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Surveillance! Out of the Shadows and Into the Courtroom

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Surveillance! The very word conjures up images of mystery, intrigue and danger. Thoughts turn to grainy videos of smoke filled rooms and shady characters. To be certain, especially in personal injury litigation, these images are not far off the mark. But the more interesting question is how courts and lawyers are approaching surveillance in this digital age where litigants and juries expect that there's a digital record of everything.[2]

A review of Pennsylvania state and federal case law reveals an issue that consistently confronts the courts: what does the word "surveillance" mean? The word's use matters considerably. It turns out that video or photographic "surveillance" of the incident/accident is governed by an entirely separate set of rules than the "gotcha!" type of surveillance conducted on a plaintiff after the alleged accident. This article will first explore the differences in what constitutes "surveillance." Since there is a significant difference in the scope of surveillance discovery under the more liberal Pennsylvania state discovery rules than under the stricter federal equivalent, this article will also seek to clarify the emerging case law in each of these judicial forums.

I. Introduction

At the core of the instant discussion are two discovery rules. Federal Rule of Civil Procedure 26(b) and Pennsylvania Rule of Civil Procedure 4003.3. F.R.C.P. 26(b) allows a party to obtain discovery of any "non-privileged matter that is relevant to any party's claim or defense." However, a party may not demand discovery of documents or other tangible things prepared in anticipation of litigation, unless "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." In contrast, Pa.R.C.P. 4003.3, does not include any similar limiting language. Rather, Rule 4003.3 allows a party to obtain discovery of any non-privileged material which is relevant to the subject matter at issue, even if that material is prepared in anticipation of litigation or trial, by or for another party, or by or for that other party's representative, including his or her attorney. Notably, 4003.3 does not require one side to demonstrate substantial need before it demands that material prepared in anticipation of litigation is disclosed.[3] So how does this apply to the use of surveillance?

II. Security Footage of An Accident/ Incident Must Be Disclosed With Initial Discovery Under Both the Federal and Pennsylvania Rules

a. Federal case law

In Pennsylvania, a limited number of federal cases[4] have ruled that media (be it photographs, auto recordings or videotapes) of the actual event at

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COMMUNICATIONS WITH PANEL AND TREATING PHYSICIANS IN WORKERS' COMPENSATION CASES

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I. Introduction

In the civil litigation context, contacts between defense counsel and treating physicians are regulated by Pa. R.C.P. 4003.6. However, the Pennsylvania Workers' Compensation Act and regulations have no corresponding rule.[1] In this vacuum, it is becoming more common that aggressive claimant attorneys are seeking to restrict or preclude defense counsel contacts with panel and treating physicians. In addition, they are demanding disclosure of verbal and written communications between defense counsel and panel physicians. This article posits that such tactics should be resisted, particularly involving panel physicians, and

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issue in the litigation must be disclosed as soon as they are recovered, because they are material to the litigation. One of the key cases is *Superior Beverage Co. v. Schweppes*, 1988 WL 46601 (E.D.Pa. 1988). In that case, defendant Schweppes moved the court to compel the production of tapes held by the plaintiff in which managers of Seven Up, a Schweppes brand, were allegedly caught engaging in anticompetitive practices, practices that were at the heart of the plaintiff's case. The tapes were made unbeknownst to the Schweppes employees. Schweppes argued that the tapes should be disclosed because they were evidence that claimed to substantiate the underlying claim at stake in the case. The plaintiff opposed, citing case law that preserved the impeachment power of recorded surveillance. In balancing these competing claims, the court noted that regardless of its impeachment value, audio recordings in this context were evidence that went to the heart of the underlying cause of action. Therefore, its corroborative value exceeded its impeachment value and the video had to be immediately disclosed in the interest of fairness – even before any depositions had taken place.

Eight years later, in *Babyage.com v. Toys "R" Us*, 458 F.Supp.2d 263 (E.D.Pa. 2006), the Eastern District again considered the disclosure of audio recordings in the context of an antitrust lawsuit alleging price fixing. Here, the plaintiff was in possession of taped conversations between the plaintiff's and defendant's representatives. Defendant sought to compel the discovery of the taped conversations; plaintiff objected and sought a protective order to prevent the disclosure until after such time as the defendant's representatives had been deposed. The court found that since the audio recordings in this antitrust case went to the heart of whether the defendant had a scheme to fix prices, the Rules of Civil Procedure compelled their immediate disclosure. The court noted that while the disclosure of impeachment evidence could be delayed because it was not substantive evidence of whether the claim or defense had merit, audio evidence of a price fixing scheme was immediately important to the core of the case and thus had to be immediately disclosed. The court paid great attention to the language of FRCP 26(c) requiring a showing of "good cause." Unlike in the case of impeachment evidence, the court found that evidence bearing on the substance of a claim or defense needed to be immediately disclosed and was not limited by the "good cause" requirement.

b. Pennsylvania state case law

No Pennsylvania state court has substantively dealt with the issue of when accident footage surveillance must be disclosed – which is somewhat surprising given that surveillance equipment has become increasingly common. However, given the expansive language of Rule 4003.3, we expect to see the state courts follow the rationale set forth above by the federal courts and require that footage of the actual accident be disclosed immediately if it is material to the facts of the case. Pennsylvania courts have already modeled some aspects of their surveillance decisions on the federal template. *See: Duncan v. Mercy Catholic Medical Services of Southeastern Pennsylvania*, 813 A.2d 6 (Pa. Super. 2002) and *Bindschusz v. Phillips*, 771 A.2d 803 (Pa. Super. 2001) discussed in-depth in Part III(b). Consequently, we expect that the state courts will approve of the federal model and require any surveillance footage of the actual accident/incident that will be used in a substantive manner be disclosed with original discovery.

III. The Time When "Gotcha!" Surveillance Must Be Disclosed Varies Between State and Federal Law.

a. Pennsylvania federal case law

Unlike accident footage that clearly goes to a material fact in the case, "gotcha!" footage of a plaintiff post-accident is more difficult to categorize. *Snead v. American Export* (59 F.R.D. 148 (E.D.Pa. 1973)) is widely considered the first Pennsylvania federal case to consider this issue. In *Snead*, the court recognized that post-accident surveillance footage of a plaintiff was prepared in anticipation of litigation and as such, should be protected as attorney work product. However, in reaching this conclusion the court fashioned a compromise and held that the defendant could not hold the surveillance material until the time of trial, but rather had to disclose the surveillance video which it expected to use at trial, after the deposition of the plaintiff occurred. *Id.*

Following *Snead*, later federal cases established a general rule that videotaped surveillance is regarded as work product since it is gathered in anticipation of litigation by a party or the party's representative, but this privilege is waived where that party intends to use the film at trial. *Gibson v. National Railroad Passenger Corp.*, 170 F.R.D. 408, 409–10 (E.D.Pa.1997). Nevertheless, to preserve its impeachment value, the film need not be turned over until after the plaintiff is deposed. *Corrigan v. Methodist Hospital*, 158 F.R.D. 54, 58–9 (E.D.Pa.1994).

This position has been cited approvingly by the federal court numerous times. For example, in *Williams v. Picker International*, 1999 WL 1210839 (E.D. Pa. 1999), the plaintiff alleged that she tripped at Temple Hospital following the defendant corporation's improper installation/removal of a CT scan machine. In her request for production of documents, plaintiff sought the disclosure

of surveillance conducted upon her. Defendants objected, arguing that any surveillance footage taken of the plaintiff constituted work product protected by FRCP 26(b)(3), and further that any disclosure required under the Rules must be preceded by the plaintiff's deposition. The court agreed and required that defense turn over footage, but only after plaintiff was deposed. *See Gibson v. National Railroad Passenger Group*, 170 F.R.D. 408 (E.D.Pa., 1997) (plaintiff sued defendant Amtrak for electrical burns she allegedly sustained while on railroad property). The plaintiff requested the production of all photographs and surveillance footage. Footage was required to be presented after the deposition of the plaintiff); *see also: Machi v. Metropolitan Life Insurance Company*, 2008 WL 2412947 (W.D.Pa. 2008) (for another similar holding).

We caution, however, that although Pennsylvania's federal courts have determined that "gotcha!" surveillance should be disclosed before trial, this view is not specifically reflected in the federal rules, nor is it always adhered to by the lower courts. In FRCP Rule 26(a)(3), the rule on pre-trial disclosure requirements, states specifically "a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial *other than solely for impeachment*. . ." Fed. R. Civ. P. 26(a)(3)(A) (emphasis added). Furthermore Federal Rule of Evidence 613(a), which permits counsel to impeach a witness without first revealing an inconsistent statement provided that witness has the opportunity to explain or deny her earlier testimony, could provide another means by which the defense may withhold surveillance evidence until trial. Taken together, these rules provide potential alternative methods for the defense to retain the surprise value of its impeachment evidence.

In fact, we have personally found that some Eastern District courts are willing to afford a bit more latitude on the timing of surveillance disclosure if defendants argue that the withheld surveillance directly impeaches a key aspect of the plaintiff's case. In a recent case that we were involved in, a post-accident surveillance video showed that a plaintiff who claimed he was unable to perform any strenuous manual labor was actually running a construction company (after his employer had declared him totally disabled). After motion practice, we were able to convince the court that pursuant to FRCP 26(a)(3) and FRE 613(a), we only had to disclose the video after opening statements because the video was actually impeachment material. While we would have preferred to disclose the video after the plaintiff's direct examination, this compromise solution fashioned by the court only gave the plaintiff 24 hours to come up with a reason why the video was not what it seemed to be. The jury ultimately found the excuse unconvincing.

b. State court cases

Pennsylvania's state courts have generally mirrored federal law when it comes to the timing of the disclosure of post-accident surveillance. In *Bindschusz v. Phillips*, 771 A.2d 803 (Pa. Super. 2001), post-accident surveillance of the plaintiff was not disclosed until two days before the start of trial. The court, after first noting that Pennsylvania's state courts were lacking in guidance, adopted the disclosure procedure espoused in *Snead, supra*. The Superior Court held that disclosure of surveillance footage was necessary as a way to protect the plaintiff against surprises at trial, but that disclosure need only come after the memorialization of the plaintiff's testimony at a deposition. *Bindschusz* at 809. Such timing, the court reasoned, furthered the purpose of discovery while preserving the evidence's impeachment potential.

In *Duncan v. Mercy Catholic Medical Services of Southeastern Pennsylvania*, 813 A.2d 6 (Pa. Super. 2002), the Pennsylvania Supreme Court also considered the issue. Here, the plaintiff objected to the admission of surveillance footage at trial on the grounds that defendant failed to disclose the video despite pre-trial interrogatories seeking the disclosure of such evidence. The court agreed that the federal court's position on the matter was highly persuasive and wrote "…the purpose of Pennsylvania's own discovery rules, prevention of surprise and unfairness, and the fostering of a fair trial on the merits, was best served by the procedure espoused in the federal cases." *Id.* at 10. Bad news for the defendant, which then lost the ability to use the footage. *See also: Dominick v. Hanson*, 753 A.2d 824 (Pa. Super. 2000) (when plaintiff failed to take action in response to defendant's objections to interrogatories regarding surveillance, the surveillance was allowed at trial despite no prior disclosure); *Mietelski v. Banks*, 854 A.2d 579 (Pa. Super. 2004) (defendant was precluded from introducing surveillance footage because the disclosure, which did not occur until the eve of the deposition of defense expert relying on the footage, was untimely); and *Morganti v. Ace Tires & Parts*, 2004 WL 3304656 (Pa.Com.Pl. 2004) (holding that defendant's surveillance videos of the plaintiff must be disclosed, but not until after the plaintiff's deposition had occurred.)

c. What footage must be disclosed?

Federal law

Federal cases have specifically ruled that if a party does not intend to introduce any surveillance evidence at trial, it need not produce such evidence during discovery. *Gibson*, 170 F.R.D. at 410. In contrast, if a party does intend to use surveillance, it only needs to disclose the video that it intends to use. *See: Evan v. Estell*, 203 F.R.D. 172 (M.D. Pa. 2001) (defense was required to turn over surveillance immediately as plaintiff had already been deposed, but the court stated that the defendant need not disclose the video at all if it had no intention of using it at trial). In *Ward v. AT Systems, Inc*., 2008 WL 4148599 (E.D.Pa., 2008), the court referred to *Gibson v. National Railroad Passenger Group*, and operated under the assumption that if the defendant chose not to use the surveillance evidence at trial, likely the evidence either corroborated plaintiffs' claims or was inconclusive. *See Gibson*, 170 F.R.D. at 410. In either case, the work product doctrine barred discovery (unless the defendants intended on using it) because plaintiffs had no substantial need of the evidence. *Ward* at 3.

State law

The scope of how much post-accident surveillance must be disclosed in state court remains in flux. As the courts have noted, "[r]equiring a defendant to produce all surveillance evidence, regardless of whether such evidence will be introduced at trial, may cast an undesirable chilling effect on a defendant's decision to employ this important discovery tool." *Ward v. AT Systems, Inc*. at 3. However the same court, citing *Snead*, also stated that "the camera

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may be an instrument of deception…that which purports to be a means to reach the truth may be distorted, misleading, and false….[and surveillance could involve] Hollywood techniques which involve stuntmen and doubles." *Id.* at 150. In the absence of clear appellate guidance, it appears that courts will be left to determine how expansive 4003.3 really is. But it is worth noting that it appears that Pennsylvania's broad discovery statute places it in the significant minority. Well over 75% of states have language that exactly mirrors FRCP 26(b). Indeed, only New York, Ohio, Pennsylvania and California have statues that significantly deviate from the federal standard. However, New York's statute, revised recently in 1993, is very specific and requires full disclosure of all media, including "outtakes, rather than only those portions a party intends to use." CPLR 3101(i). Ohio's statute requires post-accident surveillance to be disclosed "only upon a showing of good cause". Ohio Civ. R. 26. This rule is more restrictive and as such likely would not require disclosure of surveillance footage not intended for use at trial. California's statute is similar to Ohio's in that work product is generally not discoverable unless the denial of discovery "will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." Cal. Civ. Pro § 2018.030. The limiting language in the California statute, that attorney work product is generally *not* discoverable, suggests that California courts would be even less inclined to require defendants to disclose all video footage regardless of what is being used at trial. Whether Pennsylvania follows in the footsteps of the rest of the country remains to be seen.

CONCLUSION

The rules regarding the disclosure of surveillance are not altogether settled in Pennsylvania. Federal Rule of Civil Procedure Rule 26(b) and Pennsylvania Rule of Civil Procedure 4003.3 are the relevant discovery rules that dictate how and when surveillance evidence must be disclosed. Under the federal rules, Pennsylvania courts have held that surveillance footage of an actual accident, that is, videotape surveillance that relates to a material fact at issue in the case, must be disclosed as soon as the defense (or party retaining such footage) is aware of it. However, "gotcha!" surveillance conducted of a party post-accident does not have to be disclosed until after the plaintiff has been deposed. Furthermore, the defense only has to disclose the video that it intends to use at trial.

The state law rules are much more in flux. In Pennsylvania, the courts have not had the opportunity to rule on when surveillance relating to a material issue of fact must be disclosed. However based on the fact that the Pennsylvania statute is more expansive than the federal rule, we expect that the state courts will also require a party in possession of footage relevant to a material issue in the case to disclose it immediately. This supports Pennsylvania's policy of preventing surprise and unfairness at trial.

In terms of videotaped footage of a plaintiff taken post-accident, Pennsylvania courts have generally followed the federal standard and required such surveillance to be disclosed only after the plaintiff has been deposed. However, the state rules seem to deviate from the federal when it comes to precisely how such surveillance video must be disclosed. The federal cases discussed *supra* are fairly unified in their decision to exclude all surveillance videos not intended for use at trial. The state cases have not particularly considered the issue in a substantive manner. From the defense perspective, our own view is that the state courts should follow the federal rules and only require the disclosure of video that is intended to be used at trial.

ENDNOTES

[1]Special thanks are owed to Adam Gomez, a Wade, Clark law clerk, for his research contributions to this article.

[2]The issue also generated much press attention as the result of a recent New Jersey case, *Inferrera v. Wal-Mart Stores, Inc.*, 2011 WL 6372340, 1 (D.N.J.) (D.N.J., 2011), decided this past December. In *Inferrera*, the federal court in NJ expended considerable efforts distinguishing between surveillance footage of an accident, and subsequent secret footage of a plaintiff. In this case, defendant was seeking to delay the production of a security tape of accident footage prepared in the regular course of its business. *Id.* at 2. The court determined that Wal-Mart's security footage of the plaintiff's fall must be disclosed with Wal-Mart's original discovery as "the hope or expectation that relevant evidence may impeach a witness does not establish good cause to delay the production of the evidence in discovery." *Id.* at 1. The court predicted that allowing a defendant to hold back relevant evidence could lead down a long slippery slope in which parties on both sides regularly withhold relevant evidence and the exception swallows the rule. The court also stressed that the rules governing the disclosure of post-accident surveillance were different.

[3]Of course, both the Federal and Pennsylvania rules limit discovery through the use of protective orders—a party may obtain one if she can show good cause that the discovery will cause "unreasonable annoyance, embarrassment, oppression, burden or expense". *See:* F.R.C.P. 26(c) and Pa.R.C.P. 4012.

[4]Indeed, few federal courts in any jurisdiction have ruled on the issue. One of the few courts to tackle the issue was the Florida district court in *Target Corp. v. Vogel*, 41 So.3d 962 (Fla. App. 4 Dist. 2010). In *Target*, the Florida appellate court entered into a discussion of the two types of "surveillance." "Such films, usually taken by defense private investigators, were characterized by the supreme court as falling under the work product privilege, unless intended for use at trial. *Id.* at 707. The video in this case was not protected work product, prepared "to aid counsel in trying the case." *Id.* Rather, it was a video of the accident itself, discoverable evidence under the Rules of Civil Procedure, which are designed "to prevent the use of surprise, trickery, bluff and legal gymnastics. *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 111 (Fla.1970)." *Target* at 963.

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especially those who may be employed by the employer-defendant.

II. Discussion

When an employee is injured at work and is treated by a panel physician, particularly one who works for the employer, at first blush a conflict seemingly arises between doctor-patient confidentiality on the one hand and the work-product doctrine and attorney-client privilege on the other. The question then arises whether defense counsel can communicate privately with the physician to prepare employer's defense and/or for proper management of the claim.

In the civil law context, statutory law and the Pennsylvania Rules of Civil Procedure both recognize exceptions to the general rule concerning doctor-patient confidentiality. Section 5929 of the Judicial Code provides:

> No physician shall be allowed in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without consent of said patient, *except* in civil matters brought by such patient, for damages on account of personal injuries.

