COUNTERPOINT

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THE TOP 13 OF '13

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The calendar year 2013 certainly ushered in – and sometimes out - some significant events and developments: an extended federal governmental shutdown, the implementation of the Affordable Care Act and a malfunctioning website, the continued local fallout from superstorm Sandy. For those of us that closely follow the insurance industry and related legal developments, Pennsylvania's state and federal courts also offered a number of important decisions and opinions that impacted the ways insurers do business and may also shape the future litigation landscape in the Commonwealth.

What follows is just one opinion, in no particular order, of the Top 13 of '13.

1. Is Untimely Reporting Prejudicial? In *Vanderhoff v. Harleysville Ins. Co.,* 2013 WL 5826958 (Pa. 2013), Pennsylvania's highest Court held that an insurer must demonstrate prejudice to deny UM benefits following the untimely reporting of a phantom vehicle. However, the court further held that an insurer need not prove what evidence *it would have found* had it been timely notified, nor must the insurer identify specific evidence of which it is unaware, or cannot obtain, due to the delayed notice. Each claim must be addressed specifically on its own facts, on a case-by-case basis.

2. Policyholders Crack the Household Exclusion. The Superior Court in *Swarner v. Mut. Benefit Group*, 72 A.3 641 (Pa.Super. 2013) refused to enforce the household exclusion. Swarner was a passenger on her husband's motorcycle turning onto an on-ramp when it struck a pick-up truck that entered from the opposite direction. Swarner was ejected and landed in a lane of travel, where a truck ran her over. The Swarners' automobile insurance was through Mutual Benefit. Swarner's husband solely owned the motorcycle and separately insured it. The Superior Court concluded that the household exclusion did not apply, believing there were two separate and distinct accidents: the first was when the motorcycle and truck collided, the second was when Swarner was run over by the second truck. Since Swarner was not "occupying" the motorcycle when she was hit the second time the household exclusion did not apply.

3. Statute of Limitations for UIM Claims. In *Hopkins v. Erie Ins.Co.,* 65 A.3d 452 (Pa. Super. 2013), the Superior Court responded to ongoing questions concerning what triggers the statute of limitations on a UIM claim. The court concluded that the statute of limitations begins to run when the insured settles with, or secures a judgment against, the underinsured owner or operator. In this case, the court precluded a UIM claim as time-barred because four (4) years had passed since the claimant's initial settlement.

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DELAY DAMAGES

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Introduction

There are many factors considered in assessing the value of the damages claimed in a lawsuit. The assessment of damages continues to evolve throughout the life of a lawsuit, by way of, among other things: fact and expert discovery, discussions with other counsel in the case, input from judges and mediators, verdict research, and motion practice.

Often the assessment of potential delay damages, and their amount, can be put off while the compensatory damages are developed. Indeed, in order to calculate the potential amount of delay damages one must be able to accurately value the alleged compensatory damages. It takes time and effort to accurately value the alleged compensatory damages. This waiting period to calculate delay damages may cause them to be an afterthought when considering the total value of a lawsuit. This can lead to delay damages being overlooked until the eve of trial or even later. Delay damages may also be overlooked or dismissed as an afterthought due to an assumption that delay damages will only be a small

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The Top 13 of '13

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4. The Use of Appraisal in a Homeowners Policy. In a January decision, the Eastern District addressed the appraisal process and its proper use during a homeowners' claim. In *Correnti v. Merchants Preferred Ins. Co.,* 2013 WL 373273 (E.D. Pa. Jan. 31, 2013), the court decided: "[w]hen the parties merely disagree over the extent of damage or whether a covered peril is the cause of certain damage, that is a dispute regarding the amount of loss and is proper for appraisal."

5. "Intentional Acts" Exclusion Does Not Apply to Victims of Abuse. The Superior Court also addressed implications of the anti-abuse provisions of subsection 1171.5(a)(14)(i)(D) of the Unfair Insurance Practices Act ("UIPA") in the context of the intentional acts exclusion. In *Lynn v. Nationwide Ins. Co.,* 70 A.3d 814 (Pa. Super. 2013), the insured's wife, while inside her marital residence with her children, attempted to burn down the property. Nationwide denied the claim based on the intentional acts exclusion. Mr. Lynn, in a subsequent lawsuit, claimed he was the victim of abuse. In a case of first impression, the court concluded that the language of 1171.5(a)(14)(i)(D) "demonstrated the legislature's intention *to prohibit the denial of claims of innocent co-insureds where the loss was caused by the intentional acts of another insured."*

6. Inherent Vice Exclusion Limited. The Third Circuit revisited – then limited- the application of this exclusion in *United States Fire Ins Co. v. Kelman Bottles,* 2013 WL 5303261 (3d Cir. 2013). Molten glass escaped from a glass melting furnace and caused property damage and a claim to U.S. Fire. The court reasoned that a glass furnace's susceptibility to leaks should not trigger the exclusion for two reasons: (1) the leaks did not prevent the furnace from functioning properly, and (2) leaks of molten glass were common and natural.

7. Without Legal Damages, the Duty to Defend is Not Triggered. *Lebanon School District v. Netherlands Ins. Co.,* 2013 WL 308702 (M.D. Pa. Jan. 25, 2013) arose out of an insurance coverage dispute over Netherlands' denial of the school district's request for reimbursement of the legal costs incurred while defending a civil rights lawsuit. The middle district concluded that Netherlands owed no duty to defend the school district because the civil rights complaint sought exclusively declaratory and injunctive relief, plus the restitution of excessive truancy fines. Since the civil rights complaint did not seek "legal damages," Netherlands' duty to defend was not triggered.

