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Truth Or Consequences: The Fifth Amendment Privilege Does Not Excuse An Insured's Failure To Submit To An Examination Under Oath

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"You have the right to remain silent. Anything you say can and will be used against you in a court of law." This ubiquitous refrain has—thanks to television and film crime dramas—become indelibly etched into America's collective psyche. But does the Fifth Amendment right to remain silent permit an insured to avoid questioning by his insurer in an examination under oath ("EUO") pursuant to his insurance policy? Pennsylvania's courts have held that although an insured is entitled to exercise his Fifth Amendment right against self-incrimination during the EUO, there may be consequences for his silence, including a denial of coverage. As it turns out, when it comes to an insurance coverage dispute, anything you **do not** say can—and likely will—be used against you in a court of law.

The Protection Afforded By the Fifth Amendment Is Not Implicated By An EUO

Standard personal property and casualty insurance policies require the insured to cooperate with his insurer in its investigation of his claim. This duty to cooperate may include the duty to submit to an EUO. The duty to cooperate—including submission to an EUO—is, therefore, a contractual obligation that exists solely because of the private contractual relationship between the insurer and the insured.

Because submission to an EUO is a contractual obligation, the Fifth Amendment privilege—the "right to remain silent"—does not apply in the

context of an EUO; thus, invocation of this right will not excuse the insured from his duty to cooperate. As the California Supreme Court explained in the seminal case of *Hickman v. London Assurance Corporation*, 195 P. 45, 49 (Cal. 1920), "the compulsion secured against by the constitution is a compulsion exercised by the state in its sovereign capacity in some manner known to the law." *Id.* However, the Fifth Amendment

privilege does not apply to "a private examination arising out of a contractual relationship" and existing "purely by virtue of a contract between the parties." *Id.* Therefore, an insured may not cloak himself in the protection of the Fifth Amendment during his EUO and yet still demand coverage. See, e.g., *Metlife Auto & Home v. Cunningham*, 797 N.E.2d 18, 22 (Mass. App. Ct. 2003) *continued on page 2*

Duty to Defend Faulty Workmanship Claims Under a CGL Policy: *Indalex, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 2013 PA Super 311, 83 A.3d 418, 2013 WL 6237312 (Pa. Super. 2013).

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Introduction

A recent 2013 Superior Court decision calls into question Pennsylvania's jurisprudence established by the Supreme Court less than a decade ago which relieved commercial general liability ("CGL") insurers of the burden to defend and indemnify insured contractors from faulty construction

workmanship contract claims. Prior to 2006, complaints alleging claims of "faulty workmanship" or "construction defect" against an insured contractor or subcontractor often required the insurer to at least defend, if not outright indemnify, the claim, even though the law and most CGL policies exclude *continued on page 4*

On The Inside

- Practical Ramifications of Supreme Court Determination Involving Latent Manifestation of Occupational Diseases Under the Pennsylvania Workers' Compensation Act 10
- Pennsylvania Employment Law Update 13
- Pennsylvania Workers' Compensation Update 15

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Truth or Consequences

continued from page 1

(holding that the insured’s “assertion of rights under the Fifth Amendment to the United States Constitution . . . afforded him no sanctuary from his obligation to cooperate [with his insurance company], for it is not by the [Government] or by [MetLife] that [Cunningham] is compelled to . . . furnish evidence against himself, but by his own contractual undertaking.”)

Thus, an insured’s Fifth Amendment “right to remain silent” does not necessarily extend to an EUO taken pursuant to the terms of the insured’s policy.

Invoking The Fifth Amendment Privilege Against Self-Incrimination During An EUO May Constitute Non-Cooperation

An insurer’s investigation into whether a loss or claim comes within the scope of the policy’s coverage can often touch on or reveal criminal activity. For example, while a homeowner’s insurer is investigating a suspicious fire loss, local police may also be conducting a criminal investigation of the homeowner for arson for the same fire. In such a circumstance, the insurer has a right to conduct an EUO as part of its investigation to determine whether the fire was intentional or accidental. The insured, on the other hand, has a right to avoid giving sworn testimony implicating him criminally in arson. Pennsylvania courts have held that although the insured is certainly within

his rights under the Fifth Amendment to remain silent during an EUO conducted by the insurer, his silence may have consequences: specifically, a denial of coverage.

For example, in *Aetna Casualty & Surety Company v. State Farm Mutual Automobile Insurance Company*, 771 F. Supp. 704 (W.D. Pa. 1991), the insured refused to give a statement to State Farm regarding a motor vehicle accident in which she was involved. She did so on the basis of her Fifth Amendment right to remain silent in light of criminal charges pending against her. *Id.* at 706. Following the insured’s refusal to give a statement, a civil action was filed against State Farm’s insured by the party injured in the accident. *Id.* State Farm denied a defense and indemnity for the insured on the grounds that she failed to cooperate with State Farm’s investigation by not appearing for the EUO. *Id.* The court upheld State Farm’s coverage denial, and it rejected the insured’s “argument that [her] Fifth Amendment privilege excuses her breach of the contract as a matter of law.” *Id.* at 707-08. In so holding, the court provided a word of caution for an insured invoking his Fifth Amendment right to avoid questioning in an EUO: “A person may not be penalized for asserting the Fifth Amendment privilege against self incrimination, but that does not mean that if a person refuses to make a statement in a civil proceeding that the failure to provide evidence may not have adverse consequences.” *Id.* at 707.

Similarly, in *Bogatin v. Federal*

Insurance Company, 2000 U.S. Dist. LEXIS 8632 (E.D. Pa. June 21, 2000), various former officers and directors of Federal’s insured—including the plaintiff—made claims for coverage in connection with lawsuits and criminal actions filed against them. *Id.* at *63. However, Bogatin asserted his Fifth Amendment right and refused to submit to interviews by Federal in connection with its coverage investigation. *Id.* His failure to do so “prevented [Federal] from having as complete an understanding as it would like to have had about the claims it was asked to cover.” *Id.* at *64. In upholding Federal’s denial of coverage for lack of cooperation, the court agreed with Federal, and held that “a Fifth Amendment privilege against self-incrimination does not trump an insurance policy’s duty to cooperate requirement.” *Id.* at **78-79 (*citing Aetna*, 771 F. Supp. at 708). The court thus found that Bogatin “breached his duty to cooperate by failing to disclose information and documents reasonably requested by defendant and by refusing to submit to an interview,” and that his failure to do so “substantially prejudiced [Federal’s] ability to complete its investigation.” *Id.* at **78-79.

Thus, under Pennsylvania law, the insured’s refusal to testify at an EUO may constitute a violation of the insured’s contractual duty to cooperate, even if that refusal is based on the Fifth Amendment privilege against self-incrimination. In such a case, Pennsylvania courts have upheld the insurer’s denial or avoidance of coverage based on the insured’s breach of the policy.

Courts Of Other States Agree That The Fifth Amendment Privilege Does Not Trump The Duty To Cooperate

The *Aetna* and *Bogatin* decisions are consistent with the position taken by state and federal courts around the country: that is, that an insured may breach his duty to cooperate with his insurer’s investigation when he asserts his Fifth Amendment privilege to avoid testifying at an EUO.

Courts have held that a pending criminal investigation against the insured does not release him from his duty to submit to an EUO. For example, *Taricani*

v. Nationwide Mutual Insurance Company, 822 A.2d 341 (Conn. Ct. App. 2003), illustrates that the hypothetical arson facts presented above are not so hypothetical at all. In *Taricani*, the insurer refused to provide coverage to its insureds in connection with a fire loss, on the grounds that the insureds failed to cooperate with the company's investigation. *Id.* at 341-43. The insureds argued that because they were under investigation for arson at the time the insurer sought the EUO, they were entitled to avoid testifying at the EUO pursuant to the Fifth Amendment. *Id.* at 343. The court disagreed with the insureds' contention that the insurer improperly denied coverage, and held that the insureds had breached a material condition of their policy by not cooperating with the request for an EUO. *Id.* at 344-45.

Likewise, even where charges have been filed against the insured, he is still required to submit to, and fully cooperate with, an EUO. In *Miller v. Augusta Mutual Insurance Company*, 335 F. Supp. 2d 727 (W.D. Va. 2004), for example, the insured's son witnessed a fatal shooting that occurred in his parents' home. *Id.* at 729. He was subsequently charged with second degree murder and other charges in connection with the shooting. *Id.* at 730. When the family of the victim filed a wrongful death action against the insured's son, Augusta Mutual conducted an investigation into whether the wrongful death action was covered under his parents' homeowners' policy. The insured's son refused to give a statement under oath in connection with that investigation because of the pending criminal charges and his Fifth Amendment rights. *Id.* The court held that Augusta Mutual properly denied a defense and indemnity to the insured's son in connection with the wrongful death action, as his failure to provide a statement under oath to August Mutual violated the policy's requirement that the insured "help us ... to secure and give evidence." *Id.* at 733. According to the court, "An insured 'may avoid incriminating [himself] by refusing to submit to relevant requests made by [the insurer] under the policy ... although to do so may ultimately cost

[him] insurance coverage.'" *Id.* at 731. Similarly, in *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944 (11th Cir. 1990), the court held that the insured's policy required him to give a sworn statement when requested by his insurer, even though the insured had been indicted on the same day that the insurer requested the EUO. *Id.* at 945-46. According to the court, "[Pervis] is not compelled to incriminate himself. He is, however, bound by the provisions to which he stipulated when he signed the insurance agreement." *Id.* at 947-48.

