



Pennsylvania Case Summaries

- Workers' Compensation -



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PENNSYLVANIA WORKERS' COMPENSATION

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Joseph Vaughan has spent the past thirty-nine years defending employers and insurance carriers large and small against an array of ever-changing claims and exposures. He has acted as both litigator and advisor to his clients, counseling them on ways to mitigate operational risks and strategies that add value to their bottom line.

Joseph remains vigilant of constantly evolving statutes and case law and their potential impact on employment practices, as well as the exposures that these changes often create. He regularly provides his clients with education and training on a customized in-house basis and has dedicated his practice to preserving and promoting his clients' best interests financially and as leaders in their respective industries.

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Education

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Bar & Court Admissions

U.S. Supreme Court
 U.S. Court of Appeals for the Third Circuit
 U.S. Court of Appeals for the Eleventh Circuit
 U.S. Court of Appeal for the Federal Circuit
 U.S. District Court for the Eastern District of Arkansas
 U.S. District Court for the Western District of Arkansas
 U.S. District Court for the Central District of California
 U.S. District Court for the Southern District of Florida
 U.S. District Court for the Eastern District of Pennsylvania
 U.S. District Court for the Western District of Pennsylvania

Bar & Court Licenses

Pennsylvania
 New York

Practice Areas

- Appellate Practice
- Bankruptcy/Creditors' Rights
- Commercial Litigation
- Construction Practices & Litigation
- Employment Practice & Liability
- ERISA & Employment Benefits
- Federal Employer's Liability Act
- Gig Economy
- Workers' Compensation
- Insurance Coverage
- Intellectual Property Litigation
- Premises Liability
- Product Liability
- Professional Liability
- Public Sector
- Retail, Hospitality & Restaurants
- Sexual Assault
- Transportation
- Trucking

Professional Affiliations

- Professional Liability Underwriting Society
- Professional Lines Attorney Network
- Defense Research Institute
- Pennsylvania Self-Insurers' Association
- Greater Philadelphia Executive Claims Counsel
- Aviation Insurance Association
- Pennsylvania Defense Institute
- Professional Liability Defense Federation
- Risk and Insurance Management Society
- Society for Human Resource Management
- Pennsylvania Chamber of Business & Industry's Workers' Compensation Executive



MADELINE S. BAIO

PARTNER


Madeline Baio represents product manufacturers, retailers, trucking companies, a transportation network company, national pharmacy chains, supermarkets, food production companies and restaurants in product liability, premises liability, motor vehicle and employment-related matters. She has tried cases to verdict in federal and state courts, and has represented clients in appeals as well as arbitration, mediation and other alternative dispute resolution proceedings.


Madeline has significant experience representing manufacturers in product liability litigation involving catastrophic injuries and death with claims based on design defect, manufacturing defect, improper warnings, crashworthiness, misrepresentation in advertising and negligence. She has also defended product manufacturers and suppliers in connection with significant fire loss claims and has represented food production companies in connection with product liability claims involving alleged adulterated, contaminated and mislabeled food products.

Madeline has extensive experience defending pharmacy malpractice claims. Over the past 16 years, she has represented pharmacy and supermarket chains in pharmacy malpractice matters. In addition, she has defended a pharmacy chain in multidistrict litigation alleging failure to warn and other drug-related claims, as well as in premises liability and false arrest claims. She represents generic pharmaceutical companies as both litigation counsel and local counsel in connection with Abbreviated New Drug Application, or ANDA, litigation and has successfully defended trademark infringement claims on behalf of national and international distributors.

Her employment experience includes defending and counseling clients from a broad range of industries, including Fortune 100 companies, with regard to matters such as discrimination in hiring, firing and promotion; wages; benefits; civil rights claims; workplace investigations of discrimination and harassment claims; EEOC and state agency investigations; and drafting of employee manuals, employment agreements, severance agreements, non-compete agreements and employment policies and procedures.

A trusted authority within her practice areas, Madeline regularly presents on emerging employment-related issues at conferences around the country and frequently writes about developments in fields such as LGBTQ rights in the workplace and public accommodation.