8. Diesel Fuel is a Pollutant. Judge Timothy Savage, in *Heri Krupa, Inc. v. Tower Group Co.,* 2013 WL 1124401 (E.D.Pa. Mar. 18, 2013), held that diesel fuel is a pollutant. In doing so, the court expressly rejected a "reasonable expectations" approach, as Krupa argued that it intended to purchase an all-risk policy covering all losses related to the business of operating a gas station. Since Krupa did not dispute the existence of the pollution exclusion, and failed to present evidence that it specifically sought or expected pollution coverage when shopping for insurance, Judge Savage found no justifiable basis to apply the reasonable expectations doctrine.

9. The Microorganism Exclusion. Pennsylvania's courts were also given the opportunity to review "microorganism" and "seepage" exclusions in *Certain Underwriters at Lloyd's, London v. Creagh*, 2013 WL 3213345 (E.D. Pa. June 26, 2013). Lloyd's sought to avoid coverage for a property claim after a dead body, excreting fluids, had caused damage but the relevant policy had exclusions for microorganism, seepage, and/or pollution. The court was persuaded by Lloyd's forensic pathologist, who confirmed that the bacteria present in the body fluids of the deceased caused the damages in this case thereby triggering the policy's microorganism exclusion. The court also concluded that the "seepage" exclusion applied as the bodily fluids that escaped the dead body were categorized as hazardous or dangerous materials under existing federal regulations.

10. Insuring Clause in an Excess Policy Incorporates Primary Policy's Arbitration Agreement. The eastern district was also called upon to determine whether an insuring clause in an excess insurance policy incorporated the arbitration provision contained exclusively within the primary policy. *Illinois Union Ins. Co. v. Teva Pharmaceuticals USA, Inc.,* 2013 WL 5594716 (E.D. Pa. Oct. 11, 2013), arose out of Teva's efforts to seek coverage under its excess policy for patent infringement lawsuits it litigated and ultimately settled. Illinois Union filed a declaratory judgment action; Teva responded by initiating arbitration in London based on an arbitration clause within its primary policy. Judge Pratter concluded that the broad incorporation language contained in the excess policy incorporated the underlying policy's arbitration clause and granted Teva's Motion to Compel Arbitration.

11. Reservation of Rights Not Needed Where Duty to Defend Not Triggered. Applying Pennsylvania law, judge Caputo concluded that an excess insurer was not required to reserve its rights in the absence of a duty to defend. The court also found that the insurer would not be estopped from denying coverage even though it did not issue a coverage letter until five years after receiving notice of the claims. In *TIG Ins. Co. v. Tyco Intern, Ltd.*, 919 F.Supp.2d 439 (M.D. Pa. Jan. 23, 2013), Tyco failed to satisfy the first required element of estoppel, i.e. an inducement by TIG to believe coverage existed based on its five (5) year silence. While the duty to defend gives rise to the duty to reserve rights, since TIG had no reason to speak before the underlying insurance had been exhausted, Tyco could not establish inducement as a matter of law.

12. Insurer Which Tenders a Defense Can Enforce Consent to Settle Provision. In *Babcock & Wilson v. American Nuclear Insurers*, 2013 WL 3456969 (Pa. Super. 2013), Babcock & Wilson settled hundreds of radiation exposure claims. The settlements were for less than policy limits and without the consent of its insurers, who had tendered a defense subject to a reservation of rights. The court ruled that Babcock & Wilson could not seek reimbursement for a settlement negotiated without its insurer's consent, because the insurers tendered — and Babcock & Wilson accepted — coverage subject to a reservation of rights.

13. Surety Bonds Not Subject to Bad Faith Statute. The district court in *Upper Pottsgrove Tp. v. International Fidelity Ins. Co.*, 2013 WL 5467696 (E.D.Pa. Oct 2. 2013), concluded that surety bonds are not "insurance contracts" within the meaning of Pennsylvania's bad faith statute. In a matter of first impression, Judge Dalzell predicted that the Pennsylvania Supreme Court would not extend Section 8371 to surety bonds, reasoning that while the parties to an insurance contract share a direct relationship, the same relationship did not exist between a surety and a protected party.

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percentage of a claim's overall value, especially considering the historically low interest rates over the past five years. Yet with the many Pennsylvania counties that do not impose case management deadlines, instead favoring a cooperative process between counsel and the certification of trial readiness, there exist numerous older cases. Therefore, potential delay damages can significantly impact the total value of the case. The total value of even a relatively young lawsuit can also be impacted by delay damages.

Imagine a scenario in which you are preparing a case for mediation or a settlement conference leading up to trial and you learn that plaintiff's demand is significantly higher than anticipated due to use of potential delay damages as leverage in settlement negotiations. Obviously it would be beneficial to be fully prepared for such a scenario.

Once one is able to accurately value a case with estimated adverse, favorable, and average trial awards, a conscientious effort should be made to calculate the delay damages using each of those potential trial award values. Having these estimated amounts of delay damages timely calculated can help shape overall case strategy and settlement discussions (both with opposing counsel and one's client) and promotes preparedness and prevents surprise.

Pa.R.C.P. 238

The Rule provides the following with regard to the general basis on which to assess delay damages, the time period under which delay damages accrue and how to calculate delay damages.

