

  
**THE CHARTWELL**  
LAW OFFICES, LLP

April 9, 2007

**Re: Pennsylvania Workers' Compensation Act Reform**

On November 9, 2006, Governor Rendell signed House Bill 2738, amending the Pennsylvania Workers' Compensation Act. The Bill was passed with unusual speed by a unanimous House and Senate only six months after its introduction by Representative Bob Allen.

The highlights of House Bill 2738 include:

1. Expedited "Resolution Hearings"
2. Mandatory Trial Schedules Including Mandatory Mediation
3. An Increase in the Minimum Compensation Rate for Certain Old Injuries
4. Changes in the Workers' Compensation Appeal Board
5. No More "One Judge Counties"
6. Limitation of Counsel Fees
7. Creation of the Uninsured Employers Guaranty Fund

The stated goals of this legislation were to decrease litigation costs, streamline the adjudication process, and improve the timeliness and quality of Workers' Compensation Decisions.

Upon review and consideration of the final amendments, there are concerns that the amendments will fall short of these stated goals. In addition, insurers, self-insureds, and third-party administrators should be aware of the impact these amendments will have on case investigation and litigation.

**Expedited Resolution Hearings**

Amended Section 401 defines "Resolution Hearing" as a "procedure established by the Office of Adjudication with the sole purpose of providing a venue to present a Compromise and Release to a Workers' Compensation Judge (WCJ) in an expedited fashion." Section 401.1

Valley Forge Office  
Valley Forge Corporate Center  
2621 Van Buren Avenue  
Norristown, PA 19403  
(610) 666-7700  
(610) 666-7704 (fax)

Philadelphia Office  
Bell Atlantic Tower  
1717 Arch Street, Suite 2920  
Philadelphia, PA 19103  
(215) 972-7006  
(215) 972-7008 (fax)

Pittsburgh Office  
409 Broad Street  
Suite 200  
Sewickley, PA 15143  
(412) 741-0600  
(412) 741 0606 (fax)

Harrisburg Office  
1017 Mumma Road  
Suite 100  
Wormleysburg, PA 17043  
(717) 909-5170  
(717) 909-5173 (fax)

info@chartwelllaw.com  
www.chartwelllaw.com

now provides that within 120 days, or on or before March 6, 2007, the Office of Adjudication must create a "Resolution Hearing" procedure to hear Compromise and Release Agreements in an expedited manner. The hearing must be held within fourteen business days of notice the settlement, and the presiding WCJ must render a Decision within five business days of the hearing. The WCJ conducting the hearing does not need to have been formally assigned by the Bureau, but at the time of the hearing, the parties must submit proof of filing a Petition to Seek Approval of a Compromise and Release Agreement. These Sections became immediately effective when signed by the Governor.

Currently, WCJ Santoro presides over "Resolution Court" in Philadelphia. This is a venue for presentation of a Compromise and Release Agreement, where the parties are otherwise unable to obtain a prompt hearing before the assigned WCJ. WCJ Santoro holds "Resolution Court" one to two days per week, and parties are permitted to schedule a hearing or walk in. WCJ Santoro's office transfers pending litigation from the assigned WCJ, and disposes of outstanding Petitions at the request of the parties. Some WCJs outside Philadelphia have created mechanisms for expediting the disposition of Compromise and Release matters. WCJ Michael Rosen of Bucks County regularly publishes in advance a Notice advising of dates upon which he will hear only Compromise and Release Petitions.

Since the "sole purpose" of the new "Resolution Hearing" is to provide a venue to present a Compromise and Release, it is possible that the Office of Adjudication will look to Judge Santoro's "Resolution Court" or WCJ Rosen's practices for guidance. Other variations could include:

1. Assigned WCJ's being required to schedule Petitions to Seek Approval of a Compromise and Release Agreement for hearing within fourteen business days; or
2. Reciprocal agreements amongst WCJs in the same Hearing Office to preside over "Resolution Hearings" on set days in cases that are already assigned to that Hearing Office.

