

The logo for Burns White Attorneys at Law, featuring the name in a serif font inside a dark rectangular box with a thin white border.

**Burns White**

ATTORNEYS AT LAW

The title 'LEGAL UPDATE' is displayed in a large, bold, white sans-serif font against a background of overlapping, semi-transparent leaf patterns in shades of green and blue.

**LEGAL UPDATE**

WORKERS' COMPENSATION

MARCH, 2018

**Work injuries are inevitable and costly.**

**The key is to minimize your liability through expeditious and strategic legal representation. Burns White delivers positive outcomes for our clients.**

**That's what we do—and we have the case law to prove it.**

#### **YMCA of Wilkes-Barre and HM Casualty Insurance Company v. WCAB (KEMKA)**

**Matter:** Claimant sustained a work injury in 2011 in the form of a C5-6 disc herniation with radiculopathy and insertional tendonitis. Claimant's treating physician, Dr. Emmanuel Jacob, provided ongoing medical treatment, including acupuncture and a prescription muscle relaxer. In 2015, the Employer filed a Utilization Review regarding the treatment of Dr. Jacob. The UR physician determined that Flexeril was no longer reasonable or necessary, and ongoing acupuncture treatment was not reasonable or necessary because it failed to provide Claimant with significant, long-lasting pain relief.

**Resolution:** The claimant and his physician both testified that Claimant experienced one-to-three days of pain relief following his weekly acupuncture treatment, which enabled him to avoid taking opioid medications. However, the WCJ found the UR physician the "most persuasive," and concluded that continued acupuncture treatment was not reasonable or necessary because it only provided pain relief for one or two days at a time. The WCAB reversed on appeal noting that palliative treatment may be reasonable and necessary, even if it does not cure the underlying injury, as long as it alleviates pain and treats symptoms. The Board concluded the Claimant's receipt of acupuncture treatment was reasonable and necessary, even though it was aimed at managing his pain symptoms, rather than improving or curing his condition.

The Commonwealth Court affirmed the Decision of the WCAB, noting that a WCJ may not determine treatment to be unreasonable and unnecessary solely because the treatment is palliative in nature. Palliative treatments are reasonable and necessary under Pennsylvania Law, even if the relief lasts only a couple of days after each treatment. The Court noted the undisputed testimony of Claimant's physician that the pain relief provided by the acupuncture treatments allowed Claimant to avoid taking opioid medications, that opioids pose a greater risk than other treatments, and consideration of that risk is appropriate in assessing whether the pain treatment at issue is reasonable and necessary.

**Take Away:** It is interesting to note that the Court's rationale for upholding the reasonableness and necessity of the acupuncture treatment was the testimony of the Claimant and his physician both of whom stated that his acupuncture treatment provided brief, temporary relief that enabled him to avoid using opioid medications.

## **Burch v. WCAB (Graham Packaging)**

**Matter:** The Commonwealth Court affirmed the Decision of the WCJ, finding that the Claimant failed to provide timely notice of her work injury based upon text messages she exchanged with her co-workers regarding her alleged injury.

The Claimant was employed with the Insured as a Quality Assurance Technician when she allegedly sustained a work injury as the result of hitting her head on a low-hanging vent on January 28, 2013. Claimant filed a Claim Petition on June 3, 2013, and the Employer denied liability, alleging it was not notified of her neck-related work injury until June 4, 2013. Consequently, notice of the injury was not provided within the requisite 120 days.

The Claimant testified that she told three co-workers on the date of injury that she struck her head on the vent; however, she acknowledged that she did not fill out an Accident Report or inform her Supervisor because she did not want to jeopardize her co-workers' ability to earn a safety bonus. The record indicated that on February 7, 2013, the Claimant presented to the office of the Plant Manager, and informed him that she had hit her head on a tree limb. He responded, "So you did not hurt yourself at work?" Claimant responded, "No." Additionally, the Claimant's Supervisor and Quality Assurance Manager testified that Claimant told him "She was playing with her dog or walking the dog" when she "inadvertently struck a tree limb and hurt her neck." Neither party learned of Claimant's work injury allegations until June 4, 2013, at which time Claimant sent a text message to the Plant Supervisor indicating that her "claim has turned into a workman's compensation claim and she's hired an attorney."

Several text messages from March 4, 2013 were also offered as part of the record between Claimant and a non-supervisory co-worker wherein the co-worker indicated, "(The Plant Manager) knows." During his testimony, the co-worker testified that this statement was in response to Claimant's message indicating that she will have to be more cautious at work, and not in response to her question about whether he told anyone the "real story" about her injury.

**Resolution:** The WCJ found that Claimant established a work-related disability; however, he denied her claim because she did not give timely notice to the Employer of her work injury. The WCJ found that Claimant told her non-supervisory co-worker that her injury was work-related, but this notice was inadequate because he did not work for the Employer in a supervisory capacity, nor did the Claimant establish that the co-worker was an agent of the Employer for purposes of receiving notice of work injuries. The WCAB affirmed the Decision of the WCJ on appeal. The Commonwealth Court affirmed, and noted that the Claimant has the burden of proving timely notice of the work injury to her Employer.

**Take Away:** It is interesting to note that the Commonwealth Court held the Claimant strictly accountable for providing direct notice to the Employer within the requisite statutory period. Claimant essentially argued that she assumed the Employer knew of her work injury based upon the text message received from her co-worker that "(The Plant Manager) knows," however, the Commonwealth Court did not take the bait on this argument.

## **Keister Miller Investments, LLC v. WCAB (Hoch)**

**Matter:** The Commonwealth Court held that, if the Workers' Compensation Appeal Board wishes to modify an award for disfigurement benefits on appeal, the Board must cite substantial and competent evidence demonstrating that the WCJ's award was significantly outside the range normally awarded for disfigurements similar to the particular Claimant at issue.

Claimant was employed with the Insured as a Truck Driver, on December 12, 2015, when he sustained an injury in the form of a broken nose and laceration to the right side of his head. He filed a Review Petition on September 22, 2016, alleging that his work-related injury resulted in disfigurement and scarring. A description of the facial scar was placed on the record during a testimonial hearing before the WCJ, and the WCJ ultimately awarded 40 weeks of indemnity benefits based upon the description.

The Claimant appealed to the WCAB. The Board viewed the Claimant's face in person, and determined that the WCJ issued an award outside the range normally awarded for similar scars. Consequently, the Board increased Claimant's award of disfigurement benefits to 70 weeks of compensation.

**Resolution:** On appeal to the Commonwealth Court by the Employer, the Court noted that, despite using slightly different language, the Board essentially adopted the WCJ's description of Claimant's disfigurement. Despite a similar description of the disfigurement, the Board arbitrarily increased the award from 40 to 70 weeks. The Court noted that the record was devoid of any evidence regarding precisely what information the Board relied upon in concluding that the WCJ's award was significantly outside the range normally awarded for scars similar to Claimant's scar. This lack of explanation and information raises the concern that the Board is simply substituting its judgment for that of the WCJ. Therefore, in order to modify a WCJ's disfigurement award, the Board must offer sufficient evidence or explanation as to how, or why, it determined the acceptable range of disfigurement benefits for Claimant's scar.

**Take Away:** The rule of thumb gleaned from this case is never simply to accept the WCAB's modification of a disfigurement award. Rather, the Employer and its counsel should review the appellate Decision to confirm that the Board provided adequate explanation as to why the disfigurement award was modified.