42 Pa. C.S. § 5929 (emphasis added).

On its face, the statute prevents a patient from asserting doctor-patient confidentiality any time the patient has placed his or her health at issue. While on its face this statute only applies to personal injury actions, the workers' compensation context is similar. Workers' compensation cases, much like personal injury cases, seek compensatory damages and are adversarial by nature. Frequently, the parties present conflicting medical evidence to support their position. It is not uncommon for a treating panel physician to opine that a claimant is not injured or has fully recovered from injury and is capable of returning to work while claimant's medical expert is of the opinion that the claimant has suffered a work injury and is not yet capable of resuming work. If defense counsel desires to rely upon the treating panel physician's opinion to evaluate or dispute a claim, defense counsel should be permitted to present testimony from that physician concerning the claimant. In general, this premise is not disputed. However, the statute only addresses "disclosure (of) information," and does not specifically address private communications with defense counsel to prepare for depositions or seeking special reports that address the myriad issues that arise in the workers' compensation context.

Rule 4003.6 of the Pennsylvania Rules of Civil Procedure addresses this issue in the civil litigation context:

> Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter. This rule *shall not* prevent an attorney from obtaining information from:
> (1) the attorney's client,
> (2) an employee of the attorney's client, or
> (3) an ostensible employee of the attorney's client.

Pa. R.C.P. 4003.6 (emphasis added).

Thus, in the civil litigation context, an exception to the general rule regarding doctor-patient confidentiality exists that allows private communications between defense counsel and any physicians for which the employer has a special relationship by virtue of employment or ostensible agency. Clearly, a panel physician who is also an employee of the employer, *i.e.*, client, fits this definition, meaning information may be obtained directly from the physician without the need to receive patient consent.[2]

The statutory law and the Rules of Civil Procedure thus make plain that defense counsel can communicate privately with a treating panel physician who also works for the employer-defendant, or is an ostensible agent. However, the law in the workers' compensation context actually extends the propriety of such contacts beyond that allowed in civil litigation.[3]

A. Commonwealth Court

The Commonwealth Court first confronted the applicability of doctor-patient confidentiality in the workers' compensation context in *Doe v. WCAB (USAir, Inc.)*, 653 A.2d 715 (Cmwlth. Ct. 1995). Claimant Doe sought to reinstate benefits based on a prior work injury. He filed a motion *in limine* asking the WCJ to limit his employer's access to certain medical information, namely his HIV-positive status, asserting it was irrelevant to his claim petition. The WCJ disagreed, finding his health status was relevant to his alleged injury (depression), and without the information, the employer could not properly defend the claim. The WCAB affirmed, as did the Commonwealth Court. Recognizing that there is a general statutory prohibition against disclosure of confidential medical information in Pennsylvania, the court noted that in 42 Pa. C.S. §5929 the legislature had nonetheless recognized the need for an exception when someone puts his or her health in issue. "There is no question that a claimant seeking compensation benefits in a workmen's compensation matter fits into this exception [42 Pa. C.S. §5929]." Moreover, the court found that the general rule is that an individual placing his physical or mental condition in issue waives the right to oppose disclosure of private medical information.

Doe has become the seminal case, frequently cited by the WCAB in its opinions finding the physician-patient privilege does not prevent disclosure of health information in workers' compensation cases. *See*, *e.g.*, *Morrell*, *infra*.

B. WCAB

The Commonwealth Court's decision in *Doe* does not expressly address the issue of whether defense counsel can communicate in private with treating physicians. When faced with the issue of whether defense counsel could engage in *ex parte* communications with a treating physician, whether an employee or panel physician, the WCAB has repeatedly held they could without violating doctor-patient confidentiality.

In *Mogilewski v. Accupac, Inc.*, A04-2068, Opinion of May 12, 2006 (2006 WL 1455562), an employer filed a petition to modify on the basis that the claimant was capable of returning to modified work duty. In support thereof, the employer offered the deposition testimony of a non-panel, treating

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physician, who on cross-examination admitted he met with defense counsel to prepare for the deposition without the claimant's permission or knowledge. The workers' compensation judge concluded this was improper *ex parte* communication and precluded admission of the evidence. On appeal, the WCAB concluded the WCJ erred by excluding the testimony. Specifically, the WCAB held, "We are not aware of any section of the Act, its regulations, or a specific workers' compensation case that prohibits such a meeting." The WCAB distinguished cases that barred *ex parte* contact with a treating physician because such cases were based on Pa. R. Civ. Pro. 4003.6, which did not apply to workers' compensation cases. *See, id.* (citing *Ace Tire Co. v. WCAB* (Hand), 515 A.2d 1020 (Pa. Cmwlth. 1086), *appeal denied*, 529 A.2d 1083 (Pa. 1987); *East v. WCAB (USX Corp./Clairton)*, 828 A.2d 1016 (Pa. 2003)). The WCAB further noted that such *ex parte* communications are not unusual, as claimants commonly sign medical authorizations permitting access to their medical records. Moreover, the WCAB found no violation of public policy as the claimant was given notice of the meeting between defense counsel and the treating physician:

> We believe that the notice scheduling a deposition provides all parties, including claimant, with notice that counsel may need to speak with the witness beforehand. Attorneys in workers' compensation proceedings routinely meet with witnesses prior to obtaining their depositions.

Additional reasons have been cited in other WCAB opinions. For instance, in *Morrell v. Thomson Consumer Electronics*, A03-2381, Opinion of April 2, 2004 (2004 WL 762684), a claimant attempted to assert doctor-patient confidentiality to prevent his former treating physician from conducting an independent medical examination. Relying upon Section 5929 of the Judicial Code, the WCAB found the privilege was not applicable as claimant had put his medical condition at issue. Moreover, there was no indication that the information sought would tend to blacken the claimant's character, as the privilege required. It also found civil case law and rules precluding contacts in such circumstances to be nonbinding on administrative proceedings. *See also Garcia v. Duquense Light Co.*, A01-2773, Opinion of Oct. 21, 2002 (2002 WL 31398950) (*Garcia* also held that the general prohibition of Pa. R.C.P. No. 4003 against private contacts between treating physicians and defense counsel is not applicable to workers' compensation proceedings.)

C. Superior Court

As noted earlier, in the civil law context defense counsel-treating physician contacts are regulated by Pa. R.C.P. 4003.6. However, the recent Superior Court decision in *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, 32 A.3d 800 (Pa. Super. 2011, *en banc*), provides additional support for the premise that, under the auspices of the attorney work product doctrine, employer's counsel can speak in confidence to its employee or panel physician in order to develop expert opinions with regard to injuries another employee allegedly sustained at work.

In *Barrick*, plaintiff brought a personal injury action against a hospital and its catering company to recover for injuries he allegedly suffered after the chair he was sitting on in the hospital cafeteria collapsed beneath him. The plaintiff was treated for spinal injuries at the defendant hospital by Dr. Green, who was not a party to the suit. The defendant caterer subsequently served a subpoena upon the hospital, requesting a complete copy of plaintiff's medical records. The plaintiff raised no objections to the subpoena and did not seek a protective order. The hospital then provided the medical records, which it later supplemented. These later records, however, indicated that certain records not created for treatment purposes were not being produced.

The catering company filed a motion to enforce the subpoena. The hospital opposed the subpoena in part because it had retained treating physician Dr. Green as an expert witness and the documents not produced related to his capacity in that regard. The hospital also asserted that the documents were protected as communications between defense counsel and his expert in preparation for trial. Following a hearing and *in camera* review, the trial court granted the motion to enforce the subpoena. The Superior Court originally affirmed the decision, but subsequently granted re-argument *en banc*.

Following re-argument, the Superior Court held that the correspondence fell within the attorney work product doctrine and was not discoverable.[4] In reaching this conclusion, the court examined Rule 4003.3, which sets forth the work product doctrine.[5] It provides, in relevant part, that "discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." The court noted that the purpose behind the doctrine is "to shield the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case."[6, 7]

The Superior Court recognized that there were limited exceptions to the general work product doctrine rule. For instance, "documents ordinarily protected by the attorney work product doctrine may be discoverable if the work product itself is relevant to the underlying action. The work product privilege contained within Pa. R.C.P. 4003.3 cannot be overcome, however, by merely asserting that the protected documents reference relevant subject matter." The court found that the correspondence at issue was relevant only because of the subject matter discussed between counsel and Dr. Green. Thus, any mental impressions or legal analyses posited by counsel and contained in the correspondence was undiscoverable attorney work-product.[8]

The *en banc Barrick* decision is consistent with the workers' compensation, civil case law, and rules of court cited above. Considered as a whole, these decisions and rules support the conclusion that defense counsel can communicate, in private, with a treating physician about the claimant's medical condition. This is particularly true in the workers' compensation context when the treating physician is a panel physician who is also an employee of the defendant employer.

III. Claimant's Attempts to Preclude Private Communications with Treating Physicians

Faced with the potential that their claim may be undermined by a treating physician who may also be

panel physicians and/or employed by the employer defendant, aggressive claimant's counsel increasingly cry foul, citing numerous policy reasons to prevent *ex parte* communications with their clients' physicians. First, there is the broad public policy argument that a treating physician owes an absolute duty to his or her patient. There is some support for this argument, albeit based on a half-century old per *curiam* opinion by the Superior Court in a civil, personal injury action. In *Alexander v. Knight*, 177 A.2d 142 (1962), the Superior Court found a fiduciary relationship exists between a doctor and his patient. As a result, the court held that physicians have a duty to refuse affirmative assistance to a patient's antagonist in the course of litigation.

Alexander, however, is trumped by Pa. R.C.P. 4003.6,[9] and by more recent decisions in the civil law context, namely, *Barrick*. Both *Alexander* and *Barrick* involved a treating physician who was thereafter retained as an expert for the defense. *Alexander* found fault with this apparent shift in loyalties, whereas *Barrick* did not directly pass judgment on the issue. Rather, it indirectly condoned a treating physician becoming an expert for the defense when it held that certain communications between the treating physician and defense counsel were protected by the attorney work product doctrine. Moreover, *Alexander* is a civil case, and civil law and rules are not applicable to workers' compensation cases, in which the Commonwealth Court has recognized that the physician-patient privilege is weak.

Next, some claimants argue that recognizing a so-called "client exception" would somehow prevent patients from accessing their own medical records or would curtail candid patient-physician communications. Another argument claimants have advanced is that large employers will be given an unfair advantage over smaller employers, who simply cannot afford to have a physician on staff. Moreover, it is argued that permitting an employer to have *ex parte* contact with a treating physician who is also its employee could lead to improper "collusion," in the minds of some counsel for claimants. These arguments are also meritless.

It is illogical to argue that claimant's would not be honest about their injuries if they were not assured that an employer would not be able to learn the truth from panel physicians. Rather, the real intent of some claimant's counsel is to prevent panel physicians from speaking the truth when claimant's fear the truth will undermine a workers' compensation claim.

Also, private communications between defense counsel and a panel physician are not "medical records," and precluding inquiry into defense counsel-physician communications does not restrain access to medical records as well. However, it is true that claimant's counsel should not be having private contacts with employer-panel physicians. This is no different than the concomitant rule that employers' defense counsel cannot have *ex parte* contact with a represented claimant.

Claimant's counsel can always point out the employer or panel physician relationship, and argue bias and credibility, without violating defense counsel's right to communicate privately with the panel physician. Moreover, the playing field is balanced by the fact that claimants' counsel's private communication with treating physicians is likewise shielded from disclosure.[10] Moreover, these arguments were not a concern of the state legislature when it enacted the Workers' Compensation Act, which permits an employer to establish not just a panel of health care providers, but also include on that panel, a physician who is employed by it, so long as such relationship is disclosed. *See* 77 P.S. §531. Had the legislature shared claimants' concerns, it easily could have crafted the law to preclude an employee from being a panelist. Instead, it permitted an employer to designate an employee to serve as a panel physician. From this section's inclusion in the cost containment provisions of the Act, it can be presumed that the legislative intent was to foster a cost efficient method of dealing with claims, not to punish employers by banning them from speaking with their own employees or panel physicians in an effort to develop medical opinions that assist the employer's decision-making on workers' compensation claim-related issues. The claimants' argument forbidding defense counsel communications with treating panel physicians would undermine the cost-containment provision of the Act by forcing employers to hire non-treating independent medical examination physicians to strategize and address any issue that was not reflected on the face of a panel physician's records.

Moreover, when an employee allegedly injured at work treats with a panel physician, especially one who is disclosed to work for the same employer, the claimant's expectation of privacy is lessened. It is simply unreasonable for a claimant to expect that a physician, employed by the same company as the claimant, is going to maintain strict confidence and not communicate with their common employer, particularly when the claimant reveals information adverse to his or her claim. Not only does the claimant know that the employer employs the physician, the Act includes a requirement that any provider who treats an injured employee *must* provide the employer with pertinent history, diagnosis, treatment, prognosis and physical findings through periodic reports. *See* 77 P.S. §531(2). Thus, no one could reasonably expect privacy under these facts.

The following hypothetical illustrates the absurdity of such an argument. A claimant alleges he was injured lifting a heavy object at work while employed in the maintenance department of a hospital. In reality, the claimant injured his back doing chores around his house. Pursuant to the Act, the claimant goes to a panel physician designated by his employer. That panel physician is employed by the defendant-hospital. The employment relationship between the hospital and the panel physician was fully disclosed as required in advance of the claimant's treatment. During one of the claimant's appointments, the physician suspects or the patient reveals to the panel physician the true origin of his injuries.

If arguments claimants make are accepted as true, the panel physician, despite an obvious duty to his employer, must nevertheless remain silent and essentially perpetuate fraud. Clearly, this is not the intent behind the Act, especially where the claimant has placed his health condition at issue. The law does not and should not allow an employer's access to its employee's medical expertise, opinions, and knowledge of the facts to be controlled or limited.

Likewise, a claimant cannot use the

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Communications

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patient-physician privilege to shield clearly relevant information from the employer. A treating panel physician, particularly one who is an employee of the employer-defendant, is not the same as a non-affiliated primary care physician with whom the patient may have treated for years, disclosing private information completely unrelated to the particular injury in dispute.

Claimants' counsel sometimes argue the applicability of certain civil cases that are frankly distinguishable. In *Burger v. Blair Medical Associates, Inc.*, 928 A.2d 246 (Pa. Super. 2007), aff'd. by 642 A.2d 374 (Pa. 2009), a plaintiff brought a cause of action against a medical group and physician alleging they breached their duty of confidentiality when they revealed plaintiff's illicit and prescription drug abuse to her employer while providing the employer with records related to a workers' compensation claim. The physician in *Burger*, however, had been the plaintiff's primary care physician for years before the work-related injury and had obtained the information concerning plaintiff's drug use during her prior treatment, not during the course of his treatment of the relevant work-related injury. The issues in *Burger* were distinct from those that arise in the workers' compensation context. The *Burger* case is thus inappropriately cited by some claimants' counsel who seek to block defense counsel communications with treating panel physicians.

Similarly, in *White v. Behlke*, 65 Pa. D. & C. 4th 479 (Pa. C.P. 2004), the court found the ostensible employee exception to the confidentiality provisions of Pa. R. Civ. Pro. 4003.6 was inapplicable when the physician at issue treated plaintiff during her second pregnancy, not during the first, which formed the basis of the negligence claim against a colleague.

And in the civil case of *Heacock v. Sun Co. Inc.*, 38 Pa. D. & C. 4th 1 (Pa. C.P. 1998), a paralegal for one of the defendants contacted plaintiff's original treating physician and provided him with copies of the plaintiff's subsequent medical records obtained directly from his workers' compensation carrier. The plaintiff at no time authorized release of the workers' compensation file for this purpose. The defendant, though, claimed it was entitled to contact the plaintiff's treating physician because the doctor was paid by a workers' compensation carrier on behalf of *another company* that the law firm represented on other *unrelated* matters. The defendant claimed the doctor was a "client," which would enable it to talk to the doctor. The court rejected this claim, finding:

> It is absurd to contend that because a law firm represents a physician *in a totally distinct capacity in totally distinct litigation*, or as a business client, or represents that physician on personal or family matters, that therefore Rule 4003.6 does not bar *ex parte* communication. Such a fortuitous extraneous representation by any member of a large law firm cannot be any basis to avoid the clear language and intent of the rule.

Clearly, such a distant relationship should not give rise to an exception in a civil action context. But in the workers' compensation context of a panel physician, particularly one who is also employed by the employer-defendant, the relationship is significantly closer, if not inextricably intertwined. The treating panel physicians and the claimant are both employees of the same employer. By law, the employer is permitted to designate an employee to be part of its panel. *See* 77 P.S. § 531(1)(i). The employer has disclosed this relationship to the claimant in advance, thus fulfilling its legal obligations. Frequently, the employee-physicians hold information that is vital for the employer to defend the claim against it, and desires to obtain consistent with the cost-containment rationale for the panel physician scheme. Additionally, the employer often relies upon its employee-physicians' opinions in denying or disputing claims. At the center of it all, the question boils down to whether the employee-physician's ultimate diagnosis and/or prognosis are correct. It is not that the physician disclosed information gathered in his or her contact with a claimant in some unrelated capacity. Thus, the relationship is not merely fortuitous or extraneous, as was the case in *Heacock*, *supra*.

Moreover, the basic rationale for the physician-patient privilege is weak in the workers' compensation context. The employee is specifically seeing the employer's employee-panel physician for purposes of receiving treatment for an alleged work injury. The potential disclosure private information that has no bearing on the workers' compensation claim is minimal, at best. This is true, in part, because of the panel physician's limited role; and, in part, because the employee is fully aware that, by placing his health in issue, he cannot hide behind the cloak of doctor-patient confidentiality. For these reasons, public policy actually dictates full disclosure by the treating panel physician to an employer, particularly of highly relevant information relative to the disputed claim. This is particularly the case where the treating panel physician is also employed by the defendant employer, in which scenario the attorney-client privilege would also apply to allow defense counsel unfettered, private access to the physician so as to develop pertinent information and prepare the defense of the case.

Finally, claimants' counsel sometimes raise arguments that there is some impropriety in a defense counsel's privately soliciting opinions from or having communications with panel physicians that the claimant must seek treatment from. Not only is this, strictly speaking, not true, as claimants need only see a panel physician during the initial 90 days if they want the bills in non-emergency situations paid by workers' compensation, there is no inherent impropriety in any event. Moreover, the physician has an independent, professional responsibility to properly treat the patient. There is no evident impropriety in defense counsel's soliciting the panel physicians' opinions in workers' compensation medical-legal issues.

IV. Conclusion

In summary, there is no valid logic or case law that supports an assertion that doctor-patient confidentiality trumps defense counsel's right to have private communications with physicians in workers' compensation cases, particularly when a panel physician and claimant share a common employer. Counsel for the defendant-employer has the right to communicate with ostensible and actual employees of his client, and, arguably, even non-affiliated treating physicians, without fear of having the substance of those discussions disclosed to claimant's counsel.[11] Defense counsel

are urged to strenuously resist claimants' counsel's efforts to interfere or gain tactical advantage in such regards.

