

finding that the employee's second choice of provider within the employer's network is improper or inadequate.

Fee Schedule


This provision changes the calculation of the Fee Schedule, lowers it 30%, includes drugs and implant charges and provides that the Fee for out-of-state treatment shall be based on the lesser of the billed amount, the Fee Schedule in the State in which the services rendered are the Fee Schedule for the county in which the employee resides. This provision provides that, in the event that the bill does not contain substantially all of the required data to adjudicate the bill, the employer must contact the provider in writing explaining the basis for the denial and describing additional data necessary within 30 days of receipt of the bill. Any payments made more than 30 days after the required information is received accrue interest at the rate of 1% per month.

Collective Bargaining Pilot Program

This section permits the Director of the Department of Labor to designate two labor unions in the construction trades to participate in collective bargaining for an Alternative Dispute Resolution Plan which would take its members out of the Workers' Compensation Act. The provision includes requirements for approval, reporting and the provisions of such a plan.

Arbitrators

The terms of all Arbitrators terminated at the close of business July 1, 2011 but the incumbent continued to exercise all of the duties until appointments were made on October 14. All subsequent initial appointments shall be made by the Governor with the advice and consent of the Senate. All Arbitrators appointed in the future must either be authorized to practice law in the State or have previously served as an Arbitrator for the Commission. Eight arbitrators were not reappointed, one had previously resigned and one was appointed to the Commission. In November one arbitrator was appointed an Associate Circuit Judge and an arbitrator and commissioner swapped positions. Appointments were for terms concluding on July 1, 2012, 2013 and 2014. Upon expiration of a term the chairman will evaluate the performance of the Arbitrator and may recommend that he or she shall be re-appointed to a subsequent term by the full Commission.

The Commission shall assign no fewer than three Arbitrators to each hearing site. Cases should be assigned to the Arbitrators randomly. No Arbitrator shall hear cases in any county, other than Cook County, for more than two years in a three year term. The Commission has consolidated some hearing sites and announced assignments commencing in January 2012. 



PA: LATE ANSWERS BY UNINSURED EMPLOYERS – ARE THEY BINDING?

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In the world of Pennsylvania Workers' Compensation, a new entity came to town a few years ago, called the Pennsylvania Uninsured Employers Guaranty Fund ("PA UEGF"). With the arrival of the PA UEGF, issues arose as judges faced new challenges with regard to the new law governing the PA UEGF. One primary issue involves late answers to claim petitions by the uninsured employers. For years Workers' Compensation defense attorneys have dreaded the *Yellow Freight* motion, which is the motion an employee's counsel makes when the answer to a claim petition is late without an excuse, arguing all allegations of a claim petition be deemed admitted. The *Yellow Freight* terminology comes from the seminal case [*Yellow Freight Sys., Inc. v. W.C.A.B. \(Madara\)*, 423 A.2d 1125 \(Pa. Cmwlth. 1981\)](#), which precludes the employer from raising an affirmative defense. An unexcused late

answer admits "facts" only, not conclusions of law, and admits liability only through the last date the answer could have been filed. [*Bensing v. W.C.A.B. \(James D. Morrissey, Inc.\)*, 830 A.2d 1075 \(Pa. Cmwlth. 2003\)](#); [*Ghee v. W.C.A.B. \(University of Pennsylvania\)*, 705 A.2d 487 \(Pa. Cmwlth. 1997\)](#), following [*Heraeus Electro Nite Co. v. W.C.A.B. \(Ulrich\)*, 697 A.2d 603 \(Pa. Cmwlth. 1997\)](#)). In [*Heraeus*](#), the Court opined that failure of the Bureau to serve the claim petition on the carrier does not excuse a late filing of an answer where service has been made on the employer. The employer can present rebuttal evidence to any element of the claim that is not well pleaded, including the continuing disability of the employee. However, a good attorney always watches for the deadline when a claim is filed and ensures a timely answer to avoid a *Yellow Freight* motion. This article by no means changes this best practice. However, with the new law, a new dilemma arose.