The amendments do not require that all Compromise and Release Hearings be held within the fourteen day time period. The Office of Adjudication will likely provide parties with the ability to utilize or forego the expedited procedure. Many Compromise and Release Agreements require substantial document preparation addressing Child Support matters, Medicare Set-Asides and other peripheral employment issues. In addition, counsel for the employer should take time to consider issues such as whether the accident or injury will be admitted as compensable in the Compromise and Release, which could result in future third party civil actions or liens for medical bills paid by non-workers' compensation health insurance carriers. These issues can make the expedited proceedings contemplated by the amendments unfeasible. Employers and carriers should not "rush the paperwork." Great care must be given to the precise wording of a Compromise and Release, and use of general releases, waivers, resignations, etc., must be fully and clearly outlined in the agreements.

Conversely, the insurer, self-insured, or third party administrator is often faced with paying medical costs and indemnity benefits until the matter can be heard by the WCJ, despite the parties having negotiated a settlement. Pursuant to the new amendments, utilization of the "Resolution Hearing" process would reduce these particular costs to insurers, self-insureds, and third party administrators.

Circumstances frequently arise (WCJs on vacation, sick, or already overburdened) that will interfere with the clearest statutory deadlines. Where appropriate, defense counsel may insist that the employer receive a credit for any benefits paid beyond fourteen business days of filing the Petition to Seek Approval of the Compromise and Release, because the Act now requires that the parties be provided with a venue to hear the matter within that time.

#### **Mandatory Trial Schedules Including Mandatory Mediation**

Section 401.1 of the Act was also amended to include mandatory trial schedules and mandatory mediation. Although the amendments seek to streamline the adjudicative process, they are silent with respect to how long a WCJ may take to issue a Decision.

Section 401.1 now provides that each Workers' Compensation Judge assigned to conduct hearings shall set forth a mandatory trial schedule at the first hearing. This trial schedule shall include specific deadlines for the presentation of evidence by the parties, and dates for future hearings and mediation. The assigned Judge must strictly enforce the schedule, and no party will be excused from honoring the schedule absent good cause shown.

However, there is no set time frame within which the case must be heard. The Office of Adjudication may instruct WCJs on how to implement this new procedure. Since these amendments immediately went into effect on November 9, 2006, some WCJs have already implemented procedures for the new scheduling. Some WCJs complete a standard Interlocutory Order with spaces to fill in dates for future hearings, deadlines for evidence, the date of the mediation or whether mediation would be futile. Other WCJs make a statement on the record regarding the trial schedule.

Failure to adhere to the mandatory trial schedule can subject the employer or carrier to Section 435 penalties. The WCJ has discretion to impose penalties to ensure compliance with the Act, and therefore, counsel should be prepared to proceed according to the schedule set by the WCJ or be prepared to show good cause for requesting a continuance. In the event that a deadline cannot be reached, nothing in Act prevents defense counsel from withdrawing and re-filing its own Petitions in order to reset the clock. However, forced withdrawal of a Petition could constitute good cause for not adhering to the schedule.

Defense counsel cannot seek an award of penalties against the claimant, but should make a motion to dismiss for failure to prosecute if claimant fails to adhere to the mandatory trial schedule on his or her own Petition. Rule 131.63 of the Special Rules of Administrative Practice and Procedure Before Judges, provides that testimony may be excluded if not taken within the time frame set forth in the Special Rules.

The mandatory trial schedule and potential for penalties may force the defendant to choose a medical witness based upon availability to testify, rather than expertise. Selecting an examining physician under these constraints can reduce the quality and credibility of the defendant's medical evidence, since many independent examiners who maintain an active clinical practice would be eliminated.

It is important to note, however, that a mandatory schedule does not have to be a shortened schedule. To avoid missing deadlines and incurring penalties when litigating a non-Claim Petition, the claims adjuster or defense counsel should schedule or attempt to schedule expert medical testimony prior to the first hearing. If counsel is able to provide the WCJ with a date or an estimated date of testimony at the first hearing, it is more likely that the deadlines set by the WCJ will comport with that date. This permits the defendant to avoid a penalty and to present better, more credible expert evidence.

When defending a Claim Petition, however, the employer schedules its IME and associated testimony after the first hearing. Although the Office of Adjudication will instruct Judges on implementing a mandatory trial schedule, Special Rule 131.53 already sets forth that in a Claim Petition, the defendant must schedule its medical examination within 45 days of the first hearing, the claimant must schedule its medical testimony within 90 days of the first hearing, and the defendant must schedule its medical testimony 90 days thereafter. Accordingly, the defendant has, at the most, 180 days after the first hearing to complete its medical evidence, assuming that the claimant utilizes his or her full 90 day allowance.

