

Speakers

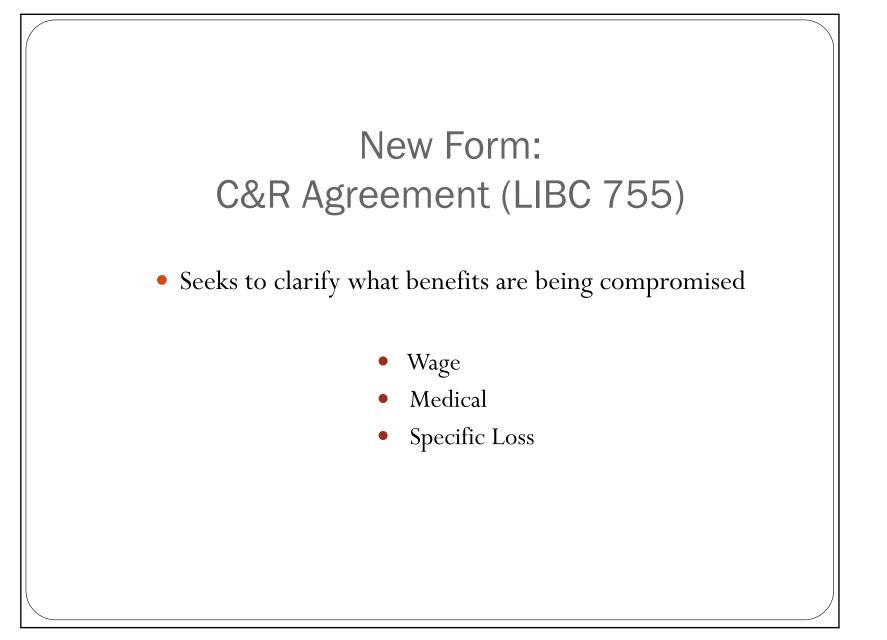
The Honorable Bonnie Callahan Malvern Hearing Office Bureau of Workers Compensation

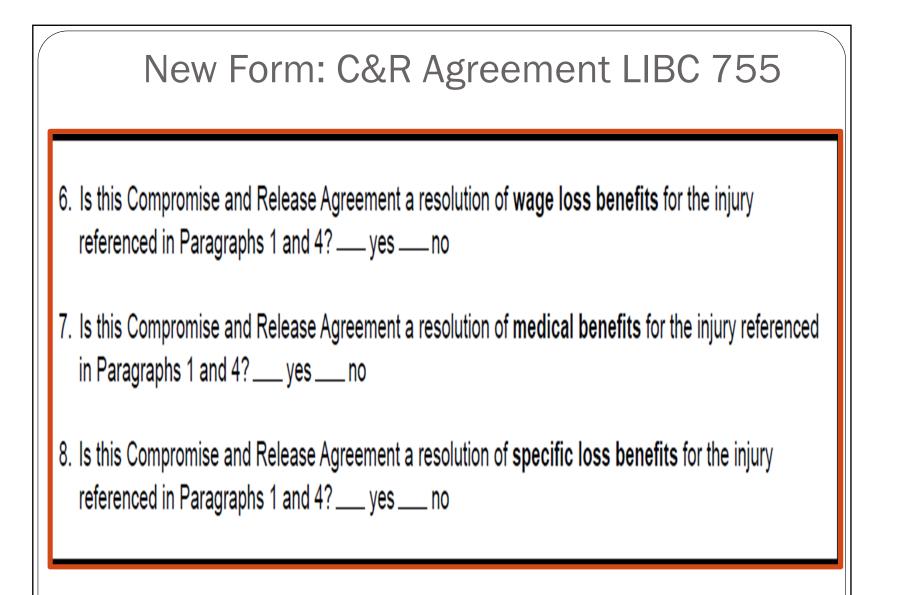
Terence Sean McGraw, Esquire Warren & McGraw Blue Bell PA