> (a)(1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury, in the decision of the court in a nonjury trial or in the award of arbitrators appointed under section 7361 of the Judicial Code, 42 Pa.C.S. § 7361, and shall become part of the verdict, decision or award.
>
> (2) Damages for delay shall be awarded for the period of time from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.
>
> (3) Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.

Sections (b)(1)(i), (b)(2)(i) and (b)(2)(ii) of the Rule set forth how a defendant can avoid the imposition of delay damages with specified "written offers of settlement." Unfortunately, it is rare that a lawsuit actually lends itself to the defense making "written offers of settlement" required by Rule 238. There are a multitude of reasons for this, some examples of which are set forth below. Regardless of the reason, one should not anticipate being able to cap delay damages in accordance with Rule 238.

Discovery is usually a lengthy process, especially in counties without looming case management deadlines. While discovery is proceeding, delay damages start accruing on the "first birthday" of service of the complaint. Unless you can be quite sure about the value of the damages being claimed, making an offer prior to receiving a demand is often perceived as "betting against yourself." That tactic may also change the strategy of the plaintiff. If plaintiff believes the offer is low and reflects that the defendant is undervaluing the claim,

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plaintiff may become more aggressive in efforts to increase the value of the claim.

A defendant may also not welcome a demand from the plaintiff until the defendant has had ample opportunity to support its defenses and develop an accurate value of the claim. In Philadelphia County the early, unwelcomed demand from plaintiff is often provided by way of the court's case management conference memorandum, which encourages plaintiff to provide an initial demand. Typically, the demand is artificially inflated as part of plaintiff's strategy. An artificially inflated demand does little to encourage a Rule 238 settlement offer from a defendant.

Note, per section (b)(1)(ii) of the Rule, a defendant will not be responsible for delay damages for a time period when the plaintiff caused delay of the trial. Though many defendants would like the opportunity to argue that a plaintiff caused delay of a trial by not providing a timely demand or worse yet, by providing an unreasonable demand, such arguments are not contemplated under the rule and thus cannot serve to defeat or reduce the imposition of delay damages.

Section (a)(3) of the Rule sets forth how to calculate delay damages. The section may make the calculation of delay damages seem a little daunting, since one must know the prime rate from the Wall Street Journal on January 1 for each year you will be calculating delay damages. Luckily, in an addendum to the Explanatory Comments of Rule 238, the drafters provided the historical prime rate from the Wall Street Journal for each year dating back to 1980. You simply need to multiply the amount of the award, or potential award, with the prime rate listed in the rule, plus one percent, for each year the case has been ongoing, excluding the first year after original process was served on your client.

Delay Damage Examples

A chart for the previous 10 years, like the one above, makes the calculation of delay damages even simpler and is a useful tool in your practice.

Date Range	Prime Rate	Additional 1.0%	Award	Total
1/1/03 – 12/31/03	4.25	+ 1.0	X (?)	=
1/1/04 – 12/31/04	4.00	+ 1.0	X (?)	=
1/1/05 – 12/31/05	5.25	+ 1.0	X (?)	=
1/1/06 – 12/31/06	7.25	+ 1.0	X (?)	=
1/1/07 – 12/31/07	8.25	+ 1.0	X (?)	=
1/1/08 – 12/31/08	7.25	+ 1.0	X (?)	=
1/1/09 – 12/31/09	3.25	+ 1.0	X (?)	=
1/1/10 – 12/31/10	3.25	+ 1.0	X (?)	=
1/1/11 – 12/31/11	3.25	+ 1.0	X (?)	=
1/1/12 – 12/31/12	3.25	+ 1.0	X (?)	=
1/1/13 – Current	3.25	+ 1.0	X (?)	=
Total delay damages as per Pa.R.C.P 238				=

In order to provide some real world examples, let's consider a case involving a motor vehicle accident occurring on September 1, 2002, wherein the complaint was served on the defendant on September 1, 2003. Under section (a)(2) of Rule 238, delay damages would not begin to accrue until one year after the service of original process, being September 1, 2004. Trial occurred on June 1, 2013 and resulted in a jury verdict of $1,000,000.00. The calculation for 2004 has to be pro-rated for the actual number of days left in that year, which were 122. That calculation is $1,000,000.00 multiplied by 5.0% (4.0% + 1.0%), which equals $50,000.00. In order to pro-rate that amount for the 122 days left in 2004, you then multiply the $50,000 by 122 days/365 days, which equals $16,712.33. The calculation for years 2005 through 2012 results in a total of $490,000.00. Using the chart for the years 2005 through 2012 looks like this:

1/1/05 – 12/31/05	5.25	+ 1.0	x $1,000,000	= $62,500
1/1/06 – 12/31/06	7.25	+ 1.0	x $1,000,000	= $82,500
1/1/07 – 12/31/07	8.25	+ 1.0	x $1,000,000	= $92,500
1/1/08 – 12/31/08	7.25	+ 1.0	x $1,000,000	= $82,500
1/1/09 – 12/31/09	3.25	+ 1.0	x $1,000,000	= $42,500
1/1/10 – 12/31/10	3.25	+ 1.0	x $1,000,000	= $42,500
1/1/11 – 12/31/11	3.25	+ 1.0	x $1,000,000	= $42,500
1/1/12 – 12/31/12	3.25	+ 1.0	x $1,000,000	= $42,500

The calculation for 2013 also has to be pro-rated. That calculation is $1,000,000.00 multiplied by 4.25% (3.25% + 1.0%), which equals $42,500.00. In order to pro-rate that amount for the 151 days that had already passed as of June 1, 2013, you then multiply the $42,500 by 151 days/365 days, which equals $17,582.19. Thus the total Delay damages, equal to the sum of Delay damages for the eight full years and the two pro-rated years is $524,294.52. For the mathematically challenged, that is more than half of the actual award.