ENDNOTES

[1]*See:* 34 Pa. Code §131.1, *et seq*.; *Roberts v. Kountry Kraft Kitchens v. W.C.A.B.*, A04-0807, May 12, 2006, 2006 WL 1455561.

[2]Concomitantly, defense counsel's communications with defendant employers' physician employees are protected by attorney-client privilege. *See*, *e.g.*, *In re: Condemnation by the City of Phila*., 981 A.2d 391, 386-397 (Pa. Cmwlth. 2009), *citing*, 42 Pa. C.S. §§5916 and 5928, and Upjohn Co. v. U.S., 101 S.Ct. 677, 449 U.S. 383 (U.S. Supreme Ct. 1981); *see also*, *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011) (attorney-client relationship extends to both attorney-client and client-attorney communications).

[3]Prior to the adoption of Pa. R.C.P. 4003.6, Pennsylvania common law allowed, without limitation, an adverse party's private interview of a party's treating physician as a cost effective alternative to formal discovery. *See, e.g.*, *Moses v. McWilliams*, 549 A.2d 950 (Pa. Super. 1988), *alloc. denied*, 521 Pa. 631, 558 A.2d 532 (1989).

[4]The court also found that the discovery request was improperly directed to a non-party expert, instead of to the party retaining him, and it sought information beyond what was permitted by interrogatories, *i.e*., the substance of the opinion and a summary of grounds for each opinion.

[5]The court also noted that its decision was consistent with the Federal Rules of Civil Procedure, which previously permitted broad discovery of expert witnesses, but was recently amended to restrict discovery of private communications and draft reports from expert witnesses. Slip Opinion, at 12 n.9.

[6]WCJ Rules 131.61 and 131.70(c) confirm that privileged information is protected in workers' compensation proceedings.

[7]Even the sole dissenting judge in *Barrick* acknowledged that "the purpose of the work-product doctrine is to provide an attorney with intellectual room to ruminate about his strategy and thoughts on his client's case, (32 A.2d at 817)". . . . without fear that their work product will be used against their clients." *Id*., *citing Comw. V. Noll*, 662 A.2d 1123, 1126 (Pa. Supr. 1995).

[8]Had Dr. Green issued a report for the litigation that denoted a reliance on defense counsel's representation of the facts, that court indicated that disclosure would have been required. 32 A.2d at 813. Defense counsel should always keep in mind when communicating with physicians that a disclosure may be demanded or required, and thus, emphasize in such letters and reports that the physician's opinions need to be based solely on the physician's personal review of the actual evidence.

[9]An often relied on text emphasizes that when a civil rule "expresses a sound public policy . . . there is every reason for the rule . . . to be looked to for guidance . . . . in workers' compensation proceedings. . . ." 7 West's Pa. Prac., Workers' Compensation §13.2 (3rd Ed.); *see also:* §20:52 (noting claimant's counsel would likely be unsuccessful asserting physician-patient privilege to try and block adverse testimony from a treating physician).

[10]Claimants' counsel inconsistently argue that their private communications with physicians are sacrosanct, while arguing that defense counsel's communications are not, under the guise of their interpretation of the physician-patient privilege and case law such as *Alexander v. Knight*. In one case, an argument was made that protecting defense counsel communications with its employee-panel physicians purportedly violated the right "to confront and cross-examine witnesses." The defense response was that the basis for a witness' opinion and matters of bias/ credibility can still be developed in cross examination, without violating the attorney-client privilege. Apparently, in the mind of some claimants' counsel, collusion is not an issue when claimants' counsel has unfettered private access to treating physicians. The reality is that the sanctity of the work-product doctrine in both claimant and defense contexts is more important than alarmist concerns over the possibility of collusion that can be addressed in other ways. Also, claimant's real interest is to gain tactical advantage over the employer in litigation by blocking efforts to develop the facts on the issues presented in a cost effective manner.

[11]HIPAA considerations are not addressed in this article. However, the usual rule is that HIPAA does not apply to matters or restrict access to medical information in litigation that follows accepted litigation rules and procedures. *See*: 45 CFR §164.512(1).

PORTSIDE INVESTORS, L.P. OPENS THE DOOR FOR PLAINTIFFS TO ESTOP INSURERS FROM INVOKING SUIT LIMITATION CLAUSES

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I. Introduction and Background

The Pennsylvania Superior Court's recent decision in *Portside Investors, L.P. v. Northern Insurance Company of New York*, 2011 WL 586235 (Pa.) (November 23, 2011) pushes open a seemingly closed door to plaintiffs efforts to estop insurers from invoking the suit limitation clauses when suit is instituted after the time frame provided under an insurance policy. After a lengthy discussion of the facts surrounding the claim and the insurer's investigation of same, the court found that Northern Insurance Company of New York waived its right to plead the affirmative defense of the suit limitation clause because it advised the insured it would revisit a demand for appraisal after the statement under oath of a vital witness was secured.

This Commonwealth has long enforced suit limitation clauses in insurance policies. *General State Authority v. Planet Ins. Co.*, 464 Pa. 162, 346 A.2d 265 (1975). These clauses are contractual undertakings between the parties to limit the time for bringing suit on the contract. *Id.* at 166. Although these clauses are entered into by contract, Pennsylvania courts have enforced them as stringently as statutes of limitations. Indeed, suit limitations clauses have been deemed to be analogous to a statute of limitations by numerous courts because the clauses limit the time period in which suit can be brought for a loss. *Prima Medica Associates v. Valley Forge Insurance Company*, 970 A.2d 1149 (Pa. Super. 2009). Moreover, both statutes of limitations and suit limitations have been found to be necessary for the general good of society:

> Statutes of limitations [and suit limitation clauses] are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extended to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

Devine v. Hutt, 863 A.2d 1160, 1166 (Pa. Super. 2004) [quoting *Gravinese v. Johns-Manville Corp*., 324 Pa. Super.

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432, 471 A.2d 1233, 1237 (1984) (material quoted in brackets added.)] By limiting the time frame in which suit can be brought, statutes of limitation allow the public some sense of security that a claim which may have arisen years earlier cannot be brought against them at any point in their lives. Suit limitation clauses provide the same security to the parties entering into an insurance contract. Indeed, in the case of insurance companies, if suit limitations clauses were not enforced, the costs associated with keeping claims open, litigating them years after they occurred and additional payments that might be made on such claims would ultimately result in higher premiums. This would negatively affect the general public.

An insurer must affirmatively plead the defense of a suit limitation clause in its answer to the complaint in order for it to preserve the defense. *Farinacci v. Beaver County Indus. Development Authority*, 510 Pa. 589, 511 A.2d 757 (1986), Pa.R.C.P. 1028; 1030. However, just as with statute of limitations, suit limitations clauses are subject to defenses of estoppel and waiver. *Pa. R.C.P. 1029(b)*. Interestingly, defenses to the statute of limitations affirmative defense, and therefore presumably to a suit limitations defense, such as estoppel, agreement, agency, apparent authority, fraud or concealment, must also be affirmatively raised in a reply to new matter or they are waived. *Devine, supra* at 1168-69.

With regard to waiver, Pennsylvania courts have found that "waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." *Samuel J. Marranca General Contracting CO., Inc. v. Amerimar Cherry Hill Associates Ld. Partnership*, 416 Pa. Super. 45, 610 A.2d 499, 501 (1992). If there has been a waiver, then the party waiving its right to invoke a limitation may be barred from attempting to do so later.

> Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. A doctrine sounding in equity, equitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which lead another to rely justifiably thereon to his own injury or detriment may be enforced in equity.

Kreutzer v. Monterey County Herald Co., 560 Pa. 600, 606, 747 A.2d 358, 361 (2000) (quoting *Novelty Knitting Mills v. Siskind*, 500 Pa. 432, 435, 457 A.2d 502, 503 (1983)). The party asserting estoppel has the burden of proving it by clear and unequivocal evidence. *Farmers Trust Co. v. Bomberger*, 362 Pa. Super. 92, 523 A.2d 790 (1987). "Mere silence or inaction is not a ground for estoppel unless there is a duty to speak or act." Id. at 793 (quoting *Brown v. Haight*, 435 Pa. 12, 19, 255 A.2d 508, 512 (1969). Therefore, there must be a factual basis for an insured's defense of waiver or estoppel.

For the past few decades, insureds have had very little success in prevailing on defenses of estoppel and waiver, even when settlement negotiations were taking place, when suit should have been instituted, or where the insurer is silent as to the suit limitation while handling a claim. *See: World of Tires, Inc. v. American Insurance Co.*, 360 Pa. Super. 514, 520 A.2d 1388 (1987) *appeal denied*, 516 Pa. 623, 532 A.2d 20 (1987) (holding insurer's offer of settlement did not indicate waiver of suit limitations clause); *Petraglia v. American Motorists Ins. Co.*, 284 Pa. Super. 1, 424 A.2d 1360 (1981) (holding insured failed to represent factual basis for waiver or estoppel despite silence of insurer as to suit limitations). And, until recently, the mere declaration that an insurer was still investigating a claim was deemed insufficient for the insurer to later be estopped from averring an affirmative defense of the suit limitation clause. *See: Prime Medica Associates, supra, World of Tires, supra.* In coming to these conclusions, these courts implicitly recognized that an insurer, only in very rare circumstances, would agree to open itself up to litigation beyond the time period set forth in the policy as there is no benefit to the insurer to do so.

II. Underlying Facts of *Portside Investors, L.P. v. Northern Insurance Company of New York*

In P*ortside Investors*, plaintiff brought suit against Northern Insurance Company of New York (hereinafter "Northern") for breach of contract, breach of duty of good faith and fair dealing and statutory bad faith for the handling of its May 18, 2000 loss. In 2000, Portside was the owner of Pier 34 on the Delaware River in Philadelphia. The Pier was subject to a triple net lease to HMS Ventures whose principals were Michael Asbell and Eli Karetny. Messers. Asbell and Karteny operated a nightclub on Pier 34.

On May 18, 2000, a portion of Pier 34 collapsed causing three deaths and numerous injuries. As a result, Portside filed a claim with Northern after retaining a public adjuster to assist in the claim. In October of 2000, Portside submitted a Sworn Proof of Loss seeking in excess of $15 million which consisted of replacement cost for the building, the 200 feet of damaged Pier, debris removal and one year of lost rental income. In its Sworn Proof of Loss, Portside averred that the cause of the loss was hidden decay of the pier.

The Northern policy insured against risks of direct physical loss to the pier and the building and property. Like many other insurance policies, collapse of the pier itself was excluded under the Northern policy unless it was caused by hidden decay. If the collapse was caused by hidden decay, the collapse of the pier itself was a covered loss. As to the loss of the pier, if there was a covered event, the policy provided for payment of Replacement Cost Value if the pier was to be rebuilt. If the pier would not be rebuilt or repaired, then the policy entitled payment of actual cash value which was defined as replacement cost less depreciation. In addition, the policy had a suit limitation clause requiring that all suits regarding claims under the policy be brought within 2 years of the date of the loss.

In conducting its investigation of the loss and in an attempt to determine the actual cash value of the pier (as Portside advised that the pier would not be replaced) Northern retained a consultant to investigate the cause of the collapse and the actual cash value of same. After a comprehensive investigation, including an underwater survey and review of historical records, as well as a creation of a model of the pier and its condition before the collapse, Northern's consultant concluded that Pier 34 collapsed

due to the fact that it was poorly maintained and that the physical structure of the pier had far exceeded its useful life. Moreover, it was determined that because it had exceeded its useful life, it was worthless at the time of the loss and thus had no actual cash value. However, Northern paid Portside over two million dollars in benefits for its claim, which included $200,000 to Portside for the loss of the pier despite its calculations that there was no actual cash value of same. Indeed, Northern advised Portside that it felt this figure was more than fair as the pier had no actual cash value according to its consultant.

Portside advised Northern that it disagreed that the pier did not have an actual cash value and demanded appraisal under the policy. At the same time, a Grand Jury indicted Michael Asbell and Eli Karetny, the principals of HMS Ventures, for involuntary manslaughter and other offenses relating to allegations that they ignored prior warnings that the pier was unsafe and in danger of imminent collapse. As a result of the indictment, it became evident that Messers. Asbell and Karetny knew about the pier's decay before the collapse occurred. Indeed, by May 2000 many of the club's employees were vocalizing concern about the conditions of the pier and worrying that it would collapse due to cracks. Moreover, on the date of the collapse, Messers. Asbell and Karetny were told that the pier would probably collapse at the next low tide which was approximately 8:00 p.m. that day or the next morning. Despite these warnings, the pier was not closed and the club which operated on the pier opened for business. Yet, Asbell and Karetny called their insurance broker that same day requesting a claim be opened as they believed that the pier was sinking.

As a result of the information revealed as part of the indictment, Northern believed that Mr. Asbell had important information with regard to the condition of the Pier prior to its collapse, as well as information which could assist in accurately determining the value of the damaged property. As such, Northern informed Portside that it was reopening its investigation as to both coverage and value of the loss. Mr. Asbell's examination under oath was requested. However, Mr. Asbell invoked his Fifth Amendment right refusing to give testimony under oath while criminal charges were pending. On October 22, 2001, one and a half years after the loss occurred, Northern's attorney wrote a letter to Portside noting that Northern would "revisit the appraisal demand after the examinations [of Asbell], are complete."

Portside eventually instituted suit on December 2002, approximately 2.5 years after the collapse occurred, averring that Northern breached the insurance contract by failing to provide Portside with all available benefits and acted in bad faith by denying the claim for physical loss of the collapsed pier. The trial was bifurcated with the breach of contract action being tried before a jury. The jury returned a verdict in favor of Portside in an amount in excess of $1.4 million which was determined to be the actual cash value of the pier at the time of collapse. The bad faith claim was then tried non-jury and the court found that Northern's conduct did not amount to bad faith under the statute, 42 Pa.C.S.A. §8371.

After trial, defendant filed a motion for post-trial relief regarding the jury award and plaintiff opposed. Judgment was taken by plaintiff pursuant to Pa.R.C.P. 227.4(1)(b). Defendant then timely appealed.

Northern raised several issues with the jury verdict, including the fact that Portside had failed to establish that Northern should be estopped from asserting the policy's limitation of suit provision. Indeed, as noted above, the policy at issue had a two year suit limitation clause and Portside instituted suit 2.5 years after the loss occurred.[1] Portside raised two defenses to Northern's claim that the suit limitation clause should be enforced: (1) Northern acted in bad faith by averring that no settlement could be obtained without Mr. Asbell's examination under oath to determine if he knew of the pier's decay before the collapse and[2] (2) because Northern waived the suit limitation clause when it advised that appraisal would be revisited after the examination of Mr. Ashbell took place.

III. The Court's Holding

Contrary to prior opinions rendered by the courts of this Commonwealth, the Pennsylvania Superior Court held that Northern waived its right to assert the affirmative defense of the suit limitations clause when it advised that it would consider appraisal after additional investigation was completed. As such, the court ultimately held that when an insurer advises an insured that it will be engaging in further discovery and that discovery cannot reasonably be completed by the time suit should be instituted per the policy, an insurer has agreed to extend the suit limitations provision.

As noted earlier, Portside pointed to the correspondence from Northern's counsel dated October 22, 2001 in order to estop Northern from asserting the suit limitation affirmative defense. The relevant language in that letter simply stated that Northern would "revisit the appraisal demand after the examinations [of Asbell] are complete." The court found that this communication implied that Northern would continue to consider Portside's claim without regard to the suit limitation clause. The court came to this conclusion despite the fact that the letter was sent seven months before the suit needed to be instituted by Portside pursuant to the terms and conditions of the policy because when it was sent Mr. Ashbell had only recently been indicted. As such, the court found that Northern must have known that Mr. Ashbell would invoke his Fifth Amendment rights throughout the criminal prosecution which would take a significant amount of time. Thus, by agreeing to resume the action of the claim once the criminal prosecution had been completed the court found that Northern implicitly waived the time bar set by the policy for bringing suit.

Interestingly, four days after Northern sent the above letter, Portside responded by threatening to bring suit against Northern if it failed to pay Portside $1.5 million for the collapsed portion of the pier. Northern used this letter to argue that Portside was not relying on its October 22nd correspondence that the suit limitation period had been waived. However, the Superior Court found that Portside was not bound to act on its threat to the exclusion of the other communications which were made by the parties. "As noted above, Northern had indicated to the Portside team, *without condition*, that it would consider appraisal under the policy after Asbell submitted to an examination under oath." *Portside*, at 12, fn. 6. (emphasis supplied).

IV. Analysis and Conclusion

The court's holding in this matter

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contradicts years of prior holdings that a mere declaration that an insurer is investigating a claim is insufficient to prove justifiable reliance that the insurer would not require the insured to bring suit within the time frame assigned by the policy. Indeed, the high scrutiny which has been applied when an insured avers a defense of waiver or estoppel, i.e., clear and unequivocal evidence, has required much more from insureds in the past than the court required of the insured in *Portside*.

Indeed in *Prime Medica Associates*, supra, a decision also rendered by the Pennsylvania Superior Court, the court held that the insured did not meet its burden in demonstrating that the insurer should be estopped from asserting the suit limitations provisions just because the insurer was still investigating the claim. In that case, the insured indicated that the insurer's attorney had a duty to remind the insured of the running of the limitations period at a deposition that took place shortly before same. Instead, the attorney was silent. The court, at that time, held that the failure of the attorney to mention the suit limitation provision at a deposition in a related matter was insufficient to provide grounds for estoppel. Indeed, the court reiterated that the mere fact that an insurer is investigating a claim is not enough to overcome an insureds' burden with regard to an estoppel or waiver defense.

Under these circumstances, it seems out of character for the same court to then hold that Northern was estopped from asserting the policy suit limitations because its counsel wrote in a letter seven months before the limitations was to run that the company would "revisit the appraisal demand after the examinations [of Asbell] are complete." Especially when shortly thereafter the insured demanded that payment for the actual cash value of the pier be made based on its calculations of same and if it was not, threatening suit. Indeed, how could Portside argue that it was justifiably relying on the aforementioned letter that the suit limitations had been extended when it itself threatened suit shortly thereafter? Not only did Portside make that argument, but the court agreed.

What does this mean for the future? Certainly, this opinion leaves room for insureds to point to any correspondence from an insurer regarding continuing investigation and argue that they were justifiably relying on it as an implicit waiver of the suit limitation provision. Yet, as nonsensical as this holding seems given the facts, the court, in its infinite wisdom, gives insurers an easy solution: to make sure that the correspondence indicates that there are conditions which apply even if it is continuing to investigate a claim or enter into settlement discussions close to and/or past the suit limitation provision. Indeed, this author suspects that if Northern had indicated that the company would revisit the demand for appraisal at a later time, pursuant to the terms, conditions and limitations of the policy, counsel could have saved Northern from paying an additional million dollars on the claim. A costly lesson, yes; but, a lesson that will not soon be forgotten.