Davis S. Reno, Esquire Zenith Insurance Company Blue Bell PA Claimant's Attorney

Bench

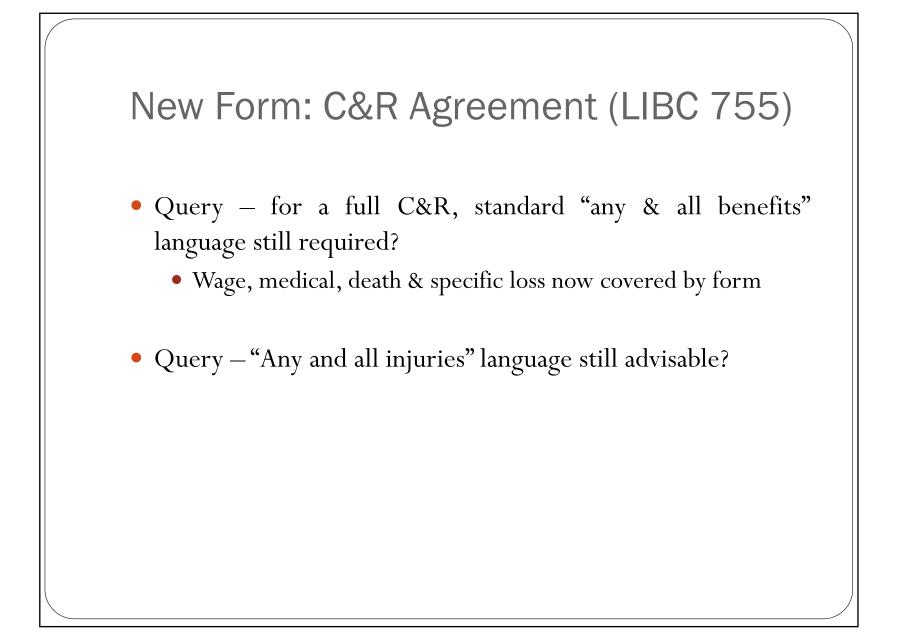
Defense Attorney

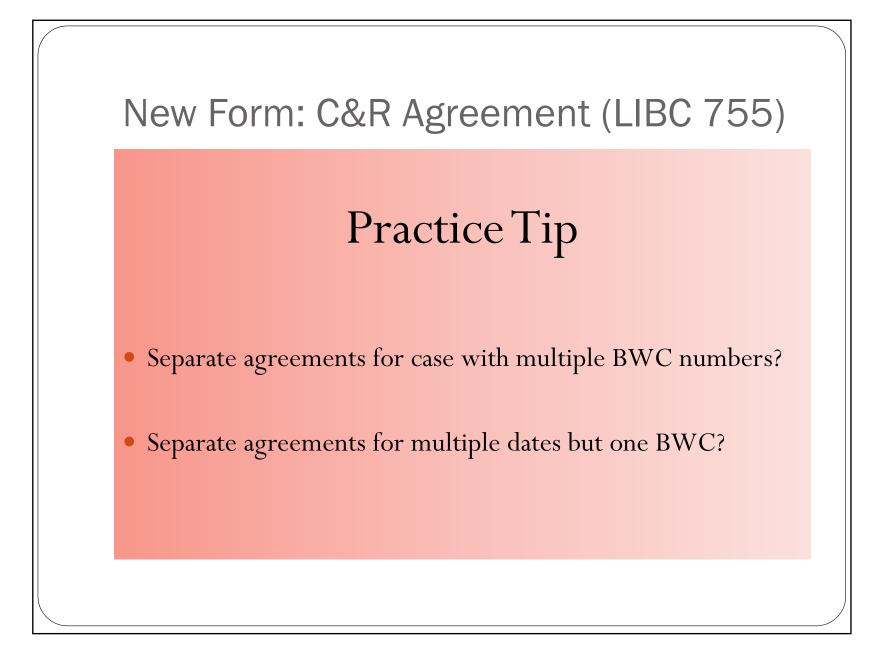


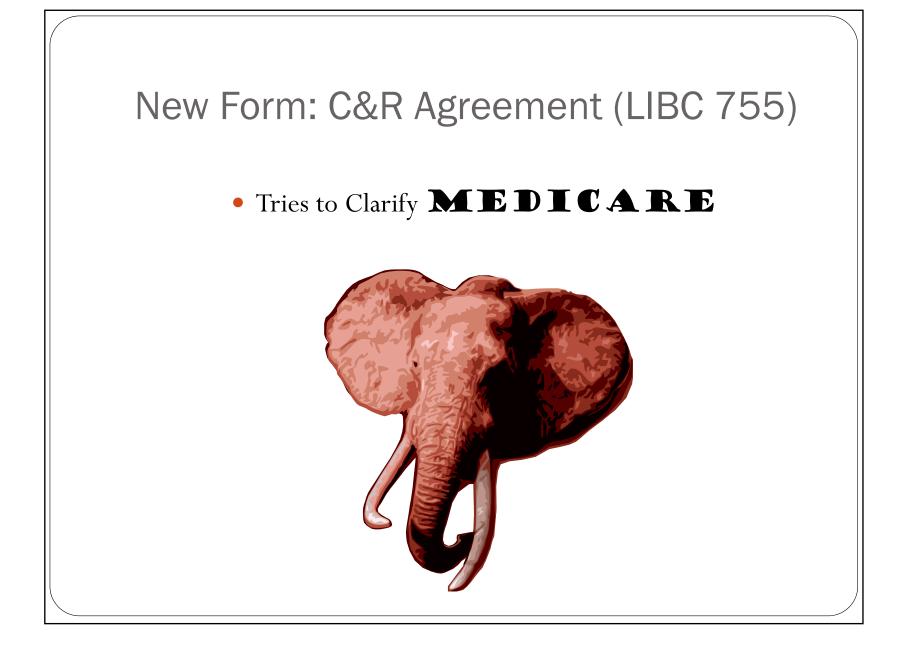


New Form: C&R Agreement (LIBC 755)

- Query check the medical box if the settlement in a "two step?"
 - Eliminate concerns about claimant having second thoughts?
 - Eliminate need for monetary hold back?
- Query check the medical box if the medical settlement is contingent upon MSA approval per the submitted proposal?
 - Bind the claimant to the whim of the carrier?