Courts have also held that an insurer is not obligated to delay conducting an EUO until the criminal charges against the insured have been resolved. For example, in *Saucier v. U.S. Fidelity & Guaranty Company*, 765 F. Supp. 334 (S.D. Miss. 1991), the insured filed a declaratory judgment action against her insurer in connection with a fire loss. *Id.* at 334-35. The insured sought a declaration that she was not required to submit to an EUO until such time as the arson charges against her relating to the fire were resolved. *Id.* at 335. In granting summary judgment in favor of the defendant insurer, the court held that "a policy is rendered void where an insured either fails to submit to an examination under oath or refuses to answer material questions during an examination under oath." *Id.* at 336. Citing *Hickman*, the court held that the plaintiff's failure to submit to an EUO was not legally excused, as "the unfortunate fact of Saucier's indictment did not work to relieve her of her contractual obligations" to cooperate with her insurer's investigation. *Id.*; see also *Mello v. Hingham Mut. Fire Ins. Co.*, 656 N.E.2d 1247, 1249-51 (Mass. 1995) (same).

Thus, as the New Jersey Superior Court has noted, "The weight of authority would seem to be that the Fifth Amendment privilege cannot be invoked in the context of a contractual examination under oath to avoid answering material questions." *State Farm Indem. Co. v. Warrington*, 350 N.J. Super. 379, 384 (App. Div. 2002).

The Insured's Silence Can and Will Be Used Against Him

The EUO can be one of the most useful tools in insurance lawyer's and investigator's arsenal. It can allow the insurer to quickly and directly ascertain facts regarding the claimed loss, including whether the claimed loss is potentially excluded from coverage. When an insured refuses to give an EUO based on his invocation of his rights under the Fifth Amendment, it is incumbent on the insurer to take steps to preserve a coverage defense and/or the basis for a denial of coverage even in the face of the insured's refusal to testify. In order to do so, counsel for the insurer would be wise to take the following steps based on the lessons of the cases discussed above:

1. *Advise the insured early and often of his duty to cooperate and the consequences of his silence.* Emphasize to the insured from the outset that he has a duty to give an EUO, and that the failure to do so, even if based on the Fifth Amendment privilege, may void coverage. This warning should be repeated on the record if the refusal to testify occurs during the EUO.
2. *Make reasonable efforts to secure the EUO.* Diligence in attempting to obtain the information necessary to ascertain coverage will work to the benefit of the insurer if the insurer subsequently invokes the insured's lack of cooperation as a defense.
3. *Pending criminal charges should not delay the insurer's investigation.* The insurer need not wait to obtain the EUO until any pending criminal charges against the insured related to the subject loss are resolved. As the insurer has an obligation under Pennsylvania law to promptly investigate and handle claims, it should not delay its investigation for a potentially lengthy period of time in order to allow the insured to protect his own interests.
4. *Ask questions that are direct and material to the loss.* Under Pennsylvania law, the insured's failure to cooperate with his insurer pursuant to the terms of his policy

continued on page 4

Truth or Consequences

continued from page 3

may void coverage if this failure to cooperate resulted in “substantial prejudice” to the insurer. *See, e.g., Bogatin*, 2000 U.S. Dist. LEXIS 8632, at *79; *Aetna*, 771 F. Supp. at 707. In order to show prejudice, the party conducting the EUO should therefore ask all questions material and necessary to the insurer’s determination of coverage—even if the response to each is an assertion of the right to remain silent—in order to make a complete record

of the insured’s non-cooperation. Indeed, the insurer or its counsel would be wise to draw out this assertion of privilege as to the ultimate questions bearing on coverage, such as “Did you intentionally hit the pedestrian?”; “Did you deliberately drive your car into the building?”; “Did you intentionally set your house on fire?”; or “Did you deliberately flood your basement?”

Conclusion

The Fifth Amendment privilege against self-incrimination does not trump an

insured’s contractual duty under his insurance policy to cooperate with his insurer’s investigation of a claim. Although the insured may properly invoke his Fifth Amendment privilege to avoid answering questions during an EUO that might incriminate him, this constitutional protection does not prevent adverse consequences for the insured for his failure to testify, including a denial of coverage. Simply put, the insured’s silence during an EUO can, and likely will, be used against him by his insurer.



Duty to Defend

continued from page 1

coverage for claims by a customer against a contractor for breach of a contract or warranties. *See, e.g., Freestone v. New England Log Home, Inc.*, 819 A.2d 550, 553 (Pa. Super. 2003) (holding allegedly poor advice of a log home kit company to customers regarding the caulking of a log home could not be construed as an “accident” or “occurrence” under the CGL policy).

However, the Supreme Court of Pennsylvania in *Kvaerner v. Commercial Union Ins. Co.*, 589 Pa. 317, (2006) made clear that coverage is not triggered by a faulty workmanship claim. Such contractually based claims are not “occurrences” qualifying as “bodily injury” or “property damage” under the terms and conditions of a typical CGL policy. *Id.* at 335-36 (2006). Nevertheless, the Superior Court of Pennsylvania recently issued *Indalex, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 83 A.3d 418 (Pa. Super. 2013), a decision carving out an exception which may force CGL insurers to defend contractors when boilerplate negligence claims are included in a complaint. The Superior Court’s exception, if allowed to stand, could have the effect of completely devouring the rule that insurers are not guarantors of the quality of the work of insured contractors, at least with respect to the duty to defend the contractors.

Development of the Law and Precedents

A. Kvaerner v. Commercial Union Insurance Company (“Kvaerner”)

In this landmark case, the Supreme Court of Pennsylvania held that faulty workmanship claims do not establish an “occurrence” under insurance policies because such claims do not present the degree of fortuity contemplated by the ordinary or judicially constructed definitions of “accident.”

Kvaerner Metals Division of U.S., Inc. (“Kvaerner”) was an insured builder of coke oven batteries for use in commercial ovens. Kvaerner faced underlying breach of contract and breach of warranty claims alleging that its product damaged the ovens in the facilities. *Id.* at 321-322. The insurance carrier would not defend or indemnify when it concluded the claims did not fall within the coverage provisions of the CGL policies because, *inter alia*, the incidents did not constitute an occurrence. *Id.* at 323-24.

Kvaerner reinforced the overarching rule that an insurer’s duties to defend and indemnify the insured depend on a third party’s complaint. More specifically, the key is whether the factual averments and language of the complaint against the insured defendant trigger coverage. *Kvaerner*, 589 Pa. 329-30 (internal citations omitted).

The key *Kvaerner* determination is whether the underlying damage was caused by an “accident” so as to

constitute an “occurrence” under the policy. *Id.* at 332. An “accident” involves something “unexpected,” which implies a degree of fortuity not present in a claim for faulty workmanship. *Id.* at 333, 335-36. The *Kvaerner* court was unwilling to consider faulty workmanship as an “occurrence,” lest it turned an insurance policy into a performance bond insuring quality construction. *Id.* at 336.

B. Millers Capital Insurance Co. v. Gambone Brothers Development Co. (“Gambone”)

The Superior Court of Pennsylvania encountered a similar fact pattern and issue in 2007 and followed the precedent set in *Kvaerner* by holding that an “occurrence” refers to “accidental” happenings and not faulty workmanship allegations. *Millers Capital Insurance Co. v. Gambone Brothers Development Co.*, 941 A.2d 706, 718 (Pa. Super. 2007).

Gambone involved a real estate firm (“Gambone”) that had planned, designed, and built a home development. *Id.* at 708. Two sets of complaints were brought against Gambone alleging faulty workmanship. *Id.* at 714. The first alleged water leaks in homes which were the result of “construction defects and product failures.” The second involved the use of defective stucco in building the houses. *Id.* at 709. The claims were for breach of contract, breach of warranty, negligence, strict liability,

continued on page 6



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Duty to Defend

continued from page 4

fraud and misrepresentation, negligent misrepresentation, and violations of the Unfair Trade Practice and Consumer Protection Law. *Id.* at 709-10. Millers Capital Insurance Co.'s ("Millers") CGL policies covered bodily injury and property damage caused by an "occurrence," which was defined by the policy as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." *Gambone*, 941 A.2d at 711. The insured attempted to distinguish this fact pattern from *Kvaerner* by arguing that the claims were not merely alleging faulty workmanship, but also accidental and ancillary damage caused by the water leaks to non-defective property within the home interiors. *Id.* at 713. The court found the claims were all based on faulty workmanship. Also, damage from rainfall seeping through a faulty home exterior is not considered sufficiently fortuitous to constitute an occurrence or accident triggering coverage. *Id.* at 713-14.

C. Erie Insurance Exchange v. Abbott Furnace Company ("Abbott")

The Superior Court of Pennsylvania applied the "gist of the action" doctrine to an underlying complaint involving a similar fact pattern, relieving a CGL insurer from the burden of providing coverage. *Erie Insurance Exchange v. Abbott Furnace Company*, 972 A.2d 1232 (Pa. Super. 2009).

Abbott involved an annealing furnace manufacturer who had contractually entered into an agreement with a commercial magnetic manufacturer to provide annealing furnaces. The annealing furnaces were allegedly defective and became damaged. The furnaces also damaged the customer's own products (i.e. laminations). *Id.* at 1234-35. The legal theories for the underlying litigation included breach of contract, breach of warranty, breach of duty of good faith and fair dealing, and fraud. *Id.*

The insurer, Erie Insurance Exchange ("Erie"), argued there was no occurrence because all of the claims in the underlying litigation stemmed from

the alleged breach of contract. *Id.* at 1237. Therefore, there was no trigger of the policy to defend/indemnify the manufacturer. The manufacturer countered that the underlying complaint also alleged a negligence claim in addition to faulty workmanship and damage to the furnace. *Id.* at 1237.

The *Abbott* court starts from the *Kvaerner* proposition that contractual claims of faulty workmanship do not constitute the active malfunction needed to trigger coverage under a CGL policy. *Abbott*, 972 A.2d at 1238. The key was whether the complaint pled a negligence claim alleging the furnace actively malfunctioned and caused destruction and damage to the underlying plaintiff's personal property (i.e. laminations). If so, then the claims would be covered under the general liability policy. *Id.* at 1237-38.