ENDNOTES

[1]Another issue raised by Northern in its appeal was that Portside's valuation expert, who was its public adjuster, was not qualified to testify as to the actual cash value and failed to articulate a clear formula for determining value. The Pennsylvania Superior Court found that the trial court did not err in permitting the public adjuster to testify as to the determination of actual cash value as he had nearly forty years of experience adjusting damaged and collapsed piers along the Delaware River and that this experience permitted him to serve as an expert on valuation of the lost Pier 34. Moreover, the court found that Northern never established that the public adjuster's valuation in determining actual cash value was unreliable, lacked a foundation in fact, or conflicted with industry practice or the policy's specific definition.

[2]The court dismissed this argument and found that obtaining Mr. Ashbell's statement under oath was a reasonable part of Northern's investigation into whether the collapse of the pier was caused by hidden decay and unknown to the insured at the time.

DISCOVERABILITY OF COMMUNICATIONS WITH AN EXPERT: A TRI-STATE COMPARATIVE

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A. Generally

A recent Pennsylvania Superior Court decision has again brought a critical discovery issue to the fore: communications between an attorney and his or her expert witness. These communications can be extraordinarily useful to an adversary. After all, what could be more damning to an expert's credibility than impeachment via the proffering attorney's own communications to the expert? The inference that the expert's opinion was molded to oblige an attorney's request, or that the expert's opinion may be predicated on a biased recitation of facts from the attorney, could prove irresistible for a jury. Thus, at first blush, it may seem that such communications should be deserving of special protection from both discovery and admissibility.

On the other hand, what evidence could be more probative of the reliability of the expert's opinions and potential bias of the expert? If, as the party offering the expert asserts, the expert is a neutral, unbiased authority on the matter at issue, retained solely to fulfill the expert's ostensible role as one who assists the trier of fact, there should be nothing untoward in the attorney's communications to the expert. Conversely, if the communication from the attorney fairly suggests that the attorney requested the expert merely regurgitate the conclusions requested by the attorney, or "nudges" the expert in a certain direction via a selective recitation of the facts, this would be extremely helpful to the trier of fact in assessing exactly how much weight the expert's opinion truly deserves. Accordingly, a balance must be struck between the sanctity of attorney work product and the overarching goals of the fact finding process.

The foregoing considerations implicate two separate, though related, analyses: first, whether an attorney's communications with an expert are protected by a privilege, such as attorney-client, work product, or trial preparation privilege; and, regardless of whether a privilege applies, are such communications encompassed within the terms of the rule that

sets forth the parameters of discovery? A multi-state practitioner must be cognizant of the applicable rules in all states in which he or she practices. Thus, these issues will be assessed separately for Pennsylvania, New Jersey, and Delaware. In brief summary, it appears that communications from an attorney to an expert are indeed privileged in both Pennsylvania and New Jersey (subject to certain exceptions), but no such privilege attaches in Delaware.

B. Pennsylvania's Approach

The Superior Court recently assessed the discoverability of an attorney's communications with an expert witness. In *Barrick v. Holy Spirit Hospital*, the plaintiffs appealed the trial court's order enforcing a subpoena for the plaintiff's medical records, including correspondence between plaintiff's counsel and his treating physician; plaintiff's treating physician was also serving as plaintiff's medical expert witness. *Barrick v. Holy Spirit Hospital*, 2011 PA Super 251 (Pa. Super. Ct. 2011). Consequently, the Superior Court reviewed the trial court's order *vis-à-vis* the terms of Pennsylvania Rule of Civil Procedure 4003.5, which defines the scope of discovery of facts known and opinions held by an adversary's expert witness. Put simply, the "lone issue presented" was "whether the Pennsylvania Rules of Civil Procedure allow discovery of the written correspondence between counsel and an expert witness retained by counsel." *Id.* at *16.

After interpreting Rule 4003.5, the court held:

> As we stressed previously, interrogatories under Pa.R.C.P. 4003.5(a)(1) may **only** require an opposing party's expert witness to "state the substance of the facts and opinions to which the expert is expected to testify and [to] summar[ize] the grounds for each opinion." Any discovery request for information beyond the boundaries of this clear, explicit, and succinct statement is impermissible under Pa.R.C.P. 4003.5(a)(1). Thus, a discovery request for the content of any correspondence between an opposing party's attorney and the expert witness retained by that party falls outside the express language of Pa.R.C.P. 4003.5(a)(1). Such correspondence is not responsive to an interrogatory seeking the expert witness to "state the substance of the facts and opinions to which the expert is expected to testify[,]" nor is it responsive to an interrogatory seeking the expert witness to summarize "the grounds for each [of his or her] opinion[s]." *Id.* **Accordingly, we conclude that, by seeking the written correspondence between Appellants' counsel and Dr. Green in his capacity as an expert witness, Sodexho's subpoena requested information that was outside the permissible confines of Pa.R.C.P. 4003.5(a)(1).**
>
> * * *
>
> In closing, based upon our interpretation of the Pennsylvania Rules of Civil Procedure, drawing upon the plain language of the rules and the case law of this jurisdiction, we conclude that the trial court committed an error of law in granting Sodexho's motion to enforce. As our Supreme Court has previously determined, other than the interrogatories described in Pa.R.C.P. 4003.5(a)(1), the Rules of Civil Procedure require that a party show cause to obtain further discovery from an expert witness. Sodexho in this case failed to make any such showing. Thus, we hold that Sodexho's subpoena seeking documents from Appellants' expert witness was beyond the scope of Pa.R.C.P. 4003.5, without first showing cause as to why such a discovery request was needed. Furthermore, the written communication between counsel and an expert witness retained by counsel is not discoverable under the Pennsylvania Rules of Civil Procedure to the extent that such communication is protected by the work-product doctrine, unless the proponent of the discovery request shows pursuant to Pa.R.C.P. 4003.5(a)(2) specifically why the communication itself is relevant. As such, we also hold that Pa.R.C.P. 4003.3 immunizes from discovery any work product contained within the correspondence between Appellants' counsel and Dr. Green.

Barrick v. Holy Spirit Hospital, 2011 PA Super 251 (Pa. Super. Ct. 2011) (emphasis added).

The foregoing passages reveal that the *Barrick* court's holding was two-fold: 1) the disclosure of communications between the attorney and the expert are protected by the work product privilege and, consequently, subject to disclosure only if relevant to the action; and 2) absent a showing of cause as to why disclosure is necessary, communications between the attorney and the expert are generally beyond the scope of Rule 4003.5 in any event. Thus, in the ordinary course of events, communications between an attorney and an expert are not likely to be discoverable.

As set forth below, this view is more restrictive than New Jersey's approach, and significantly more restrictive than Delaware's approach to the issue. Indeed, the protection is less robust in New Jersey, and, in Delaware, communications between an attorney and a testifying expert enjoy no work product privilege protection at all.

B. New Jersey's Approach

New Jersey's approach to the discoverability of communications with an expert is generally similar to Pennsylvania's. In *Coyle v. Estate of Simon*, 588 A.2d 1293 (N.J. Super. Ct. App. Div. 1991), a case arising under New Jersey's then-current rule governing the discovery of expert information, N.J. Court Rule 4:10-2(d), the defendant physician in a medical malpractice action moved for an order compelling discovery of statements made by the plaintiffs to their attorneys and was thereafter forwarded to the plaintiffs' expert. The court noted that, at the time these communications were made, they were protected by the attorney-client privilege, and this privilege generally extended to an attorney's communication with agents, including experts. *Id.* at 1295. However, the court held that the privilege is lost when the communication is "used as evidence." *Id.* To be "used as evidence," the communication merely must be "used by an expert witness as a basis for opinion testimony." *Id.* at 1296.

Although this waiver may seem quite broad, the court limited the discoverability of communications with an expert by confining the waiver to only those portions of the communications relied upon by the expert. *Id.* Nonetheless, there is no clear rule to assess reliance by

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the expert; to the contrary, waiver of the privilege is necessarily a case-specific evaluation, based on what might aid the fact finder. Specifically, the scope of any waiver of privilege is to be assessed as follows:

> The problems identified by the judge may be avoided by applying a different test to define the scope of the waiver. Instead of trying to discern what portions of the statements the experts chose to rely upon, **the waiver must encompass those portions that are relevant to an evaluation of their opinions.** A party's statements given to his or her expert witness are not shielded by the attorney-client privilege **if they could reasonably aid a fact finder in evaluating the opinions the expert is expected to give at trial.** Upon request of the other party, the trial judge shall determine by an *in camera* review of the statements which portions are relevant in that respect and must therefore be disclosed in discovery.

Id. at 1296-97 (emphasis added.) The court did, however, acknowledge the importance of maintaining the privilege with respect to such communications. *Id.* at 1296 ("Care must be taken, however, to maintain the protection of the privilege with respect to attorney-client communications that the client's expert will not use at trial and which therefore remain confidential."). Similarly, in the related context of discoverability of draft expert reports, the Appellate Division subsequently observed:

> New Jersey's Civil Practice Rules, like the Federal Rules of Civil Procedure upon which they are based, struggle to insure adequate discovery of information considered, or at least relied upon, by experts expected to testify. At the same time, they seek to provide protection to attorneys so that the adversarial system will function efficiently. The interactions between attorneys and the experts implicate both these objectives.

Adler v. Shelton, 778 A.2d 1181, 1186-87 (N.J. Super. Ct. App. Div. 2001). Although *Coyle* speaks in terms of the attorney-client privilege, as the statement originated with the clients, was made to the attorney, and was thereafter forwarded to the expert, the rationale should apply with equal force to statements and communications originating with the attorney and encompassed within the work product privilege. *See Coyle*, 588 A.2d at 1296 ("The Rule requires a party to disclose to other parties **an otherwise privileged communication** made to his or her attorney or expert if that communication is used by the expert to arrive at an opinion that the expert will give at trial.") (emphasis added).

In the ensuing years, the New Jersey Court rule itself was revised, and the text of the rule appears to be generally consistent with the rationale of *Coyle*:

> Discovery of communications between an attorney and any expert retained or specially employed by that attorney occurring before service of an expert's report **is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by R. 4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule.** (Emphasis added.)

In turn, Rule 4:17(e) states: "Except as herein provided, the communications between counsel and expert deemed trial preparation materials pursuant to R. 4:10-2(d)(1) may not be inquired into."

The classification of communications that are part of the "collaborative process" as trial preparation materials gives meaningful "teeth" to the protection of such communications. Under Rule 4:10-2(c), trial preparation materials are protected, discoverable only upon a showing that the party seeking the discovery possesses a "substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See also: Adler*, 778 A.2d at 1191 ("Too much scrutiny of [the] collaborative process [between an attorney and an expert] serves only to demonize the natural communicative process between an attorney and his or her retained expert. Ultimately, it does little to insure that the expert's opinion has been independently derived.").

In short, as it is currently written, Rule 4:10-2(d) allows for discovery of communications between an attorney and an expert occurring prior to service of that expert's report to the extent such communications contain "facts and data considered by the expert in rendering the report." However, the potential discoverability of such information is likely to be significantly tempered by the competing desire to facilitate open and effective communication between an attorney and an expert; the foregoing case law suggests that the courts are inclined to be wary of enabling "too much scrutiny" of the collaborative process between an attorney and an expert, lest there be a chilling effect to the "natural communicative process." In all other respects, communications between an attorney and an expert are deemed trial preparation materials and are very unlikely to be discoverable.

C. Delaware's Approach

Delaware's approach to the discoverability of an attorney's communications with an expert is, by far, the most expansive. Indeed, in Delaware, attorneys should be cognizant of the very broad discoverability of any communication with an expert witness.

The Superior Court of Delaware[1] has held that there is *no* privilege whatsoever to *any* communication to a testifying expert:

> Although the discovery rules provide for a limited privilege with regard to documents and tangible things prepared in anticipation of litigation, this Rule specifically provides that it is subject to the rules on expert witness discovery. As a result, the work product rule is generally not applied to expert discovery. **Rather, where an expert will be used at trial, discovery should be broad so as to allow the opposing party effectively to cross-examine that expert.** Further, Delaware courts have generally held that where

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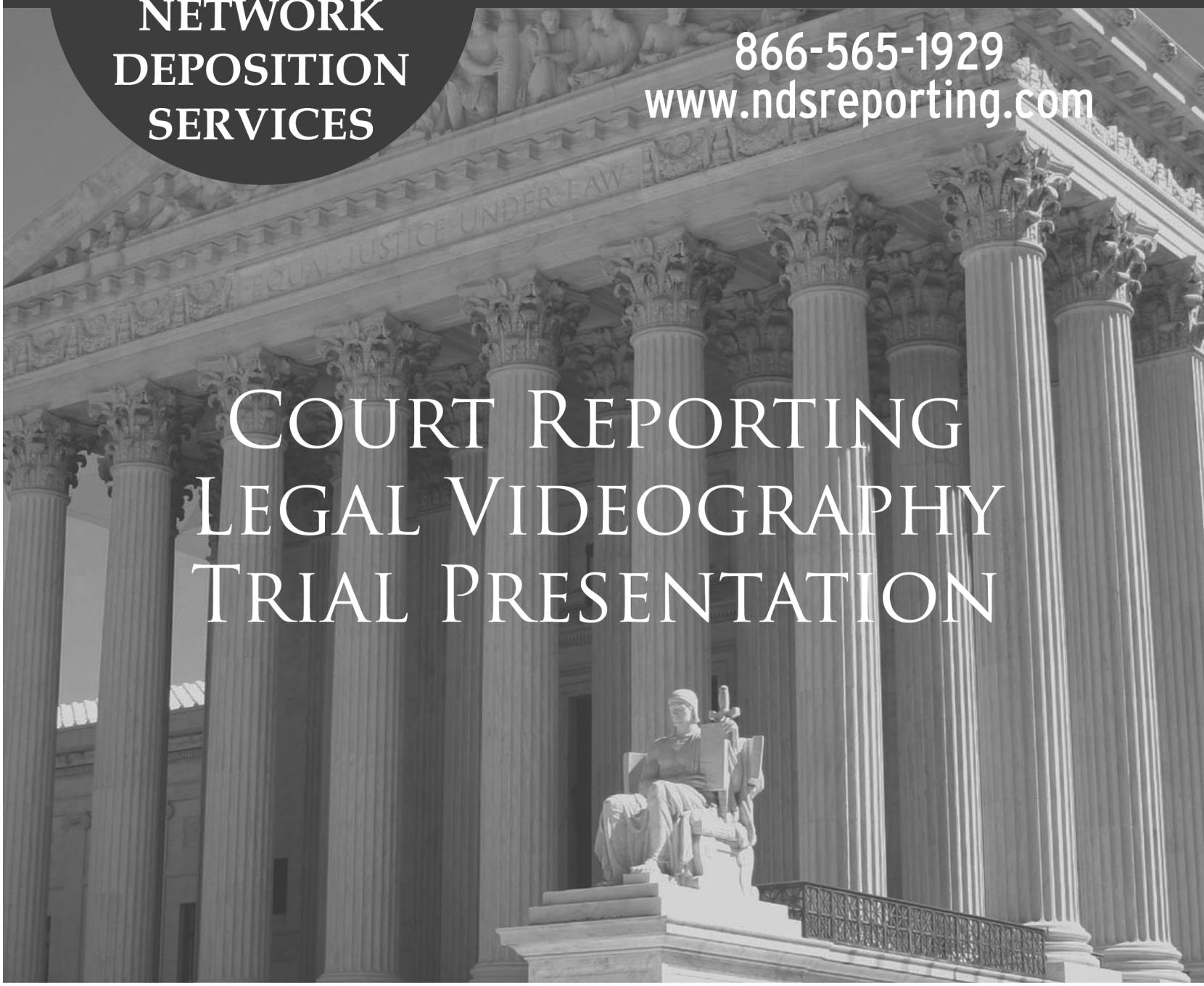

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> an attorney forwards letters and memoranda to an expert who is expected to testify at trial, any claim of privilege or work product is waived. Although plaintiffs argue that the letters contain mental impressions of their attorney and should not be disclosed, **Delaware courts do not distinguish documents sent to experts based on what they contain. Any correspondence to an expert who will be testifying waives the privilege no matter what is contained in the documents.**

Rowlands v. Choon Lai, 1999 Del. Super. LEXIS 176, at *2 (Del. Super.) (emphasis added); *see also: Gunzl v. Riverside Hospital*, 1985 Del. Super. LEXIS 1437, at *1 (Del. Super.) ("The court holds that **any document** considered by an expert who testifies in reaching his opinion (not confined to review before testifying), including that which submits information to the expert or delineates the scope of his assignment as an expert, should be available for review by the adversary party upon proper request in order to assist cross examination.") (emphasis added).

The foregoing passages are quite straightforward and essentially speak for themselves. Put simply, the bright line rule in Delaware is that *any* correspondence with a testifying expert is discoverable by the opposing party.

D. Putting It All Together

The distinctions among the three states' approaches to discoverability of communications between an attorney and an expert could prove to be quite significant, depending upon the facts of a given case. However, perhaps the most important point here is the absolute necessity that a multi-state practitioner be familiar and comfortable with the respective states' approaches to this issue.

Although the geographic differences in the tri-state area may be insignificant, these legal distinctions are not. It is easy to envision an unwary lawyer, unaware of the differing discovery rules, inadvertently proceeding under a neighboring state's rules for expert discovery, subsequently realizing that robust protection in Pennsylvania rendered his or her overzealous efforts to minimize communications with an expert unnecessary, or, worse, realizing that the absence of any discovery protection in Delaware has rendered *all* correspondence with the expert discoverable, forcing the disclosure of unfavorable information or analyses that was erroneously believed to be privileged.

ENDNOTE

[1]In Delaware, of course, the "Superior Court" is the trial court of general jurisdiction, in contrast with Pennsylvania, where the "Superior Court" is the intermediate appellate court. Delaware has no intermediate appellate court, although parties may appeal to the Supreme Court of Delaware as of right. Nonetheless, many issues have been decided by the Superior Court and not yet been addressed by the Supreme Court, thereby often rendering the Superior Court of Delaware's decisions the most useful guidance available.

SPLIT DECISION RESULTS IN EXTENSION OF EMOTIONAL DISTRESS TORT

By Daniel E. Cummins, Esquire, Foley, Cognetti, Comerford, Cimini & Cummins, Scranton, PA

In a December 22, 2011 split decision, the Pennsylvania Supreme Court issued its long-anticipated opinion in the case of *Toney v. Chester County Hospital*, 2011 WL 6413948 (Pa. Dec. 22, 2011) (Baer, Todd, and McCaffery, JJ. join in support of affirmance)(Castille, Saylor, Eakin, JJ. join in support of reversal) (Orie Melvin, J. not participating) which addresses the issue of whether the common law created tort of negligent infliction of emotional distress ["NIED"] should be extended to yet another class of plaintiffs.