 - Can the carrier elect to leave the medical open and then resubmit an MSA at any indefinite period in the future?







New Form: C&R Agreement (LIBC 755)	
 This Compromise and Release Agreement addresses the interests of Medicare in accordance with the Medicare Secondary Payer Statute (42 U.S.C. Section 1395(y)): 	
a) Manner in which Medicare's interests have been addressed:	
b) Amount allocated: \$	
c) Manner in which conditional payments have been addressed:	



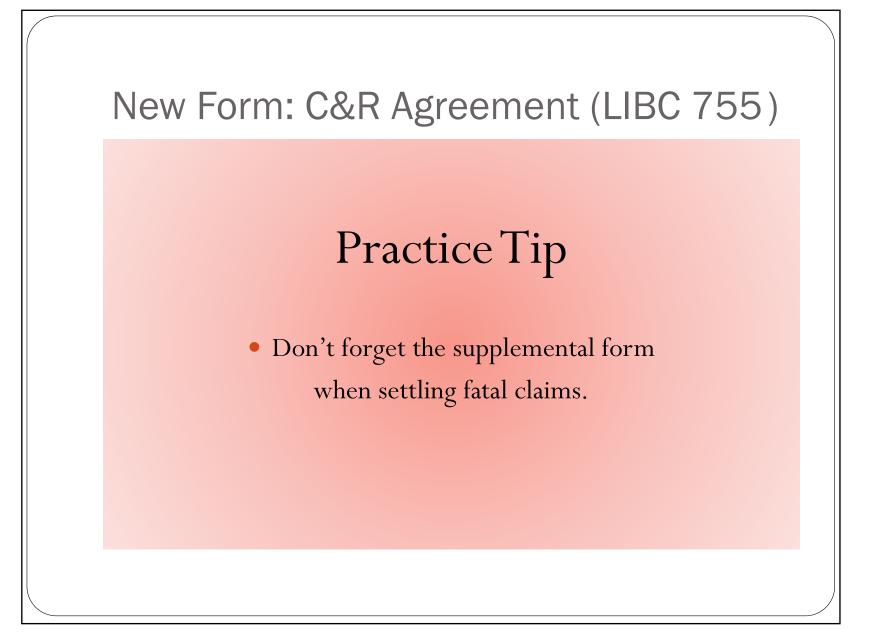
New Form: C&R Agreement (LIBC 755)

Practice Tips

• Philadelphia Resolution Court – Santoro says.....