This example is extreme as it represents a case that is nearly 11 years old. But don't laugh. In the past year I have resolved one case that was 7.5 years old and another that was nearly 12.5 years old. These cases do exist.

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At the same time, a $1,000,000.00 case with delay damages going back only three years still yields delay damages of $127,500.00. Even with the historically low interest rates during that time period, and a case that is not particularly old, delay damages cannot be an afterthought. Delay damages are significant figures in the total value of a case and must be accounted for when assessing the potential value of a lawsuit.

Is There a Cap on Delay Damages?

Rule 238 does not provide for a cap on delay damages, though there are limited statutory caps and the parties can cap delay damages via contract, such as in a high/low agreement. As such, nowhere in Rule 238 is the amount of the award on which delay damages are calculated specified. The default is to calculate delay damages using the amount of the award. But what happens when the amount of the award is more than the amount of the available insurance coverage. Are the delay damages calculated on the amount of the award or the amount of the available coverage? In other words, is this a situation that justifies imposition of a cap?

The Pennsylvania Supreme Court has recently weighed in on this question in the context of uninsured motorist (UM) lawsuits in the case of *Marlette v. State Farm Mut. Auto. Ins. Co.*, 57 A.3d 1224 (Pa. 2012). In *Marlette*, the court determined that delay damages in a UM case could only be calculated on the verdict molded down to the amount of available coverage under the UM coverage. In a UM case, and likely also in a an underinsured motorist (UIM) case (since UM and UIM cases are often treated similarly under Pennsylvania law), delay damages will not be calculated on a verdict in excess of the coverage limits, even though this may seem contrary to the understood purpose of delay damages to encourage settlements.

Despite being contrary to Rule 238's purpose, *Marlette* is logical because UM/UIM policy limits are created via a contract based upon how much insurance the insured chooses to purchase. To allow delay damages to be calculated on an award in excess of the amount of contractual coverage would provide an un-bargained for windfall to the insured.

In contrast, there is no limit on the calculation of delay damages in the third-party liability context. Even though a defendant in the third-party context may have a limited amount of insurance, delay damages will not be based only on the third-party defendant's amount of liability insurance. An excess verdict is permissible in the third-party context because the avoidance of such excess verdicts is a prominent argument to encourage settlement within the limits of the insured's policy.

Yet, there is no shortage of defendants in third-party litigation, who, beyond the amount of insurance coverage available to them, are judgment proof. Is it fair or logical for such defendants to be personally subject to delay damages based on an excess verdict when there is no ability to actually collect against those defendants beyond the limits of their insurance? Ultimately, it seems unlikely that the courts will do anything to impair the underlying purpose of Rule 238 to encourage settlements, meaning even judgment proof defendants can be subject to the full extent of available delay damages. *Shay v. Flight C Helicopter Servs.*, 2003 PA Super 86, P41 (Pa. Super. Ct. 2003). At this point, *Marlette* is simply a unique case applying only to UM and likely UIM matters.

This raises another question: Who pays delay damages in excess of an insured's liability policy limits, when settlement within the policy limits was possible at any time prior to the rendering of a verdict? Obviously, if the insured's policy provides coverage for delay damages, then the insurer will be covering such damages. If the policy does not provide that coverage, this determination will have to be made on a case-by-case basis. By and large, the insurer controls the defense of litigation instituted against its insured, including valuation of a claim and the amount at which to settle a claim. If the insurer unreasonably chooses to not settle a claim within the policy limits and an excess verdict is returned, the insurer may ultimately be liable for the excess verdict amount by reason of the insurer's "bad faith." *The Birth Center v. The St. Paul Companies, Inc.*, 567 Pa. 386, 406 (2001). The logic employed by the Pennsylvania Supreme Court in *The Birth Center* is that an insurer owes its insured a fiduciary duty and is to protect its insured from a verdict in excess of the policy limit. Under this reasoning, if the insurer elects to risk an excess verdict without sufficient justification, it should bear that risk. An insurer comes to bear that risk through the process of bad faith litigation, which can be pursued directly by the insured or assigned by the insured to the plaintiff.

The logic of the Pennsylvania Supreme Court in *Birth Center* is yet another reason to be prepared as early as possible with case valuations that consider delay damages. By having these valuations calculated and shared with the insured and the insurer, one can be better prepared to protect the insured from an excess verdict, should the insurer determine that a plaintiff's demand is unreasonable and the case should be tried. In advance of trial, an agreement can be created between the insured and insurer, in which the insured agrees to cooperate in the trial of a case with potential exposure in excess of its policy limits, in exchange for the insurer agreeing to indemnify the insured for the amount of an award in excess of the policy limits. This type of agreement can also prevent a conflict from arising between defense counsel's retention by an insurer and their representation of the insured.

When delay damages are awarded, and there is no evidence that the insurer breached its duty to the insured and no corresponding bad faith on the part of the insurer, the insured will ultimately be responsible for the delay damages. *Hall v. Brown*, 363 Pa. Super. 415 (Pa. Super. Ct. 1987). The court in *Hall* examined this issue noting the plain language of Rule 238 only allows the collection of delay

damages from defendants and that there is no provision of Rule 238 that shifts a defendant's liability to an insurance carrier. The Pennsylvania Supreme Court has not addressed this specific issue or discussed the correctness of the holding in *Hall*. Yet, the straightforward analysis performed in *Hall* is a strong indication that the holding in that matter would be affirmed upon review by the Pennsylvania Supreme Court.

