





# Workers' Compensation

## Current Legal Cases & News

The following is an overview of some recent court cases and news that could affect boroughs' workers' compensation rates.

### *Protz Case*

A July 2017 case upended the insurance industry when it eliminated a portion of workers' compensation law regarding temporary or permanent disability. It resulted in the PA Compensation Rating Bureau (PCRB) increasing workers' compensation insurance rates in February 2018 by 6.06 percent as well as impacting future claims by allowing more injured employees to receive permanent versus temporary benefits.

In response to the PCRB rate increase, the legislature passed a new law in the fall of 2018 that established a new threshold for

permanent disability. The PCRB reduced the rates by 5.24 percent on Jan. 1.

### *Incorrect Loss Data*

All insurance companies submit financial data – payrolls of their insureds and claims cost – to the PCRB, so the bureau can determine the rates insurance companies should use.

In November 2018, the insurance industry was notified by the PCRB that the 2016 financial data for one of the insurance companies was incorrect, leading to inaccurate rates being approved for April 2018.

In reaction to the error, the PCRB released new rates effective Jan. 1 based on what should have been the approved rates from April 2018.

The PCRB also acknowledged that when an insurance company determines a business' final premium, there are more risk factors that come into play than just the rate. Therefore, rates were not retroactively applied.

The bureau stated that insurance companies routinely use other means to adjust premiums, such as scheduled credits or debits or using different rate tiers.

Because of pricing considerations, only a handful of insurance companies voluntarily lowered their rates retroactively back to April 1, 2018 – the Pennsylvania State Association of Boroughs' endorsed insurance program through Keystone and EMC Insurance Companies was one of them.

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## FMLA and ADA

The 6<sup>th</sup> U.S. Circuit Court of Appeals in Cincinnati in *Heidi Hostettler v. The College of Wooster* overturned a lower court ruling and reinstated disability discrimination charges filed by a college employee who had been terminated because of her post-pregnancy disability.

The employee's incapacity required her to work only part time. Noting that there were genuine disputes that full-time work was an essential function of the job, the court stated that although it may have been more efficient and easier for the college if the employee worked full-time, the employee could fulfill her job duties on a part-time basis.

**Note:** *Keystone and EMC Insurance Companies have seen a growing number of lawsuits alleging violation of Americans with Disabilities Act or Family and Medical Leave Act when it comes to both work-related and non-work-related injuries and recommends seeking advice to handle each situation appropriately.*

## Workers' Compensation

In *Pettine v. WCAB (Verizon Pennsylvania)*, an employee was struck by a car while marking the road and suffered compensable injuries. He later requested that the claim be expanded to include his back and shoulder. When he

declined an offer of a modified job that met his physical restrictions, vocational background, and geographical area, Verizon sought to modify his benefits.

The case went through several appeals, but in each case, the employee's petition was denied and Verizon's was granted.

In a similar vein, many employers tell stories of injured workers who are off work on workers' compensation but are seen doing all kinds of physical activities. One of the best ways to control the costs of an injury, and reduce fraud is to utilize transitional or light duty positions. If the injured employee refuses to accept the temporary duty, it allows the insurance company to petition to stop wage payments.

## Reduced Burden of Proof in Firefighter Cancer Cases

While the state had created a presumption of an occupational disease for firefighters with cancer, the Commonwealth Court has a newer reading of the language requiring firefighters to prove they had industrial exposure to carcinogens known to cause cancer.

In a recent decision, *City of Philadelphia Fire Department vs Workers' Compensation Appeal Board (Sladek)*, the Supreme Court lowered the burden of proof, noting



that a cancer-stricken firefighter has the responsibility of proving the "occupational disease" but does not have to prove an identified Group 1 carcinogen actually caused the cancer.

The proof process involves showing they spent four or more years working as a firefighter, after passing a physical examination, during which they were cancer free. In addition, the cancer-stricken firefighter must have evidence of direct exposure to a Group 1 carcinogen.

This case and ruling shows that the workers' compensation industry continues to decipher what is and what is not, covered by the Firefighter Cancer Presumption Law. They are also discerning the costs associated with treating the afflicted firefighters but more data is needed before firefighters can be insured again.

## PA Insurer Cannot Sue Third-party

An employee of Reliance Sourcing, which was insured by The Hartford, was standing in the parking lot of Thrifty Rental



Car when she was struck by a rental vehicle. The Hartford paid over \$59,000 in medical and wage benefits and sought to sue the responsible parties for damages.

However, the employee did not join in the insurer's action, did not assign her cause of action to the insurer, and did not seek to recover damages independently.

While the defendants argued, Hartford had no independent ability to commence a claim directly against them, the insurance company argued it had filed the suit "on behalf of" the employee.

In a divided decision, the Supreme Court ruled that because the injured employee's lack of assignment or voluntary participation as a plaintiff, the insurer could not use subrogation (substituting one person or group for another and any associated rights and duties) against the tortfeasor (a person or entity that commits a civil wrong).

Keystone has received questions from employers regarding why their insurance company has not subrogated an employee's injury from a third party. This case demonstrates that the incapacitated employee must fully participate in the legal proceedings, or at a minimum, authorize the insurance company act on her or his behalf.

## Medical Marijuana reimbursement

In *Newville v. Michigan Department of Corrections*, the workers' compensation magistrate found that a correction officer's injuries were sustained as a result of altercations with inmates, and prescriptions for oxycodone, fentanyl, and medical marijuana for back pain were reasonable and necessary.

However, in line with the workers' compensation law and the Medical Marijuana Act, the magistrate could not order the employer to reimburse for the cost of medical marijuana, even though a worker's use of marijuana helped reduce his use of prescribed opioids.

Pennsylvania's legalization of medical marijuana is more recent than Michigan's, so workers' compensation cases have not made it through the full court system. However, it is not uncommon for judges to look at other state rulings as possible examples when interpreting new laws.

**About the author:** David R. Leng, CPCU, CIC, CBWA, CRM, CWCA, is author of the *International Best Sellers – The Laws of Insurance Attraction and Turning Premiums into Profits*, as well as one of the top selling workers' compensation books for employers, *Stop Being Frustrated & Overcharged*. David

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