Clearly, an employee who intends to file a Claim Petition would benefit from selecting his or her medical expert, and scheduling testimony prior to the first hearing. Then, at the first hearing, the claimant could request a deadline earlier than 90 days for presentation of medical testimony, thereby forcing the defendant to have its medical evidence completed well under the 180 day maximum.

If the defendant does not wish to proceed under this shortened schedule, or in the event that claimant does not utilize this tactic, at the first hearing, defense counsel should request that the WCJ look to the time periods set forth in Rule 131.53 in scheduling all future deadlines and hearings. Since the WCJ must set the entire trial schedule at the first hearing, by using Rule 131.53, the defendant can ensure that receives 180 days to depose its expert.

Unfortunately, in practice 180 days is not a great deal of time, and could eliminate qualified and credible medical experts from the field. By examining the alleged injuries in the Claim Petition and promptly investigating the circumstances of the accident with the employer, claims adjusters and defense counsel will develop an idea of what type of examining physician to select. Thereafter, no time should be wasted in scheduling the IME and obtaining potential dates for testimony.

It will be important to promptly request and pay for all available medical records prior to the IME. Without a complete set of medical records, even the most competent, credible

examining physician could issue an equivocal, incredible opinion. In addition, advance payment for the IME must be made, so as not to delay the examination.

Judges are sure to appreciate counsel's initiative in providing estimated dates for the IME and testimony of the doctor at the first hearing, and are therefore, much more likely to issue a trial schedule which comports with counsel's wishes - even if it falls outside the time frames set forth in Rule 131.53. The amendments do not appear to rescind or modify the Special Rules, and since many WCJs already impose litigation schedules at the first hearing, there may not be any significant impact upon the present litigation regime.

Nonetheless, some WCJs may begin to enforce deadlines more strictly. Even if the defendant meets the IME deadline, timely testimony may not be possible, thereby wasting the money expended on obtaining records and the IME. Although defense counsel can argue good cause for a continuance to take its medical testimony, or any type of testimony for that matter, this is up to the WCJ to decide. Defense counsel may want to suggest taking live testimony at the next scheduled hearing, since a WCJ faced with hours of testimony may be more willing to find good cause for granting a continuance.

Counsel should communicate with one another regarding the habits of each WCJ in order to prepare most effectively for the first hearing. In the case of the WCJ that is willing to decide at the first hearing whether mediation is futile, counsel should be prepared to make an argument to that effect if appropriate. Also, counsel should be prepared to recommend dates for presentation of witnesses and deadlines if the assigned WCJ tends to strictly enforce the trial schedule.

### **Mandatory Mediation**

Mandatory mediation was added to ensure that there is a good faith attempt to resolve the issues involved in the case. Although mandatory, some WCJs may not adhere to this and others may decide at the suggestion of the parties at the first hearing that it would be futile. Under Act 57, mediation was voluntary, and neither party could be required to participate in a mediation conducted before the WCJ assigned to the case. Amended Section 401, however, now provides the following definition for "Mediation":

"A conference conducted by a workers' compensation judge, but not necessarily the judge assigned to the actual case involving the parties, and shall require the attendance in person or by teleconference of all parties including the claimant and employer, and their respective counsel, if any. All parties shall have requisite authority to accept, modify, or reject settlement proposals offered at mediation, either at the mediation or within a reasonable time period after the mediation as established by the Workers' Compensation Judge."

It should be noted that under Article IV of the Act the word "employer" is interchangeable with the word "insurer" meaning that the proposed legislation does not mandate that the actual "employer" participate in the negotiating session, but rather the defending party authorized to effectuate settlements.

Section 401.1 goes on to provide that every trial schedule shall include a specific date and time for a mediation conference. Mediations shall take place “no later than thirty (30) days prior to the date set for filing proposed findings of fact and conclusions of law or legal briefs or memoranda, unless, upon good cause shown, the workers' compensation judge determines mediation would be futile.” Accordingly, the WCJ will decide from the outset of the litigation process whether mediation in the particular case would be appropriate or “futile.” Since this applies in “every” trial schedule, it presumably applies to every Petition filed. However, it is likely that mediation of some Petitions, for instance those for Physical Examination or Vocational Interview, will be deemed “futile.”

