involved the lawsuit filed by the original plaintiff against his counsel for professional negligence

Subsequent to the latest listing for trial, the defendant filed a motion to strike the plaintiff's expert, Mark Foster, M.D., as he was unqualified under the MCARE Act. Further, plaintiff discovered six days before trial that Dr. Foster had signed an agreement with the underlying medical negligence defendant, UPMC, that he would not testify against UPMC or any of its physicians.

Trial court issued an Order dismissing plaintiff's action as he had no medical expert and could not prove the underlying medical negligence claim, which was a prerequisite for moving forward on the

legal malpractice claim. The plaintiff then appealed to Superior Court which reversed finding that the trial court's refusal of any continuance effectively ended Plaintiff's case without a trial on the merits. As the defendant had been given a continuance when he obtained new counsel, justice required that a continuance be granted to the plaintiffs. The matter was thus remanded for trial.

FEDERAL DISTRICT COURT PRECLUDES ERISA PLAN FROM PURSUING REIMBURSEMENT CLAIM DUE TO DELAY

CARPENTER TECHNOLOGY CORP V. WEIDA, ___F Supp. 2d ___ (E.D. Pa. 2018)

This case involved a situation whereby Weida, a beneficiary of Carpenter Technology Corporation's self-funded ERISA Welfare Benefit Plan, filed suit against the negligent party which caused him injury. The case was eventually settled. Prior to disbursing the settlement proceeds, the injured party's counsel notified the Plan of the settlement. The employer's ERISA plan then waited nine months after receiving notice to file this action for equitable relief.

By the time the case was filed, the settlement funds had been dissipated; thus the equitable requests made in plaintiff's Complaint were moot. The court then granted the defendant's motion to dismiss due to the delay of the Plan in pursuing its claim.

FEDERAL DISTRICT COURT HOLDS THAT INSURER'S FAILURE TO OBTAIN NEW WAIVER OF STACKING WHEN INSURED INCREASED UIM LIMITS TWO YEARS AFTER POLICY INCEPTION RESULTS IN INSURED BEING ALLOWED TO STACK UIM COVERAGE

BARNARD v. THE TRAVELERS HOME AND MARINE INS. CO., ___ F.Supp. 2d ___ (E.D. Pa., 2018).

Michelle Barnard purchased a policy of insurance with Travelers in September of 2007 and selected UM/UIM coverage in the amount of $50,000 per person for each of the two vehicles she owned. She also signed a waiver of stacking. In May of 2009, Ms. Barnard increased her UIM limits to $100,000 per person, but Travelers did not secure a separate signed waiver of stacking.

Ms. Barnard was injured in a motor vehicle accident in June of 2016. The tortfeasor tendered its $15,000 liability limits and then she filed a claim for UIM benefits with Travelers, which tendered its $100,000 in UIM limits. Ms. Barnard claimed that she should be entitled to stacking since Travelers never obtained a written waiver of stacking when she increased her UIM limits in 2009.

The District Court reviewed Pennsylvania case law and found that the insurer's obligation to secure a waiver of stacking is not limited to the inception of the policy but extends to any purchase of insurance. The District Court further found that Ms. Barnard "purchased" insurance in May of 2009 when she raised her UIM limits and that Travelers should have presented her with a new stacking waiver at that time for her signature. Because it did not do so, Travelers was obligated to provide stacked UIM limits.

FEDERAL DISTRICT COURT REMANDS PROPERTY DAMAGE AND BREACH OF CONTRACT CLAIM TO STATE COURT AFTER PLAINTIFF DROPS BAD FAITH CLAIM

SCIULLI v. GEICO GENERAL INS. CO., No. 16-1907 (W.D. Pa. Feb. 26, 2018).

Plaintiff was involved in a single-vehicle accident in which her car was damaged in the approximate amount of $18,000. She filed a pro se complaint in the Court of Common Pleas of Allegheny County asserting claims for breach of contract and bad faith. GEICO removed the case to federal court for the Western District of Pennsylvania based on diversity of citizenship. Plaintiff later obtained counsel and, at a hearing, counsel agreed to withdraw the claim for bad faith. Since the only remaining claim was a state law breach of contract claim for approximately $18,000, the District Court remanded the case to the Court of Common Pleas of Allegheny County.

FEDERAL DISTRICT COURT DENIES REMAND MOTION FINDING EXCEPTION TO REMOVAL STATUTE'S UNANIMITY REQUIREMENT WHERE NON CONSENTING PARTY HAD NO INTEREST IN THE LITIGATION

HAGAN V. LEON AND PROGRESSIVE, ___ F. Supp 2d ___ (M.D. Pa., 2018)

The plaintiff was injured in a motor vehicle accident and filed suit against the tortfeasors and Progressive, his UIM carrier. Eventually the claim against the primarily liable tortfeasor was settled. Part of the settlement was an agreement that the settling defendant would "refuse to consent to removal by Progressive."

Once the Pennsylvania defendant had settled, Progressive filed a Notice of Removal to the Federal District Court on the basis of diversity of jurisdiction. Plaintiff then filed a Motion for Remand contending that there was no unanimity of consent to the removal as the Pennsylvania defendant refused to consent.