The "gist of the action" doctrine is at play when making this determination. "When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts must examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort." *Id.* at 1238 (citing *Mfrs.' Ass'n Ins. Co. v. L.B. Smith, Inc.*, 831 A.2d 1178, 1182 (Pa. Super. 2003)). It is important to look at the nature of the action as a whole. The difference between a breach of contract claim and a tort claim is that the former arises out of a breach of duties imposed upon individuals by a contract, while the latter arises out of breach of duties imposed by law as a matter of social policy. *Id.* (citing *Reardon v. Allegheny College*, 926 A.2d 477, 486-87 (Pa. Super. 2007)). Practically, the doctrine precludes recasting ordinary breach of contract claims into tort claims. *Abbott*, 972 A.2d at 1238 (internal citations omitted). The gist of the action doctrine precludes a tort claim when said claim

(1) [arises] solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success

of the tort claim is dependent on the success of the breach of contract claim.

Reardon v. Allegheny College, 926 A.2d 477, 486-87 (Pa. Super. 2007) (internal citations omitted).

The court found that the negligence claim was not adequately pled in the underlying complaint. The "gist" of the action was not in tort and was properly limited to a contract claim because the parties' obligations arose from an agreement rather than from larger social policies. *Id.* at 1239.

With these three cases as background, the Pennsylvania Superior Court recently again confronted this issue.

Indalex, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA, 2013 PA Super 311, 83 A.3d 418 (Pa. Super. 2013).

Facts and Procedural History of *Indalex*

Appellants Indalex Inc. and Harland Clarke Holdings Corp. (collectively "Insured") filed an Allegheny County Court of Common Pleas action against Appellee National Union Fire Insurance Co. of Pittsburgh, PA ("NUFI"). *Indalex*, 83 A.3d at 419. Appellants sought indemnification under a commercial umbrella policy for multiple out-of-state, underlying lawsuits filed by homeowners and property owners claiming that Insured's windows and doors were defectively designed or manufactured, resulting in water leakage. *Id.* The water leakage allegedly caused physical damage (e.g. mold, cracked walls) and personal injuries. *Id.* at 419-420. The out-of-state claims against Indalex were based on negligence, breach of warranty, strict liability, and breach of contract. *Id.* at 420.

Appellee NUFU did not believe it was required to defend because there was no "occurrence" triggering coverage under Pennsylvania law. *Id.* There were a few key clauses in the policy which were relevant for the purposes of resolving this issue. First, NUFU was obligated to provide coverage for "liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily

Injury, Property Damage, Personal Injury, or Advertising Injury that takes place during [the] Policy Period and is caused by an *occurrence* happening anywhere in the world.” *Indalex*, 83 A.3d at 421. (emphasis added). The major dispute was over the meaning of “occurrence” in the policy. The policy has two definitions of “occurrence”:

1. As respects Bodily Injury or Property Damage, an accident, including continuous or repeated exposure to conditions, which results in Bodily Injury or Property Damage *neither expected nor intended from the standpoint of the Insured*. All such exposure to substantially the same general conditions shall be considered as arising out of one Occurrence;
2. As respects Personal Injury, an offense arising out of your business that results in Personal Injury. All damages that arise from the same or related injurious material or act shall be considered as arising out of one Occurrence, regardless of the frequency or repetition thereof, the number and kind of media used and the number of claimants[.]

Id. at 421-22 (emphasis added).

The policy also provided a separate \$25 million aggregate limit of liability for a “Products-Completed Operations Hazard,” including “all Bodily Injury and Property Damage occurring away from premises you own or rent and arising out of Your Product or Work Scope.” *Id.* at 421. Further, “Property damage *in your product*” is excluded. *Id.* (emphasis original). The definition of “Your Product” includes all of the insured’s “goods or products” and related “[w]arranties or representations . . . with respect to the fitness, quality, durability, performance or use.” *Id.* Covered property damage includes “[p]hysical injury to tangible property, including all resulting loss of use” and “[l]oss of use of tangible property that is not physically injured.” *Indalex*, 83 A.3d at 421.

The trial court agreed that *Kvaerner* barred coverage and granted summary judgment to NUFI. *Id.* at 422. The lower court determined that the language in NUFI’s umbrella policy was almost

identical to the policy language at issue in *Kvaerner*. *Id.* at 424.

On appeal, the main issue was whether NUFI had an obligation to defend or indemnify under the terms and conditions of the commercial umbrella policy issued by NUFI. There were three interrelated sub-issues that needed to be addressed in order to resolve the main question.

- 1) Was it proper to characterize the underlying lawsuits as involving “faulty workmanship” and thus not an “occurrence” as defined in the policy?
- 2) Did the underlying lawsuits plead tort-based products liability claims involving property damage other than the doors and windows, therefore deserving coverage under the policy when read as a whole?
- 3) Did the trial court improperly rely on Pennsylvania’s “gist of the action” doctrine to ignore legally viable tort claims against product manufacturers, triggering a duty to defend? *Id.* at 420.

Discussion

The Superior Court reversed the trial court and concluded there was an “occurrence” requiring NUFI to defend the Insured. First, the court went about distinguishing *Indalex* from *Kvaerner*, *Gambone*, and *Abbott*, *supra*.

In *Gambone*, the “product” itself was the home and the issue was framed as faulty workmanship in applying stucco and other items. Even though *Indalex*, like *Gambone*, involved water leaks, the product at issue in *Indalex* was limited to the windows and doors only. Therefore, the damage to the walls of the house did not involve *Indalex*’s product. *Indalex*, 83 A.3d at 420.

The court distinguished the *Kvaerner* holding as being limited to situations “where the underlying claims were for breach of contract and breach of warranty, and the only damages were to the [insured’s] work product.” *Id.* The language in the NUFI CGL policy was distinguishable with the CGL policy language in *Kvaerner*. The *Indalex* CGL policy defined an “occurrence” as an accident—“including continuous or repeated exposure to neither conditions—

which was *expected nor intended from the standpoint of the Insured*.” *Id.* at 424-25 (emphasis in original). *Kvaerner* did not contain subjectivity in its definition of occurrence. Moreover, a key term of the ordinary definition of “accident” is unexpected. From the Insured’s subjective viewpoint, the alleged damages involving mold-related health issues were arguably unexpected. Therefore, the court highlighted this as an important distinguishing feature from *Kvaerner*.

The *Indalex* opinion stresses that an insurer is obligated to defend its insured whenever an injured party’s complaint may potentially fall within the policy’s coverage. *Id.* (citing *American States Ins. Co. v. Maryland Casualty Company*, 628 A.2d 880, 887 (Pa. Super. 1993)). The *Indalex* court construed the NUFI policy in such a way as to give effect to all of its language and concluded NUFI was obligated to defend appellants. *Indalex*, 83 A.3d at 425. The claims in the underlying complaint were based on damages to person or property (i.e. mold and cracked walls) other than Insured’s doors and windows.

The court also focused on distinguishing its previous decision in *Abbott* in which the court applied the “gist of the action” doctrine in reaching its decision. The court did so by stating that in *Abbott* the “gist of the action” doctrine was applicable because the negligence claim was not adequately pled in the underlying complaint. *Id.* The court in this case rejected preclusion on the “gist of the action” doctrine purportedly because the doctrine has not been adopted by the Supreme Court of Pennsylvania in an insurance coverage context. Therefore, the Superior Court chose not to apply the doctrine to bar the negligence claims. *Id.* However, multiple federal opinions have applied the doctrine when interpreting Pennsylvania law on similar issues. *See: Meridian Mut. Ins. Co. v. James Gilligan Builders*, 2009 WL 1704474 (E.D. Pa. June 18, 2009) (holding that under the “gist of the action” doctrine, a contractually based claim against a home-improvement contractor could not be recast as a tort claim for the purposes of establishing an occurrence

continued on page 8

Duty to Defend

continued from page 7

and triggering coverage under a policy); see, also, *Transportation Ins. Co. v. C.F. Bordo*, 2009 U.S. Dist. LEXIS 27266 (M.D. Pa., March 30, 2009).

Since the duty to defend is broader than the duty to indemnify and applicable for a potentially covered claim, *Indalex* found the “gist of the action” doctrine would be inconsistent if applied in this context. *Indalex*, 83 A.3d at 426. The court distinguished the *Abbott* application of the doctrine. The alleged duties breached in *Abbott* arose from an express underlying contractual agreement rather than from tort duties imposed by public policy. *Id.* at 426, n 3. The court also noted that when tort claims are among a litany of different causes of action, they must be considered. *Id.* (citing *National Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.*, 2011 WL 1327435 (W.D. Pa. 2011) (insurer must defend a multiple cause of action complaint until the claim(s) excluded from the scope of the policy can be isolated)). Based on these reasons, *Indalex* rejected application of the doctrine.

In sum, because the underlying claims alleged defective products resulting in personal injury and property loss not involving Insured’s products, there was an “occurrence” triggering coverage under the commercial umbrella policy.

Analysis and Conclusion

Indalex certainly bucked the trend in Pennsylvania case law on the issue of whether commercial general liability

insurers are relieved from defending and indemnifying contractually based construction defect claims pled as negligence allegations. *Kvaerner* is still the controlling precedent on the issue. However, *Indalex* has carved out some big exceptions worth noting.

One important distinction is policy language defining occurrence in a way that relies on the insured’s subjective expectations or intentions. *Indalex* found this distinction critical because unexpected adverse happenings are more likely to be “accidental” when applying an ordinary definition to the term. Any CGL policies containing similar language may subject the insurer to liability under a similar fact pattern. Notably, *Gambone* involved a similar fact pattern with home water damage, but the *Indalex* court read the case as viewing the whole house as the “product” because the insured was building home developments. In this case, the product was narrowly construed to be just the doors and windows of the house. The damage, moldy walls, was “other property.” This is an important distinction because the property alleged to be damaged in an underlying complaint becomes important in determining if coverage is triggered.