The mediation can occur any time during the course of the litigation, so long as a date for the mediation is set at the first hearing and occurs 30 days before the parties' briefs are due. Different WCJs may develop preferences for scheduling mediation – some before testimony is taken, and some after. It will be imperative to identify and insist upon your desired date for mediation, in the event that you are unable to negotiate this with opposing counsel prior to the first hearing.

Proponents for scheduling the mediation prior to taking testimony are most likely concerned with reducing litigation costs. If the mediation is scheduled 30 days prior to the date set for filing proposed findings of fact and conclusions of law, no costs will be saved. However, scheduling the mediation prior to taking testimony could reduce litigation expenses, assuming the parties agree to resolution during the mediation.

Counsel may also attempt to schedule the mediation prior taking testimony in order to shield his or her witnesses from the prospect of cross-examination. For example, on paper, a claimant's physician's diagnoses and recommendations appear clear and sound. However, on cross-examination, the same doctor can be made to modify or retract his opinions based upon facts of which he or she was unaware when issuing a report. Cross-examination of witnesses is the most critical aspect of ensuring a proper and fair result in any litigation. The idea that cases could be forced into mediation prior to taking any testimony is, therefore, alarming, and should be avoided.

What is also alarming is that the WCJ who will decide the merits of the case may be the same WCJ who mediates the case. Although many WCJ's are likely to refuse to mediate any of their own cases, the amendments do not prevent it. This should be of special concern to practitioners in the less populated counties where only one to two WCJs sit. The problems inherent with this scenario include: (1) the WCJ may address the merits of the case during the mediation, prior to issuing a Decision; (2) otherwise inadmissible evidence can be discussed during the mediation, and could impact the WCJ's Decision; (3) the parties may not make a good faith effort to mediate the case, since they do not want to disclose any information which would harm their case if the mediation does not result in resolution; and (4) the WCJ may not want to discuss the merits of the case during the mediation, thereby turning it into a mere “numbers game.” Accordingly, counsel should try to avoid mediating a case before the assigned WCJ.

Interestingly, the rules with respect to the Commonwealth Court's Mediation Program are very strict regarding mediating judges and assigned judges. Specifically, the "mediation judge shall not participate in any decision on the merits of the case." 210 Pa.Code § 67.71. In addition, upon termination of the mediation, the mediating judge shall dispose of all documents obtained during mediation, especially any confidential documents submitted to the mediation judge. Id. These documents shall be destroyed immediately upon the termination of the mediation. Id.

It is unclear what recourse under the amendments either party has if it does not wish to mediate a case in front of the assigned Judge. The parties could argue that mediation would be futile if conducted before the Judge deciding the case. Unfortunately, the only option may be to make a motion to recuse that Judge under Special Rule 131.24.

It is also unclear if an unsuccessful mediation before the assigned WCJ can provide a basis for appeal of an unfavorable Decision and Order. Since there will likely be no record made at the mediation, a party which feels biased due to the events at the mediation, may have no way to argue this bias on appeal.

Whether or not the assigned and mediating WCJs are the same, additional concerns arise. If information comes out during the mediation that a party was unaware of and would like to use in its case in chief, is that permissible? The Pennsylvania Rules of Evidence provide that evidence of conduct or statements made in settlement negotiations is inadmissible. Pa.R.E. § 408. Although the amendments do not specifically state that the purpose of mandatory mediation is to increase settlement, this is traditionally why parties have engaged in voluntary mediation. According to Section 401, all parties at the mediation must have the "requisite authority" to "accept, modify, or reject settlement proposals offered at mediation" or "within a reasonable time." Therefore, mediation will likely be considered a "settlement negotiation," and statements made during the mediation will be inadmissible. It will be up to the party wishing to offer the evidence learned at mediation to re-open the record or show good cause to extend the trial schedule in order to produce the evidence in an admissible form.