In ruling on the Motion for Remand, the District Court found that there are exceptions to the unanimity rule. One exception is when the "non-joining" defendant is an unknown or nominal party. In this instance the settling parties had no interest in the litigation as releases had been executed. The District Court thus denied the remand motion and allowed the claim against Progressive for UIM benefits to remain in District Court.

LAWRENCE COUNTY TRIAL COURT DENIES DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PUNITIVE DAMAGE CLAIM

HILLIARD V. PANEZICH AND JEFFERYS, 10988 of 2015 (C.C.P. Lawrence Co. 2017)

Defendant Panezich had been smoking marijuana at a home owned by his mother, Ms. Jefferys. He was later involved in a motor vehicle accident while driving his own vehicle causing injury to the plaintiff. According to

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Panezich the accident occurred while he was "adjusting" his cell phone.

The investigating State Trooper believed Panezich to be chemically impaired. Blood tests showed Diazepam and cannabis metabolites in Panezich's sample. To complicate matters Panezich was changing songs on his phone immediately prior to the accident.

Plaintiff's Complaint contained a claim for punitive damages. In addition to the alleged intoxication, the plaintiff alleged that the cell phone usage constituted a "reckless indifference to the interest of others."

In denying the defendant's motion for summary judgment on the punitive damage claim, the trial court followed the Pennsylvania Superior Court's opinion in Focht v. Rabada, which held that a person's intoxication can give rise to a punitive damage, based upon the circumstances. Further, the court held that despite a split in authority concerning punitive damage claims arising out of cell phone use, the fact in this case allowed the punitive damage claim to proceed on both theories of "distracted driving" and "chemical impairment."

TRIAL COURT FINDS PAIN AND SUFFERING VERDICT OF $600 ADEQUATE BASED UPON EVIDENCE OF PLAINTIFF'S PRE-EXISTING MEDICAL CONDITION AS WELL AS MEDICAL TESTIMONY PRESENTED AT TRIAL

STEMMERICH v. MASSUNG AND PITTSBURGH MOBILE TELEVISION, INC., GD 1523133 (Allegheny Co. 2017).

Plaintiff was injured in a 2014 motor vehicle accident when struck from behind by a tractor-trailer. The accident was not significant as the truck was almost stopped when the operator's foot slipped off of the clutch, causing it to move forward and strike plaintiff's vehicle. It should be noted that at the time of the accident the plaintiff had preexisting conditions such as fibromyalgia and reflex sympathetic dystrophy. She was also having ongoing problems with her right foot, right shoulder, left knee and low back. She was still under the care of a pain management specialist at this time.

Post-accident, the plaintiff had lumbar steroid injections from her treating pain management specialist. She later underwent arthroscopic surgery of the right shoulder. The surgery was done by the orthopedic surgeon with whom she was still treating at the time of the accident.

At trial the jury received an itemized list of past medical expenses of almost $10,000. The jury interrogatories divided potential damages into past medical expenses, future medical expenses and pain and suffering. The jury returned a verdict of $1,170 for past medical expenses, $0 for future medical expenses, and $600 for pain and suffering. The plaintiff filed post-trial motions contending that the $600 pain and suffering award was inadequate.

The trial court denied the post-trial motions, finding that Pennsylvania case law is clear that a jury can find an injury to be minimally compensable if so reflected in the evidence presented at trial. In this case, there was evidence of the plaintiff's extensive pre-accident medical history. Further, the IME physician had a reasonable basis for his opinion that there was only an exacerbation of the preexisting conditions and no new structural damage.

The case is currently on appeal to the Pennsylvania Superior Court.

TRIAL COURT UPHOLDS $500,000 VERDICT FOR INDIVIDUAL INJURED DURING LIMOUSINE RIDE

DEIVERT v. PITTSBURGH CHAUFFEUR, LLC, GD 1519904 (Allegheny Co. 2017).

Plaintiff was allegedly injured while a passenger in an overcrowded limousine. Apparently, his right leg was pinned against the doorway and he could not extricate himself. During the ride, his leg apparently repeatedly scraped on the door, causing a burn-type injury. Eventually the plaintiff exited the vehicle and examined his knee, which exhibited a "softball sized red mark" with the top layer of skin removed.

The wound did not improve, and the plaintiff sought medical care. Conservative measures were unsuccessful, and plaintiff had two surgical procedures involving skin grafts. The plaintiff was left with permanent right leg scarring.

The plaintiff filed an action against the limousine company alleging that the limousine was overcrowded and should not have been operated at that time. At trial, the plaintiff presented testimony from Gregory Habib, M.D., an orthopedic surgeon. The testimony of Dr. Habib was challenged by way of a motion in limine on the basis that Dr. Habib merely took a history from the plaintiff, examined his injury, reviewed photographs and records and provided an opinion. The court denied the motion in limine, finding that Dr. Habib's conclusions, not his methodology, were at issue. Further, there was a discrepancy between Dr. Habib and the IME physician concerning whether the injury could have occurred as plaintiff stated. The defendant also contended that Dr. Habib did not support his opinion with medical literature or studies.