Act 147, Section 1601, [77 P.S. § 2701](#) et seq, created the PA UEGF, which provided a new remedy to an employee in the event the employer did not have workers' compensation insurance. Under Act 147, the employee must first file a notice of claim, Form LIBC 551, against the uninsured employer and the PA UEGF. A claim petition for benefits against the PA UEGF (and uninsured employer) may not be filed until 21 days after the notice of claim against the uninsured employer has been filed. Therefore, there are two Claim Petitions; one against the uninsured employer and one against the PA UEGF and the uninsured employer.

Under Section 1604, of the Pennsylvania Workers' Compensation Act, the PA UEGF cannot be bound under Section 416 by a late answer of the uninsured employer. Section 1604 of the Act clearly and unambiguously states, "... failure of the uninsured employer to answer a claim petition shall not serve as an admission or otherwise bind the Fund under Section 416." Since there are two claim petitions, claimants' attorneys still made *Yellow Freight* motions against the uninsured employer. This caused issues for the PA UEGF, as some judges would grant the *Yellow Freight* motions against the employers, and essentially use the late answer against the PA UEGF.

In a recent case, a Workers' Compensation Judge granted benefits for a limited period up to the date full recovery was found by the medical expert for the PA UEGF thus allowing a termination of benefits. The judge erroneously found that she was bound to find that a work injury occurred based on the *uninsured employer's* failure to file a timely answer. However, the judge admitted in the Findings of Fact that the claimant *failed* to submit legally sufficient medical evidence to support her contention of ongoing disability. The PA UEGF appealed the judge's decision and the Pennsylvania Workers' Compensation Appeal Board (WCAB) found, in this case of first impression, that *Yellow Freight* and its progeny have no applicability where there is a claim petition filed against an uninsured employer. The WCAB stated "to hold that *Yellow Freight* applies to an uninsured employer while not impacting UEGF's liability in any way would create the potential for conflict because it would require Workers' Compensation Judges to separately analyze the merits of the claimant's claim petition under the theory that the allegations are deemed admitted, as against the uninsured employer, but not against the PA UEGF."

Thus, theoretically, "the WCJ could grant the claim petition as it applies to the uninsured employer, but then deny a claim petition against the PA UEGF based on his or her review of the evidence". [Evangelista v. Trexler Park Manor and the Pennsylvania Uninsured Guaranty Fund, A10-1378/A10-1379, 2011 WL 2803009](#), Opinion Circulated June 8, 2011.

Therefore, the WCAB stated that the only logical conclusion is that *Yellow Freight* is not applicable in situations involving the uninsured employer, because it appears from Section 1604 that the legislature did not intend for the PA UEGF to be held liable, even secondarily, for the uninsured employer's failure to file an answer. This may seem unfair to the claimant when most uninsured employers have no interest in responding or participating in the litigation of the claim. The WCAB stated that in that circumstance, as in the case where a defendant files a late answer, the PA UEGF should not be penalized by becoming secondarily liable for a claim that may not be warranted based on the particular facts at issue.

This issue has not gone before the Pennsylvania Commonwealth Court at this time; however, this is an issue that continuously arises in PA UEGF claim petition litigation. Fortunately, for the first time since the inception of the PA UEGF, defense counsel has a resolution to the late answer conundrum. Defense counsel representing the PA UEGF dealing with uninsured employer's late answer/*Yellow Freight* situations, should argue the legislative intent behind the creation of the PA UEGF, and the PA UEGF's role in the litigation process. The Commonwealth Court has always looked to the legislative intent of the laws of Pennsylvania and the WCAB could not have been any clearer that the legislature did not intend the PA UEGF to be held liable, even secondarily, for the uninsured employer's failure to file an answer. Nor should the PA UEGF be penalized by becoming secondarily liable for a claim that may not be warranted based on the particular facts at issue. The WCAB provided this legal analysis as a framework for future cases, recognizing the need for a new prospective. Defense counsel who has this situation should cite to the WCAB decision, which, while not bindings, is persuasive authority. Simply stated the *Yellow Freight* motion practice involving late answers cannot be used when an uninsured employer is present and the PA UEGF is involved. ⚖️