Conclusion

With the limited caps on delay damages available to third-party defendants, and the generally rare opportunities in which to use "written offers of settlement" to limit delay damages, the focus should be on using information gleaned from discovery and the parameters of Rule 238 to properly calculate potential delay damages as early as possible in a case. The potential values of the delay damages can be added to the already calculated potential value of compensatory damages. You will then be in a superior position to address the complete value of the case with your client, opposing counsel, a mediator, and even a judge and make fully informed strategy decisions to effectively defend and protect your client.

PENNSYLVANIA EMPLOYMENT LAW UPDATE

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

The United States Supreme Court holds that a mixed-motive jury instruction in a Title VII retaliation case is improper.

University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (6/24/13)

The United States Supreme Court held that a plaintiff bringing a retaliation claim under Title VII must demonstrate "that the desire to retaliate was the but-for cause of the challenged employment action" and further noted that a "mixed-motive" jury instruction in a Title VII retaliation case is not proper. In this case, the plaintiff filed suit, alleging constructive discharge and retaliation after he complained about his supervisor's alleged bias toward him on the basis of his religion and ethnic heritage. At trial, the jury returned a verdict in favor of the plaintiff on both of his claims. On appeal, the Fifth Circuit vacated the jury's verdict on the constructive discharge claim but upheld the verdict on the retaliation claim, finding that retaliation claims—like status-based discrimination claims under Title VII—require only a showing that retaliation was a motivating factor for the adverse employment action, rather than its but-for cause.

The Supreme Court, however, reversed this decision and found that the plain language of Title VII's anti-retaliation provision, which makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria, mandates that "the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." In so holding, the Court reasoned that, unlike Title VII status discrimination claims—which were amended by Congress to explicitly authorize discrimination claims in which an improper consideration was a motivating factor for an adverse employment decision—Congress did not amend the anti-retaliation provision of Title VII and there is a lack of any meaningful textual difference between the text of Title VII's anti-retaliation provision and the Age Discrimination in Employment Act, which was at issue in the Supreme Court's 2009 decision in *Gross*. The Court further reasoned that "lessening the causation standard could contribute to the filing of frivolous claims," which would permit an employee who knew that he or she was about to be fired for poor performance could forestall a lawful action by making a complaint of discrimination. Indeed, the Court noted that "[e]ven if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage."

Accordingly, with this decision, employers will have an easier time defending Title VII retaliation claims, as the employee will now have the ultimate burden of establishing that the retaliatory motive was "the reason" or the "but-for" cause of the employment decision.

The Supreme Court holds that an employee is a "supervisor" for purposes of vicarious liability under Title VII only when the employer has empowered the employee to take tangible employment actions against the alleged victim.

Vance v. Ball State University, 133 S. Ct. 2434 (6/24/13)

The Supreme Court resolved a circuit split and held that an employee is a supervisor for purposes of establishing vicarious liability in a Title VII hostile work environment case only when "the employer has empowered that employee to take tangible employment actions against the victim; *i.e.*, to effect 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits.'" In this case, the plaintiff was employed as a catering assistant and alleged that she was harassed by her "supervisor," a catering specialist. The Court noted that while the parties disputed the exact nature of the catering specialist's job responsibilities (and the plaintiff asserted that the catering specialist had the ability to direct her daily work assignments), they both agreed that she did not have the power to hire, fire, demote, promote, transfer or discipline the plaintiff.

In holding that an employee is a supervisor only where they are empowered to take tangible employment actions against the victim, the Supreme Court expressly

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rejected the EEOC's definition of "supervisor" in its Enforcement Guidance that a supervisor is one who wields authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment"—categorizing the EEOC's definition as a "study in ambiguity." In so holding, the Supreme Court further reasoned that the definition of "supervisor" under the standard adopted by the Court in this opinion can very often be resolved by the trial court as a matter of law prior to an actual trial. Moreover, the Court rejected the notion that "employees [would be] unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or altering the work environment in objectionable ways," expressly noting that the "victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent."

While this opinion can be seen as a victory for employers defending harassment claims by their current or former employees, employers should continue to take immediate action to investigate allegations of harassment by their employees. Although one may not be deemed a "supervisor" under this opinion, the failure to investigate and remediate workplace harassment may lead to a finding that the employer was negligent in permitting the harassment to occur.

Third Circuit finds that group of employees' Fair Labor Standards Act claims for unpaid wages and overtime did not require an interpretation of collective bargaining agreements and did not require arbitration pursuant to collective bargaining agreements.

Bell v. Southeastern Pennsylvania Transportation Authority, 2013 U.S. App. LEXIS 17166 (8/19/13)

The plaintiffs filed a collective action pursuant to the Fair Labor Standards Act against SEPTA, seeking recovery of unpaid wages and overtime in connection with pre-run reporting responsibilities and pre-trip vehicle safety inspections (which generally take 25 minutes to complete). SEPTA and its operators are bound by three separate collective bargaining agreements, each of which includes a provision concerning compensation for time spent working prior to the morning scheduled start time, and each of which includes grievance procedures requiring that "any dispute involving the application, implementation or interpretation of any of the provisions of the agreements" be subject to arbitration. The trial court dismissed the lawsuit, finding that the resolution of the FLSA claims depends on the interpretation of the collective bargaining agreements and, therefore, the claims must be decided by an arbitrator.