The testimony of Dr. Habib was heard by the jury. The jury then returned a verdict in the amount of $500,000. The defendant filed post-trial motions which the trial court denied, finding that Dr. Habib's credibility and the substance of his opinion were at issue, as opposed to its admissibility. As such the verdict stood and the matter is on appeal to the Pennsylvania Superior Court.

MONROE COUNTY TRIAL COURT ALLOWS DEFENDANT ACCESS TO INTERNAL POSTINGS OF PLAINTIFF'S INSTAGRAM SOCIAL MEDIA ACCOUNT

KELTER v. FLANAGAN, 286 Civil 2017 (Monroe Co. 2018).

Plaintiff claims that she was injured in a motor vehicle accident and filed suit against the defendant. In discovery, plaintiff claimed that her physical

activities were limited as a result of the accident-related injuries. Specifically, she could no longer go to the gym or shovel snow.

At her deposition, the plaintiff denied having an Instagram account. When confronted with the "public access" posts from her Instagram account, she advised that she did not understand the question and that her account only had "public posts." Counsel for the defendant then requested plaintiff's login information to access any private posts. Plaintiff denied access.

Defendant filed a motion to compel. The trial court held that since the information on the public portion of the Instagram site was contradictory of the plaintiff's sworn testimony concerning her physical restrictions, that access was to be provided. Applying a relevancy analysis, the trial court held that the likelihood of finding relevant information outweighed any potential privacy claims. This decision followed prior trial court decisions in the Commonwealth.

LUZERNE COUNTY TRIAL COURT ENFORCES EXCLUSION IN UMBRELLA POLICY AGAINST WRONGFUL DEATH BENEFICIARIES

CHARLES v. UNITED SERVICES AUTO. ASSN., No. 7106 of 2016 (C.C.P. Luzerne Co., 2017).

Janice Lewis was a passenger in a vehicle driven by her husband when it was involved in an accident with another vehicle. Both Ms. Lewis and her husband died as a result of the accident. At the time of his death, Mr. Lewis was insured by USAA for liability coverage. USAA also provided a personal umbrella insurance policy. USAA paid its limits under the automobile liability policy. USAA denied any claim under the umbrella policy on the basis that an exclusion in the policy provided that there was no coverage for any injury to an insured under that policy.

The court granted summary judgement in favor of USAA, finding that Ms. Lewis was clearly an insured under the policy. The plaintiffs argued that they were wrongful death beneficiaries under the Pennsylvania Wrongful Death statute and were therefore not insureds. The court rejected this argument based on the clear and unambiguous language of the umbrella policy.

POST-KOKEN UPDATE

*By Daniel E. Cummins**

BIFURCATION OF TRIAL

In the case of *Fertig v. Kelley*, No. 16 - CV - 4801 (C.P. Lacka. Co. Dec. 29, 2017 Nealon, J.), Judge Terrence R. Nealon denied a UIM carrier's motion to sever and stay bad faith claims in a Post-Koken matter but held that the bad f aith claims would be later bifurcated for trial.

Judge Nealon issued a thorough Opinion that outlined the current status of the splits of authority in the Pennsylvania state and federal courts on the issue of bifurcating and staying a bad faith claim in a Post-Koken lawsuit that also contains third party negligence and UIM breach of contract claims.

Judge Nealon confirmed that, to date, no state appellate court has addressed this issue.

The court in *Fertig* cited to issues of judicial economy in deciding to deny the motion to sever and stay the bad faith claims during the discovery phase of the litigation. The court directed that any discovery disputes on the bad faith claim could be addressed through motions practice.

In ruling that the bad faith claims would be bifurcated for purposes of trial, Judge Nealon elected to follow the procedure first espoused by Allegheny County Court of Common Pleas Judge R. Stanton Wettick in the cases of *Gunn* and *Wutz*.

Under that procedure, the trial of the third party negligence claims and UIM claims would go first before the jury, and would then be immediately followed by a bench trial on the bad faith claims.

Under this procedure, once the jury retires to the deliberation room on the third party and UIM claims, the UIM defendant would be required to turn over additional unredacted discoverable materials from the carrier's file that may have been properly withheld during the pendency of the UIM claim (i.e., information on the carrier's evaluation of the claims, etc.). The Plaintiff would then have the option of proceeding directly into the bench trial on the bad faith claims or requesting a continuance to digest the information produced.

***Commentary*:** As stated, there remains a split of authority on this issue of severance (and staying) and/or bifurcation of various types of claims in Post-Koken auto accident matters. A comprehensive list of the cases can be viewed on the Tort Talk Post-Koken Scorecard, which can always be accessed down the right hand column of the blog at www.TortTalk.com.

In the case of *Jones-Silverman v. Allstate Fire & Casualty Ins. Co.*, No. 17-1711 (E.D. Pa. July 31, 2017 Baylson, J.), the Eastern District Federal Court denied a carrier's Motion to Bifurcate a Plaintiff's UIM breach of contract and bad faith claims.