- Attachments varying practices
 - CFA?
 - Act 109 Affidavit & PACES Report (SSN)?
- Pre-submission of C&R in some jurisdictions
 - WCJ Terry Knox (Reading)
 - Hearing will be canceled if do not comply





- Where the employee, states unequivocally that he or she is retired and has no intention of seeking further employment, the employer is relieved of the burden of proving the availability of employment.
- Vitelli v. WCAB (St. Johnsbury Trucking Co.), 630 A.2d 923 (Pa.Cmwlth. 1993); Dugan v. WCAB (Fuller Co. of Catasauqua), 569 A.2d 1038 (Pa.Cmwlth. 1990).

- For disability compensation to continue following retirement, an employee must show that the employee is seeking employment after retirement, or that the employee was forced into retirement because of the work-related injury.
- SEPTA v. WCAB (Henderson), 669 A.2d 911 (Pa. 1995); Alpine Group v. WCAB (DePellegrini), 858 A.2d 673 (Pa.Cmwlth. 2004); Kasper v. WCAB (Perloff Bros., Inc.), 769 A.2d 1243 (Pa.Cmwlth. 2001); Shannopin Mining Co. v. WCAB (Turner), 714 A.2d 1153 (Pa.Cmwlth. 1998).

- To defeat a suspension of benefits, an employee has the burden of establishing that he or she was forced to retire from the **entire labor market**, not just from the pre-injury job.
- Pries v. WCAB (Verizon Pennsylvania), 903 A.2d 136 (Pa.Cmwlth. 2006), app. denied, 923 A.2d 412 (Pa. 2007); Hepler v. WCAB (Penn Champ/Bissel, Inc.), 890 A.2d 1126 (Pa.Cmwlth. 2006), app. denied, 906 A.2d 545 (Pa. 2006); County of Allegheny (Department of Pub. Works) v. WCAB (Weis), 872 A.2d 263 (Pa.Cmwlth. 2005)

New Cases

City of Pittsburgh v.WCAB (Robinson)

Facts

• Claimant worked for Employer in a light-duty position.

• Employer discontinued its transitional-duty program.

- Claimant sought, and received, a disability pension from Employer.
- IME released to light-duty, sedentary work. Notice of Ability to Return to Work issued.ER filed Suspension Petition.
- Claimant looked for jobs she believed she could perform, but did not apply for any.

New Cases City of Pittsburgh v.WCAB (Robinson) Procedural History - WCJ

• The WCJ determined that Employer forced Claimant into retirement by eliminating her modified-duty position.

• The WCJ found the Claimant had been looking for work.

New Cases City of Pittsburgh v.WCAB (Robinson) Procedural History - WCAB

• Employer argued that the WCJ erred in failing to apply *Weis*.

• WCAB aff'd -WCJ's decision did not conflict with *Weis* because the WCJ found that Claimant had looked for work and, therefore, remained attached to the labor market.

New Cases

City of Pittsburgh v.WCAB (Robinson) Holding

- BOP is on the ER to show, by the <u>totality of the circumstances</u>, that the claimant has chosen not to return to the workforce.
- Circumstances to consider:
 - (1) where there is **no dispute** that the claimant retired;
 - (2) the claimant's acceptance of a **retirement** (not disability) pension; or
 - (3) the claimant's acceptance of a pension and refusal of suitable employment within her restrictions.
- Allocator granted.

New Cases

City of Pittsburgh v.WCAB (Leonard) Facts

- Claimant received a service-connected disability pension from Employer. Claimant was not working light duty or otherwise at the time.
- IME released to full-time light-duty and part-time mediumduty work. Notice of Ability to Return to Work issued.
- Employer filed a Petition to Suspend
- Claimant admitted he did not start looking for work until 4 months after receipt of NOARTW

New Cases

City of Pittsburgh v.WCAB (Leonard)

Procedural History

- WCJ suspended benefits from NOARTW until Claimant started looking for work (in good faith).
- WCAB affirmed
- Cmwlth Ct. ER argued:
 - 1) suspension should have commenced when pension commenced citing *PSU v*. *Workers' Compensation Appeal Board (Hensal)*, 948 A.2d 907, 910 (Pa. Cmwlth. 2008), (claimant who accepts a pension is presumed to have left the workforce);
 - 2) C's job search efforts insufficient to re-establish connection with job market