The *Indalex* court makes a significant departure from its previous holding in *Abbott* in applying the gist of the action doctrine. While there is an attempt to distinguish *Abbott* on the adequacy of the negligence pleading in that case, *Indalex* also suggests the gist of the action doctrine is not applicable in determining if a duty to defend is triggered as a matter of law. The court was persuaded by *National*

Fire Ins. Co., *supra*, that a trial court’s presiding over the underlying action, should examine and apply the gist of the action doctrine to specific claims in the underlying complaint. The application is fact-specific and dependant on the law of the underlying jurisdiction. This case-by-case approach creates uncertainty for CGL insurers moving forward.

Indalex did not disturb the case law on whether a duty to defend or indemnify arises for underlying claims of faulty workmanship and damage to the manufacturer’s own product. *Kvaerner* was buttressed by *Indalex* on this point regardless of how a claim is dressed. However, if the property allegedly damaged is not that of the insured’s, then *Indalex* has seemingly opened the door to trigger coverage under a CGL policy with underlying contractual causes of action dressed as negligence claims. The split within the Superior Court may require the Supreme Court of Pennsylvania to clarify the issue in the future.

Until the Supreme Court addresses the issue, insurers must be aware that a well plead negligence claim may at least trigger the duty to defend a contractor in a faulty workmanship/ construction defect case. And if the carrier decides that the negligence claim is not well pled and there is diversity of citizenship, the carrier should consider moving forth with a declaratory judgment action in federal court and avail itself of the use of the “gist of the action” doctrine.





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PRACTICAL RAMIFICATIONS OF SUPREME COURT DETERMINATION INVOLVING LATENT MANIFESTATION OF OCCUPATIONAL DISEASES UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT

By Anthony Natale III, Esquire, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, PA

INTRODUCTION

The Supreme Court of Pennsylvania recently published a decision removing the exclusivity provision of the Pennsylvania Workers' Compensation Act (hereinafter "Act") as it relates to latent manifestation¹ occupational disease cases. In *Tooley v. AK Steel Corporation*², the court held that such claims manifesting latently do not fall within the purview of the Act and therefore the exclusivity provision does not apply to preclude an injured employee from filing a common law action against the employer. This decision has removed the exclusivity protection Pennsylvania employers enjoyed regarding occupational disease cases, and has placed employers directly in the cross hairs of major direct law suits. Moreover, in the wake of this decision, there is ample confusion as to the handling of latent manifesting occupational disease cases, insurance issues surrounding these claims and protective measures that can be employed to aid employers in the litigation process.

BACKGROUND: OCCUPATIONAL DISEASE LAW UNDER THE ACT

In order to understand the impact of *Tooley*, a rudimentary foundation in prosecuting occupational disease claims is necessary. Importantly, there are two ways to litigate an occupational disease claim under the Act. First, our Supreme Court has held that an "injury" as contemplated by the Act includes any and all diseases caused by employment and related thereto – the so-called 301(c)(1) claims.³ This section of the Act itself defines "injury" and "personal injury" to mean an injury to an employee, regardless of previous physical condition, arising in the course of employment and related thereto.⁴ One can see that occupational injuries can fall within this section of the Act rather easily.

Second, the Act defines injury arising in the course and scope of employment as including all "occupational diseases" as defined and enumerated by the Act – the so called 301(c)(2) claim.⁵ Under this section of the Act, occupational diseases as enumerated in Section 108 of the Act are included in the definition of "injury." Importantly, Section 108(n) of the Act is a "catch-all" provision that allows non-enumerated diseases to be included as an "occupational disease" if certain criteria regarding the disease are met.

A question arises as to which section of the Act an occupational disease claim should be prosecuted. Clearly, most claimant attorneys will prosecute an occupational disease claim under both sections of the Act to see what sticks. Suffice it to say, there are differing burdens of proof involved for each section. Under a Section 301(c)(1) claim, the claimant must prove by a preponderance of the evidence that an occupational disease injury was sustained during the course and scope of employment and such disease was related to that employment. If death is claimed as a cause for compensation, the death must occur within 300 weeks of the date of injury. Further, if the claim is pursued under this section, notice of the injury must be given within 120 days of the date of injury. However, the Act further holds that this notice may be extended in cases where a claimant does not know the nature of the injury or its relationship to employment. In that scenario, the 120-day notice period does not begin to run until the claimant knows, or by the exercise of reasonable diligence should know, of the existence of the injury and possible relationship to employment – the aptly named "discovery rule."⁶ Finally, such a claim filed under this section must be filed within three years of the date of injury.⁷ Note, there is no discovery rule applied

to the statute of limitations period for occupational disease claims filed under 301(c)(1).

Conversely, an occupational disease claim prosecuted under 301(c)(2) gives additional benefits to the claimant regarding burden of proof, notice and statute of limitation periods, and death claims. Once an enumerated disease is established, a claimant will enjoy a presumption that the disease arose out of and in the course of employment. However, disability or death arising from the occupational disease must occur within 300 weeks from the claimant's last date of employment in an occupation or industry to which there was exposure to the hazards of such a disease. Notice of the injury under this section is contemplated to run within 120 days of a claimant having (a) knowledge; (b) of a disability; (c) in existence; (d) resulting from an occupational disease; (e) as well as having a possible relationship to employment.⁸ Likewise, the three-year statute of limitations begins to run as of the date the claimant is disabled as a result of the occupational disease. Regarding death claims arising from a 301(c)(2) occupational injury, as long as the claimant was disabled within 300 weeks of the last exposure to a hazard, the subsequent death as a result of the disease is also compensable even if the death is outside the 300 weeks.⁹

This brief synopsis of the occupational disease sections of the Act gives insight into how claimant attorneys may formulate claims for prosecution. Clearly, a 301(c)(2) claim gives the claimant more advantages in the litigation process. However, as noted above, there is nothing to prevent a claimant from pursuing claims under both sections of the Act concomitantly.

THE TOOHEY HOLDING

The decedents involved in *Tooev* both worked and were exposed to the hazards of the asbestos injury for decades. Mr. Tooev worked from 1964 through 1982 as an asbestos salesman. Mr. Landis worked and was exposed to asbestos through employment from 1946 through 1992. Both men contracted mesothelioma in 2007 and died a short time later. Their respective cases were filed not as workers' compensation claims but as actions directly against the manufacturers of asbestos and their respective employers.

Their cases were consolidated before the Supreme Court on the issue of whether the exclusivity provision contained in the Pennsylvania Workers' Compensation Act¹⁰ barred common law suits directly against the employers.

Three issues were presented to the Supreme Court, with the first two framing arguments that the 300-week provision contained in Section 301(c)(2) violated the state and federal constitutions. Those issues were not addressed by the court.

Instead, the court addressed the third issue before them in keeping with the long held concept that cases should be adjudicated on non-constitutional bases, if possible. Thus, the main issue to be addressed was whether "injury" as defined in Section 301(c)(2) excluded occupational diseases that manifest more than 300 weeks after the last exposure to the hazard at issue and therefore do not invoke the exclusivity provision of the Act. The Supreme Court found the definition of injury under Section 301(c)(2) to exclude latent manifesting injuries and thus exclusivity could not be invoked to insulate the employers from common law suits.

In reaching this decision, there was substantial analysis as to grammatical ambiguities that existed in the sections of the Act at issue. In fact, a large portion of the decision dealt with what the word "it" meant in the second sentence of Section 301(c)(2).¹¹ The court found that the controversial word "it" meant "the Act" as opposed to the "basis for compensation." Thus, it was held that the Act only applies to injuries that

manifest within the 300-week window and nothing more. This analysis of restrictive versus non-restrictive clauses overshadowed any real exploration of the intent of the framers of the Act or the *quid pro quo* between employers and employees that formed the basis of the Act itself.

As such, the holding by the Supreme Court now allows common law suits against employers when occupational injuries manifest outside of the 300-week period noted within Section 301(c)(2) of the Act since the exclusivity provision of the Act and the Act itself would not apply to those injuries.

OBSERVATIONS FOR EMPLOYERS

Manifestation of Disability is a Defense

In light of this decision, many employers now have unexpected exposure to direct laws suits for alleged work-related occupational diseases that manifest outside of the 300-week window discussed above. The first question that needs to be dealt with is how to define the word "manifest." By its very terms, Section 301(c)(2) holds that a claimant's disability or death must occur within 300 weeks of last exposure to the hazard at issue to be compensable. Considering the Supreme Court's determination, the Act then would only apply to those occupational disease injuries within the gamut of Section 301(c)(2) wherein disability or death occur within those 300 weeks. Therefore, it is postulated that the word "manifest" must mean that the claimant was disabled or died within the 300 weeks at issue as a result of the claimed occupational disease.

There is a problem though – the explicit language of this section of the Act uses the terms "disability" and "compensable disability" somewhat interchangeably. While some may argue that manifestation arises when a claimant is disabled as a result of an occupational disease, others will take the position that manifestation occurs only after a disability is adjudicated as "compensable." It is within this rather confusing framework that an employer must take a stand.

Those employers who take the position that manifestation occurs when the claimant is disabled as a result of the

occupational disease (regardless of whether a claim petition is filed and adjudicated) are attempting to bind the claimant to the Act and eliminate a common law tort action against them. This is the first and primary defense that employers can use to possibly defeat a common-law suit against them. Employers facing these suits may be fooled by the fact that the now deceased claimant never filed a workers' compensation action alleging disability within the 300-week window. The issue is not whether the claimant filed a workers' compensation claim, but whether the claimant was disabled within the 300 weeks following the compensable exposure. It is submitted that if the claimant was indeed disabled during this critical time (regardless of whether a workers' compensation action was filed) the resulting claim falls under the purview of the Act and the exclusivity provision applies. After all, a claimant has a colorable workers' compensation claim under Section 301(c)(2) once he or she is disabled as a result of an occupational disease and has an understanding of a possible causal relationship to employment. Just because a claimant does not pursue the claim under the Act does not mean the disease has not manifested within the meaning of the Act. In other words, the *Tooev* holding cannot be used to file a claim directly against the employer because the claimant failed to perfect a claim during the 300 weeks post last hazardous exposure.