The court found that the required evidence of each of the claims overlapped such that a bifurcation would amount to a waste of judicial resources.

The court also noted that, even if the parties settled their breach of contract claim, the insured could still pursue a bad faith claim based upon a theory of undue delay and claims handling. Accordingly, the court found that the potential resolution of the breach of contract claim did not necessarily render a bad faith claim moot.

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The court otherwise ruled that it was equipped to address any issues of prejudice to the UIM carrier that may arise through the normal rules and procedures of litigation if the case was not bifurcated and a single trial was allowed.

As such, the court denied the carrier's Motion for Bifurcation.

In his recent decision in the case of **Newhouse v. GEICO**, No. 4:17-CV-00477 (M.D. Pa. Sept. 18, 2017 Brann, J.), Federal Middle District Judge Matthew W. Brann denied GEICO's Motion to Sever and Stay the bad faith portion of a post-Koken claim filed by a Plaintiff also asserting a UIM claim.

The court declined to sever or bifurcate the UIM and bad faith claims after finding that the Plaintiff would utilize similar evidence and testimony for both claims. The court also rejected the carrier's argument that it would be prejudice by a lack of bifurcation because, relative to the bad faith action, the carrier will have to present information on how it values a claim before the jury assesses liability and damages in the UIM portion of the claim.

In his recent decision in the case of *Mulgrew v. GEICO*, No. 3:16-cv-02217 (M.D. Pa. Oct. 11, 2017 Caputo, J.), the court denied a Defendant's Motion to Sever and Stay the Plaintiff's bad faith claim in a underinsured motorist matter.

The court referred to Federal Rule of Civil Procedure 21 which grants the Federal District Courts broad discretion in deciding whether or not to sever a case.

Judge Caputo noted that the factors used to decide a Motion to Sever under Rule 21 are the same as utilized in deciding a Motion to Bifurcate under Rule 42(b).

The court differentiated between the two rules by indicating that a Rule 21 severance essentially creates a separate case, the disposition of which is final and appealable, whereas Rule 42(b) does not create a new case but bifurcates issues or claims within a single case for separate trials. A claim that is bifurcated under Rule 42(b) is not final and appealable as long as the other claims in the case remain unresolved.

The factors to be considered in deciding such motions to sever or bifurcate in Federal Court cases includes the following:

- Convenience of the parties
- Avoiding prejudice, and
- Promoting expedition and economy

In denying the Motion, Judge Caputo found that both the convenience of the parties and the judicial economy weighed against severance. The court also rejected the Defendant's claim that the resolution of the breach of contract action could greatly impact and potentially moot the bad faith claim. The court noted that litigation on the bad faith claim is not contingent upon the success of the breach of contract claim in that a Plaintiff could simultaneously prevail on a bad faith claim while losing the UIM claim. The court also found that severance would hinder judicial economy by requiring separate cases and separate trials instead of handling these claims within a single action.

The court additionally opined that the potential prejudice to the carrier of litigating the breach of contract and bad faith claims at the same time did not outweigh the countervailing goal of judicial economy in the prompt resolution of the entire matter.

For these reasons, Judge Caputo denied the Motion to Sever and Stay the Plaintiff's Bad Faith Claim.

MOTION TO COMPEL CLAIMS REP DEPOSITION

In the case of **Novoczynski v. Swingle et al.**, No. 2016-CV-6538 (C.P. Lacka. Co. Nov. 20, 2017 Gibbons, J.), the court granted a Plaintiff's Motion to Compel a claims representative's deposition and denied a carrier Defendant's Motion for a Protective Order in a Post-Koken auto accident case.

While the court allowed the deposition, the court also ordered that the Plaintiff was not permitted to inquire into the claims representative's mental impressions, conclusions or opinions respecting the value or merit of the claims or defenses, or with regards to strategy or tactics. In this regard, the court cited to Pa.R.C.P. 4003.3.

MOTION TO COORDINATE ACTIONS

In his recent decision in the case of *Grimes v. Velez*, No. 2016-CV-4071 (C.P. Lacka. Co. Jan. 22, 2018 Gibbons, J.), Judge James A. Gibbons of the Lackawanna County Court of Common Pleas granted a Plaintiff's Motion to Coordinate separate motor vehicle accident litigations filed in separate counties. The court granted the motion under Pa. R.C.P. 213.1.

By way of background, the entire case against the tortfeasor Defendant and the Plaintiff's own UIM carrier initially began under a single Complaint filed in the Lackawanna County Court of Common Pleas. However, the UIM carrier succeeded on Preliminary Objections to the Complaint on the basis that venue was improper in Lackawanna County under a forum selection clause. The UIM portion of the case was therefore carved out and transferred to Monroe County.

Through an error by the Lackawanna County Prothonotary, it turned out that the entire case was transferred to Monroe County. At that point, the Plaintiff filed a Motion to Consolidate the matters in Monroe County. The Monroe County court denied the Plaintiff's motion based upon a lack of jurisdiction over Defendant Velez given the mistake by the Lackawanna County Prothonotary. The Monroe County Court directed that the tort claim be transferred back to Lackawanna County.