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Education

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Bar & Court Admissions

U.S. District Court for the Eastern District of Pennsylvania
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 U.S. Court of Appeals for the Third Circuit

Bar & Court Licenses

Pennsylvania
 New Jersey
 Massachusetts

Practice Areas

- Employment Practice & Liability
- Gig Economy
- Premises Liability
- Product Liability
- Professional Liability
- Retail, Hospitality & Restaurants
- Sexual Assault
- Transportation
- Trucking

Professional Affiliations

- National Retail & Restaurant Defense Association, Board of Directors
- Employment Practices Committee, Board Advisor and Former Chair
- Annual Conference Planning Committee
- Chamber of Commerce of Greater Philadelphia, Firm Member

Honors

- AV Preeminent® rating by Martindale-Hubbell®
- Super Lawyers, 2021-2023




GREGORY J. FISCHER


ASSOCIATE

Greg Fischer brings more than 20 years of experience to his practice of workers' compensation law. He represents employers, insurers and third-party administrators in all aspects of workers' compensation litigation. He has successfully represented clients including large retailers, school districts, hospitals, trucking companies, and manufacturers, among others. Greg is also licensed in West Virginia, where he has also represented employers and insurers.

For a leading national retailer, Greg was able to assume a specific workers' compensation case and successfully negotiate a resolution of a complex matter. The case had been in and out of litigation for almost 20 years. For an insurer client, Greg successfully argued before the Commonwealth Court, an intermediate appellate court in Pennsylvania, and saved the client close to \$100,000. He argued that a contractor who was essentially acting as a medical provider under Pennsylvania law by modifying the home of an injured worker, was obligated to file a fee review which he did not do.

Greg has served on the planning committee for the Pennsylvania Worker's Compensation Bureau Conference since 2015. He is also on the planning committee for the Western Pennsylvania Workers' Compensation Bar Association Kids' Chance Golf Outing, the Bar Association's annual statewide charity event.

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Bar & Court Admissions

Pennsylvania State Bar
West Virginia State Bar

Bar & Court Licenses

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Practice Areas

- Workers' Compensation

Professional Affiliations


- Pennsylvania County Bar Association
- Allegheny County Bar Association
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Bar & Court Licenses

Pennsylvania

Kelly Davis practices in the firm's Workers' Compensation, Insurance and Employment practice groups. Kelly defends employers against workplace claims and injuries, and advises businesses in the retail, staffing, manufacturing, and restaurant and hospitality industries. She also has over a decade of experience working with small family-owned businesses.

Kelly began her legal career as an attorney for the Workers' Compensation Appeal Board, which has Commissioners throughout the State and at its main office in Harrisburg. She then joined Gallagher Bassett Services, a third-party administrator, where she was part of the management team and handled complex litigated compensation claims. Kelly was based in the company's Mechanicsburg, P.A. office.

Drawing from her experience in the insurance industry, Kelly blends legal experience with actual day-to-day business strategy. Working in claims directly with employers, she understands their business needs as it relates to claims handling and exposure, employee retention, and various other concerns. Kelly knows that many employers have business needs that influence how safety and claims are handled and she's able to carry that understanding forward and let it influence her legal advice. Kelly's understanding of the claims process enables her to connect easily with claims professionals as well as employers facing challenges resolving claims matters.

Kelly's strength as an advocate comes from her emphasis on being available, responsive and easy to contact. She also takes great pride in being approachable and easy to understand—a skill, which she developed after more than a decade teaching and mentoring students as an Adjunct Professor at Central Penn College.

Kelly's favorite part of being a lawyer is talking and collaborating with employers and claims professionals to solve various legal needs. If Kelly weren't practicing law, she would be a professional chef or caterer. Kelly enjoys cooking for friends and family and sitting down to dinner.


Practice Areas


- Workers' Compensation
- Employment Practice & Liability
- Retail, Hospitality & Restaurants



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Education

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Bar & Court Admissions

U.S. Supreme Court
U.S. Court of Appeals for the Third Circuit
U.S. District Court for the District of Delaware
U.S. District Court for the Eastern District of Pennsylvania
U.S. District Court for the District of New Jersey

Bar & Court Licenses

Delaware
Pennsylvania

Raymond Cobb has almost 40 years of trial and litigation experience, having appeared as counsel in all courts in Delaware and before various Delaware administrative boards. Additionally, he has appeared as trial counsel in Pennsylvania, New Jersey and other states.