It appears that our Supreme Court is receptive to this type of analysis. The court has held in death claims falling outside the statute of repose arising out of Section 301(c)(2), that a claimant-decedent's "disability" within the 300-week window allowed claimant-widow to file for death benefits under Section 301(c)(2) outside of the 300-week window even though no lifetime claim for benefits was filed on the claimant-decedent's behalf.¹² The court reasoned that the claimant was disabled within the 300-week period and that triggered the extension of the death claim. The court did not differentiate between "disability" and "compensable disability," but instead

continued on page 12

Practical Ramifications

continued from page 11

held that even though no claim petition was filed, the medical evidence showed that the claimant was disabled within the 300-week period at issue. There was no requirement that the claimant-decedent file an action within the 300 weeks for lifetime benefits.

This holding must be contrasted with similar case scenarios where the court seems to indicate that a claim petition must be filed within the 300-week period at issue in order for a death outside of the 300-week period to be held compensable.¹³ These cases focus on the fact that the disability at issue must be “compensable” in order to meet the requirements of Section 301(c)(2). The court seems to state that compensability is synonymous with adjudicated disability.

This dichotomy in the case law leaves employers in a perplexing position. A question arises as to whether the court intended to allow a claimant to choose the forum for an occupational disease claim where death occurs outside of the 300-week statute of repose. More aptly put, if a claimant is disabled within the 300-week period at issue, but chooses not to file a claim petition, can the resulting death then escape the purview of the Act, per *Tooley*, and force the employer to face a common law tort claim? It is submitted that this result is absurd. If disability exists within the 300-week period and can be proven by the employer, then arguably the claim should remain under the purview of the Act regardless of whether the claimant instituted a claim petition. Still, claimants will likely point to the line of cases holding that compensable disability has not been established. Clearly, this is a legal skirmish waiting to happen.

Proving a claimant was disabled within the meaning of the Act within the 300-week period discussed above is not an easy task (especially if the claimant is dead) but is doable. Care should be taken to secure all medical treatment records available. Medical records describing an occupational disease which disabled a claimant within those critical 300 weeks could be proof positive of a compensable

claim under the Act and could therefore insulate employers from liability in a common law suit.

Insurance Concerns

At this point, it appears that the Supreme Court decision will be construed as retroactive and already many employers are being joined into pre-existing common law suits involving occupational diseases. With the piercing of the tort immunity shield, employers can be exposed to a proportional share of liability which some mass tort defendants may welcome. Unfortunately, the conduct of employers during a claimant-decedent’s period of employment can be now made an issue in these cases¹⁴ – a concept heretofore wholly foreign to employers who had enjoyed the exclusivity provision of the Act.

Since the court has found that latent manifestation of an the occupational disease mesothelioma is not considered within the definition of an “injury” within the Act, employers can no longer rely on traditional workers’ compensation insurance to cover their potential exposure. Employers now may be looking to Part B of the workers’ compensation insurance policy to protect this newly adjudicated exposure. This part of the policy is designed to cover employers for workplace injuries that are not contemplated by the workers’ compensation act. Sadly, the policy limits for this type of coverage are usually low and certainly may not cover an employer’s proportional share of liability in a common law occupational disease action. Employers probably will not have effective supplemental or umbrella coverage in place based on the extreme change in the law engendered by *Tooley*. Additionally, the triggering mechanism for Part B coverage may be tricky when attempting to correlate a latent manifesting occupational disease claim with last injurious exposure more than 20 years old. Employers must engage in a reassessment of appropriate insurance coverage in order to combat the propensity for common law verdicts in the occupational disease setting.

It is surmised that an employer’s commercial general liability policy will

be of no avail. These policies exclude injuries arising in the course and scope of employment. Arguments have already started regarding the court’s interpretation that the mesothelioma is not a work injury defined by the Act and therefore a general liability policy should recognize and trigger. With due respect, this argument lacks merit since the policy makes no distinction between injuries that are recognized by the Act or not recognized – arising in the course and scope of employment perfects the exclusion. Many of these policies may also have additional exclusion language regarding occupational diseases such as asbestos or asbestos-related diseases.

Ramifications to Other Sections of the Act

Even though the *Tooley* decision centered on a mesothelioma disease, the decision itself arguably applies to all occupational disease claims contemplated by Section 301(c)(2) of the Act. This means that employers can have exposure to direct tort actions for any enumerated disease that latently manifests. It is therefore imperative that employers be cognizant of any workplace exposure that results in disability during the period of compensability under the Act.

Questions have arisen as to the effect of the Supreme Court decision on non-occupational disease claims. It is submitted that claims outside the realm of Section 301(c)(2) are not subject to the piercing of exclusivity. This decision is designed to correct a perceived flaw in occupational disease cases where manifestation is outside of the 300-week statute of repose. Thus, the court would be hard-pressed to try to formulate a comparable decision as it relates to an injury under Section 301(c)(1) of the Act.

Proponents of the decision from the claimant bar have nonetheless begun to make parallel arguments to the 300-week statute of repose contained in Section 301(c)(1) of the Act¹⁵ regarding death claims. These proponents seek to have the word “it” in this section defined as “the Act” and argue that death claims outside of the 300-week statute of repose can pierce the exclusivity provision of the Act in much the same way as the

Tooev holding. It is submitted that this argument fails on its face since the injuries contemplated in Section 301(c) (1) are effectively covered by the Act regardless of whether a death claim can be perfected within 300 weeks. The statute of repose here does not eliminate a claimant's ability to sue for a cause of action but merely limits the extent of the action.

CONCLUSION

The Supreme Court holding in *Tooev* definitely changes the landscape of occupational disease claims from the employer perspective. It is submitted that employers must reassess their Part B coverage in light of this decision. Additionally, employers must be vigilant when it comes to determining whether

their employees' potential occupational disease claims have "manifested" in order to defend their interests and keep hold of the exclusivity shield.

ENDNOTES

¹Latent manifestation as used in this article pertains to manifestation of an occupational disease outside of the 300 week period prescribed by section 301 (c)(2) of the Act.

²Case No. 21 WAP 2011 (Pa. S. Ct. 11/22/13); 2013 Pa. LEXIS 2816

³*Pawlosky v. WCAB (Latrobe Brewing Co.)*, 525 A.2d 1204 (Pa. 1987).

⁴Section 301(c)(1) of the Act, 77 P.S. 411(1)

⁵Section 301(c)(2) of the Act, 77 P.S. 411(2)

⁶Section 311 of the Act, 77 P.S. 631.

⁷Section 315 of the Act, 77 P.S. 602.

⁸*Republic Steel Corp. v. WCAB (Zacek)*, 407 A.2d 117 (Pa. Commw. 1979).

⁹*Cable v. WCAB (Gulf Oil/Chevron USA, Inc.)*, 664 A.2d 1349 (Pa. 1995).

¹⁰Section 303(a) of the Act, 77 P.S. 481.

¹¹Section 301(c)(2) reads in part as follows:

Provided that whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to the hazards of such a disease. (Emphasis added).

¹²*City of Mckeesport v. WCAB (Miletti)*, 746 A.2d 87 (Pa. 2000).

¹³*Sporio v. WCAB (Songer Construction)*, 717 A.2d 525 (Pa. 1998).

¹⁴For example, negligence of an employer may be an issue as well as duty to act and/or employer's knowledge of hazard.

¹⁵Section 301(c)(1) states in part:

...and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such injury...and occurring within three hundred weeks after the injury.



PENNSYLVANIA EMPLOYMENT LAW UPDATE

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

The Third Circuit holds that an employee's violation of a return to work agreement requiring the employee to refrain from consuming alcohol did not violate the Americans with Disabilities Act.

Ostrowski v. Con-Way Freight, Inc., 2013 U.S. App. LEXIS 22091 (3d. Cir. 10/30/13)

The employee was employed as a driver/sales representative for a company, which was required to maintain strict drug and alcohol screening programs for its employees in accordance with the federal motor carrier safety regulations issued by the Department of Transportation. During his employment, the employee requested a leave of absence pursuant to the Family and Medical Leave Act to seek treatment for alcoholism. The employee's request was granted, and he was not disciplined for seeking treatment. However, the employer required that the employee sign a "return to work agreement," which mandated that he remain "free of drugs and alcohol (on company time as well as off company time) for the duration of [his] employment." Within a month of executing the agreement,

the employee admitted himself into a center for treatment of alcohol abuse after he suffered a relapse. Based upon the employee's violation of the return to work agreement, the employer terminated his employment. The employee filed this lawsuit, alleging that his termination violated the ADA and the FMLA.

The Third Circuit upheld summary judgment in favor of the employer, holding that the employer did not violate the ADA and the FMLA. In so holding, the Third Circuit reasoned that "employers do not violate the ADA merely by entering into return-to-work agreements that impose employment conditions different from those of other employees," as the difference in conditions "results from the terms of [the employee's] agreement rather than disability discrimination." Significantly, the Third Circuit further noted that the employee "does not explain how the [return to work agreement], to which he voluntarily agreed, tends to discriminate against him because of his alleged disability (alcoholism), as opposed to regulating his conduct (drinking alcohol)." The return to work agreement "does not restrict the

ability of individuals who suffer from alcoholism to work at [the company]...it simply prohibits employees subject to its terms from consuming alcohol."

The Third Circuit rejects plaintiff's gender identity claim, finding that an employer's reason for selecting the plaintiff in a reduction in force was not a pretext for unlawful discrimination.