Prior to 1970, Pennsylvania followed the common law "impact rule" in cases involving emotional distress claims. Under this rule, recovery was barred in claims "for fright, nervous shock or mental or emotional distress unless it was accompanied by a physical injury or impact upon the complaining party." *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988, 992 (Pa. 1987).

In 1970, the Pennsylvania Supreme Court extended the tort of NEID in the case of *Neiderman v. Brodsky*, 261 A.2d 84 (Pa. 1970). In *Neiderman*, the court adopted the "zone of danger" theory of NIED liability, which allows recovery by those who did not actually suffer a physical impact resulting in emotional distress so long as they were in personal danger of the physical impact. The *Neiderman* court held that the fear of impact resulted in emotional distress that should be compensated. The court reasoned that this extension of liability was, in part, based upon the evolution of medical science's ability to diagnose mental distress.

The most recent liberalization of the claim of NEID occurred in *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979), where the Pennsylvania Supreme Court adopted the theory of "bystander liability". The bystander liability theory of NIED allows a plaintiff to recover for emotional distress under a claim that the plaintiff witnessed an accident causing serious injury to a close family member, even if the plaintiff was not within the zone of danger of any physical impact.

Later, in *Mazzagatti v. Everingham*, 516 A.2d 672 (Pa. 1986), the Supreme Court refused to extend bystander liability where the plaintiff in that case did not immediately witness the traumatic event sustained by a family member, but instead came upon the scene after the accident had occurred.

Now, 25 years after its decision in *Mazzagatti*, the Pennsylvania Supreme Court squarely addressed the status of the claim of NIED, and whether it should be further liberalized, in its decision in *Toney v. Chester County Hospital*. In *Toney*, the court addressed the history of the tort of NIED and confirmed that the above precedent created three distinct variations of NIED claims (impact rule, zone of danger rule, and bystander liability rule). Now, with

Toney, comes a fourth variation. The court granted appeal to consider whether a cause of action for NEID exists where the emotional distress results from a "negligent breach of a contractual or fiduciary duty," absent any physical impact or injury.

The *Toney* case involved a medical malpractice claim in which the plaintiff alleged that her medical providers had read an ultrasound during the plaintiff's pregnancy as normal. Unfortunately, the plaintiff's child was born with several profound abnormalities. The plaintiff alleged that the defendants' negligence prevented her from preparing herself for the shock of witnessing her child's birth with such deformities.

The defendants filed preliminary objections in the nature of a demurrer to the plaintiff's claim for NIED, arguing that the plaintiff failed to state a legally cognizable claim upon which relief could be granted. The trial court dismissed the complaint, but the Superior Court reversed the trial court.

After a detailed review of the development of the tort of NIED under Pennsylvania law and in other jurisdictions, three members of the Pennsylvania Supreme Court (Baer, Todd, and McCaffery, JJ.) concluded that it was "appropriate to extend liability for the infliction of emotional distress to a limited species of cases." More specifically, they held "that NIED is not available in garden-variety 'breach of contractual or fiduciary duty' cases, but only in those cases where there exists a special relationship where it is foreseeable that a breach of the relevant duty would result in emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress."

In his opinion in support of affirmance, Justice Baer wrote that he (and the two Justices who joined his opinion) "would hold that if an actor has a particular contractual or fiduciary relationship with a victim and it is foreseeable that the actor's carelessness could cause severe emotional harm to the victim, and that harm occurs, a cognizable tort arises which is, in short-form, referred to as a breach of a 'contractual or fiduciary duty' not to inflict foreseeable emotional distress upon a victim."

The Justices in favor of affirmance further concluded that "recovery for NIED claims does not require a physical impact."

The 3-3 split decision in *Toney* renders the Supreme Court's decision a plurality opinion which serves to affirm the Superior Court's decision to recognize the extension of the tort of negligent infliction of emotional distress.

The Justices (Castille, Saylor, Eakin, JJ.) opposing extension of the tort primarily relied upon a public policy rationale in the context of exposing medical providers to yet another potential liability risk in the "complex and risk-laden" medical malpractice arena.

In his opinion in support of reversal, Justice Saylor wrote that the NIED claim in *Toney* appeared to fall outside of the "inherent limits" of the judicial system of compensating injured parties. Saylor commented that "there simply are some wrongs which are not, and should not be made, actionable in courts of law." Justice Saylor, who was joined by Justice J. Michael Eakin, also faulted the opinion in support of affirmance for not giving concrete guidelines on how the damages recoverable under this new form of NIED were to be determined.

Rather than clarifying the tort of NIED, it appears that the split decision in *Toney* leaves the parameters of this tort as nebulous as ever. It is likely that there will be more litigation on the issue of whether a plaintiff is entitled to pursue such a claim and, if so, what is the proper method to determine the amount of compensation due.

THE ONE -YEAR ANNIVERSARY OF *ZALEPPA*

By Stephen J. Bruderle, Esquire, Margolis Edelstein, Philadelphia, PA

In the April 2011 edition of Counterpoint I reported on the Pennsylvania Superior Court decision in *Zaleppa v. Seiwell*, 9 A.3d 632 (Pa. Super. 2010) regarding the rights and obligations of a defendant or insurer under the Medicare Secondary Payer Act (MSPA) to satisfy liens held by Medicare. This article comments on those same issues one year after the *Zaleppa* decision and reviews the cases that have cited or relied on the *Zaleppa* decision.

A Review of *Zaleppa*

Zaleppa arose out of a motor vehicle accident. The case proceeded to a jury trial. The defendant admitted liability and the sole issue at trial was the amount of damages. The jury entered a verdict in the amount of $15,000 comprised of $5,000 for future medical expenses and $10,000 for past, present and future pain and suffering. Significantly, Ms. Zaleppa did not exhaust her PIP benefits and was prohibited from recovering past medical expenses pursuant to the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL").

As all of Ms. Zaleppa's medical bills had been paid by her PIP, there was, by definition, no Medicare lien directly related to any treatment resulting from the relevant motor vehicle accident. However, Ms. Zaleppa was 69 years old at the time of the accident and was Medicare eligible. After the verdict the defense requested post-trial relief in the form of a court order allowing the defendant to identify Medicare as a payee on the settlement draft or in the alternative to pay the money into court pending confirmation from Medicare that all liens had been satisfied. The trial court denied that request and was upheld by the Superior Court in a November 17, 2010 opinion.

The Superior Court pointed out that there is a distinction between the defendant's obligation to reimburse Medicare and Medicare's right of reimbursement pursuant to the MSPA. The court noted that only the United States government is permitted to pursue its right to reimbursement and this may only occur after it has issued a recovery

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demand letter to the primary plan. The statute does not allow a private party to bring suit on behalf of the United States government for reimbursement. In addition, the Superior Court concluded that the request sought by defendant would conflict with the concepts of a civil judgment. In order to satisfy the judgment, payment of the debt must be tendered in full to the party specified in the judgment. If defendant paid less than the full amount of the judgment, the judgment would not be satisfied. In order to satisfy the judgment under Pennsylvania law the entirety of the judgment must be paid to the creditor which would not happen if a portion of the judgment was paid to or reserved for Medicare. The Superior Court held that nothing in Pennsylvania law allows a defendant to pay less than the full amount of the judgment under these circumstances.

A year after *Zaleppa,* litigants are without much practical guidance for protecting against a lien being asserted by the federal government. In fact, *Zaleppa*, as of the drafting of this article, has not been cited by any Pennsylvania appellate court. Two Pennsylvania trial courts have published opinions making reference to the issues set forth in *Zaleppa*. In addition, at least two Pennsylvania trial courts have issued orders without opinions requiring the disbursement of settlement funds consistent with *Zaleppa*. Lastly, a federal court in Kentucky and a trial court in Connecticut cited *Zaleppa,* but each distinguished it and chose not to apply it.

Zaleppa in the Pennsylvania Trial Courts

Zaleppa was analyzed in *Mirabal v. C.R. Bard, Inc.*, 2010 WL 6813837 (Philadelphia 2010). In *Mirabal* the court was concerned with whether a defendant who chooses not to issue settlement funds was subject to sanctions for failure to do so. During trial the parties put on the record a settlement agreement including an agreement that plaintiff would be responsible for paying any Medicare lien. Almost three months later, plaintiff filed an affidavit of non-payment of settlement funds pursuant to Pa. R.C.P. 229.1 and requested sanctions. The defendants argued that they were not required to pay any portion of the settlement until they had received a final demand letter from Medicare. The request for sanctions was denied. Plaintiff then received a final demand letter and filed a motion for reconsideration and pointed out that a final demand letter had since been received. The court then ordered the defendants to immediately release half of the settlement funds with interest accrued. The order further required plaintiff to verify Medicare's position regarding any future medical lien and that the remaining balance of settlement funds be placed in an escrow account. Plaintiff appealed the denial of sanctions. The *Mirabal* court ordered defendants to immediately release the totality of the settlement funds with interest accrued and denied plaintiff's request for interest, attorney's fees and costs. The plaintiff appealed the court's denial of the request for sanctions, prompting the relevant opinion.

The plaintiffs argued that the trial court erroneously refused to impose sanctions pursuant to Pa. R.C.P. 229.1 which requires defendant to deliver the settlement funds within 20 days from receipt of an executed release; and, upon failure to do so, plaintiff may seek sanctions by filing an affidavit in support of defendant's failure to do so. Nonetheless, and significant to our issues, the trial court found that sanctions were not appropriate "where there existed a material dispute or uncertainty of condition of the terms of the settlement." Based on the uncertainty that existed in the law until *Zaleppa* "the defendants acted appropriately and delivered the settlement proceeds to the plaintiff shortly after the issuance of [sic] *Zaleppa* decision and this trial judge [sic] directive to do so." The *Mirabal* court held that where there was uncertainty in the law prior to *Zaleppa*, and where the defendant issued payment shortly after *Mirabal* court's instructions to do so, the defendants acted appropriately and an order for sanctions or contempt was not appropriate.

Just six days after the court's opinion in *Mirabal*, judge Friedman in Allegheny County issued an order in *Hockenberry v. Erie Insurance Exchange*, requiring the defendants to place UIM settlement proceeds in an interest bearing escrow account pending receipt of payment of Medicare's lien. Upon receipt of proof of payment of that lien, the settlement funds were to be issued to the plaintiff. This order further states that two checks shall be issued, one made payable to Medicare and the other to plaintiff and her counsel.

Similarly, on April 4, 2011, in *Vincent v. Buck and Erie Exchange*, the Cambria County Court ordered that defendants pay settlement funds in the amount of $31,000 as well as interest at 4.25% and attorney's fees and costs in the amount of $2,141.98 for failure to issue settlement funds promptly. Neither of these orders was supported by an opinion of the court.

In *Dailey-Console v. Barnwell*, judge Arthur Zulick of the Court of Common Pleas in Monroe County issued an opinion and order on May 18, 2011, addressing these issues. The parties settled this motor vehicle case for $57,500 and a release was signed on November 2, 2010. The defendants asserted that a Medicare lien existed and must be satisfied prior to issuance of the settlement funds. The plaintiff relied on *Zaleppa* for the proposition that there was no basis for not promptly issuing the settlement funds in their entirety. Defendant attempted to distinguish *Zaleppa* on the basis that (1) *Dailey-Console* did not involve a verdict, merely a release; and (2) there was no evidence in *Zaleppa* that Medicare had paid any bills whereas in *Dailey-Console* a conditional payment letter had been issued.

The court in *Dailey-Console* rejected these arguments and upheld the principle that Congress intended that only the United States government could assert its rights under the MSPA. The *Dailey-Console* court noted that any exposure of the defendant to liability from Medicare could have been prevented by addressing these issues in the release. The release included language to the effect that plaintiff would be responsible for satisfying the DPW lien but no such language in the release dealt with Medicare. Judge Zulick awarded attorney's fees in the amount of $250 and interest at the rate of 4.25% per annum.

Zaleppa in Other Jurisdictions

Zaleppa has been cited by other jurisdictions but without much insight or commentary. In an unpublished opinion of April 4, 2011, a Connecticut trial

court cited *Zaleppa* for the proposition that (1) there is no authority for allowing the defendant payor to protect against a government lien by making the lienholder a co-payee on a settlement or judgment check; and (2) doing so would prevent full satisfaction of a judgment. In *McBride v. Brown*, 2011 WL 1566002 (Conn.Super.) the Connecticut Superior Court was confronted with a claim by the plaintiff for attorney fees for the defendant's failure to issue settlement funds. Approximately a month after a verdict the defendant insurer became aware of a Texas child support lien against the plaintiff. The defendant tendered a check that made the Texas attorney general a co-payee on the check with plaintiff. Plaintiff rejected this proposal. Four months after the verdict the defendant was able to obtain confirmation that the lien had been satisfied and a check was issued to the plaintiff and counsel. Plaintiff then sought fees for the defendant's failure to promptly issue the funds. The court acknowledged that it is appropriate for defendants to protect themselves from liability where plaintiff fails to satisfy applicable liens. However, naming the lienholder on the check is "unsatisfying" as a remedy. The *McBride* court provided no analysis of *Zaleppa* and distinguished it on the basis that *Zaleppa* involved a Medicare lien, not a child support lien. However, the *McBride* court denied the request for sanctions finding that the defendant's actions did not demonstrate intent to delay or harass.

These issues were played out again in *Wilson v. State Farm*, 795 F.Supp.2d 604, (W.D.KY 2011). In this uninsured motorist claim, both parties moved for summary judgment on plaintiff's claim for bad faith and delay in paying settlement funds of $50,000 where the defendant would not issue the settlement check until it confirmed the exact amount of a known Medicare lien. Plaintiff cited *Zaleppa* for the proposition that the MSPA does not authorize private entities to assert the rights of the Unites States Government. The *Wilson* court distinguished *Zaleppa* and noted that there was no evidence of an actual Medicare lien, merely the possibility of one. Also, *Zaleppa* did not involve a claim of bad faith for failure to issue settlement funds. The *Wilson* court denied plaintiff's motion and sustained the defendant's.

Analysis

No Pennsylvania appellate court has clarified the *Zaleppa* holding. It should still be argued that it only applies to cases where there is no evidence of a lien. However, that argument was rejected by a trial court in *Dailey-Console*. To date, no Pennsylvania appellate court has taken up this issue.

Of the cases that have cited *Zaleppa*, *Mirabal* is unique in that *Zaleppa* had not yet been decided when the defendant originally decided to withhold the settlement funds. After *Zaleppa* was decided the court ordered issuance of the funds. *Mirabal* is a vote in favor of *Zaleppa* even though sanctions were not ordered. In *Dailey-Console*, the court followed *Zaleppa* and ruled that any concern about the lien could have been addressed in the release, which it was not. Guidance also comes from the trial courts that issued orders without opinions. Those cases may indicate a broader trend of courts holding that the issue has been decided by *Zaleppa* and that the defendant must issue the funds. It can be helpful to look at other jurisdictions when confronted with a dearth of appellate guidance. However, the two courts that cite *Zaleppa* chose to distinguish it rather than apply it.

Counsel needs to be aware of these issues well before settlement discussions are commenced. A final demand letter should be requested as soon as possible. When settlement is effectuated the release should include indemnification language. The issuance of the settlement check should also be made conditioned on confirmation of satisfaction of any lien.

PENNSYLVANIA EMPLOYMENT LAW UPDATE

By Lee C. Durivage, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA

Plaintiff's FMLA inference claim failed where she asserted that she was improperly placed on FMLA leave.

Figueroa v. Merritt Hospitality, LLC; 2011 U.S. Dist. LEXIS 107465 (E.D. Pa. Sept. 21, 2011)

The plaintiff filed a lawsuit against her former employer alleging, among other things, that it interfered with her rights under the FMLA and retaliated against her. After the employer filed a motion to dismiss, the plaintiff abandoned her retaliation claim pursuant to the FMLA. The court, however, determined that the plaintiff's FMLA interference claim failed as a matter of law. In so holding, the court noted that plaintiff's amended complaint averred that she did not actually need FMLA at the time and that she was only alerting her employer to the fact that she may need some leave in the future. Specifically, the court noted that the plaintiff could not successfully plead that she was entitled to FMLA leave, which was required under the statute. Indeed, the court stated that "[i]n order to be eligible for FMLA leave due to a serious health condition, an employee must have 'a serious health condition that makes the employee unable to perform the functions of the position of such employee'" and by "pleading that she was fully capable of working at the time she was placed on alleged involuntary leave, she essentially admitted that she was not at that time entitled to FMLA leave."

District court holds that a written disciplinary consultation was not an adverse employment action to support a claim pursuant to Title VII.

Harris v. Harley-Davidson Motor Co. Operations, Inc.; 2011 U.S. Dist. LEXIS 137020 (M.D. Pa. Nov. 30, 2011)

The plaintiff filed her lawsuit alleging that she was discriminated against on the basis of her race and gender and that a co-worker was sexually harassing her. In rejecting the plaintiff's claims pursuant to the Title VII, the court first noted that the claimant did not suffer an adverse employment action, which is required to demonstrate a *prima facie* case of race and/or gender discrimination. In particular, the court reasoned that a written disciplinary consultation was not an adverse employment action because it did not result in a "demotion or denial of a promotion or pay raise, change in her

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work schedule or hours, or reassignment to a different position or location in the workplace." In so holding, the court rejected the plaintiff's argument that a record of the consultation was permanently placed in her personnel file, noting that there was no evidence that the consultation materially changed the terms or conditions of her employment. The court, likewise, found that the plaintiff's claims of a hostile work environment—which were primarily premised on the fact that a co-worker stared at her on four occasions and used the water cooler closest to her on two other occasions—failed because the actions were not severe or pervasive to defeat the employer's motion for summary judgment.

District court dismisses nurse's FMLA and disability discrimination claims when she was terminated eleven days after her return to work following a medical leave.

Estate of Nancy Murray v. UHS of Fairmount, Inc.; 2011 U.S. Dist. LEXIS 130199 (E.D. Pa. Nov. 10, 2011)

In *Estate of Nancy Murray*, the plaintiff filed a lawsuit against her former employer following her termination as a staff nurse. Prior to her termination, the plaintiff took two leaves of absence for depression, including a leave of absence eleven days prior to her termination. However, upon her return to work, the plaintiff made two narcotics mistakes in violation of her employer's policies. First, after a patient refused to take the mediation that was prescribed, the plaintiff wasted the mediation without securing a witness signature. Second, the plaintiff signed for 25 doses of medication when the pharmacy provided her with 23 doses of medication. The plaintiff also failed to inform the employer of the two mistakes. Based upon those narcotics mistakes, her employment was terminated. Following her termination, the plaintiff filed a lawsuit, alleging she was discriminated and retaliated against on the basis of her disability (depression) and terminated in retaliation for taking FMLA leave. The employer first argued that the plaintiff was not disabled under the ADA because, among other things, her depression was a transitory and/or temporary impairment. The court, however, rejected this argument, noting that the EEOC has adopted regulations which provide that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" and the plaintiff's depression, therefore, may constitute a disability despite the fact that she took leave for only a short period of time. The court, however, noted that the plaintiff could not sustain her burden of demonstrating that her termination was a pretext for discrimination. In particular, the court found that while there was a dispute as to whether the plaintiff was permitted to "explain her [narcotics] errors," it did not make the "termination for the narcotics errors themselves and for failure to report the errors implausible or so plainly wrong that they could not have been the real reasons for termination."