For most of his career, he has represented corporations and employers in a variety of matters including workers' compensation, general liability, and director and officer liability, shareholder litigation matters.

Raymond has also represented individuals and corporations in the Delaware Court of Chancery. His experience includes:

- Defense of wrongful death claims,
- Construction defect claims
- Workers' compensation claims
- Trucking and automobile claims
- Toxic tort claims

Raymond has served as national trial counsel for a manufacturer in product liability matters, playing a key role in numerous expert depositions and trials in jurisdictions throughout the country. He has also defended insurance coverage and declaratory judgment actions on behalf of insurance companies. He has defended multi-million-dollar construction defect claims on behalf of general contractors and developers, as well as liability claims on behalf of trucking companies.

As a part of his representation of manufacturers, he has defended claims for exposure to asbestos, benzene, lead, talc and other alleged toxic substances.

Practice Areas

- Workers' Compensation
- Construction Practices & Litigation
- Premises Liability
- Product Liability
- Commercial Litigation
- Corporate Governance

Professional Affiliations

- Delaware State Bar Association

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Case Summaries

September 2023

We hope you find our Vaughan Baio & Partners September issue of summaries of cases pertaining to Pennsylvania Workers' Compensation proceedings useful. These summaries are a roundup of cases our Workers Compensation Group has deemed to have affected the standard of review of Workers Comp cases. The decisions touch on employers in different industries. All cases have their own individual fact patterns, procedural histories, and as seen, outcomes. The summaries enclosed are by no means exhaustive. If you wish to discuss any of these cases further or if you have a matter pending in the Workers Compensation landscape, please feel free to contact the Workers Compensation attorneys at Vaughan Baio.



ALPINI V. WORKERS' COMP. APPEAL BD. (TINICUM TWP.), 2 MAP 2022
(PA. MAY. 16, 2023)

Date of Filing: May 16, 2023
Opinion by Justice Brobson

In a Nutshell: It is the nature of the action, not the legislative body of law under which the claim is asserted, that determines whether an employer is entitled to subrogation out of the third-party settlement. If the nature of the action falls within the scope of “an action arising out of the maintenance or use of a motor vehicle” and thereby controlled by section 1720 of the motor vehicle financial responsibility law (MVFRL), there shall be no right to subrogation even though a large portion of the settlement fund came from parties to the litigation liable under the Dram Shop act.

Claimant, a police officer, sustained work-related injuries to his spine, ribs, left, knee, left hip and pelvis when an intoxicated driver (Driver) struck Claimant’s patrol car with his vehicle.

Employer issued a temporary notice of compensation payable (TNCP), which converted by way of operation of law to a notice of compensation payable (NCP). Employer, however, paid heart and lung benefits to Claimant, and Claimant signed over his workers’ compensation wage loss benefits to Employer as required by the Heart and Lung Act (HLA).

Thereafter, Claimant, and his wife filed a civil action against the third-party tortfeasors responsible for Claimant’s work-related injuries. Claimant asserted a cause of action against Driver for negligence and separate causes of action against several tavern owners (Tavern Owners) for violations of the Dram Shop Act; i.e. the selling/furnishing liquor to Driver when he was visibly intoxicated.

On September 16, 2013, Claimant and his wife executed a General Release Agreement (Settlement Agreement), whereby they settled their claim against Driver and Tavern Owners in exchange for the payment of \$1,325,000—\$25,000 paid by Driver and his insurance company; \$375,000 paid by Lou Turks; and \$925,000 paid by Jimmy D’s (Tavern Owners).

Employer filed a modification petition seeking subrogation from Claimant’s third-party recovery relative to Tavern Owners.