The Third Circuit, however, reversed and held that the operators' FLSA claims did not require any interpretation of the collective bargaining agreements and did not, as a result, require that the claims be arbitrated. In so holding, the Third Circuit noted that the FLSA guarantees covered employees with specific substantive rights and takes precedence over conflicting provisions in a collectively bargained compensation agreement. Moreover, the Third Circuit further noted that where an employee's FLSA claim is inevitably intertwined with the interpretation or application of a collective bargaining agreement, an employee must exhaust the provisions of the collective bargaining agreement prior to vindicating his rights in federal court. Despite this analysis, the Third Circuit noted that there was no contention that the operators were owed additional payments under the collective bargaining agreements or that SEPTA violated any provisions of the agreements. To the contrary, the operators asserted (and the Third Circuit agreed) that their FLSA claims were independent of any rights they had pursuant to the collective bargaining agreements and required payment for all "hours worked" under the FLSA.

Plaintiff's failure to seek treatment for her alleged serious medical condition required dismissal of her FMLA claims.

Criscitello v. MHM Services, Inc., 2013 U.S. Dist. LEXIS 112470 (M.D. Pa., 8/9/13)

The plaintiff alleged that her former employer interfered with her rights pursuant to the Family and Medical Leave Act when it denied her FMLA leave and retaliated against her when it terminated her employment. The plaintiff alleged that she suffered from a serious health condition for which she was receiving ongoing medical treatment. Specifically, she alleged that—although she was neither a doctor nor a nurse practitioner at the time—she diagnosed herself with anxiety and depression in October 2008 and requested FMLA leave on three occasions during this month. She alleged that her leave requests were denied and her employment was thereafter terminated. The plaintiff did not receive any medical treatment at the time she allegedly requested FMLA leave. Rather, she first sought treatment more than one month after her alleged leave, and her doctor never diagnosed her with the anxiety and depression that she premised her FMLA leave request upon. In rejecting her claim, the court noted that "a serious health condition must exist at the time leave is requested." In so holding, the court rejected the plaintiff's assertion that she intended to seek medical treatment, noting that the "[p]laintiff has pointed to no case law, and the court is unaware of any, that has found a serious medical condition to exist upon the bare assertion of [an] employee's intent to seek medical treatment." Notwithstanding the fundamental flaws of the plaintiff's FMLA claim, the court further determined that the plaintiff's failure to return to see her doctor "leads this court to the conclusion that no continuing treatment took place." Accordingly, the court dismissed the plaintiff's FMLA interference claim and held that the plaintiff's failure to sustain an interference claim "compels the logical conclusion that she cannot make out a *prima facie* case for retaliation."

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PENNSYLVANIA WORKERS' COMPENSATION UPDATE

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

The Supreme Court of Pennsylvania clarifies Section 413 (a) of the Pennsylvania Workers' Compensation Act.

Gina Cozzone, Executrix of the Estate of Andrew Cozzone v. WCAB (Pa. Municipal/East Goshen Township); 51 MAP 2012; decided August 19, 2013; Chief Justice Castille

This case involved a claimant who sought a reinstatement of temporary total disability benefits after the 500-week period of partial disability had long since expired. The claimant was injured in January of 1989. In September of 1989, the claimant returned to work with no loss of earnings, and benefits were suspended without a supplemental agreement or court order. Over 13 years later, in May of 2013, the parties agreed to a reinstatement of benefits from February to March of 2003. Benefits were then voluntarily reinstated again from June through August of 2005. In June of 2007, benefits were again reinstated. In November of 2007, the claimant began working a modified-duty position for a different employer. The claimant was placed on partial disability status by agreement. In January of 2008, the claimant felt he could no longer work and petitioned for a reinstatement of benefits.

The defendant, who had been making partial disability benefits, ceased doing so, and the claimant filed a penalty petition. The WCJ granted the claimant's reinstatement and penalty petitions. However, the Appeal Board reversed, and the Commonwealth Court affirmed that reversal.

At the appellate level, the Board and the Commonwealth Court held that the reinstatement petition was untimely filed beyond the 500-week period for which compensation was payable under §306 (b) and §413 (a) of the Act. The courts also held that the claimant was not entitled to penalties because his right to compensation was completely extinguished by the expiration of §413 (a)'s 500-week statute of repose, notwithstanding the supplemental agreement signed by the parties in January of 2008 that provided for payment of partial disability benefits. The courts viewed this supplemental agreement as void and unenforceable.

On appeal to the Supreme Court, the claimant argued that the petition was filed within three years of his most recent compensation payment, consistent with §413 (a) of the Act, and argued that his petition was not barred by the 500-week statute of repose since the defendant voluntarily reinstated compensation after the expiration date for his claim, which was sometime in April of 1999. The Supreme Court, however, agreed with the Commonwealth Court's conclusion that the claimant's reinstatement petition was barred by §413 (a) of the Act because the claimant's statutory right to benefits expired prior to the filing of the petition.

The Supreme Court held that under §413 (a), claimants 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 workers' compensation received subsequent to suspension for a minimum of three years from the date of payment. Finally, in the event that a period of suspension comes to an end upon the resumption of workers' compensation payments, claimants retain the right to petition for modification as set forth in §413 (a).