Pennsylvania Commonwealth Court upholds Pennsylvania Human Relations Commission's determination that a personal care facility discharged patient because she had HIV and awarded counsel fees for a frivolous appeal.

Canal Side Care Manor, LLC v. Pennsylvania Human Relations Commission; 2011 Pa. Commw. LEXIS 531 (Pa. Commw. Oct. 20, 2011)

The Commonwealth Court reviewed a decision from the Pennsylvania Human Relations Commission, which found that the personal care facility violated the Pennsylvania Human Relations Act by denying a resident a place in the facility because she had HIV. Specifically, the patient was transferred to the facility, and the prior facility did not disclose that the patient had HIV and also did not disclose the patient's incontinence problems. Upon arrival to the facility, the patience had several incidents of incontinence, which led to the discovery that the patient had HIV. Following a "heated" exchange between the facility and the patient's sister, the patient was removed from the facility. As a result and after a public hearing, the Commission determined that the facility violated the Pennsylvania Human Relations Act by forcing the patient to leave the facility because of her HIV condition. On appeal, the facility argued (as it did before the Commission) that the patient was removed because of the extent of her incontinence issues and she would not have been admitted in the first place if those issues had been disclosed to the facility. The court, however, determined that the argument ignored the fact that the Commission had previously made the credibility determinations against the facility. As a result, there was no basis to overturn the Commission's decision. Moreover, due to the fact that the facility premised the appeal "solely on facts contrary to those found by the trier of fact," the court found the appeal frivolous and awarded counsel fees and delay damages.

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PETITIONS TO COMPEL AN IME UNDER THE MVFRL VS. INSURANCE POLICY: When Must "Good Cause" Be Shown to Succeed?

By Curtis C. Johnston, Esquire, Bennett Bricklin & Salzburg, Philadelphia, PA

Pursuant to the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A. §1796 ("MVFRL"), an independent medical examination ("IME") is authorized whenever the physical condition of a person is "material to a claim" for medical benefits, and upon a showing of "good cause".[1] Despite the enactment of this provision of the MVFRL in 1984, there continues to be litigation over the standard applicable to determining whether and when an insurer is entitled to require a first party claimant to submit to an IME. While a petition to compel an IME filed pursuant to section 1796 of the MVFRL requires an insurer to make a statutory showing of "good cause", it has been the law since 1991 that an insurer is *not* required to make that showing if its insurance policy provision does not impose such a requirement. *Fleming v. CNA Ins. Co.*, 597 A.2d 1206, 1208 (Pa. Super. 1991). However, a recent non-precedential Pennsylvania Superior Court opinion in *State Farm Mutual Automobile Insurance Co. v. Hernandez*, 1008 MDA 2010 (Pa. Super. April 13, 2011) suggests that the omission of the "good cause" requirement in an IME policy provision is not necessarily determinative, and that a showing of "good cause" may still be required depending on the specific IME policy language at issue.

In *State Farm v. Swantner*, 594 A.2d 316, 320-22 (Pa. Super. 1991), the Pennsylvania Superior Court *en banc* stated that the phrase "material to the claim" in Section 1796 limits the examination to those instances where the information sought is essential to confirm the need for continued treatment or to pay or to continue payment of the claim. *Swantner*, 594 A.2d at 321. The court reasoned that the "good cause" requirement under the MVFRL exists to protect a party from harassment, untoward intrusion and unwarranted examination when the proof presented does not meet the aforesaid standard. *Id.* at 321-22. In construing this standard, the court expressly rejected prior Superior Court precedent in the *Zachary* and *Hunt* cases which attempted to impose more stringent standards for establishing "good cause".[2] *Id.* at 322. Rather, the court ruled that Section 1796 "must be liberally construed to effectuate the legislative objectives and to promote justice", *id.* at 319, and that an insured "cannot ignore reasonable limitations on treatment by continuing in treatment without validation or justification." *Id.* at 322. The *Swantner* court agreed with the trial court that State Farm's petition to compel sufficiently demonstrated that the claimant's physical condition was "material to the claim", and that all reasonable non-intrusive means had been pursued by State Farm to establish the justification or lack of it for continued payment. Accordingly, the court affirmed the trial court's decision to grant the petition to compel, without requiring any further discovery or depositions, without demonstrating that a controversy exists, and without conducting oral argument on the petition. *Id.*, appeal denied, 606 A.2d 903 (Pa. 1992). It is important to note that the *Swantner* case construed only Section 1796, and not State Farm's policy provision authorizing an IME.

Soon after *Swantner*, in *Fleming v. CNA Ins. Co.*, 597 A.2d 1206, 1208 (Pa. Super. 1991), the Superior Court addressed a different question: whether an insurer is contractually entitled under its insurance policy language to obtain an order compelling an independent medical examination *without* satisfying the statutory "good cause" requirement, where the insurer's policy language does not expressly require a showing of good cause. In *Fleming*, the insurer filed a motion to compel an IME under Section 1796, Pa. R.C.P. Rule 4010, *and* under its policy language. The CNA policy language provided in relevant part:

> Duties of an Injured Person. The injured person *shall*: . . .
>
> c. Submit to a physical examination by a physician of our choice;

(emphasis added).

The claimant filed an answer which did not challenge the policy language as being void as against public policy or as unconscionable and, after oral argument, the trial court granted the motion on the basis that the insurer had met the statutory "good cause" requirement. On appeal, the Superior Court affirmed the trial court decision, but on a different basis. The court reasoned that it did not need to address whether the insurer had met the statutory "good cause" requirement, and instead ruled that the insurer was entitled to compel the insured to be examined by a physician of the insurer's own choice, because the insurer had a contractual right under its policy to compel such IME, independent of Section 1796 of the MVFRL.[3]

In an attempt to overcome the appellate authority in *Fleming*, claimants often argue that insurance policy provisions which are contrary to statutory provisions should be deemed *ipso facto* invalid or unenforceable, and cite cases such as *Colbert*, *Richmond*, and *Miller*.[4] However, these arguments should be unsuccessful. First, none of these cases even addressed the standard for compelling an IME under 75 Pa.C.S.A. §1796 or under an insurance policy provision. Second, the *Fleming* case already represents appellate authority directly on point which, in fact, expressly upholds an insurance policy provision which is arguably contrary to §1796.

Claimants' counsel also often try to overcome the *Fleming* decision by relying upon a later trial court opinion by the Honorable R. Stanton Wettick in *Nationwide Ins. Co. v. Hoch*, 36 Pa. D.&C. 4th 256 (Alleg. CCP 1997). In *Hoch*, judge Wettick declined to enforce a policy provision requiring a claimant to submit to an IME without also showing "good cause" as required by the statute. While judge Wettick's decision ultimately rested on the determination that the insurer's petition was deficient because it contained mere conclusory allegations that "good cause" existed to support the request for the IME, the court specifically declined to follow *Fleming* and rejected the insurer's position that it was entitled to the IME without a prerequisite showing of "good cause" based on its policy language.[5] *Id.* at 258-59, 263-64. Nationwide's policy

provision provided for the insured, if injured, to "submit to examinations by company-selected physicians as often *as the company* reasonably requires." Judge Wettick rejected Nationwide's position stating that he had previously rejected a similar argument in *Erie Insurance Exchange v. Dzandony*, 39 Pa. D.&C.3d 33 (Alleg. CCP 1986) on the grounds that: 1) the relief sought could not be enforced by filing a petition, but rather must be sought by a writ or complaint; 2) specific performance of the contractual provision requiring an insured to submit to an IME is not available because the insurer had an adequate remedy at law, *i.e.*, the insurer can obtain an IME upon a showing of "good cause" and the court may order the denial of benefits until compliance with its order; and 3) the policy provision was unenforceable since it was inconsistent with Section 1796's "good cause" requirement, would require an insured to appear for an IME which the law does not require, and does not specifically require the insurer to provide the insured with a copy of the IME report contrary to section 1796. Lastly, in rejecting Nationwide's reliance upon *Fleming*, judge Wettick reasoned that *Fleming* was not binding since it did not specifically address or reach the specific issues he raised in *Dzandony* and, therefore, he concluded there was no appellate case law inconsistent with *Dzandony*. However, it is respectfully submitted that the court's latter determination is open to question, given that the *Fleming* decision expressly upheld the insurer's right to compel an IME based on the policy language alone and expressly declined to even address the statutory requirement of "good cause" since it concluded that the policy did not require such a showing.

In a more recent case, *Williams v. Allstate Ins. Co.*, 595 F. Supp. 2d 532, 539 (E.D. Pa. 2009), Senior U.S. District judge Ronald L. Buckwalter followed the appellate authority of *Fleming* and expressly rejected the trial court opinion in *Hoch*. The court enforced Allstate's policy provision which provided that the insured shall submit to mental and physical examinations by physicians selected by Allstate when and as often as Allstate may reasonably require. Unlike Section 1796, the provision did not impose a requirement to show "good cause". Judge Buckwalter expressly rejected the claimant's reliance on *Hoch*, and emphasized his finding that *Fleming* "has never been overruled, rejected, criticized, or meaningfully distinguished by any Pennsylvania court." Id. at 541. He further noted that no Pennsylvania appellate court, or any court for that matter, had either affirmatively cited the holding in *Hoch* or rejected it as erroneous, which remains the case even as of today (with the exception of the negative treatment by *Williams* and some other unpublished trial court opinions). Judge Buckwalter opined that "based on the current state of the law in Pennsylvania, this court predicts that the Pennsylvania Supreme Court would find that a contractual provision, which requires an insured to submit to reasonable medical examinations as a condition precedent to insurance coverage is enforceable, notwithstanding §1796 of the MVFRL." *Id.* at 545.

More recent cases following *Fleming* and *Williams* include *State Farm Mutual Insurance Company v. Choi*, C.A. No. 11-4327, Ebert, J. (Cumberland CCP June 27, 2011); *State Farm Mutual Insurance Company v. Ashcroft*, CI 11-00159, Madenspacher, P.J. (Lancaster CCP March 31, 2011); and *Erie Ins. Exchange v. Palermo*, 99 Luzerne Reg. Reps. 146 (Luzerne CCP 2009). The State Farm IME policy provision at issue in *Choi* and *Ashcroft* provides that State Farm is entitled to seek an IME of the insured "whenever the mental or physical condition of a person is material to any claim for medical expenses".[6] Like the policy language at issue in *Fleming* and *Williams*, State Farm's policy language does not expressly condition the right to an IME to a showing of "good cause".

However, in contrast to the trial court opinions in *Choi* and *Ashcroft*, *supra*, which followed *Fleming*, in *State Farm Mutual Automobile Insurance Co. v. Hernandez*, CA No. 2010-SU-001693-08, Linebaugh, P.J. (York CCP May 30, 2010), the trial court denied State Farm's petition to compel on the grounds that good cause had not been shown. The trial court reasoned that State Farm had not alleged that the IME will "substantially assist in the evaluation of the claim", that the proofs provided by the insured were adequate for State Farm to make a determination concerning the insured's claim, and that the peer review process was still available for further guidance. The trial court did not directly address *Fleming*.

Although the Superior Court affirmed the trial court's decision in *Hernandez*, it did so in a non-precedential opinion which cannot be cited for any purpose. *Hernandez*, 1008 MDA 2010 (Pa.Super. April 13, 2011); Pa. Superior Court I.O.P. 65.37. None of the Superior Court judges deciding *Hernandez* had participated in *Swantner*, *Hunt*, or *Fleming*. In its opinion, the Superior Court reasoned that State Farm's IME policy language, see footnote 6 *supra*, was distinguishable from the policy language at issue in *Fleming*, because its policy language provided that the court "may" order, instead of "shall" order, the insured to submit to an IME, and that the provision lacked guidance on how the court should exercise its discretion when addressing a petition to compel under such policy language. However, the decision did not discuss, and appears to have ignored or given little weight to, the fact that State Farm's policy language, like the policy language at issue in *Fleming* and *Williams*, expressly omitted the "good cause" requirement. Nevertheless, having thus determined that a showing of "good cause" was required, the Superior Court quoted, and appears to have agreed with, the trial court's application of the more stringent standard set forth in *State Farm v. Hunt*, 569 A.2d 365, 366-67 (Pa.Super. 1990), which the *Swantner* court previously expressly rejected. *State Farm v. Swantner*, 594 A.2d 316, 322 (Pa.Super. 1991).[7] Thus, although State Farm's reliance on *Fleming* did not succeed in *Hernandez*, it can be argued that the reasoning in *Hernandez* is flawed to the extent that the court did not directly explain why it imposed a "good cause" requirement where the contract specifically omitted that requirement, and because it appears to have erroneously applied the more stringent "good cause" standard set forth in *Hunt*. Moreover, because the *Hernandez* case is non-precedential and cannot be cited for any purpose, it should not foreclose continued reliance on the rationale and holding of *Fleming* in future cases.

In sum, the Pennsylvania Supreme Court has yet to address the breadth of Section 1796 and whether it forecloses conflicting insurance policy provisions. Although a showing of "good cause" arguably is not required under many insurer's policy provisions based on the *Fleming* case, many insurer's IME

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policy provisions have not yet been interpreted in a published opinion by an appellate court. Thus, in practice claimants' counsel often continue to advance opposition to carriers' petitions to compel IMEs, arguing that the carrier has failed to make the statutory showing of "good cause" and/or failed to employ less intrusive means to address their concerns regarding either causation or the reasonableness and necessity of treatment, *i.e*., by first pursuing a Peer Review under 75 Pa.C.S.A. §1797(b).

The question then, in practice, is whether it is better when preparing a petition to compel based on *Fleming* to nevertheless also assert, in the alternative, that even if the court elects not to follow Fleming, the facts at issue satisfy the statutory "good cause" requirement. To do so will increase the preparation time and cost to advance the petition. However, if a petition based on *Fleming* alone is denied, the insurer may have lost valuable time, and must then decide whether either to appeal at added expense and delay, or proceed to file a new petition to compel setting forth the facts and issues necessary to meet the "good cause" requirement under Section 1796. It is appropriate to address this question on a case by case basis, considering the venue and amount involved and the specific facts of the case. However, by advancing a well-reasoned "good cause" argument in the alternative in the first instance, it is submitted that the insurer will significantly increase the chance that its petition to compel will succeed.

ENDNOTES

[1]Section 1796 provides in relevant part: Whenever the mental or physical condition of a person is *material to any claim* for medical, income loss or catastrophic loss benefits, a court of competent jurisdiction . . . may order the person to submit to a mental or physical examination by a physician. The order may only be made upon a motion for good cause shown. . . . If a person fails to comply with an order to be examined, the court . . . may order that the person be denied benefits until compliance. (Emphasis added.)

[2]*Compare: State Farm v. Zachary*, 536 A.2d 800, 801 (Pa. Super. 1987) ("To establish `good cause shown', an insurer's petition, at a minimum, must contain facts showing: 1) that the proofs supplied in support of a claim are inadequate; 2) that the proposed physical examination will substantially assist the insurer in evaluating the claim; and 3) that the amount of the claim justifies a court order compelling the claimant to submit to a physical examination"); *State Farm v. Hunt*, 569 A.2d 365, 367 (Pa. Super. 1990) (requiring "that a bona fide controversy exists regarding the nature of the claimant's injuries", and "that the requested mental or physical examination will substantially aid the insurer in evaluating the claim").

[3]*See also*: *Hollock v. Erie Ins. Exchange,* 54 Pa. D. & C.4th 449, 532-33 (2002) (noting, albeit in *dicta,* that an insurance policy containing a provision requiring the insured to submit to a medical examination gives the insurer the right to request that the insured voluntarily undergo such an examination or risk having the insurer deny coverage for failure to cooperate), *aff'd,* 842 A.2d 409 (Pa. Super.2004); *Olsofsky v. Progressive Ins. Co.,* 52 Pa. D. & C.4th 449, 479 n. 2 (2001) ("If the insurance policy between the insurer and insured requires the insured to '[s]ubmit to [a] physical examination by a physician of [the insurer's] choice,' the first-party benefits insurer does not have to establish the statutory 'good cause' under section 1796 as a condition precedent to compelling the insured to undergo a medical examination").

[4]*See*: *Richmond v. Prudential Prop. & Cas. Ins. Co.*, 856 A.2d 1260 (Pa.Super. 2004) (definition of insured in policy conflicted with MVFRL definition); *Prudential Prop. & Cas. Ins. Co. v. Colbert*, 813 A.2d 747 (Pa.Super. 2002) (definition of insured in policy conflicted with MVFRL definition); *Miller v. Allstate Ins. Co.*, 763 A.2d 401 (Pa.Super. 2000) (policy provision allowing 60 days to appeal an arbitration award to a trial court conflicted with Pennsylvania common law arbitration statute allowing only 30 days).

[5]With respect to the "good cause" standard, citing *Swantner*, Judge Wettick stated that an insurer is not entitled to an IME until it "has pursued less intrusive means to obtain reliable information concerning the insured's physical condition, such as allowing the insured to submit medical information from her treating physician addressing any questions of the insurer." *Id.* at 258. Judge Wettick further stated that the insurer's petition must contain factual allegations showing that a medical examination is warranted by explaining why the treating physician's records have not eliminated reasonable doubt as to the validity of the claim and why the IME will substantially assist the insurer in evaluating the claim. *Id.*

[6]The State Farm insurance policy provides in relevant part:

> **Mental or physical examination**
> Whenever the mental or physical condition of a **person** is material to any claim for medical expenses or income loss benefits, a court of competent jurisdiction may order the **person** to submit to mental or physical examination by a physician. If a **person** fails to comply with the Order, the court may order that the **person** be denied benefits until he or she complies.

Policy Form 9838A, page 16. (Emphasis added.)

[7]The Superior Court in *Hernandez* also found that State Farm had not adequately explained why the less intrusive peer review process was not adequate to address the "causal relationship" of the insured's injuries to the subject accident or to a separate incident. It should be noted that the question of whether causation is outside the scope of a peer review has not yet been addressed by the Pennsylvania Supreme Court. *Kuropatwa v. State Farm Mut. Autombile Ins. Co.*, 721 A.2d 1067, 1070 n.4 (Pa. 1998). *See also*: *Bodtke v. State Farm Mutual Ins. Co.*, 659 A.2d 541 (Pa. 1995), reversing and remanding, 637 A.2d 648, 649 (Pa. Super. 1994) (in dicta, the Superior Court held that question of causation may be addressed in a peer review, with Judge Kate Ford-Elliott dissenting) for disposition consistent with *Terminato v. Pa. National Ins. Co.*, 645 A2d 1287 (Pa. 1994). In practice, it has generally been understood that the question of causation is outside the scope of a peer review.