Many Judges, however, will likely not desire to mediate their own cases. Since the date for the mediation must be set at the first hearing, there must be exceptional cooperation amongst the WCJs. Currently, there is a list of WCJs who are willing to conduct mediations, and presumably, the Judge's Handbooks found on the Department of Labor and Industry website will be updated to reflect whether a particular WCJ will conduct mediations.

Since a goal of these amendments was to reduce litigation costs, it is possible that increased settlement of claims would reduce future litigation and litigation costs. Conversely, an increase in settlements through forced mediation could result in the employer paying out more money to settle cases than it would have if it had continued to pay bi-weekly disability benefits.

Mandatory mediation appears to be geared toward complete, final settlement of the claims. If mediation is scheduled despite defendant's argument that it is futile, the meeting should be used to gain leverage and soften the settlement expectations and demands of an otherwise

unreasonable claimant. This can be achieved through diligent claims handling, including the following:

- Issuing the Proper Accepting Document: The Notice of Denial (NCD) with Box #4 checked, rather than the "Medical-Only" Notice of Compensation Payable (NCP), will place a higher burden of proof upon the claimant in any future litigation and increase leverage for the employer during mediation. Also, the Temporary Notice of Compensation Payable (TNCP) should be followed by the Notice Stopping and an NCD or Agreement for Compensation, especially when these documents would be preferred over allowing the TNCP to convert to an NCP.
- Use of Forms: Regularly issuing Bureau Forms LIBC-760, LIBC-750, and LIBC-756A and issuing the Notification of Suspension or Modification when appropriate, can all lead to reducing monies owed to the claimant as well as reducing the settlement value of the claim.
- Utilization Review: File UR Requests where appropriate to eliminate certain types of treatment, thereby reducing the settlement value of the medical portion of the claim.
- IRE: File requests for IREs at the expiration of one hundred four (104) weeks of compensation in order to unilaterally adjust the status of the employee's workers' compensation benefits from total to partial, thereby capping the amount of benefits which the employee may receive at 500 weeks and reducing the settlement value of the claim.
- Obtain Testimony: Cross-examine the claimant and his or her medical and fact witnesses, as well as direct examination of defendant's medical and fact witnesses, as to gain information that would not otherwise be volunteered.
- Other: Schedule IMEs every six months; obtain a Life Care Plan for use during mediations where settlement of the claim would require approval of a Medicare Set-Aside; and obtain surveillance.

In addition to the above file development, counsel should prepare a memorandum to assist the mediating WCJ in understanding the procedural, medical, and factual issues of the case. This could include the relevant Bureau documents, medical and independent examination reports, excerpts of testimony, and surveillance evidence.

Although not every injury will lead to a mandatory mediation, employers and insurers should begin preparing for the mediation by utilizing the above tools in every case. This is especially true when the merits of the defendant's case warrant a refusal to settle the claim.

### **Increase in the Minimum Compensation Rate**

Section 306(h) of the Act now provides that any person receiving compensation under sections 306(a), 306(c)(23) or 307, as a result of an injury which occurred prior to August 31, 1993, shall, beginning January 1, 2007, receive a minimum amount of one hundred dollars (\$100) per week. The additional compensation shall be paid by the self-insured employer or insurance carrier making payment and shall be reimbursed in advance by the Commonwealth on a quarterly basis as provided in rules and regulations of the department.

### **Changes in the Workers' Compensation Appeal Board**

Section 401.2 has been added to Act, and includes changes to the Workers' Compensation Appeal Board (WCAB). The amendments seek to "professionalize" the WCAB and allow the Board to act more expeditiously. It presumes to do so by requiring that the Board consist of at least three, but no more than fifteen appointed members. If the Board consists of more than three members, which it currently does, it may sit in "panels" of three. A majority of a three-membered panel will have the authority to write and issue a binding Decision.

All proposed Decisions will then be circulated by the WCAB Secretary, who is appointed by the Secretary of Labor and Industry, to all members to review and comment upon, concur, object or dissent within 30 days to the Chairperson, the Secretary of the Board and the Board Member responsible for writing the draft Opinion. If a majority is not reached, then the Chairperson of the WCAB, in consultation with the Chair of the panel that heard the case, shall re-assign the Opinion to a Board member for redrafting purposes. With a volume of over 3,500 annual Opinions, this places a tremendous responsibility on the Chairperson and the Secretary of the WCAB to oversee all Decisions to ensure uniformity and consistency. It also creates additional tracking responsibilities for the chair of the Panel, as well as the Members amongst themselves. This could delay the decision-making process rather than speed it up as intended.