Thereafter, the Plaintiff filed the subject Motion to Coordinate pursuant to Pa. R.C.P. 213.1 in Lackawanna County seeking a transfer of the tort claim back to Monroe County.

In his decision, Judge Gibbons noted that the claims against the tortfeasor Defendant and the UIM carrier arise from the same occurrence, i.e., the same

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motor vehicle accident. The court noted that this factor alone served as a basis for granting the coordination motion. The court additionally noted that common questions of law or fact existed as well.

On the issue of the convenience of parties, the Lackawanna County Court recognized that litigation in Monroe County would involve roughly one (1) hour of travel from Lackawanna County.

The ruling in favor of coordination was also compelled by the notion that only one trial should take place on the questions presented as they all arose out of the same accident. The court additionally noted that it was likely that all of the witnesses and parties called to testify with respect to the tort action would also be called to testify with respect to the UIM action.

Judge Gibbons rejected the tortfeasor's Defendant's claims of prejudice and unreasonable delay if he was required to defend the case in Monroe County.

Lastly, the court found that the interest of judicial economy and the prevention of duplicative or inconsistent Orders weighed in favor of coordinating and transferring to Lackawanna County to the Monroe County case.

For these reasons, the court granted the Plaintiff's Motion for Coordination under Pa. R.C.P. 213.1.

MOTION TO REMAND

In his recent decision in the case of *Hagan v. Leon*, No. 3:17-CV-2155 (M.D. Pa. Jan. 3, 2018 Mariani, J.) (Mem. Op. Judge Robert D. Mariani of the Federal Middle District Court of Pennsylvania), the court denied a Plaintiff's Motion to Remand his post-Koken claims back to the state court.

In this matter, the Plaintiff sued the alleged third party tortfeasor Defendants on a negligence claim and his own carrier, Progressive, for underinsured motorist benefits.

The Plaintiff had previously released the tortfeasor Defendants in exchange for a payment of $15,000.00 along with an agreement to refuse any consent to removal that may be sought if the UIM carrier attempted to remove the case to federal court.

Thereafter, Progressive filed a Notice of Removal to which the Plaintiff responded with a Motion to Remand. The Plaintiffs asserted that the Notice of Removal failed to allege citizenship of all parties at the time the Complaint was filed and further asserted that not all Defendants had consented to the removal as required by the removal statute.

On the same day that the Plaintiffs' Motion to Remand was filed, Progressive amended its Notice of Removal to include allegations of the citizenship of all of the parties at the time the Complaint was filed.

After reviewing the matter, the court found that both of the Plaintiffs' arguments lacked merit and, therefore, denied the Plaintiff's Motion to Remand.

Judge Mariani more specifically noted that Progressive's Amended Notice of Removal clearly stated that, at the time the Plaintiffs' Complaint was filed, the Plaintiffs were citizens of Pennsylvania and the tortfeasor Defendants were citizens of New Jersey and the UIM carrier Defendant was a citizen of Ohio. Accordingly, the court found that, even if Progressive's original Notice of Removal was deficient, the defect was cured by the amendment.

Turning to the Plaintiffs' second argument, the court reviewed the procedure for removing a civil case to federal court under 28 U.S.C. §1446. The court noted that this code provision has been construed to require that, when there is more than one (1) Defendant, all must join in the removal petition. However, the court noted a recognized exception that provided that the unanimity rule may be disregard where (1) a non-joining party is an unknown or nominal party; or (2) where a defendant has been fraudulently joined.

The court noted that nominal parties are generally those parties without any real interest in the litigation.

Here, the court noted that the tortfeasor Defendants had been released from the matter by way of a settlement agreement. Accordingly, the court found that the tortfeasors had no real remaining interest in the litigation and, therefore, were, consequently, nominal parties from whom consent was no longer required to support a removal of a state court litigation to federal court.

In so ruling, Judge Mariani stated that it did not appear that the Third Circuit Court of Appeals had ever considered a similar fact pattern prior to this decision. However, the court noted that similar rulings have been issued by the Fifth Circuit Court of Appeals and the Eighth Circuit Court of Appeals granting remands under analogous facts. As such, the Plaintiff's Motion to Remand was denied.

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Pennsylvania Workers' Compensation Updates

*By Francis X. Wickersham, Esquire**
Marshall Dennehey Warner Coleman & Goggin

Commonwealth Court provides guidance for an employer's burden of proof in labor market survey case according to *Phoenixville Hospital v. WCAB (Shoap)*.

Dennis Smith v. WCAB (Supervalu Holdings PA, LLC); 796 C.D. 2016; filed Jan. 5, 2017; Judge Simpson

The Commonwealth Court recently issued a decision that employers can use as a guide for meeting their burden of proof in a labor market survey case. The claimant sustained a work injury in February 2011. The employer filed a modification petition in November 2013, seeking to reduce the claimant's benefits based on the results of a labor market survey.

In connection with the petition, the employer submitted deposition testimony from a vocational counselor, who had interviewed the claimant, performed a transferable skills analysis and identified five positions for the claimant within his vocational and medical restrictions and within his geographic area. The counselor testified that the claimant had a residual earning capacity of $440 per week.