NEW EXPOSURES UNDER THE AMERICANS WITH DISABILITIES AMENDMENTS ACT ("ADAAA")

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Overview

The Americans with Disabilities Act (the "ADA") was enacted in 1990. When Congress first created the ADA, it intended for the statute to be interpreted broadly and in a manner which would be most favorable to those with disabilities. However, a subsequent line of U.S. Supreme Court cases more narrowly construed the scope of the protected class under the ADA such that many employees found themselves unable to invoke the anti-discrimination provisions of the statute or seek entitlement to reasonable accommodation from their employer.[1] Based on the perception that persons with *bona fide* disabilities were being excluded from the landmark civil rights law, in 2008 Congress enacted the Americans with Disabilities Act Amendments Act (the "ADAAA") to reinstate the original legislative intention of the ADA.

The ADAAA became effective on January 1, 2009. On March 24, 2011, the EEOC issued regulations implementing the ADAAA. The EEOC Final Regulations summarize the primary goal of the ADAAA: "The primary object of attention in cases should be whether covered entities have complied with their obligations and whether discrimination has occurred . . . *The question of whether an individual meets the definition of disability under this part should not demand extensive analysis*."[2]

Legislative History

The ADAAA was enacted to effectively override the perception that the U.S. Supreme Court had given an overly restrictive reading of the definitional elements of a "disability" necessary to invoke the protections of the ADA. *Feldman v. Law Enforcement Associates Corporation*, 2011 WL 891447 at * 6 (E.D. N.C. March 10, 2011). Congress mandated in the ADAAA that the definition of disability be construed in favor of broad coverage to the maximum extent permitted by the law. *Id*., citing, 42 U.S.C. §12102 (4) (A). Nonetheless, the ADAAA left intact the statutory requirement that a claimant demonstrate that s/he "has a physical or mental impairment that substantially limits one or more major life activities". 42 U.S.C. §12102 (1).

Congress instructed that the statutory language "substantially limits" is to be interpreted consistently with the express legislative findings and purpose underlying the passage of the ADAAA. 42 U.S.C. §12102 (4) (B). The preamble to the Act states that prior EEOC regulations which equated substantially limits with "significantly restricted" were inconsistent with legislative intent and that in enacting the ADA, Congress expected that courts would construe the definition of disability consistent with prior decisions under the Rehabilitation Act of 1973. 42 U.S.C. § 12101(a) (3).

Although Congress expressed its view that the "substantially limiting" language had been given a cramped construction by courts including the U.S. Supreme Court in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), legislative sponsors for the ADA Restoration Act of 2008, H.R. 3195, stated that the phrase "substantially limits" is equivalent to "materially restricts" which is a lower threshold than "significantly restricted", but a more onerous standard than a "moderate impairment". *See*: Joint Statement of Representatives Hoyer and Sensenbrenner on the Origins of the ADA Restoration Act of 2008, H.R. 3195, Cong. Rec. H. 6067 (June 25, 2008).

The purpose underlying the Act was to repudiate the notion that an individual must have an impairment that "prevents or severely restricts the person from doing activities that are of central importance to most people's daily lives in order to qualify for protection." *Id*. Impairments that are transitory and minor are excluded from the "regarded as" component of the disability definition and, according to the Joint Statement, it was considered unnecessary to carve out transitory impairments from the "substantially limiting" component of the disability definition because "the functional limitation requirement adequately prevents claims by individuals with ailments that do not materially restrict a major life activity". *Id*.

According to the Joint Statement, the proposed House bill made no changes to the current law with respect to the duration that is required for an impairment to substantially limit a major life activity. The "duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe". *Id*.

Likewise, the legislative history for the Senate version, SB 3406, supports the idea that Congress intended to restore the meaning of disability to the Congressional intent underlying the passage of the ADA as opposed to the more restrictive reading provided by the Supreme Court in *Toyota Manufacturing*; *however*, that would still encompass an examination of the condition, manner and duration of the impairment as compared to the capabilities of most people. *See:* Senate Statement of Managers on S. 3406 (Cong. Rec. S. 8841 Sept. 16, 2008) ("We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner is a useful one".)

Statutory Requirements Are Same: EEOC Regulations Are Broader In Recognition of Congressional Intent

Under the ADA, as amended by the ADAAA, a disability means "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. §12102 (1)[3]. A "physical or mental impairment" is defined as: "any physiological disorder, or condition... or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal..." 29 C.F.R. §1630.2(h). "Major life activities" include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working" as well as major bodily functions. 42 U.S.C. §12102(2).

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Interestingly, though the ADAAA promulgated many changes, it did not alter the language defining what constitutes a "disability." The definition of disability is the same as it has always been under the ADA. A person can claim a disability if he or she: 1) has a physical or mental impairment that *substantially limits* one or more *major life activities*, 2) has a *record* of having such impairment, or 3) is *regarded as* having such impairment by his or her employer.[4]

The EEOC rules of construction highlight that *an impairment need not prevent or significantly or severely restrict*, a person from performing a "major life activity" in order to be "substantially limiting."[5] The EEOC regulations state that whether or not a condition or impairment is remediable will not be determinative in whether or not it will be considered to be a disability.[6] Further, an impairment that is episodic or is in remission is a disability if it would substantially limit a major life activity when that condition is in an active state.[7]

The definition of major life activities was expanded and now also includes not simply functional activities, but also the operation of *bodily* functions. Major life activities include:

> • Activities such as caring for oneself, performing manual tasks, seeing, hearing, *eating, sleeping*, walking, *standing, sitting, reaching, lifting, bending,* speaking, breathing, *learning, reading, concentrating, thinking, communicating, interacting with others,* and working; and
>
> • The operation of a major bodily function, including: immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

29 C.F.R. 1630(i)

Therefore, a substantial limitation of a bodily function, e.g. reproductive capacity, qualifies as a "disability", even if it imparts no restriction in the performance of daily activities. It is this second prong of the definition of a "major life activity" that harbors the potential for significant expansion of the protected class because the impairments of bodily functions need not be outwardly manifest in the performance of physical or mental activities. Yet these conditions could qualify the individual for protected status even if those physical conditions are under control through medication or are in remission.

Prior to the passage of the ADAAA, most judicial decisions on employer motions for summary judgment were premised on whether the plaintiff could establish a jury issue on whether they were substantially limited in the performance of a "major life activity". The enactment of the ADAAA and EEOC regulations impose on courts the obligation to more liberally construe the definitional requirement of a disability and focus on whether discrimination on account of such a disability has occurred.

Judicial Decisions Post-ADAAA

The impact of the ADAAA and EEOC regulations is starting to be felt in the courts' hesitation to grant an employer summary judgment on the existence of a disability. For example, in *Cohen v. CHLN, Inc*., No. 10-00514, 2011 WL 2713737 (E.D. Pa. July 13, 2011), the plaintiff testified that he suffered from debilitating back and leg pain for four months prior to his employment termination, that it impacted his ability to walk, climb stairs and sleep and was diagnosed with lumbar radiculopathy and spinal stenosis. He claimed to be limited in walking to ten to twenty yards before resting, he used a cane and claimed to be in pain until he had surgery some months following his termination. The court rejected the employer's defense that the restrictions were too short lived, holding that the ADAAA imposes no bright line durational requirement. The court noted that the plaintiff's doctor had presented the option of surgery with no indication that the symptoms would permanently abate. The court stated that the walking restrictions easily passed the standards imposed under the ADAAA.

Similarly, in *Estate of Murray v. UHS of Fairmount, Inc*., No. 10-2561, 2011 WL 5449364 (E.D. Pa. Nov. 10, 2011), the court declined to grant summary judgment on the issue of whether the employee, who had a history of depression, qualified as a person with a disability. Plaintiff testified to longstanding depression which was intermittent during her employment but resulted in her taking a leave of absence. The court observed that the prior requirement to show a permanent or long term impairment was likely no longer viable under the ADAAA.

The court noted that the plaintiff testified as to how her depression affected her ability to eat, sleep and think, but presented no expert testimony. She did not testify as to the severity, duration or frequency of the symptoms and did not submit any other evidence to demonstrate the substantiality of the impairment. The court also observed that she presented no evidence to compare her limitations to the general population. Yet, because of the new standards and the dearth of case law, the court declined to grant summary judgment on this basis and instead turned to the evaluation of the quality of the evidence of discrimination, granting summary judgment to the employer on this basis. Expert testimony is not necessary to get over the summary judgment threshold.

As indicated by the legislative history, courts should still consider evidence as to the condition, manner and duration of the impairment and the comparison of the person's condition to the general population to assess whether the impairment materially restricts the performance of a "major life activity". While the EEOC regulations do not spell out what "substantially limiting" means-as opposed to what it does not mean-legislative history supports application of a materiality requirement. Substantial has been defined as "material, ample, considerable in importance, value, degree, amount or extent". The American Heritage Dictionary of the English Language (New College Edition).

Defendants may continue to legitimately assert that the court should still draw lines to distinguish between persons with physical or mental impairments or illnesses that materially affect their ability to perform major life activities from those whose impairments are or are expected to be short lived or are insignificant. As noted in Estate *of Murray*, the EEOC regulations caution that "not every impairment will constitute a disability", so the court must draw a line somewhere. *Id*. at * 7.

The lowered hurdle to claiming a

disability opens employers to new areas of exposure by many different segments of the American public. Employers must be aware of these new exposures and be prepared to make reasonable accommodation to those individuals who claim to have a disability.

Perhaps the largest segment of the population that will likely benefit from the ADAAA is one that is at not first apparent: the aging workforce. With more elderly individuals in the workforce than ever before, and with these individuals being more prone to illness and injury simply by virtue of their age, this population will demand the protection of the ADA. The injuries, bodily conditions and illnesses that become inherent in an aging population are fertile ground for ADA disability claims.

Other groups that employers should be aware of include those with obesity, mental illness and learning disabilities. According to a study by Reuters, 34% of Americans are obese and just under 6% are "extremely" obese.[8] Though in the past, only morbidly obese plaintiffs had litigation success with disability discrimination claims, the physical impairments and limitations of bodily function incident to obesity will yield to greater focus under the ADAAA.[9]

As of 2009, more than forty-five million U.S. adults nearly twenty percent of the population) had some type of mental illness,[10] and 4.67 million Americans (roughly 1.8% percent) had some learning disability.[11] These groups receive express protection under the ADA.[12]

The ADAAA, as applied by the EEOC, will undoubtedly give rise to increasing numbers of disability discrimination and failure to accommodate claims. Employers and their risk managers will need to be vigilant to identify and respond to potential ADA claimants to minimize their liability exposure. Recognition of the changed landscape for the adjudication of these claims is a starting point. Implementation of the new standards in making reasonable accommodation decisions to persons with impairments will require more attention and will certainly entail greater costs. Documentation of the interactive process required of employers and employees as part of fulfilling the duty of reasonable accommodation will be critical.

ENDNOTES

[1]In the case of Sutton v. United Airlines, 119 U.S. 2139 (1999), the Supreme Court held, contrary to the EEOC's interpretive guidance and numerous lower court decisions, that the mitigating measures used by an employee must be taken into account in assessing whether an individual has a disability. If mitigating factors can "correct" the problem, the court held the condition is not a disability.

Similarly, in Toyota Manufacturing, Kentucky Inc. v. Williams, 534 U.S. 184 (2002), the Supreme Court held that the determination of whether an impairment rises to the level of a disability in the major life activity of "working" is not limited to those activities performed in the workplace, but rather should consider the individual's ability to perform manual tasks encountered in daily life. The definition of "major life activity" that is used in evaluating the performance of manual tasks should focus on the inquiry of whether the plaintiff is unable to perform a range of tasks that are central to most people in carrying out the activities of daily living. The issue is not whether the individual is unable to perform her specific job tasks.

[2]29 C.F.R. 1630.1(c) (4).

[3]The ADA also includes in the definition of "disability" having a record of such impairment or being regarded as having such an impairment. *Id.*

[4]29 C.F.R. 1630.2(g).

[5]29 C.F.R. 1630.2(j).

[6]See, generally: *Sutton v. United Airlines*, supra note 1, holding that if an illness or condition could be remedied with medicine or other remedial measures that it was not a disability. This holding has been overturned by the recent ADAAA. See 42 USCA § 12101 note. The only exception to the current rule under the ADAAA is in the case of glasses or contact lenses (poor eyesight is not a disability because it can be corrected).

[7]42 USCA § 12101 note; PL 110-325 (S 3406)(4)(D).

[8]*Reuters Online, Obese Americans Now Outweigh the Merely Overweight*, http://www.reuters.com/article/2009/01/09/us-obesity-usa-idUSTRE50863H20090109 (last visited Jan. 30, 2012).

[9]In the past, courts dismissed discrimination complaints where obese and morbidly obese plaintiffs were unable to establish that their weight was related to a physiological condition. *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006).

[10]Substance Abuse and Mental Health Services Administration (SAMHSA) Online, National survey reveals 45.1 million adults in the U.S. experienced mental illness in the past year, http://www.samhsa.gov/newsroom/advisories/1011180411.aspx (last visited Jan. 30, 2012).

[11]National Center for Learning Disabilities Online, *The State of Learning Disabilities*, http://www.ncld.org/stateofld (last visited Jan. 30, 2012).

[12]29 C.F.R. 1630.2(h).

WORKERS' COMPENSATION UPDATE

By Francis X. Wickersham, Esquire & G. Jay Habas, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin, King of Prussia and Erie, PA

An employer must pay 100% of charges billed for acute care provided from an accredited Level I Trauma center to a claimant for immediately life threatening or urgent injuries.

Roman Catholic Dioceses of Allentown v. Bureau of Workers' Compensation, Fee Review Hearing Office (Lehigh Valley Health Network); No. 2711 C.D. 2010; filed October 28, 2011; by judge Simpson

An elderly claimant sustained work-related injuries after he fell on an icy sidewalk and remained outside for five minutes before he was found. An ambulance responded, and the claimant was immobilized. He was transported to the hospital by the EMS unit, where it was determined that he sustained two unstable spinal fractures. The claimant was admitted as a trauma patient and placed in the intensive care unit. Two days later, he underwent spinal surgery and remained a trauma patient until his discharge.

The employer accepted the claimant's injuries. The provider billed the employer $406,338.79 for their services. The employer issued an explanation of benefits (EOB) approving payment for $142,196. Three days after receipt of the EOB, the provider filed a fee review application. The Bureau determined that the provider was entitled to the full amount of the bill. The employer appealed and requested a fee review hearing. The hearing officer determined that the claimant's condition and assessment qualified for Level 1 Trauma transport and hospital admission/ treatment and concluded that the employer must pay the provider 100% of its charges in that the trauma center exemption from the Act's medical fee caps applied.

On appeal to the Commonwealth Court, the employer primarily argued that the trauma center exemption did not apply. According to the employer, the claimant did not meet any of the criteria in steps 1 -3 of the ACS Triage Guidelines and the medical evidence produced at the hearing established only that the claimant's condition was potentially and not immediately life threatening or urgent.

The Commonwealth Court rejected the employer's arguments and affirmed the decision of the hearing officer. The court pointed out that the decision by the EMS personnel that an injury is immediately life threatening or urgent, absent a violation of ASC Guidelines, is presumptive of the reasonableness and necessity for transport to a trauma center.

A claimant fails to satisfy his burden of establishing that a work-related injury resolved into a specific loss when he fails to present evidence to show loss of use for all practical intents and purposes and when his medical evidence was contrary to a prior workers' compensation judge's decision which found that the claimant had not lost the use of his upper extremity.

Donald Argyle v. WCAB (John J. Kane McKeesport Regional Center and UPMC Work Partners Claims Management); No.43 C.D. 2011; filed September 2, 2011; by judge Brobson

The claimant sustained an injury to his right wrist in 1993. Following the injury, the claimant returned to light-duty work but stopped working in 1998. The claimant then filed a petition to reinstate, alleging that his injury was resolved into a specific loss of the right forearm and/or hand. This petition was denied by a workers' compensation judge.

Almost nine years after that decision, the claimant filed another petition alleging, as before, that his injury resolved into a specific loss of the right forearm and/or hand. The claimant presented medical evidence in support of the petition. The employer presented medical evidence to oppose the petition. The workers' compensation judge dismissed the petition, finding the testimony of the employer's expert to be more credible than the claimant's. Additionally, the judge denied the petition on the basis that the issue had already been adjudicated in a prior decision and that the claimant had not demonstrated any change in condition since that decision. The Appeal Board affirmed on appeal.

The Commonwealth Court also affirmed. According to the court, the judge found the testimony of the employer's medical expert more credible. In addition, the court concluded that even if the judge had rejected the testimony of the employer's expert, the claimant's medical evidence was legally incompetent because the opinions given by claimant's experts were directly contrary to a fact established in the prior judge's decision, that being, the claimant did not suffer the complete loss of use for all practical intents and purposes of his right forearm and/or hand.

A self-insured employer that is required to pay heart and lung benefits in addition to workers' compensation benefits is entitled to reimbursement from the Supersedeas Fund, and two-thirds of the amount paid automatically represents workers' compensation benefits.

Bureau of Workers' Compensation v. WCAB (Excalibur Insurance Management Service); No. 376 C.D. 2011; filed November 17, 2011; by judge Butler

The claimant sustained a work-related injury in the course and scope of his employment as a police officer. The employer filed a termination petition. The employer's request for supersedeas was denied, but, ultimately, the workers' compensation judge granted the petition. The employer then filed a petition for Supersedeas Fund reimbursement, and that petition was granted. The Appeal Board affirmed the decision of the judge.

On appeal to the Commonwealth Court, the Bureau argued that the employer was not entitled to reimbursement from the Supersedeas Fund because the claimant's compensation was paid pursuant to the Heart and Lung Act. In addition, the Bureau argued that the evidence did not support the conclusion that two-thirds of the monies paid to the claimant represented workers' compensation benefits. According to the Bureau, the proof of payment clearly showed that the amounts paid to the claimant were entirely Heart and Lung benefits, which consisted of full wages.

The Commonwealth Court rejected the Bureau's arguments and dismissed their appeal. The court pointed out

that neither the Appeal Board nor the workers' compensation judge attempted to adjudicate a Heart and Lung issue. Moreover, the employer did not request Supersedeas Fund reimbursement for Heart and Lung benefits paid. The Commonwealth Court further held that, unless there was evidence to the contrary, as a matter of law, when an employer is self-insured for workers' compensation purposes and is required to pay Heart and Lung benefits in addition to workers' compensation benefits, two-thirds of the amount paid automatically represents workers' compensation benefits.

A claimant who lost an eye when a piece of a bowling ball that he struck with a sledge hammer while waiting for a delivery truck is held to have violated a positive work order when told to stop immediately before the incident.