Interestingly, this change in law may permit panels of three Members to sit and act at different geographic locations throughout the state subject to the concurrence of a majority of those panel members. While the three member panel assignments are apparently inspired by the internal operation of the PA Commonwealth Court (See 201 Pa.Code § 67.2), the sheer volume of cases heard specifically in Pittsburgh and Philadelphia may overwhelm the WCAB. To accommodate oral arguments at the request of the parties at these locations, it is conceivable that all Board Members would have to attend and sit in the three member panels over the course of several hearing days in order to process all of the appeals. This too could delay the decision-making process.

The amendments also establish a code of conduct for Board members. The Members do not need to be attorneys; however, there is a minimum requirement of eight hours of continuing legal education for Members. Each member will also be assigned two opinion writers, who are subject to the CLE requirement as well. Many Board Members were already assigned opinion writers, who are typically recent law school graduates. This legislative acknowledgement that

opinions are frequently written by non-members of the Board may cause concern that Members will be less involved in the Opinion drafting process.

It should also be noted that initially, the proposed amendments to Section 426 of the Act sought to afford a party aggrieved by an Appeal Board ruling issued by a Panel a full and fair opportunity to present argument to the Board *en banc*. In the final version, however, Section 426 was deleted in its entirety, and accordingly, there are no more re-hearings by the Board.

### **No More "One Judge Counties"**

Section 414 of the Act has been amended to prohibit a single Judge from hearing all of the Petitions filed in a county. When assigning petitions, including those for "Resolution Hearings," the Department shall not assign to a particular WCJ more than seventy-five (75%) per cent of the petitions from a particular county. Most likely, a WCJ will travel into a neighboring county for the purpose of hearing twenty-five (25%) of the Petitions filed in that county.

### **Limitations on Counsel Fees**

In the case of a Compromise and Release Agreement, the proposed amendments initially sought to prohibit counsel fees in excess of 20% only when there was no underlying litigation. However, amended Section 442 provides that in the case of Compromise and Release Agreements, no counsel fees shall exceed 20% of the settlement amount. In addition, the amendment removes the provision permitting the WCJ to allow a reasonable attorney fee exceeding 20% of the amount awarded at the WCJ's discretion. When considered in conjunction with the remaining provisions of that Section, all counsel fees must be approved by either the WCJ or the WCAB, and may not exceed 20% percent of the amount awarded.

### **Creation of the Uninsured Employers Guaranty Fund**

Newly added Section 1601 creates the Uninsured Employers Guaranty Fund. This Fund will provide workers' compensation benefits to injured workers or their dependents for claims arising out of injuries or death sustained while in the course and scope of employment with employers who fail to carry workers' compensation insurance coverage as of the date of injury. The Fund will initially receive \$1,000,000.00 from the existing Workers' Compensation Administration Fund, and continued funding will come through State assessments on self-insurers and insurance companies in the Commonwealth, as well as reimbursement or restitution obtained from uninsured employers. Initial proposals to have the Fund incorporated into the Commonwealth budget met with opposition, and the amendments now provide that insurers and self-insureds will be assessed a fee of no more than 0.1% of the amount of compensation paid in the previous calendar year.

Procedurally, the injured worker must notify the Fund within 45 days after learning that the employer was not insured as of the date of injury or death. Upon receipt of such notice, the Fund shall process the claim. However, no Claim Petition may be filed against the Fund until

21 days after the notice of the claim is made to the Fund, and at that time, the injured worker may file a Claim Petition naming both the employer and the fund as defendants. The failure of the uninsured employer to answer a Claim Petition shall not serve as an admission or otherwise bind the Fund; however, the Act is silent on whether failure of the Fund to answer will serve as an admission.