New Cases

City of Pittsburgh v.WCAB (Leonard)

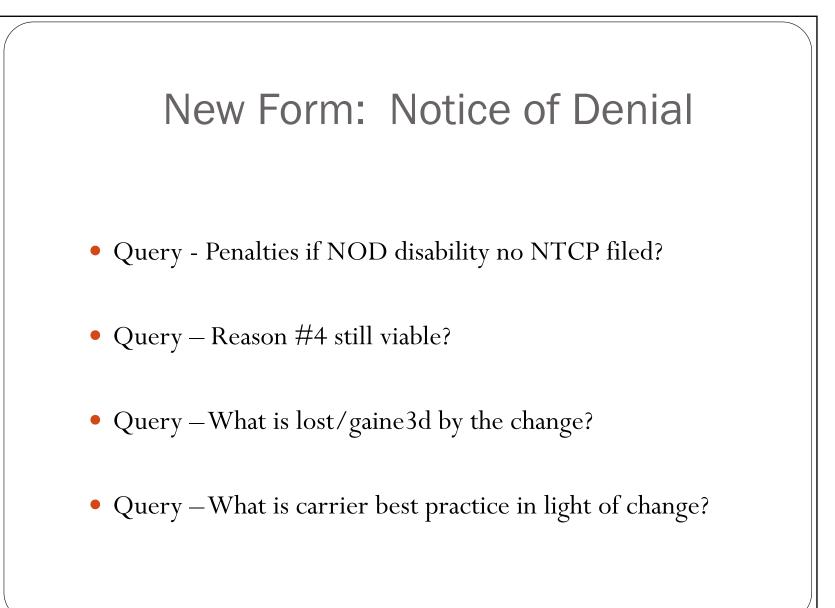
<u>Holding</u>

- Cmwlth. Ct. Affirms, applying the "totality of circumstances" test of *Robinson*.
- It was not until Claimant received notice that he was capable of working and then subsequently failed to adequately seek employment that there was sufficient indicia that Claimant had voluntarily left the workforce.
- Claimant can rebut presumption of retirement by showing: 1) seeking employment in good faith; or, 2) forced to retire from entire work force.
- Hensal testimony of looking at various job listings not enough "window shopping."
- *Leonard* Claimant testified to various unsuccessful contacts with possible employers testimony credited by WCJ

New Form: Notice of Denial

- Specific language prohibiting use when accepting medical and denying indemnity
- Must use Medical Only NCP
- New Reasons removal of language that required explanations when lack of medical records in the basis of denial.

New Form: Notice of Denial	
NOTICE: The employer/insurer has decided to deny you workers' compensation benefits. You have the right to contest this denial by timely filing a petition with the bureau.	-
Do not use this form to accept a medical-only claim. This denial shall be sent to the employee or dependent and filed with the bureau no later than 21 days after notice or knowledge to the employer of the employee's disability or death. Date employer received notice or knew of alleged injury or date of employee's claimed disability: This date must be completed.]
The employer/insurer declines to pay workers' compensation benefits to claimant because:	•
 The employee did not suffer a work-related injury. The definition of injury also includes aggravation of a pre-existing condition, or disease contracted as a result of employment. The injury was not within the scope of employment. The employee was not employed by the defendant. 	
 4. The employee has not suffered a loss of wages as a result of an already accepted injury. 	
 5. The employee did not give notice of his/her injury or disease to the employer within 120 days within the meaning of Sections 311-313 of the Workers' Compensation Act. 	
6. Other good cause. Please explain fully in the space below. Note: Language re failure to obtain reports not being good cause removed.	



Practice Tip

 Payment logs of UC benefits may be obtained on line at https://www.paclaims.state.pa.us/uccc/LoginBenefitStatus.asp

- Need the claimants SSN and UC Pin #
- Full benefits info available from Wednesday to Saturday

Practice Tip

- What to do when the info is not available on line?
- Subpoena?
 - 400 back logged pending new administration ruling on confidentiality issues
 - Confidentiality ruled changed due to federal mandate. See 61 Pa. Code §25
 - Fee charged \$125.00
- "Direct" request by claimant
 - Cheaper \$40.00
 - Faster 10 days

???? Wrinkle?????