Stacy v. LSI Corp., 2013 U.S. App. LEXIS 22885 (3d. Cir. 11/13/13)

The Third Circuit held that the plaintiff failed to present evidence demonstrating that her termination through a reduction in force was a pretext for unlawful gender identity discrimination. The plaintiff filed suit, alleging that she was provided with a poor performance review from her supervisor after she had returned from a gender identity disorder surgery and had made a complaint about the performance review to her supervisor's direct supervisor. One year later, following a merger, the company engaged in a series of layoffs in response to the declining economy, which resulted in the layoff of more than 3,700 positions over an eight-month time frame. The

continued on page 14

PA Employment

continued from page 13

plaintiff's supervisor's direct supervisor was instructed to reduce his department's staff by eight employees. In making this decision, he first determined which job positions and functions would be impacted by the reduction in force, and he then conducted a skills assessment of the individuals in those groups. The plaintiff was the lead engineer in a three-member group and was rated lowest of the three in the skills assessment. After discussing the findings with management, the plaintiff was informed of the decision to lay her off.

In rejecting the plaintiff's allegation that her layoff was motivated by unlawful gender identity discrimination, the Third Circuit reasoned that the plaintiff failed to contradict the facts of record that the supervisor was directed by his superiors to reduce his workforce, he selected several groups of employees who would be impacted, he chose the skills to be evaluated based upon those he believed would be beneficial to the employer moving forward and the plaintiff was ranked the lowest within her group. Based upon this finding, the Third Circuit upheld dismissal of the plaintiff's discrimination claims as a matter of law.

Plaintiff's admission that he failed to secure a prison control room door, thereby creating an opportunity for an inmate to gain access to the control room, mandates dismissal of plaintiff's disability discrimination claims.

Dove v. Community Education Ctrs., Inc., 2013 U.S. Dist. LEXIS 170081 (E.D. Pa. 12/2/13)

The plaintiff asserted violations of the ADA and the FMLA following his termination from employment as a prison guard. Specifically, the plaintiff alleged that he requested and took leave for depression and that, when he returned to work, he was subjected to harassment by a prison chief. Several months following

his return from leave, the plaintiff was assigned to the control room in the area of the prison that housed the "worst-of-the-worst inmates" and was involved in an incident where an inmate was able to gain access to the control room and make contact with a correctional officer—despite the prison's policy that the doors remain locked at all times. The incident was captured on the prison's surveillance system and was investigated. The investigations supervisor noted that, "Leaving a control room door unlocked, even if an officer is inside, constitutes a violation of policy that is a terminable offense." The deputy warden reviewed the investigative report and surveillance video and recommended to the warden that the plaintiff's employment be terminated.

In rejecting the plaintiff's claims of discrimination, the court noted that "[n]othing in the evidence suggests that [the chief]—who, according to plaintiff, bore him some discriminatory animus—initiated, recommended, and ultimately caused plaintiff's termination." Rather, the court determined that the decision was clearly initiated by the investigations supervisor, with a recommendation for termination by the deputy warden, "neither of whom had any demonstrable knowledge of plaintiff's impairment or request for leave." In so holding, the court further reasoned that the plaintiff "did not identify any situations where control room doors were left unlocked on the SMU, an inmate gained entry to the control room, the offending officer used force to remove that inmate, and the entire incident was captured on video." As a result, the court determined that, "given the overwhelming evidence that leaving a control room door open was itself a terminable offense" and the lack of "any mitigating circumstances to warrant a deviation from that policy," the plaintiff failed to establish a pretext of discrimination.

Court denies a doctor's request for a preliminary injunction to modify

the American Board of Pediatrics' exam pursuant to Title III of the ADA, holding that the doctor was not disabled and that the requested accommodations were not reasonable.

Rawdin v. The American Board of Pediatrics, 2013 U.S. Dist. LEXIS 159458 (E.D. Pa. 11/6/13)

The court denied a doctor's request for a preliminary injunction and his requested accommodation that he be awarded board certification without passing the multiple-choice portion of the examination or providing him with an alternative form of testing. The doctor was a pediatrician who had been unable to obtain board certification, having failed to pass the multiple-choice portion of the examination on five occasions. He argued that he suffered from a memory deficiency caused by a brain tumor and the subsequent treatment he received. Following his fifth attempt to pass the examination, his employment with a hospital was terminated based upon his failure to become board certified. As a result, the doctor requested that the court award him certification, that the test be modified so that he could take the test "open book" and/or that he be provided with an oral component to the test.

In rejecting his requests, the court first noted that the doctor was not disabled as a matter of law. In so holding, the court determined that, while "test-taking" is a major life activity, there was no evidence that the doctor's "test-taking abilities are lower than those of the average person in the general population" to be deemed "substantially limited" in that major life activity. Moreover, the court noted that, even if the court found that the doctor was disabled pursuant to the ADA, the requested accommodations were not reasonable and would have resulted in a fundamental alteration of the examination and an undue burden on the board.



PENNSYLVANIA WORKERS' COMPENSATION UPDATE

By Francis X. Wickersham, Esquire, Marshall Dennehey Warner Coleman & Goggin, King of Prussia, PA

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2013

1. Workers' Compensation Act does not cover occupational diseases, such as mesothelioma, that manifest more than 300 weeks after employment ends. *Tooy v. AK Steel, ARMCO Steel, Crown Cork & Seal, et al.*, 2013 Pa. LEXIS 2816

2. An employer's burden of proof when seeking a modification of benefits based on a labor market survey requires showing the existence of open jobs the claimant is capable of filling, not simply the existence of jobs that are already filled. *Phoenixville Hospital v. WCAB (Shoop)*, 2013 Pa. LEXIS 2810

3. A Pennsylvania state trooper who struck and killed a woman with his patrol car was entitled to benefits for a psychic injury due to abnormal working conditions. *Paves v. WCAB (Commonwealth of Pennsylvania State Police)*, 2013 Pa. LEXIS 2588

4. Section 413 (a) of the Act allows claimants to retain the right to petition for any modification that they hold at the time of any workers' compensation payment for a minimum of three years from the date of that payment. Where such payments have been suspended due to a return to work or an attempted return without a loss in earnings, § 413 (a) extends the right to petition for the entire 500-week period during which compensation for partial disability is payable. In the event payments are resumed after a suspension of benefits, claimants continue to retain the right to petition for any modification they hold at the time of any payment received subsequent to suspension for a minimum of three years from the date of payment. In the event that a period of suspension comes to an end upon the resumption of payments, claimants retain the right to petition for modification as set forth in § 413 (a).

Gina Cozzone, Executrix of The Estate of Andrew Cozzone v. WCAB (Pa. Municipall/East Goshen Township), 73 A. 3d 526 (Pa. 2013)

5. A claimant's receipt of pension benefits is not a presumption of retirement but is, instead, an inference that must be considered in connection with the totality of the circumstances. *City of Pittsburgh and UPMC Benefit Management Services, Inc. v. WCAB (Robinson)*, 67 A.3d 1194 (Pa. 2013)

6. Grace period payments made to the claimant are considered compensation under the Act, and the employer is entitled to reimbursement of them from the Supersedeas Fund. *Department of Labor and Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board, (Excelsior Insurance)*, 58 A.3d 18 (Pa. 2012)

7. Massage therapy provided by an LPN not licensed in massage therapy is, nevertheless, reasonable and necessary.

Kevin Moran v. WCAB (McCarthy Flowers and Donegal Mutual Insurance), 2013 Pa. Commw. LEXIS 421

8. An impairment rating given for a condition not part of the recognized work injury will not bar the employer from obtaining a termination for the official work injury.

Richard Harrison v. WCAB (Auto Truck Transport Corp.), 2013 Pa. Commw. LEXIS 391

9. A claimant is not in the course and scope of employment at the time of injury when the claimant abandons his employment to work on his child's go-cart.

Trigon Holdings, Inc. v. WCAB (Griffith), 74 A.3d 359 (Pa. Cmwlth 2013)

10. Denial of fatal claim petition because decedent's death did not occur within 300 weeks of the date of the

original work injury was proper, even where the injury was later expanded by a judge's decision.

Jamie Whitesell v. WCAB (Staples, Inc.), 74 A.3d 297 (Pa. Cmwlth 2013)

RECENT DECISIONS

In a modification petition based upon a labor market survey, the employer meets its burden of proving that it does not have an open and available job for the claimant through testimony from the employer that the jobs it did have did not comply with the claimant's restrictions.

James Reichert v. WCAB (Dollar Tree Stores); 42 C.D. 2013; filed 11/8/13; by Judge Brobson

After the claimant's work injury, the employer filed a modification petition based on the results of a labor market survey. In connection with that petition, the employer presented testimony from its district manager, who testified that the employer, which had a total of 10 retail stores, had positions available in the stores that required a lot of physical movement. He also testified that there was very little office work to be done in the stores. The witness further said that, having reviewed the restrictions given by an IME physician, who released the claimant to do light-duty work, the employer did not have any open positions that met these limitations. On cross examination, the employer admitted that no one asked him to look for a job and that he was never contacted by the employer's vocational expert. He also acknowledged that he did not have any actual written job descriptions for the retail store positions.

The WCJ granted the modification petition. In doing so, he found the testimony given by the employer's witness credible that there were no open and available jobs for the claimant within the restrictions of

continued on page 16

PA Workers' Comp

continued from page 15

the IME physician. The claimant appealed.

The court held that the employer presented sufficient evidence to establish that it did not have an open and available position for the claimant. It went on to note that, once an employer has presented evidence that it does not have an available position, a claimant is entitled to rebut that evidence by demonstrating that during the period in which the employer has or had a duty to offer a specific job, the employer was actively recruiting or had posted or announced the existence of a specific job vacancy. In this case, the claimant did not present any evidence that the employer was actively recruiting for a specific job vacancy. The court also held that there was no legal authority for the proposition raised by the claimant that a vocational expert is prohibited from conducting a labor market survey unless he first contacts the liable employer to determine whether it has any open and available positions for a claimant.

Benefits were properly suspended after the claimant returned an employment verification form by fax which was signed but not dated.