Charles Habib v. WCAB (John Roth Paving Pavemasters); No. 2612 C.D. 2010 (Pa. Cmwlth. August 12, 2011); opinion by judge Jubelirer

The claimant in this case sought specific loss benefits for the total loss of use of his right eye after a piece of a bowling ball broke off and struck him in the eye as he tried to break it apart with a sledge hammer. The event occurred while a crew attempted to kill time while waiting for delivery of a truckload of asphalt. The claimant was challenged to see if he could break apart a bowling ball found in the parking lot with a sledge hammer, but before doing so, he was warned by his foreman to "knock it off, or stop."

The workers' compensation judge determined that the claimant sustained his burden of proof in a claim petition and specifically denied the employer's defense that the claimant violated a positive work order. Although the judge found that the claimant met the elements of the defense, the decision was based on the finding that the supervisor's order was given too late to be effective. The Appeal Board reversed, holding that the foreman's order was legally sufficient because it was given immediately before the claimant struck the bowling ball with the sledge hammer. In affirming the Appeal Board's decision, the Commonwealth Court ruled that the claimant was injured in violation of a positive work order where all of the elements of the defense were met.

A claimant has an unshifting burden of proving disability from the work injury throughout the pendency of a reinstatement petition following a suspension, for which surveillance video evidence may be sufficient to challenge the claim of continuing, disabling pain.

Sonja v. WCAB (Hillis-Carnes Engineering Associates); No. 455 C.D. 2011 (Pa. Cmwlth. November 7, 2011); Opinion by judge Leavitt

The claimant sought reinstatement of total temporary disability benefits following an aggravation of back pain while working for another employer. In his testimony before the workers' compensation judge, the claimant reported that his legs were constantly numb and the pain was increasing, such that he could no longer drive safely and was unable to move his legs, making it difficult to stand or walk. The employer offered surveillance evidence from the same day he testified showing him driving a pickup truck away from the hearing, picking up a passenger and driving 30 miles to a salvage yard where he proceeded to climb out of the truck without difficulty and remove parts from a van. In so doing, he crawled on the ground, operated a jack under the van, used a wrench to tighten lug nuts on a tire, twisted and bent his body, jumped in the back of his truck and threw parts into it.

The workers' compensation judge found that the claimant's ongoing pain was due to the original work injury but rejected the claim that he was unable to work. The claimant's own actions, as depicted on the videotape, contradicted the claimant's testimony and that of his physician. The judge concluded that as of the date of the surveillance, the claimant had failed to prove continuing disability from his work injury. Therefore, the claimant's benefits were suspended as of that date.

After the Appeal Board affirmed, the Commonwealth Court addressed the issue of whether it was error to suspend benefits based upon surveillance and to impose upon the claimant the burden of proving his continued loss of earnings. The Commonwealth Court, in affirming the judge and the Appeal Board, explained that when an employer has the burden of proof, such as when seeking to reduce or terminate a claimant's benefits, surveillance evidence alone is inadequate to meet the burden. In the court's words, such evidence is not "an infallible measure of either disability or earning power." However, where the claimant has the burden of proof to show that a work injury continues to cause disability in a claim or reinstatement petition following a suspension, then such evidence itself may be relied upon to reject the claim.

Employer entitled to Supersedeas Fund Reimbursement for benefit payments made under NCP issued by mistake.

Comcast Corp. v. WCAB (Jones); 2208 C.D. 2010; filed December 12, 2011; by judge Brobson

The employer filed a petition to review / set aside a notice of compensation payable (NCP) pursuant to §413, alleging that the NCP had been issued in error. In connection with that petition, the employer requested supersedeas, which was denied. The parties later entered into a compromise and release agreement to resolve future payments, but agreed to allow the employer's review petition, as well as a termination petition, go to decision. The workers' compensation judge granted the review petition. The employer then sought reimbursement from the Supersedeas Fund for the benefits they paid to the claimant under what the judge found to be a null and void NCP.

The employer's request to obtain Supersedeas Fund reimbursement on the review petition was denied at the agency, judge and Appeal Board levels. The Commonwealth Court reversed those decisions, agreeing with the employer that under §443 (a) of the Act, Supersedeas Fund reimbursement was available to the employer.

Fatal claim petition granted for death of claimant from overdose of medications that were previously found to be neither reasonable nor necessary.

JD Landscaping v. WCAB (Heffernan); 1866 C.D. 2010; filed December 2, 2011; by judge Brobson

This case has been a hot topic of conversation in the Pennsylvania workers' compensation community. It

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involved the death of a claimant from an overdose of medications that had been prescribed to him by his treating provider. Two weeks before the claimant's death, a utilization review determination (UR) was issued, concluding that all of the provider's treatment, including prescriptions, was neither reasonable nor necessary. After the UR was issued, the provider tried to prescribe medications, but the pharmacy refused to fill them. The provider then told his sister, a physician in his practice, that the pharmacy would not fill the claimant's prescriptions because of the UR and asked her to handle the situation. She then saw the claimant and prescribed medications for him. Two days later, the claimant passed away from overdosing on the medications.

The Commonwealth Court affirmed the workers' compensation judge's decision granting a fatal claim petition, holding that the issue of causation was separate and distinct from the reasonableness and necessity of medical treatment. In the court's view, the prior UR concerned only reasonableness and necessity of treatment and was irrelevant in determining whether the claimant's death was causally related to his work-related injury.

Claimant who stops working a light-duty job due to a known incorrect restriction given by her treating physician is not entitled to a reinstatement of benefits.

Karen Verity v. WCAB (The Malvern School); 356 C.D. 2011; filed October 11, 2011; by judge Cohn Jubelirer

Following the claimant's work injury, she returned to a light-duty position with the employer. The claimant later sought a reinstatement of total disability benefits, alleging a worsening of her condition and that there were no restricted-duty positions available. According to the claimant, the employer accommodated her return to light-duty work until her treating physician issued a note restricting her from going up and down stairs. The claimant presented this note to the employer and was informed she could not work since she had to go up a flight of ten stairs approximately four times per day.

During litigation, the claimant testified that she thought she could perform the light-duty job with the employer since she went up and down three flights of stairs in her apartment complex throughout the day. The claimant's treating physician testified that she was not aware that the claimant had this ability.

The Commonwealth Court agreed with the workers' compensation judge and the Appeal Board that the claimant was not entitled to a reinstatement of benefits since she voluntarily left her light-duty position. The court held that the claimant was not forced to stop working due to an elimination of the light-duty job. Rather, the claimant stopped working because of an incorrect "no stair" restriction that she knew was not accurate. The court held that the claimant failed to meet her burden of proving that her earning power was once again adversely affected by her work-related disability.

Claimant is not entitled to a resumption of temporary total disability benefits after the expiration of the 500-week period of partial disability, even when employer reinstated benefits after the 500-week period ended.

Andrew Cozzone v. WCAB (Pa. Municipal /East Goshen Township); 664 C.D. 2011; filed January 5, 2012; by judge Brobson

The claimant suffered an injury on January 24, 1989. When he returned to work on September 20, 1989, his benefits were suspended. Beginning in May of 2003, a series of supplemental agreements were signed, reinstating the claimant's benefits at various periods of time. In late 2008, the claimant filed a reinstatement petition, requesting an adjustment from partial disability to total disability. The claimant also filed a penalty petition, alleging the employer violated the Act by unilaterally ceasing payment of partial disability benefits.

The Commonwealth Court affirmed the Appeal Board's reversal of the workers' compensation judge's decision granting the reinstatement petition. The court pointed out that under §413 (a) of the Act, the claimant had until approximately April 1999 to file a reinstatement petition, but had failed to file it until 2008, over nine years after the 500-week period had expired. The court also did not buy the claimant's contention that he was lulled into a false sense of security by the series of Supplemental Agreements executed in 2003.

According to the court, an employer has no legal duty to notify claimants of the existence of the 500-week statute. The court further rejected the claimant's argument that the reinstatement petition was timely filed since it was done within three years from the last date a compensation payment was made. The court held that §413's three-year limitation is not applicable where there has been a suspension and is only applicable to reinstatements following a termination of benefits.

Employer not entitled to a termination of benefits for a chronic conjunctivitis injury, despite claimant's lifelong allergies.

City of Philadelphia v. WCAB (Whaley-Campbell); 981 C.D. 2011; filed December 23, 2011; by senior judge Friedman

A workers' compensation judge granted a claim petition, finding that the claimant developed a chronic eye condition in the 1990s while working as a youth study counselor for the employer. Many years later, the employer filed a petition to terminate the claimant's benefits, alleging full recovery. In support of the petition, the employer presented testimony from an ophthalmologist, who said the claimant was fully recovered from the injury. According to the employer's expert, the claimant experienced recurrent episodes of conjunctivitis due to her baseline allergic condition, which could flare-up when exposed to certain irritants, such as dust, dirt, pollen and grass. The claimant's expert, however, testified that, although the claimant had a genetic propensity to react to certain allergens in the air, if the claimant returned to work and was placed in the same environment, she could have a recurrence of chronic conjunctivitis.

The Commonwealth Court affirmed the judge's dismissal of the termination petition. In doing so, the court distinguished this case from *Bethlehem Steel Corporation v. WCAB (Baxter)*, 550 Pa. 658, 708 A.2d 801 (1998), in which the Supreme Court reversed an award of benefits for an asthmatic condition

since the claimant's asthma was pre-existing and not directly caused by his employment. In this case, although the claimant had lifelong allergies, she did not have chronic conjunctivitis until beginning work for the employer.

Receipt of Social Security disability benefits unrelated to a work injury demonstrates claimant's voluntary removal from the workforce and justifies suspension of benefits.

Burks v. WCAB (City of Pittsburgh); No. 980 C.D. 2011; filed January 13, 2012; by judge Friedman

The claimant sprained her right knee in the course of her employment, which ultimately required multiple knee surgeries, including a knee replacement. The claimant has not worked or looked for work since then. As a child, the claimant underwent multiple surgeries for a left hip problem that resulted in hip fusion and replacement, and the left hip problems were aggravated by motor vehicle accidents that occurred after the work injury. An IME identified that the claimant was capable of full-time, light-duty work due to the work injury.

The employer filed a suspension petition, alleging the claimant was physically able to work but had voluntarily removed herself from the workforce. The workers' compensation judge agreed, and the court affirmed, holding that because the claimant sought a disability pension that was based on her inability to engage in gainful activity, and the work injury itself did not prevent her from working, she had voluntarily withdrawn from the workforce.

"Old age" Social Security retirement benefit offset is constitutional.

Caputo v. WCAB (Commonwealth of Pennsylvania); No. 191 C.D. 2010; filed January 5, 2012; by judge Leavitt

Section 204(a) of the Act permits an employer or insurer to take a credit against workers' compensation disability benefits for 50% of the claimant's Social Security retirement benefits. The claimant challenged this offset, arguing that it violated the equal protection clause of the Pennsylvania Constitution because it treats individuals over the age of 65 and receiving Social Security benefits differently. The court rejected this position in a lengthy analysis, finding that the statute has a rational basis as it promotes a legitimate governmental interest of cost containment for employers and encourages individuals collecting Social Security retirement benefits to remain in the workforce.

Medical evidence supports finding that lifting at work precipitated heart attack.

Bemis v. WCAB (Perkiomen Grille Corp.); No. 2687 C.D. 2010; filed December 27, 2011; by judge McCullough

The importance of a physician's overall testimony, as opposed to a couple of particular statements, determines whether it is unequivocal so as to support a claim of a work-related injury. In this case, the claimant moved kegs of beer for the employer and developed chest pain that recurred two days later while lifting a heavy pot of chili. The claimant was hospitalized and thereafter underwent quintuple bypass surgery after which the employer replaced him at work. Medical evidence in support of a claim petition indicated that the lifting incidents "certainly could have precipitated and probably did precipitate the incident" and were "very likely" to have done so. The workers' compensation judge rejected such evidence as equivocal. On appeal, however, the court reversed, finding that the doctor's further statements that the incidents certainly caused the claimant's hospitalization and heart attack and that lab studies after the events were indicative of a heart attack. In consideration that the claimant only reported problems after the work activities indicate that, on the whole, the medical evidence was not equivocal.

Offset for pension benefits received affirmed.

School District v. WCAB (Davis); No. 166 C.D. 2011; filed December 22, 2011; by judge Brobson

The employer is entitled under § 204(a) to take an offset against compensation benefits for money a claimant receives from a defined benefit or contribution plan to the extent funded by the employer. The employer in *Davis* sought to obtain an offset for the claimant's receipt of disability benefits through the School Employees Retirement System and offered actuarial testimony on the amount of the employer's contribution toward the claimant's pension fund and the formula involved. The workers' compensation judge found the testimony unpersuasive and not credible because it did not quantify the value of the return on investment retained in the fund after non-vesting employees are paid their contribution plus four percent return, which potentially reduced the calculation of the employer's contribution. On appeal, the court reversed, holding that the employer met its burden of proof and offered testimony consistent with the requirements of the law that an employer need not offer proof of exact contributions to a pension plan. The claimant is required to offer his or her own evidence challenging the employer's contribution to the pension fund and cannot rely on hypothetical questioning on employee contributions to the plan.

Medical opinion that fails to consider previous full recovery determination is insufficient, and claimant is estopped from arguing NCP is incorrect where that issue was not raised in litigation on termination petition.

Namani v. WCAB (A. Duie Pyle); No. 522 C.D. 2011; filed December 6, 2011; by judge Jubelirer

The claimant was found to be fully recovered from the accepted left arm and hand injury. He then filed a reinstatement petition and claim petition alleging worsening of his condition and additional work injuries involving his cervical spine. The workers' compensation judge denied the petitions, which was upheld on appeal. The claimant's doctor's opinion was found to be legally insufficient because he did not know of and failed to address the prior termination petition, his testimony of an additional injury was given more than three years later, and he failed to identify any change in condition since that decision. The claimant's argument that the NCP was materially incorrect was precluded as the information about an additional injury was available during the termination petition.

Installation of an in-home therapy pool held neither reasonable nor necessary treatment where judge did not consider all of the circumstances, including alternative devices.

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of Transportation v. WCAB (Clippinger); No. 1142 C.D. 2011; filed December 30, 2011; by judge Simpson

The claimant, paralyzed from the waist down following surgery for a work-related back condition, filed a review petition and a utilization review request seeking payment for the installation of an aquatic therapy pool at this home, along with the construction of an additional room to house it. Although the claimant was able to return to work full-time in a sedentary job, he had permanent impairment that made it difficult to stand, walk without assistance, transition and dress himself. His treating physician prescribed aquatic therapy, but the claimant complained that the physical therapy facility was busy and he had difficulty getting into the building and navigating the locker room. The workers' compensation judge upheld the claimant's position, finding that the pool installation was reasonable and necessary treatment.

The court, however, reversed that decision, finding that the judge failed to address alternative treatment. In its discussion, the court noted that the claimant is able to travel to physical therapy to obtain aquatic treatment and his concerns about the physical therapy facility are not an impediment to treatment. The court further cautioned that the cost of the proposed appliance and any windfall to the claimant from improvements to his home have to be considered. As a result, the court remanded the case back to the judge, overturned awards for penalties and attorney's fees on this issue, but upheld a penalty for the failure to pay other medical expenses on the basis that the claimant's providers had not submitted medical reports but where the claimant complied with the carrier's instructions in submitting the receipts.

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2011

1. Helmet inspector who left work complaining about pain but did not report injury as work-related and initially identified condition as involving non-work condition held to have provided sufficient notice of work injury, as precise description is not necessary considering totality of circumstances and later message of "work-related problem." *Gentex Corp. v. WCAB (Morack)*, 23 A.3d 528 (Pa.2011).

2. Abnormal working conditions sufficient to sustain work-related psychiatric injury were not established where liquor store clerk robbed at gunpoint, as the injury was the result of normal working conditions based on the frequency of such incidents in the area, *PA Liquor Control Board v. WCAB (Kochanowicz)*, 29 A.3d 105, (Pa. Cmwlth. 2011), and where state police officer involved in horrific death scene investigation of infant and later developed post traumatic stress disorder as investigation was normal, routine activity of job, *Washington v. WCAB (Commonwealth of Pennsylvania)*, 11 A.3d 48 (Pa.Cmwlth. 2011).

3. Employee suffered fatal heart attack at home two days after receiving letter of termination of employment following dispute over light-duty work assignment from accepted work injury; held that relationship to employment not established. *Little v. WCAB (B&L Ford/Chevrolet)*, 23 A.3d 637 (Pa.Cmwlth. 2011).

4. Termination petition may be granted despite surgery for work-related injury where credible medical evidence establishes that surgery completely resolves work injury or any aggravation of pre-existing condition without objective evidence of pain complaints. *Schmidt v. WCAB (IATSE Local 3)*, 19 A.3d 1171 (Pa. Cmwlth. 2010).

5. Employee on unpaid lunch at on-campus dining facility who jumps down flight of steps and injures legs held not to be within scope of employment as activity was totally foreign to employment. *Penn State University v. WCAB (Smith)*, 15 A.3d 949 (Pa.Cmwlth. 2011).

6. Acceptance of retirement pension and Social Security Disability benefits, combined with failure to seek work following work injury and receipt of notice of ability to return to work, held to support suspension of benefits based on voluntary withdrawal from workforce. *Dept. of Public Welfare/Norristown State Hospital v. WCAB (Roberts)*, 29 A.3d 403 (Pa.Cmwlth. 2011). Compare to *Keene v. WCAB (Ogden Corp.)*, 21 A.3d 243 (Pa.Cmwlth. 2011), where the court held that failure to look for work for two years because of negative feelings about job-seeking process and receipt of Social Security Disability benefits was insufficient to establish voluntary removal from the workforce.

7. Circumstances of sales manager's death from blunt force trauma in home-based office while unable to travel due to non-work injury were insufficient to establish injury within course and scope of employment. *Donald Werner v. WCAB (Greenleaf Service Corp.)*, 28 A.3d 245 (Pa. Cmwlth. 2011).

8. Medical opinion that a firefighter contracted Hepatitis C based upon a single note in his military records 30 years previous indicating claimant had Hepatitis B from drug use is not competent where there was no evidence of any subsequent drug use or link to Hepatitis C. *City of Philadelphia v. WCAB (Kriebel)*, 29 A.3d 762 (Pa. 2011).

9. Asphalt paver denied benefits for violation of positive work order when he ignored supervisor's oral warning to stop attempt at breaking a bowling ball with a sledge hammer while waiting for delivery. *Charles Habib v. WCAB (John Roth Paving)*, 29 A.3d 409 (Pa.Cmwlth. 2011).

10. Insurer entitled to Supersedeas Fund reimbursement for payment of medical bill after request for supersedeas denied where bill was for treatment received before supersedeas request made. *Department of Labor & Industry, Bureau of Workers' Compensation v. Crawford & Company*, 23 A.3d 511 (Pa. 2011).

PENNSYLVANIA DEFENSE INSTITUTE
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