61 Pa. Code §25

(2) *Rule of confidentiality.*

(i) Unemployment compensation information is confidential and may be disclosed only as permitted in this subsection.

(ii) Except as provided in paragraph (5), unemployment compensation information <u>will not be competent evidence</u> and may not be used in any action or proceeding in any court or other tribunal.

Unemployment Compensation Credits ????Wrinkle????

61 Pa. Code §25

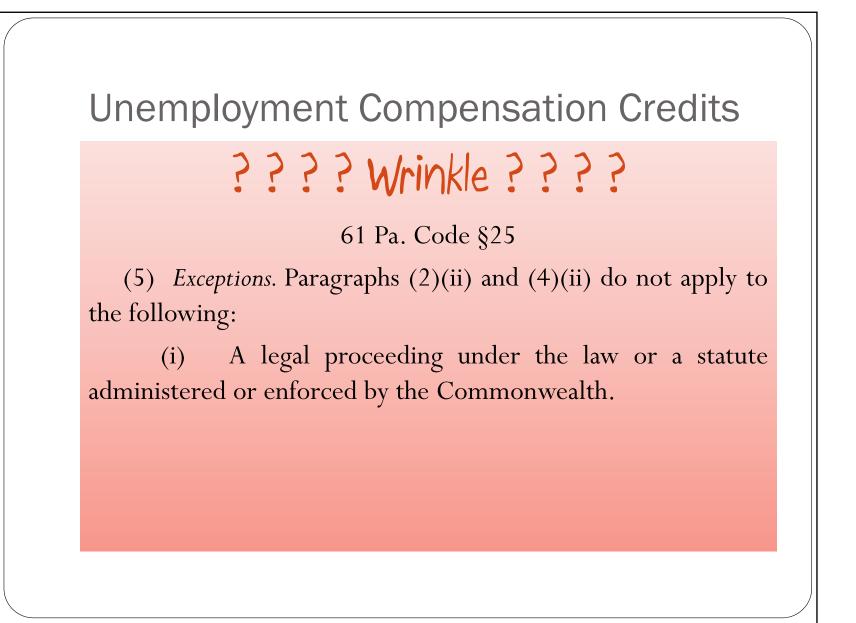
(3) Permissible disclosure...

(ii) To a claimant, the last employer of the claimant, a base year employer of a claimant or a representative of any of the foregoing in accordance with paragraph (7), to the extent necessary for the proper determination of the claimant's application for benefits and claims for compensation.

(vi) As permitted by provisions of the law or as required or permitted by Federal law.

(4) *Redisclosure prohibited.*

(ii) Except as provided in paragraph (5), a person, other than an officer or employee of the Department or a member or employee of the Board, to whom unemployment compensation information is disclosed under paragraph (3) or otherwise may not disclose the information to any person <u>or before any court or</u> <u>other tribunal</u> without the prior, written authorization of the Department or the Board. This subparagraph applies to the initial person to whom the information is disclosed and subsequent recipients of the information.



Practice Tip

• Credit is on the Net, not the Gross

Sample brief language -

The parties agree that the employer is entitled to a credit for claimant's receipt of unemployment compensation benefits. They do not agree whether the credit should be on the gross benefit or the net benefit paid. Initially, the Commonwealth Court resolved this question in favor of awarding credit for the gross benefit. *Ferrero v. WCAB (CH&D Enters.)*, 706 A.2d 1278 (Pa. Cmwlth. 1998). However, the decision in Ferrero was filed 11 days after the Bureau issued regulations that state that the unemployment compensation credit was to be based upon the net amount received by the employee and these regulations were not discussed in *Ferrero*. 34 Pa.Code § 123.6(a).