In reversing the opinion of the Commonwealth Court of Pennsylvania, the Pennsylvania Supreme Court cited Section 1720 of the Motor Vehicle Financial Responsibility Law, which had previously provided, in part, that, “in any action arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from claimant’s tort recovery with respect to Worker’s Compensation benefits.....” In 1993, however, the General Assembly enacted what is commonly referred to as Act 44.6 Act 44, inter alia, amended the WCA and repealed certain provisions of the MVFRL. Relevant here, Section 25(b) of Act 447 repealed the provisions of Sections 1720 and 1722 of the MVFRL as they related to workers’ compensation benefits, thereby reinstating an employer’s right of subrogation with respect to



workers' compensation benefits in actions arising out of motor vehicle accidents. Notably, this repeal only mentioned workers' compensation benefits, not HLA benefits, and, therefore, it left a question about whether HLA benefits paid by an employer could be recovered by way of subrogation. Later, it was determined that an employer is precluded from subrogating for HLA benefits that the employer paid to the public safety employee as a result of a motor vehicle accident. See, *Oliver v. City of Pittsburgh*, 11 A.3d 960, 962 (Pa. 2011).

The Court noted that, unlike the MVFRL, the Dram Shop Act does not speak of subrogation or workers' compensation benefits. Employer, in pursuit of its subrogation claim, maintained that the rather large sums of money provided by Tavern Owners for settlement of the civil action initiated by Claimant and his wife be should be subject to subrogation given that there was no prohibition in exercising this right under the Dram Shop Act.

Interestingly, rather than focusing on the lack of prohibition against the pursuit of subrogation found in the Dram Shop Act, the Court, applying statutory interpretation principles and law, held that the "action" through which Claimant asserted his claim under the Dram Shop Law "arose out of the maintenance or use of a motor vehicle." The Court recognized the fact that Claimant and his wife had filed a single lawsuit against Tavern Owners and Driver, wherein they set forth a cause of action against Driver for negligence and separate causes of action against Tavern Owners for a violation of the Dram Shop Act. However, the Court stressed that it is the nature of the lawsuit as a whole, and not the individual causes of action that Claimant and his wife asserted against Tavern Owners for violations of the Dram Shop Act, that constitute the "action" for purposes of Section 1720. It is that lawsuit, continued the Court, and not individual causes of action that Claimant and his wife asserted against Tavern Owner for violations of the Dram Shop Act, that constitute the "action" for purposes of Section 1720. Additionally, commented the Court, it was that action which originated, stemmed, and/or resulted from the motor vehicle collision involving Driver's vehicle and Claimant's patrol car. The Court proceeded to hold that Section 1720 clearly and unambiguously precludes Employer from subrogating to the amount of its payment of HLA benefits against Claimant's third-party settlement of the Dram Shop Act claims with Tavern Owners because the action that Claimant and his wife had filed against Tavern Owners "arose out of the maintenance or use of a motor vehicle."

Dissenting Opinion:

A Dissenting Opinion was filed by Justice Wecht who, joined by Chief Justice Todd, pointed out that two-thirds of the full salary received by Claimant under the Heart and Lung Act (HLA) had come from the workers' compensation insurance carrier for the Employer, Tincum Township, and, pursuant to HLA mandates, these payments were turned over to Employer for inclusion in the HLA benefits.

Justice Wecht cited Section 319 of the Pennsylvania Workers' Compensation Act mandating that the employer has a right of subrogation, where the compensable injuries are caused in whole or in part by the act or omission of a third-party. He also stressed that it is now clear that workers' compensation benefits are subrogable even in situations where a police officer's injuries arise as



a result of the maintenance or operation of a motor vehicle. However, the Justice stated that, under current law, HLA benefits are NOT recoverable.

Justice Wecht, distinguishing this case, from several other cases where the employers were self-insured for workers compensation purposes, stressed that the payment of workers' compensation benefits in this case was not a legal fiction and to be treated as HLA benefits as was decided in several self-insurer situations, but constituted a meaningful transfer of funds by which the Employer's insurer incurred a loss.

Justice Wecht opined that the impact of the holding of the Majority served to leave the workers' compensation carrier without anyone to make it whole despite the fact that Act 44 was intended to allow it to recover its loss, shifting the financial liability for the employee's injury onto the third-party tortfeasor. The loss incurred by the workers' compensation insurance carrier for Employer was quite sizable. The Employer's workers' compensation carrier in this matter had a total lien of \$364,024.60, consisting of \$186,063.41 in wage loss benefits and \$177,961.19 in medical benefits.