An impairment rating given for a medical condition that is 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.); 769 C.D. 2013; filed 10/2/13; Judge Leavitt

The claimant sustained a work-related injury to his right ankle. The employer issued a notice of compensation payable (NCP) acknowledging the right ankle sprain, and the claimant received temporary total disability benefits. The claimant was later seen for an IRE and was given a 13% impairment, and the employer subsequently filed a modification petition to change the claimant to partial disability status. An IME was then performed, and this physician concluded that the claimant was fully recovered. The employer petitioned to terminate the claimant's benefits. The claimant then filed a petition to review to amend the injury description in the NCP to include additional conditions described by the IRE physician in his report.

The WCJ not only granted the employer's modification petition, based on the results of the IRE, but he also granted the employer's termination petition and denied the claimant's review petition. The claimant appealed to the Board, which affirmed the judge's decision. In his appeal to the Commonwealth Court, the claimant argued that the report from the IRE physician established the "compensable injury" and that the testimony of the IME physician, in his opinion, only addressed the injury that was described on the NCP.

The Commonwealth Court dismissed the claimant's appeal and affirmed the decisions of the WCJ and the Board. According to the court, although §306 (a.2) states that the impairment rating is to be based on the "compensable injury," it does not state that an impairment rating based on all of the claimant's medical conditions changes the work injury. Secondly, the court noted that the IRE physician did not opine that the work injury was anything more than an ankle sprain. The IRE physician included the claimant's right foot and ankle in his impairment rating out of an abundance of caution. Finally, the court held that the judge's acceptance of the IRE did not

alter the employer's burden of proof on the termination petition.

The claimant's receipt of a pension does not raise a legal presumption of voluntary removal from the workforce.

Nancy Turner v. WCAB (City of Pittsburgh); 347 C.D. 2013; filed 10/16/13; Judge McCullough

The claimant was involved in a work-related motor vehicle accident in February of 1994 in the course and scope of her employment as a police officer. The claimant sustained injuries to her neck, left shoulder, lower back, right wrist and right knee. Those injuries were acknowledged by a notice of compensation payable (NCP) from the employer. Subsequently, the claimant returned to work at a modified-duty job and received Heart and Lung benefits for approximately 10 years. In August of 2003, the Heart and Lung benefits were converted to workers' compensation benefits based on a medical determination that the claimant would not be able to return to her job and based on the claimant's acceptance of a disability retirement.

Following an IME, the employer sent the claimant a notice of ability to return to work (NARW) and filed a petition to suspend benefits, alleging the claimant had voluntarily removed herself from the workforce since she was physically capable of performing light-duty work and had not sought employment. The claimant asserted in her answer that she was involuntarily put out of the workforce and would otherwise continue to work.

When the claimant testified, she admitted that she was capable of performing some level of work, such as the modified-duty job she previously worked. She also agreed that she did not look for work immediately following retirement. However, the claimant said she would not have applied for a disability pension if her job had not been removed. The claimant also said that after receiving the NARW, she enrolled in a skills training program, which she eventually completed. A witness from the employer's third party administrator testified that the employer's transitional duty program was discontinued in 2003 and a new program was instituted in 2005. This new program was only available to active employees, and the claimant was not eligible since she retired with a disability pension in 2003.

The WCJ granted the employer's petition and rejected the claimant's allegation that she had not voluntarily withdrawn from the workforce because she had work capabilities and admittedly had not looked for work since retiring. The judge also found that, because the claimant was retired and no longer an active employee, the employer was not required to offer the claimant a return to a light-duty position. On appeal, the Board remanded to the judge for further findings regarding whether the claimant was forced into retirement because of her work injuries. On remand, the judge again granted the employer's suspension petition, and the Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the judge and Board improperly reasoned that receipt of an NARW and a disability pension are sufficient to raise a presumption that the claimant intended to withdraw from the general workforce. The court agreed with the claimant and granted the appeal. The court held that the receipt of any type of pension does not raise a presumption that a claimant has retired from the workforce and, in this case, that the claimant's receipt of a disability pension merely showed the claimant's inability to perform her time-of-injury job. The court vacated the Board's order and remanded the case to the judge for further findings.

In a cumulative trauma case, the claimant's last employer is not automatically liable for payment of benefits where there is evidence that work for a prior employer materially contributed to the injury.

A&J Builders, Inc. and State Workers' Insurance Fund v. WCAB (Verdi); 479 C.D. 2013; filed 10/16/13; Judge Simpson

This cumulative trauma case involved multiple employers. The claimant filed a claim petition against Employer A alleging a work-related repetitive trauma injury to his right knee on October 6, 2008. The claimant then filed a claim petition against Employer B, alleging that on September 25, 2007 (his last day of work for Employer B), he sustained a repetitive trauma injury to his right knee. Employer B denied the claim petition's allegations and filed joinder petitions against numerous employers.

The evidence revealed that before working for Employer B, the claimant sustained an injury to his right knee in 2004. He had surgery and returned to work without restrictions. The claimant worked for Employer B for three and a half years and performed his regular duties installing commercial drywall. The claimant said that this caused his right knee pain to return. While working for Employer B, he began treating for his right knee pain. After Employer B, the claimant worked for several other employers; the last employer was Employer A.

The claimant's treating physician, who testified in the case, opined that the claimant's job duties with Employer B and Employer A materially aggravated his underlying right knee condition. Because the claimant worked for Employer B for more than three years, the expert said he sustained more chondral damage to the right knee than during the time he worked for Employer A. Employer A's medical expert also testified, stating that the claimant was experiencing slow, gradual deterioration of his right knee function related to age. However, the expert also said he did not think the three days of work the claimant performed for Employer A substantially contributed to the development of his right knee arthritis.