In Phila. Gas Works v. Workers' Comp. Appeal Bd. (Amodei), 964 A.2d 963 (Pa. Cmwlth. 2009), the Commonwealth Court reconsidered the issue in light of the regulations issued by the Bureau. The Court concluded that the Bureau's regulations, mandating that the credit be applied on the net amount, were entitled to deference. Accordingly, the credit should be applied on the net amount in the instant case. Application of the credit on the net amount in this case also results in a credit which is based upon what the claimant has actually received. (Exh J-1); see, e.g., Steinmetz v.Workers' Comp. Appeal Bd. (Cooper Power Sys.), 858 A.2d 182 (Pa. Cmwlth. 2004)

New Form: Utilization Review Request (Pending)

- Draft of new UR Request form in the works
- Five spaces for different providers
- Can use one form to review five different providers
- Will get different report for each specialty
- Designed to allow UR to apply to multiple providers in one group
- Convenience and cost containment

New Form: Utilization Review Request (Pending)

PROVIDER 3: First Name:	Lest Name:		
Office Address:			
Telephone ()	License/Speciality		
Treatment to be Reviewed:			
Stat/End Date:	WCJ Circulation Date:		
	WCJ Circulation Date:		
PROVIDER 4:			
First Name:	Last Name:		
Office Address:			
City/State/Zlp:			
Telephone ()	License Gpecially		
Treatment to be Reviewed:	Licensets boolety		
Start/End Date:	MACJ Cite Hatton Date.		
PROVIDER 5:			
First Name:	Last Name:		
Office Address:			
City/State/Zip:			
Telephone ()	License/Specialty		
Treatment to be Reviewed:			
v			
Start/End Date:	WCJ Circulation Date:		
], none /Report Rec'd		
	the second se	and for the treatment of issue)	

New Form: Utilization Review Request (Pending)

- Query Will new form encourage pervasive requests, fishing expeditions? (WCJ Bruce Doman)
- Contra: Carrier charged per each specialty reviewed.
- Contra: Cost of the individual review will inhibit encouragement toward pervasive use.

Utilization Review Erosion of the "Provider Specific" Rule?

- When a UR is requested, the requesting party must identify both the provider under review and the treatment being challenged.
- A UR only determination pertains to the provider named, and the treatment as issue.
- But see *MTV* Transportation v. Workers' Compensation Appeal Board (Harrington).

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Utilization Review

Erosion of the "Provider Specific" Rule?

New Cases

MTV Transportation v. Workers' Compensation Appeal Board (Harrington).

Facts

- Employer listed "Frank Shenko, LPT" as the "Provider Under Review."
- WCJ concluded that Employer proved that Claimant's physical therapy sessions with Shenko were neither reasonable nor necessary.
- The WCJ rejected Employer's claim that this determination should be applied to other physical therapists who also treated Claimant.

Utilization Review Erosion of the "Provider Specific" Rule?

New Cases

MTV Transportation v. Workers' Compensation Appeal Board (Harrington).

Procedural History

- ER appealed, arguing that all of the physical therapists in Shenko's facility operate under the supervision of the same physician and provide the same course of treatment.
- Employer pointed out that it would be cost prohibitive to request multiple utilization reviews; this one alone cost \$770.

Utilization Review

Erosion of the "Provider Specific" Rule?

New Cases

MTV Transportation v. Workers' Compensation Appeal Board (Harrington).

<u>Holding</u>

- *Bucks County* and *Schenck* are both distinguishable because they dealt with physicians who have the power to act independently of each other.
- Physical therapy is a different matter, It is prescribed by a physician and then carried out by physical therapists acting under the doctor's supervision.
- It would make no sense to have different utilization reviewers separately reviewing the same course of physical therapy, under the direction of the same physician, and potentially reaching different conclusions as to its reasonableness and necessity.

90 Day Rule Soon to be 180 days?

- PUEGF needs to be funded
- Funding bill pending in legislature HB 808 scheduled for vote Monday May 23, 2011
- Includes amendment increasing mandatory treatment period from 90 days to 180 days
- Applies only to injuries after the effective date (60 days after signing)
- http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType =HTM&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=0808&pn =1847

Philadelphia Bar Association Workers Compensation Section Spring Party

Tuesday, June 7, 2011 6:00-9:00 p.m. Manayunk Brewery and Restaurant

4120 Main Street Manayunk, PA

- \$45 Member
- \$55 Non-Member
- Judges Complimentary

<u>Send to:</u> <u>Philadelphia Bar Association</u> <u>1101 Market St., 11th Floor</u> <u>Philadelphia, PA 19107-2955</u> <u>Fax: (215) 238-115</u>

http://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/

WebServerResources/CMSResources/2011wcs_springparty4.pdf