John McCafferty v. WCAB (Trial Technologies, Inc.); 208 C.D. 2013; filed 11/21/13; by Judge Leavitt

The claimant filed a claim petition for an injury he sustained while working for the employer. While the claim petition was pending, the employer sent the claimant an "Employee Verification of Employment, Self-Employment or Change in Physical Condition Form" (LIBC-760). The claimant was instructed to sign, date and return the form within 30 days. The form was sent on January 18, 2010, and returned by fax on February 22, 2010. On April 13, 2010, the forms were rejected by the employer since they were not the originals and were not dated. About 30 days thereafter, the claimant returned the form by hand delivery, but the

form was still not dated. The claim petition was granted, and the employer then sent the claimant a notification of suspension because he had not properly completed and returned the LIBC-760 to the employer. The claimant then mailed a second LIBC-760 to the employer that was dated, and the employer promptly reinstated benefits. The claimant filed a penalty petition, alleging that the employer violated the Act for suspending benefits and sought a reinstatement of benefits for the period benefits were suspended.

The judge dismissed the claimant's petitions, concluding that the claimant's failure to date the form on a line that was located next to the signature line was a fatal omission. The claimant appealed to the Appeal Board, and the Board affirmed the judge's decision.

The Commonwealth Court agreed that transmission of the LIBC-760 form by facsimile is proper. However, they rejected the claimant's argument that the form was not defective because the date was contained on the fax. According to the court, there was no way of determining from the fax when the claimant signed the form. This would have an impact on when the employer could send another form to the claimant, which they are entitled to do every six months. The court held that the signature and date are essential to an unsworn statement being given and that the date is necessary to confirm the substance of the statements made in the form as of a date certain.

An automobile insurance carrier that pays first-party benefits to a claimant and fails to pursue their lien during the pendency of workers' compensation proceedings fails to exhaust its remedy under §319 of the Act and may not recoup its lien.

Liberty Mutual Insurance Company also Catherine Lamm v. Excalibur Management Services db/a Excalibur Insurance Management and Luzerne County; 1792 C.D. 2012; filed 11/8/13; by Judge Leadbetter

The claimant sustained injuries as a result of a work-related motor vehicle accident and filed a claim against the employer. Later, a settlement was reached by compromise and release agreement. Subsequently, the automobile carrier filed a complaint to recover first-party benefits it paid to the claimant pursuant to an automobile insurance policy. The payments were made as a result of the workers' compensation carrier's initial denial of the workers' compensation claim. The automobile insurance carrier sought recovery from the workers' compensation carrier. The workers' compensation carrier secured a dismissal of the complaint by successfully arguing that the automobile insurance carrier failed to exercise or exhaust its statutory remedy under §319 of the Workers' Compensation Act (the subrogation provision) during the pendency of the workers' compensation claim.

The Commonwealth Court agreed. The automobile insurance carrier argued that §319 of the Act did not apply. The court cited the second paragraph of §319, which contemplates subrogation established either by contract or by litigation. The automobile insurance carrier did not file a complaint in Common Pleas Court seeking reimbursement until one year after the settlement by compromise and release agreement was approved. The court held that the automobile insurance carrier not only sought reimbursement in the wrong forum, but waited too long to do so.

A judge does not have jurisdiction for a utilization review petition filed on the basis that records were not timely supplied to the URO by a foreign provider who was treating a claimant who had permanently relocated to his native country.

Peter Leventakos v. WCAB (Spyros Painting); 2156 C.D. 2012; filed 12/5/13; by President Judge Pellegrini

The claimant sustained injuries in October of 1983. About ten years later, the claimant permanently relocated to his native country of Greece. Many

years later, a judge suspended the claimant's workers' compensation benefits based on his voluntary removal from the work force.

The employer filed a utilization review request (UR) seeking review of the claimant's treatment with a physician in Greece. The UR notified the physician and instructed him to submit his treatment records. The URO advised that a summary of the claimant's treatment could not be considered in lieu of the records. The physician, however, provided the URO with a treatment summary. The treatment summary was sent to the provider performing the UR, and that provider discussed the treatment with the claimant's physician in a phone conversation. During that conversation, the provider performing the review was informed that there were no medical records documenting treatment. Consequently, a utilization review determination was issued indicating that the treatment was not reasonable or necessary due to a lack of documentation. The claimant filed a petition challenging the determination.

The judge dismissed the utilization review petition, concluding that she lacked jurisdiction because the physician in Greece failed to submit any medical records to the URO. The judge also said that there was no basis for an exception because the provider was out of the country or because of "foreign convention" that medical records are not kept in Greece. The claimant then appealed to the Board, which affirmed.

The claimant then appealed to the Commonwealth Court, which affirmed the decisions below. They agreed that the judge lacked jurisdiction because none of the information provided could be considered a "record" appropriate for review. However, they also rejected the claimant's argument that his physician's oral account of the treatment constituted a "record."

An employer or workers' compensation carrier that secures a claimant's signature on a final receipt and files it

with the Bureau without any information regarding the claimant's full recovery from a work injury does so fraudulently and subjects the final receipt to be set aside, even after the three-year statute of limitations has passed.

Celeste Kraeuter v. WCAB (Ajax Enterprises, Inc.); 457 C.D. 2013; filed 12/19/13; by Judge Leadbetter

The claimant sustained a work-related injury on September 24, 2004. She continued working but eventually became disabled and began receiving workers' compensation benefits. Approximately one and a half years later, in May of 2006, the employer sent the claimant a notification of suspension (LIBC-751), notifying her that her disability benefits were suspended due to a return to work three days before. Three days later, the claimant signed a final receipt, which stated that the claimant was able to return to work without a loss of earnings and that the claimant received benefits for a period of 69 weeks and two days. The employer then filed the final receipt with the Bureau of Workers' Compensation.

Thereafter, in July of 2011, the claimant filed a petition to set aside the final receipt, alleging fraud and/or improper action. The claimant also filed a penalty petition, alleging that the final receipt and notification of suspension were fraudulently filed because they were based on a return to work that never happened. The claimant also filed a petition challenging the notification of suspension.

At the WCJ level, the claimant acknowledged her signature on the final receipt and said she was pretty sure the employer asked her to come in and sign it. However, she also said that her doctor had performed surgery on her and did not release her to return to work when she signed the final receipt. She further said that she did not return to work for the employer nor was she working for any other employer at the time the final receipt was signed. Finally, she said that she had not fully recovered from her work injury

when she signed the final receipt. The employer presented deposition testimony of a claims adjuster who said that he prepared and sent the suspension notification and final receipt to the claimant based on his understanding from paperwork from the employer that the claimant had returned to work. He admitted that the form he received from the employer did not indicate that the claimant had fully recovered from her work injury and that he was not in possession of any medical evidence of full recovery. The judge granted the claimant's petitions, finding that the claim adjuster engaged in fraudulent conduct and that the employer violated the Act by unreasonably and excessively delaying compensation payments. The judge also concluded that the employer did not have a reasonable basis to contest the claimant's petitions.

The court agreed with the claimant and reversed the decision of the Board. The court noted that the claims adjuster conceded that he prepared and sent the claimant the final receipt for signature relying solely on dated information provided by the employer in February of 2005 and without any information that the claimant had returned to work in May of 2006 or had fully recovered from the work injury as of that date. In short, the court concluded that the adjuster failed to perform his duty to ascertain the claimant's medical status before preparing and sending the final receipt to the claimant and that claimant was receiving medical treatment, had not fully recovered from the work injury and had not returned to work, contrary to the statements in the notification of suspension and the final receipt. Concluding this, the court also held that the claimant was not required to present any medical evidence in order to set aside the final receipt.

Ex parte communication prohibited between employer's attorney and claimant's physician.

Pennsylvania State University v. Workers' Compensation Appeal Board

continued on page 18

PA Workers' Comp

continued from page 17

(*Sox*); 454 C.D. 2013, 455 C.D. 2013; filed December 19, 2013

This new Commonwealth Court decision has changed the law regarding communications between an employer and a panel physician when taking depositions. No longer is counsel for the employer able to meet with the panel physician prior to the deposition as to do so violates the injured worker's expectation of privacy.

In this case, the claimant sustained an initial work injury in 2006. After receiving benefits for that injury, the claimant went back to work for the employer. The claimant then sustained additional work injuries on July 19, 2009, and on October 18, 2009. The employer acknowledged the October 18, 2009, work injury by issuing a Medical Only Notice of Compensation Payable. Later, the claimant filed claim petitions, as well as a penalty petition, against the employer. The claimant also filed a reinstatement petition against the employer for his 2006 work injury.

During litigation of the petitions, the employer sought to depose the claimant's treating physicians, who happened to be employees of the panel facility. The claimant objected and sought an order from the WCJ precluding the depositions on the basis that the depositions of the physicians would be an *ex parte* contact by the employer's counsel.

In response to the claimant's objection, the employer asserted attorney/client privilege to justify the *ex parte* contact with the treating physicians. The judge, however, found that the claimant enjoyed a physician/patient privilege with the treating physicians and that, in the absence of consent, the employer was precluded from engaging in *ex parte*, non-disclosed communications. The judge further concluded that an attorney/client relationship did not exist between the employer's counsel and the treating physicians because of their status as employees. The judge

permitted the employer to schedule the deposition of a treating physician, but prohibited counsel for the employer from having any *ex parte* contact with any physician to be deposed. The judge further permitted the claimant's counsel to cross examine a physician as to any *ex parte* contacts made.

The judge granted the claim petitions against the employer, who appealed to the Workers' Compensation Appeal Board. The Board affirmed and concluded that the issue of whether the judge's interim order was violative of attorney/client privilege was moot because the employer submitted the reports of the physicians into evidence, as is permissible under §422 (c) of the Act, where the period of disability involved is less than 52 weeks. The employer appealed to the Commonwealth Court.