Justice Wecht stated that he was inclined to affirm the order of the Commonwealth Court that the Employer was entitled to exercise its right to subrogation, along with a mandate that further factual development of the details of the asserted lien be developed.

**KRISTINA STEETS V. CELEBRATION FIREWORKS, INC.
(WORKERS' COMPENSATION APPEAL BOARD)**

*Date of Filing: May 8, 2023
Opinion by Judge Covey*

In a Nutshell: The Court addressed the survivability of specific loss benefits concluding that Section 306(g) of the WC Act clearly conditions the entitlement to these benefits on death of the employee from some other cause than the work injury.

Claimant sustained very traumatic injuries as a result of an explosion that occurred when she inserted a fuse into a fireworks display.

Employer filed a Notice of Compensation Payable (NCP) under which temporary total disability benefits were paid.

Subsequently, Claimant was able to establish that, in addition to total disability resulting from numerous established work-related injuries from the incident at work, she also was able to persuade a WCJ that she had permanently lost the use of her arms for all practical intents entitling her to receive loss of use benefits under Section 306(C), (3) and (25) of the WC Act (Act), to be



paid after cessation of temporary total disability benefits payments to Claimant under Section 306(A) of the Act.

Claimant continued to receive temporary total disability benefits up until the time she died as a result of complications from her bilateral pneumonia caused by her work-related respiratory deficiency.

Claimant's estate (Estate) filed Claim, Review, and Penalty Petitions, maintaining entitlement to receive the previously awarded specific loss benefits, which would have amounted to 840 weeks of compensation. Employer represented that the Estate was raised by Claimant's non-dependent sister.

The Court held the language of Section 306(g) of the Act to be controlling. This provision of the Act, dealing with the survivability of specific loss benefits, provides, in part, that, if there be no dependents, the payments of specific loss benefits are to be made to the estate of the deceased, but in an amount, not exceeding reasonable funeral expenses provided in the Act. To qualify for receipt of specific loss benefits under this provision as a dependent, it is necessary to establish that under 306(g) that "the employee die from some other cause than the injury."

The Court held that the judicial reasoning set forth in the case of *Est. of Harris v. Workers' Comp. Appeal Bd. (Sunoco, Inc.)*, 845 A.2d 239, 243 (Pa. Cmwlth. 2004) to be controlling in this matter, and standing for the legal conclusion that Section 306(g) of the Act governs the payment of specific loss benefits, and that such benefits may be paid only where death of the employee is from a cause other than the work injury.

Claimant argued that it was inconsistent with the Act and its humanitarian purposes, and the principles of statutory construction to provide greater benefits to workers who die from non-work related causes than those whose injuries ultimately cause their death. In rejecting this argument, the Court pointed out that the requirement under Section 306(g) providing survival of the specific loss election is intended to protect dependents, where an injured worker dies of a cause other than the work any related injury. The Court noted that the survival provision in Section 306(g) is augmented by death benefits for dependents in cases where the injured worker dies of a work-related injury. Therefore, concluded the Court, whether the worker dies of a work-related injury, or some other cause, a benefit or advantage is preserved for the statutory dependents.

Dissenting Opinion:

In his Dissenting Opinion Judge Ceisler maintained that Section 410 of the Workers' Compensation Act (Act), not Section 306(g), authorizes the payment of specific loss benefits following the work-related death of a claimant. Section 410 of the Act provides that, if a claimant dies before the final adjudication of her claim, the amount of compensation due "to the date of death shall be paid" to the claimant's dependents or, in the absence of dependents, to the claimant's estate. This jurist notes the language in Section 410 does not condition the payment of compensation upon a specific cause of death. In addition to the statutory language relied upon by Judge Ceisler, he cites the case of *White v. Workers' Compensation Appeal Board (Good Shepherd Rehabilitation Hospital)*, 666 A.2d 1128 (Pa. 1995), where the Court agreed with the



claimant's estate that "Section 410's scheme of distribution applies to all claims regardless of the nature of the loss[,] including specific loss benefits, fatal claims, and total disability benefits." He further stresses that, when section 306(g) was amended as part of the legislative changes reflected in Act 12 no changes were made to the statutory language set forth in Section 410 of the Act.