Upon notification of a claim, within ten days the Fund must demand from the employer proof of an applicable insurance coverage. If the employer does not provide proof, there will be a rebuttable presumption of a lack of insurance. The Act further provides that the department shall, on behalf of the Fund exhaust all remedies at law against the uninsured employer in order to collect the amount of a voluntary payment or award including voluntary payment or the award itself. Reimbursement is also authorized to investigate violations for possible prosecution of uninsured employers under the criminal law. The Fund is authorized to file a certified proof of lien with the Prothonotary of the Court of Common Pleas which shall enter the entire balance as a judgment against the employer. The injured worker also retains the right to bring a direct suit for damages at law against the uninsured employer. This is a subtle change in standard workers' compensation practice in that the injured worker may now seek workers' compensation benefits through this Fund **and** civil damages from the employer.

It is possible that the Fund will utilize the ten day period mentioned above to negotiate payment of the claim by the employer in exchange for the Fund's agreement not to exercise its right to prosecute or file a lien.

The Fund will necessarily have to contract with a knowledgeable third party administrator to process claims, which creates business for these administrators and defense counsel. Third party administrators and defense counsel should be pleased to know that the failure of the uninsured employer to answer the Claim will not subject the Fund to the application of Yellow Freight, and it is highly unlikely that the Fund will be subject to an award of penalties or unreasonable contest fees.

There are valid concerns that the Fund will be subject to claims by workers who should be considered independent contractors. In that context, there is no employer-employee relationship, and the entity contracting for the work does not carry workers' compensation insurance coverage. Since workers' compensation case law favors finding the existence of an employer-employee relationship, many independent contractors may now bring claims against this Fund, which they otherwise would not have sought due to a lack of workers' compensation insurance coverage.

Another concern is that this Fund could become depleted if the amount of the claim awarded exceeds available funds. If this happens, the result could be that a claimant who prevails on a Claim or Reinstatement Petition would not actually receive benefits until the Fund is replenished through the yearly assessment.

### Miscellaneous

The original version of this Bill also included a re-classification of Workers' Compensation Judges to achieve parity with Administrative Law Judges for pay grade purposes. The Senate not only deleted this amendment, but went on to delete Section 1401 in its entirety, which provides for schedules, training, continuing legal education, and professionalization of WCJs. The Senate was, no doubt, highly adverse to passing any form of legislation providing for a pay raise, considering the events in the summer of 2005.

As noted by Mr. Greenberg in his previous article,<sup>1</sup> the proposed legislation fails to address a number of problems in the Pennsylvania Workers' Compensation system. For example: (1) the legislation does not facilitate the informal administration of minor work injuries; (2) the legislation does not address needed changes with respect to misguided legal "presumptions" in connection with occupations; (3) the legislation does not facilitate the development of a more effective vocational mechanism for assessing an injured worker's earning power; (4) the legislation does not address the sky rocketing cost of expert medical depositions and (5) the legislation does not address refinement of the Medicare-based fee caps that were instituted and calculated in 1993.

The Chartwell Law Offices will monitor the actual implementation of the amendments, and report, from time to time, with the firm's suggestions for how employers and carriers should adapt. Please check our website, [www.chartwelllaw.com](http://www.chartwelllaw.com), for these updates, or feel free to call the undersigned or any of our Workers' Compensation attorneys with any questions or concerns.

Very truly yours,

THE CHARTWELL LAW OFFICES, LLP

By: \_\_\_\_\_  
Alexis C. Ouseley, Esquire



**Alexis C. Ouseley** is a 2002 summa cum laude graduate of Temple University and a 2005 graduate of the Temple University Beasley School of Law. Ms. Ouseley participated in the Beasley School's nationally recognized "Integrated Trial Advocacy Program," and was twice awarded "Distinguished Class Performance" for her skill in trial advocacy. She was also a Certified Legal Intern in the Philadelphia City Solicitor's Claims Unit Law Clinic, and worked as a law clerk in the areas of Social Security Disability and Personal Injury. Ms. Ouseley began her legal career as an opinion writing law clerk for Workers' Compensation Judge David I. Slom. She joined The Chartwell Law Offices in 2006 where she is committed to the defense of insured and self-insured entities in Pennsylvania and New Jersey workers' compensation matters.

[aouseley@chartwelllaw.com](mailto:aouseley@chartwelllaw.com)  
610.666.7700

<sup>1</sup> This Article can be found at <http://www.chartwelllaw.com/articles/a051206b.pdf>.