The employer argued to the Commonwealth Court that the judge's decision prohibiting them from deposing the claimant's treating physicians was prejudicial. According to the employer, the judge may have decided the case differently if the employer's attorney had been allowed to consult and depose the treating physicians without restrictions. The employer further argued that the judge improperly limited the employer's counsel's contact with the treating physicians because the physicians were employees and *ex parte* communications were, therefore, subject to attorney/client privilege.

The Commonwealth Court rejected the employer's arguments and found that the judge's interim order was proper. In the court's view, although the physicians were employees, they acting in their capacity as the claimant's treating providers, not as the employer's employees. In other words, they were not "clients" of employer's counsel. The court concluded that the application of an attorney/client privilege in this context would be improper since it would confer upon the employer an unfair strategic advantage. The court also rejected the employer's argument that the Rules of Civil Procedure permitted counsel

to engage in *ex parte* communications with the treating physicians because the case was in litigation. The court held that, although the privacy right against disclosing private medical information was waived, the Rules of Civil Procedure do not permit an employer's attorney to obtain information in any way he sees fit. Moreover, the court rejected the employer's argument that the employment relationship between the treating physicians and the employer circumvented the Rules of Civil Procedure.

The expansion of claimant's injuries by judge's decision granting a review petition does not negate the validity of a prior IRE that was not challenged within 60 days.

Gregory S. Wingrove v. WCAB (Allegheny Energy); 1151 C.D. 2013; filed 1/3/14; by Judge Leavitt

After the claimant sustained a work-related injury that was acknowledged by the employer, the employer issued a notice of change of workers' compensation disability status to the claimant, based on the results of an IRE which found the claimant to have a whole body impairment of 11 percent. Four years later, in an attempt to challenge the IRE, the claimant filed a review petition to amend the description of injury contained in the NCP issued by the employer. The claimant also filed a review petition challenging the results of the IRE because it did not take into account the additional injuries. Later, the claimant filed a third review petition, alleging that lumbar fusion surgery performed rendered him more than 50 percent disabled pursuant to the AMA Guidelines. The parties then agreed in a supplemental agreement that the claimant became totally disabled as of the date of surgery, but for a limited period. The parties also agreed that the execution of the supplemental agreement would have no effect on the pending petitions.

The Commonwealth Court agreed with the employer and dismissed the claimant's appeal. The court held that the amendment to the NCP did not

render the original IRE invalid. The court further pointed out that once 60 days passed without a challenge from the claimant, the IRE became fixed and the burden, therefore, shifted to the claimant to prove that the addition of depression to the NCP rendered him at least 50 percent impaired. The court also rejected an argument made by the claimant that §306 (a.1) of the Act was unconstitutional.

Dismissal of claim petition based on claimant's delay in presenting medical evidence was improper because the delays were, in part, due to requests made by the employer.

David D. Wagner, II v. WCAB (Ty Construction Company, Inc.); 1202 C.D. 2013; filed 1/3/14; by Judge Leavitt

The claimant filed a claim petition alleging his small cell lung cancer was caused by exposure to paint chemicals while working for the employer. The matter was assigned to a WCJ. The first hearing was held on April 11, 2011, and the judge instructed the parties to complete their medical evidence. Claimant's counsel informed the judge he was waiting for a report from the claimant's treating oncologist, and it was agreed that the employer would not schedule an independent medical examination until receiving the report.

One month later, at another hearing, the employer requested dismissal of the claim petition since the claimant had not produced the oncologist's report. Claimant's counsel said that, just a week before, he learned that the claimant's oncologist refused to get involved in legal matters. He, therefore, began a search for an opinion from an industrial hygienist. The judge denied the employer's motion and instructed claimant's counsel to schedule a deposition within the month.

Thirty days later, the employer again moved for the dismissal of the claim petition. The judge gave the claimant another 30 days and issued a written order directing claimant's counsel to submit medical evidence by the end of the 30-day period or the claim petition

would be dismissed. Two days before the expiration of the 30 days, a medical report was produced by the claimant. The deposition of the claimant's expert was also scheduled, but was subsequently canceled at the request of the employer so that they could first obtain an IME of the claimant.

At the next hearing, the employer again asked for a dismissal of the claim petition. Claimant's counsel again explained that he had been attempting to reschedule the deposition of his expert since receiving the employer's IME report but was having difficulty. He pointed out that the expert deposition that was scheduled previously was postponed at the employer's request. The judge granted the employer's motion to dismiss, and the Board affirmed.

The Commonwealth Court, however, reversed. Recognizing that it is within the judge's discretion to close the record and preclude the submission of evidence, nevertheless, the dismissal of a petition for lack of prosecution can be set aside for abuse of discretion. The court pointed out that the judge issued an order requiring the claimant to produce an expert report to the employer within 30 days and that the claimant complied with that directive. The court further pointed out that the claimant did schedule a deposition but that it was canceled at the request of the employer. The claimant was then forced to wait until the report from the employer's IME had been received to reschedule the deposition.

A C&R agreement that does not resolve an issue that is on appeal with the board does not preclude the employer from recovering from the supersedeas fund.

H.A. Harpers, Inc. v. WCAB (Sweigart); 861 C.D. 2013; filed 1/3/14; by Judge Brobson

The claimant filed a claim petition, which was granted by the WCJ. In his decision, the judge established the claimant's average weekly wage and compensation rate, which the employer appealed. In connection with the appeal, the employer requested

supersedeas, which was denied by the Appeal Board.

While the appeal was pending, the employer filed a termination petition. Thereafter, the parties settled the case by C&R agreement. The employer's termination petition was amended to a petition to seek approval of a C&R agreement. Later, the Board granted the employer's appeal as to the calculation of the claimant's average weekly wage and modified the claimant's AWW and compensation rate. The employer then filed an application for supersedeas fund reimbursement.

The application was challenged by the Commonwealth. The judge granted the application, but the Bureau appealed to the Appeal Board, which reversed. According to the Board, the C&R that was approved during the pendency of the employer's appeal resolved all litigation and/or liability.

The Commonwealth Court reversed, holding that the C&R agreement did not settle the issue of the average weekly wage calculation. They noted that, following approval of the settlement, the employer did not withdraw the appeal of the average weekly wage issue pending before the Board. According to the court, the agreement did not settle the exact issue raised in the appeal, which was a dispute as to the average weekly wage.

An employer is not required to issue a notice of ability to return to work after a notice of denial has been issued and before a claim petition has been filed.

School District of Philadelphia v. WCAB (Hilton); 598 C.D. 2013; filed 1/7/14; by Judge Leadbetter

A WCJ granted a claim petition and awarded the claimant benefits. However, the judge found that the claimant was entitled to benefits for a closed period. Therefore, he suspended the claimant's benefits, finding that there was work available to the claimant that she was capable of performing despite her work injuries. On appeal, the Appeal Board reversed.

continued on page 20

PA Workers' Comp

continued from page 19

The employer appealed to the Commonwealth Court, which reversed decision of the Board. In doing so, the court accepted the employer's argument that the claimant only established disability for a limited period of time. The court further held that the employer was not required to provide the claimant with a notice of ability to return to work during the time period after it issued a notice of denial, but before the claimant filed a claim petition, since the claimant was not receiving benefits at the time the alternate job offer was made and while no litigation was taking place.

Injuries sustained by claimant who, through a state-funded program, was employed by her son as his caregiver, are compensable pursuant to the "bunkhouse rule" in that her presence on the premises was required by the nature of her employment.

Laura O'Rourke v. WCAB (Gartland); 1794 C.D. 2012; filed 1/8/14; by Judge McCullough

Through a state-funded program, the claimant was employed by her son to provide care for him at her residence in exchange for an hourly wage. The claimant filed a claim petition, alleging that she sustained multiple injuries when, while she was sleeping in her bed, her son (employer) cut her throat with a butcher knife and inflicted three other stab wounds. The claimant later filed a review petition, alleging she needed medical treatment and was

unable to work due to post-traumatic stress disorder.

During litigation of the petitions, testimony was presented that: (1) the employer had not lived with his mother since he was 15 years old; (2) the employer had significant health issues, from a history of drug problems; (3) the employer underwent an amputation of his leg in 2007 and spent six months in a rehabilitation center; (4) the claimant agreed to care for the employer in her home until he got better and could live independently; and (5) the employer moved into the claimant's residence. The care that the claimant provided included assistance with bathing and dressing, doing laundry, preparing meals and providing transportation. Although the care did not include 24-hour or nighttime care, the employer could request care during the evening or nighttime hours, but the worker had to be awake and providing care during those hours. Evidence was also presented that, on the night of the injury, after the claimant returned home at around 10:00 p.m., the employer and the claimant argued about preparing the employer something to eat. After getting the employer something to eat and fixing the couch up as his bed, the claimant went to bed at 11:30 p.m. Around 1:30 a.m., while asleep in her bed, the employer attacked her.

The WCJ granted the claimant's petition. In doing so, the judge concluded that the claimant demonstrated that her employment

required her to be on the employer's premises at the time she sustained her injuries. He also concluded that it was the employer's burden to prove that the attack occurred due to personal animosity and that the employer failed to meet his burden. The Appeal Board, however, reversed.

The claimant appealed to the Commonwealth Court, and they reversed the Board. On appeal, the claimant argued that her injuries were compensable under the "bunkhouse rule," which stemmed from a 1924 Supreme Court case which held that a claimant was considered to be in the course of employment while sleeping on premises, even though not actively favoring the interests of the employer at the time of the injury. Based on this opinion, the court construed the language of §301(c) of the Act to include those situations where the evidence establishes that an employee lives on the premises because he or she is "practically required" to do so. According to the court, under the circumstances of the case, the only feasible way for the claimant to provide the employer with attendant care was to do so in her home. The court also held that, under the "bunkhouse rule," "it was immaterial that the claimant was not sleeping and not furthering the interests of the employer at the time of the assault.



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