**CITY OF PHILADELPHIA V. JOSEPH HEALEY
(WORKERS' COMPENSATION APPEAL BOARD)**

*Date of Filing: June 21, 2023
Opinion by Judge Covey*

In a Nutshell: Exercise of the Authority Given to The International Agency For Research On Cancer (IARC) to Add to the Group 1 Carcinogen List After the Effective Date of Act 46 Does Not Constitute an Unlawful Delegation of the General Assembly's Legislative Authority.

Claimant, a firefighter, was diagnosed with clear cell renal carcinoma with attendant periods of time when he was not able to perform the duties of his position.

On May 31, 2019, Claimant filed a Claim Petition asserting that his employment had exposed him to hazardous fumes causing his kidney cancer.

Claimant offered the testimony of internal and occupational medicine expert Arthur L. Frank, M.D., Ph.D. (Dr. Frank) who opined that Claimant's exposure to arsenic, asbestos, diesel fumes and TCE was the major occupational risk factor for developing kidney cancer.

Employer presented medical testimony that there was insufficient data to establish a causal connection between Claimant's occupational exposures and kidney cancer.

The WCJ found credible Dr. Frank's testimony that Claimant's clear cell renal carcinoma was caused by his cumulative exposures to asbestos, arsenic, TCE, PAHs, diesel fuel emissions, and soot over those 13 years and awarded Claimant benefits under Section 108(r) of Act 46.

Employer argued that IARC did not designate TCE as a Group 1 carcinogen until after Act 46 became law on July 7, 2011, and allowing the IARC to add or subtract from Group 1 is an unconstitutional delegation of the General Assembly's legislative authority.

The Court found sufficient evidentiary support that Claimant had met his burden to show that it was possible that his exposure to TCE, a known carcinogen, had caused his kidney cancer and that Employer had failed to rebut the presumption of causation Claimant had established.



Further, The Court held that, despite the fact TCE was not listed as a Group 1 carcinogen when Act 46 was enacted, Claimant’s medical expert testified that medical studies and documentation evidenced TCE’s known link to kidney cancer.

**ALVIN HOLLIS V. C&R LAUNDRY SERVICES LLC
(WORKERS’ COMPENSATION APPEAL BOARD)**

Date of Filing: July 31, 2023

Opinion by Judge Wojcik

In a Nutshell: Clamant Did Not Define the “Pathology” or Provide a Medical Diagnosis in His Claim Petition. Accordingly, The Court Held That the Late Answer Filed by The Employer Did Not Constitute an Admission of Injury.

Claimant, a truck driver, who sustained injuries as a result of his truck being sideswiped, filed a Claim Petition alleging that he had sustained a compensable injury in the form of “left, rotator cuff pathology/cervical left, side, radiculopathy, [cervical, thoracic, lumbar], sprain/strain.”

Employer failed to file an Answer to this petition within the mandatory 20 days of service upon the employer as mandated under section 416 of the Pennsylvania Workers’ Compensation Act (Act). As a consequence of this untimely filing, following the holding reached in *Yellow Freight System, Inc. v. Workmen’s Compensation Appeal Board (Madara)*, 423 A.2d 1125, 1127 (Pa. Cmwlth. 1981), all well-pled factual allegations were deemed admitted by the Workers’ Compensation Judge (WCJ).

The Court held that the description of injury set forth in the Claim Petition filed by Claimant, was not well-pled in that the rotator cuff consists of numerous muscles blending within a capsule. The Court stated that, while the body part of the injury was well pled, the injury itself was not, in that Clamant did not define the “pathology” or a medical diagnosis in his Claim Petition.

The WCJ awarded Claimant a limited period of disability benefits, but, on the basis of medical testimony of full recovery, proceeded to enter a termination order. Claimant challenged this decision, pointing out that none of employer’s medical experts testified that he had fully recovered from his “left, rotator cuff pathology” injury. The Court held that because the nature of injury was not well pled, Claimant was not entitled to a presumption of ongoing disability related to this injury. The termination of benefits was affirmed.

The Court further opined that because the “left rotator cuff pathology” pled by Claimant was not admitted by employer’s late answer, Employer could refute any allegations of left shoulder injury.