The claimant also testified about applying for the five jobs the vocational counselor identified for him. Of the five, the claimant applied for all of them and was interviewed for two of them. However, no job offers were made to the claimant.

The Workers' Compensation Judge granted the petition, finding that there was nothing in the record to indicate that the five jobs were not open and available at the time the claimant applied for them. On appeal, the Workers' Compensation Appeal Board affirmed, reasoning that the employer's burden was to establish that the positions in the labor market survey were open and actually available to the claimant at the time the survey was conducted.

The claimant appealed to the Commonwealth Court, arguing that the Worker's Compensation Judge and the Appeal Board improperly shifted the burden to him to prove that positions were not available, contrary to the Supreme Court's decision in *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d 830 (Pa. 2013). In *Phoenixville Hospital*, the Supreme Court held that jobs identified by an employer's expert witness, which are used as proof of earning power under §306 (b) Act, should remain open until such time as the claimant is afforded a reasonable opportunity to apply for them.

The Commonwealth Court agreed that the judge and the Board incorrectly reasoned that it was the claimant's burden to prove that all five jobs were not open. The court noted that in their recent decision of *Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance Company)*, 1302 C.D. 2016, filed December 7, 2017, they held that an employer bears the burden of proving all facts entitling it to a modification of benefits, including the continued availability of jobs identified as proof of earning power. Considering this, the court found that of the five jobs, only two remained open and available to the claimant—the two for which the claimant received job interviews. Therefore, the court affirmed the decision of the Appeal Board and recalculated the claimant's residual earning capacity based on these two jobs only, which, according to the claimant's own testimony, were open and available.

The mere presentation of evidence of unsuccessful applications to jobs listed in a Labor Market Survey does not mandate a finding that the positions were not open and available and that the claimant lacked an earning capacity.

Laurie Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance Company); 1302 C.D. 2016; filed Dec. 7, 2017; Judge McCullough

The claimant sustained a work injury in October of 2010. In January of 2014, the employer/insurer had a Labor Market Survey and Earning Power Assessment performed, pursuant to § 306(b) of the Act, which listed six jobs with a pay range of $320 to $420 per week. The employer filed a modification petition based on the results of the survey and assessment.

Medical and vocational evidence was presented by the claimant and the employer. This included testimony from the claimant's own vocational expert, who testified that the claimant lacked the skills to perform the jobs listed in the survey and assessment. With regard to the claimant's efforts to apply for all six positions, she testified that she applied for all the jobs but was not offered a position.

The Workers' Compensation Judge granted the employer's petition, finding that the claimant had a residual earning capacity of $320 per week. In doing so, he accepted the employer's evidence as more credible than the claimant's. In her appeal to the Workers' Compensation Appeal Board, the claimant argued that the six jobs could not be considered actually open and available if she tried to apply and was were unsuccessful. She also argued that she could not have any earning capacity given she had tried to apply but could not obtain any of the positions. The Board affirmed the decision of the judge.

The claimant then appealed to the Commonwealth Court. The court said this was a case of first impression regarding the rights of claimants and employers under § 306(b) of the Act after the Supreme Court's decision in *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d. 830 (Pa. Cmwlth. 2013). The claimant took the position that because she applied for the jobs listed on the survey/assessment but did not get a job, the employer failed to prove an earning capacity. The employer argued that while

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the claimant's testimony that she applied unsuccessfully was relevant, it was not dispositive. The court noted that the claimant presented evidence attempting to show that the survey/assessment was based upon incorrect information in that the jobs were not open and available because she attempted to apply for all of them, but was either turned down, told the job was unavailable or unable to reach the contact person. The court indicated that this was precisely the sort of testimony that Phoenixville Hospital mandated claimants be permitted to present. In the court's view, the Workers' Compensation Judge evaluated the claimant's testimony but did not find it sufficient to show that the employer had not met its burden. The court rejected the claimant's argument that the presentation of evidence of unsuccessful applications to jobs listed in a survey/assessment required a finding that the positions were not open and available and that she lacked any earning capacity. According to the court, the evidence was relevant but not determinative with regard to the earning power inquiry.

An employer is obligated under § 306 (f.1)(1)(i) of the Act to reimburse the claimant for massage therapy sessions performed by a licensed therapist under the direction of the claimant's treating provider.

Leslie Schriver v. WCAB (Commonwealth of Pennsylvania, Department of Transportation); 289 C.D. 2017; filed Dec. 28, 2017; Judge Covey

Following a 1978 work injury, the claimant was referred by her chiropractor to a licensed massage therapist in 2015 for therapy to the low back and hips. The claimant received massage therapy treatments every three weeks beginning in January 2015, for which she paid $60 per hour out of pocket. The massage therapy receipts were submitted to the employer's counsel for reimbursement. However, the employer did not pay the claimant. Consequently, the claimant filed a penalty petition and a review petition seeking reimbursement of the expenses. The Workers' Compensation Judge granted the petitions, ordering the employer to reimburse the claimant and awarding the claimant penalties, costs and attorney's fees.

The employer appealed to the Workers' Compensation Appeal Board. The Board reversed, reasoning that although the massage therapist was licensed, as required under the Massage Therapy Law of 2008, this did not automatically mean the employer was required to cover massage therapy under the Act. According to the Board, an employer is only liable for medical treatment designed to diagnose impairment, illness, disease, and disability and massage therapy is merely intended to "enhance health and well-being," and, therefore, not compensable.

The Commonwealth Court reversed the Board. The court noted that § 306 (f.1)(1)(i) does not expressly limit health care providers to medical treatment to the exclusion of methodologies intended to enhance an injured worker's health and well-being. Based on legal precedent and the Act's definition of a health care provider, regardless of whether or not massage therapists are licensed, if they are supervised or have an employment or agency relationship with a licensed health care provider, the employer is liable for expenses related to the services rendered. The court concluded that the evidence supported the Workers' Compensation Judge's finding that the claimant's massage therapy was provided under the direction of her chiropractor in connection with her overall work-injury treatment plan and, therefore, the employer was obligated under the Act to reimburse the claimant for the sessions.

A claimant who had been separated and living apart from the decedent but not divorced is not entitled to dependency benefits under § 307(7) of the Act as he could not establish he was actually dependent upon and received a substantial portion of support from the decedent.

Gerard Grimm, on behalf of Catherine A. Grimm, Deceased v. WCAB (Federal Express Corporation); 1982 C.D. 2016; filed Jan. 4, 2018; Judge Simpson

The claimant and the decedent were married in November of 1988 and had three children. They separated in August or September of 2010. On February 2, 2012, the decedent suffered a fatal heart attack while in the course of her employment as a truck driver/delivery person. The claimant filed a fatal claim petition on behalf of himself as the widower/husband and the couple's children as dependents. The employer acknowledged the decedent's work-related death and the children's entitlement to benefits, but disputed the claimant's entitlement to dependency benefits because the claimant was separated and living apart from the decedent at the time of death, although they were not divorced.

At the Workers' Compensation Judge level, the claimant submitted evidence to show dependency, including joint tax returns that he filed with the decedent and information concerning health insurance benefits the decedent provided to the claimant and their children. The claimant testified that after their separation, the decedent continued to provide her family, including the claimant, with health insurance through the employer. The decedent paid for health insurance coverage through payroll deductions.

The Workers' Compensation Judge dismissed the petition, finding the claimant was not living with the decedent and was not dependent on her or receiving a substantial portion of support from her at the time of death. According to the judge, the only support the decedent provided to the claimant was health care benefits. The record showed the claimant provided the majority of support for the decedent's and children's household by continuing to pay for utilities, the children's expenses and half of the real estate taxes. The claimant appealed to the Appeal Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that the Workers' Compensation Judge erred in denying his petition because there was evidence establishing that, although he was separated from the decedent at the time of death, they could still be considered "living together" under § 307(7) of the Act. According to the claimant,

although the decedent filed for divorce and the claimant moved to a townhouse thereafter, the divorce was never finalized, the claimant continued using a joint account for his personal use and the couple continued to file joint tax returns. Additionally, the couple jointly owned the marital residence and the decedent provided health insurance coverage for the children and the claimant.

The Commonwealth Court rejected the claimant's argument, holding that the Workers' Compensation Judge was correct in finding that the claimant and the decedent were living separate lives at the time of the decedent's death and that the marital relationship existed in name only. The court further rejected the claimant's argument that he nevertheless received a substantial portion of support from the decedent through the health care benefits she provided through her employer, which in the year preceding the decedent's death amounted to 25% of the family's overall monthly expenses. The court concluded that this was considered by the Workers' Compensation Judge, who correctly found that the benefits alone failed to establish that the decedent substantially contributed to the claimant's support. The court also dismissed the claimant's argument that joint tax returns from 2009 and 2010 showing negative income were further evidence of the substantial support he received from the decedent. The court pointed out that the claimant's 2011 tax return showed that the year prior to the decedent's death his income recovered following earlier business losses and that he earned significantly more than the decedent.

A claimant is not eligible to seek a reinstatement of disability compensation benefits when it has previously been adjudicated that the work injury did not cause a loss of earning power.

Wilner Dorvilus v. WCAB (Cardone Industries); 397 C.D. 2017; filed Jan. 5, 2018; President Judge Leavitt

In his claim petition, the claimant alleged a work injury that occurred on November 12, 2009, while he was packing machine parts on to a cart. The Workers' Compensation Judge granted the claim petition for a low back strain and sprain and ordered payment of wage loss benefits as of September 18, 2009, ongoing. The employer appealed to the Appeal Board. Although the Board affirmed that the claimant sustained a work injury, they reversed the judge's award of disability benefits. The claimant appealed that decision to the Commonwealth Court, which affirmed the Board in a 2014 decision.

On May 5, 2015, the claimant filed a reinstatement petition, alleging that his work injury had worsened and caused a loss of earning power as of June 26, 2013. The employer moved to dismiss the petition as barred by collateral estoppel and res judicata, which was denied by the Workers' Compensation Judge. The employer then moved to dismiss the petition as time barred under § 413(a) of the Act, which requires a reinstatement petition to be filed within three years after the date of the most recent payment of compensation. The judge dismissed the petition, and the Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that his reinstatement petition was timely since his last payment of compensation was made on July 21, 2013, and his petition was filed on May 8, 2015. The employer paid the claimant benefits from May 23, 2011—the date of the Workers' Compensation Judge's award—through July 31, 2013—the date the Appeal Board reversed the award of disability compensation. According to the employer, it had been adjudicated that the claimant was not entitled to any wage loss compensation and, therefore, the payment of benefits to which the claimant was not entitled was irrelevant to the three-year deadline imposed by § 413(a) of the Act for filing a reinstatement petition.

The Commonwealth Court dismissed the claimant's appeal, pointing out that in this case, the claimant fully litigated his claim for disability compensation and lost. Thus, there were no benefits capable of reinstatement. Although the claimant proved a work injury, he did not prove that it caused disability. Therefore, he could not now seek a reinstatement after the three-year statute of limitations had run based upon his collection of compensation payments that were ultimately reversed on appeal.

A Workers' Compensation Judge lacks jurisdiction to hear a claimant's appeal of a utilization review determination where the required medical records were not provided to the utilization review organization.

Timothy M. Allison v. WCAB (Fisher Auto Parts, Inc.); 704 C.D. 2017; filed Jan. 12, 2018; President Judge Leavitt

Following multiple injuries sustained by the claimant in a work-related motor vehicle accident, the employer filed a request for Utilization Review of medical treatment being provided to the claimant by a treating physician. The request was assigned to a Utilization Review Organization (URO), which requested the physician's medical records. The records were never provided. Nevertheless, the URO assigned the matter to a reviewing physician, who, despite not having the records, performed a substantive review of the care. The reviewing provider concluded that the treatment was not reasonable and necessary, citing medical literature to support his opinion. The claimant filed a petition challenging the determination.

The employer moved to dismiss the petition, arguing the Workers' Compensation Judge lacked jurisdiction because the physician had not provided medical records to the URO. The employer's motion was denied since the reviewing provider prepared a substantive report. The Workers' Compensation Judge granted the claimant's petition, holding that the medical treatments were reasonable and necessary. The employer appeal to the Appeal Board, which reversed.

The Commonwealth Court affirmed the Board, agreeing that the Workers' Compensation Judge lacked jurisdiction to review the reasonableness and necessity of the medical treatment at issue since the medical records were not provided to the URO. Although the reviewing provider had performed a substantive Utilization Review, the

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court held that the URO's assignment of the Utilization Review to a reviewing physician was improper because the substantive review could not be performed without the records. The court further rejected an argument raised by the claimant that the Board, by denying his right to a hearing, violated his due process rights since he had an identifiable property interest in the treatment he received from his physician. According to the court, this claim was unfounded because there was no identifiable property right to any medical treatment that, by law, has been determined not to be reasonable and necessary.

Commonwealth Court holds that employer had a reasonable basis for its termination petition, even though employer's medical expert questioned whether an accepted work injury occurred.

Lourdes Sarmiento-Hernandez v. WCAB (Ace American Insurance Company); 1799 C.D. 2016; filed Feb. 13, 2018; by Judge Cohn-Jubelirer

The claimant sustained a work-related injury to her right wrist. The employer accepted by issuing a Notice of Compensation Payable, which described the injury as a right wrist sprain. Later, the employer filed a petition to terminate the claimant's workers' compensation benefits, alleging she was fully recovered. The claimant filed a review petition, seeking to amend the Notice to include additional conditions.

In connection with the termination petition, the employer deposed the physician who performed an IME on the claimant. When questioned on cross examination, the expert said he was not aware of the fact that a Notice of Compensation Payable was issued indicating that the claimant had a right wrist sprain due to the repetitive nature of her job until the day of his deposition. He also stated that he did not see a work injury to begin with.

The Workers' Compensation Judge dismissed the termination petition and granted the review petition. Furthermore, he found that the employer's contest of the termination and review petitions was not reasonable on the basis that the IME physician did not believe that the claimant sustained a work injury.

The employer appealed the unreasonable contest issue to the Appeal Board. They reversed, finding that there was conflicting medical evidence to support the employer's contest. The Commonwealth Court agreed and affirmed the Appeal Board.

According to the court, the employer presented competent, conflicting medical testimony that rendered its contest reasonable. According to the court, although the IME physician did not believe the claimant suffered a work injury, he still testified that he thought the claimant had fully recovered from what he "assumed" to be a work injury. The court held that this was sufficient to satisfy the standard for presenting competent medical evidence that claimant was fully recovered from the work injury. In addition, the court pointed out that the IME physician's testimony that the claimant's work played no role in exacerbating an underlying condition of the right wrist satisfied the employer's challenge of the review petition.

**Frank Wickersham is a shareholder and member of Marshall Dennehey Warner Coleman & Goggin's Workers' Compensation Department. Frank works in the firm's King of Prussia, Pennsylvania office.*

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