The WCJ granted the claim petition that was filed against Employer B. In doing so, he accepted the opinion of the claimant's physician. He also credited the testimony of the employer's physician that the claimant's work duties for Employer A did not materially aggravate the claimant's condition. Employer B appealed to the Board, which affirmed. Employer B then appealed to the Commonwealth Court.

On appeal to the Commonwealth Court, Employer B argued that the judge erred

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in determining that the claimant provided timely notice. According to Employer B, the claimant did not provide notice within 120 days from his last day of work with them. Employer B further argued that the claimant did not show "reasonable diligence" in providing notice under §311 of the Act. The court, however, dismissed this argument, pointing out that the judge found that the claimant did not know for sure whether there was a relationship between his work duties and his knee pain until first being informed by his physician of the causal connection in July of 2009, approximately 90 days before the claim petition was filed. The court further rejected Employer B's argument that liability should have been assessed against Employer A since they were the claimant's last employer in a cumulative trauma case. The court held that the judge accepted the testimony of the claimant's expert that he materially aggravated his right knee condition when he worked for Employer B for three years and that the decision was, therefore, supported by the evidence.

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); 830 C.D. 2013; filed 10/16/13; Judge McGinley

The claimant was injured at work in July of 1997. Later, the claimant settled the wage loss portion of his claim through a compromise and release agreement. However, medicals remained opened. The employer then requested utilization review concerning the reasonableness and necessity of medical treatment the claimant was receiving from a nurse, which included massage therapy.

The utilization review was performed by a licensed practical nurse. In her determination, she said that massage therapy does not fall within the scope of a licensed practical nurse. The nurse provider was certified in massage therapy but was not licensed for that. Therefore, it was determined that the massage therapy was not reasonable and necessary. The claimant challenged the determination by filing a petition. The WCJ granted the petition and found that the nurse provider was licensed as a practical nurse and that the massage therapy was being performed under orders from a licensed physician.

The employer appealed, and the Board reversed, concluding that in order for the cost of services to be payable under §306 (f) of the Act, it must be a medical service which the provider (a practical nurse) is licensed to provide. Because the provider was not licensed by the Commonwealth as a massage therapist, her services were not reimbursable under the Act.

The Commonwealth Court reversed the decision of the Board and granted the claimant's appeal. The court pointed out that the nurse is a licensed health care provider under the Act, her services were prescribed by a physician, and the nurse asserted that she was trained in massage therapy. The nurse further stated that the massage therapy was something she utilized in providing therapeutic care to patients. The court held that the employer failed to establish that massage therapy did not come under the duties of an LPN.

An employer is entitled to subrogation from a recovery made by a claimant from a bad faith action against a manufacturer's insurance carrier.

Clyde Kennedy v. WCAB (Henry Modell & Co., Inc.); 1649 C.D. 2012; filed 8/1/13; by Judge Leavitt

The claimant sustained a crush injury to his right hand while using a conveyor belt at work. The employer paid the claimant total disability benefits and paid his medical bills. Later, the claimant filed a product liability action against the manufacturer of the conveyor belt, and the employer asserted a subrogation lien. The manufacturer's insurance carrier refused to defend the action, claiming it fell within the "product hazard" exclusion in the liability insurance policy.

The trial court approved a consent judgment against the third party. The claimant agreed not to pursue the third party for the judgment. Instead, the claimant pursued the manufacturer's insurance carrier for collection of the judgment and filed a complaint against them for breach of contract and bad faith. The trial court ruled in the claimant's favor. When the claimant failed to pay the employer the amount of their subrogation lien, the employer filed a review offset petition. In his answer, the claimant asserted that the employer was not entitled to subrogation because the money the claimant received was for a breach of contract, not negligence. The employer's petition was granted by the WCJ and affirmed by the Workers' Compensation Appeal Board.

On appeal to the Commonwealth Court, the claimant argued that, by law, the employer is subrogated only where the recovery comes from the third party that caused the injury for which the employer paid compensation benefits. In this case, the third party tortfeasor that caused the injury, the manufacturer, paid nothing to the claimant due to its insolvency. The court, however, rejected this argument, pointing out that the only reason the manufacturer's insurance carrier was not involved in the case was because it wrongfully refused to defend and indemnify the tortfeasor. The claimant's lawsuit against the insurance carrier depended on the malfeasance of the original tortfeasor, that is, the manufacturer's negligence. Thus, the court concluded that the employer was entitled to subrogation under §319 of the Act and affirmed the decisions of the WCJ and the Appeal Board.

A judge's decision granting a claim petition is reversed on the basis that the claimant was not in the course and scope of employment at the time of the work injury.

Trigon Holdings, Inc. v. WCAB (Griffith); 207 C.D. 2013; filed 8/7/13; by Judge Covey

In this case, the claimant filed a claim petition for workers' compensation benefits for a degloving injury that occurred to his left thumb. The claimant worked in a machine shop, and approximately two hours into the midnight shift, after ensuring that the employer's machines were running smoothly, the claimant told co-workers he would be in the tool and die room for a few minutes if they needed

him. Within five minutes, while polishing a bolt for his child's go-cart with an emery cloth, the claimant's left thumb was drawn into a lathe. The claimant filed a claim petition, which was granted by the WCJ. The Appeal Board affirmed the judge's decision.

The Commonwealth Court, however, reversed the decisions below. Noting that the judge concluded that the injury occurred during a temporary departure from work that did not break the course of employment, the Commonwealth Court disagreed and held that the claimant abandoned his work responsibilities as he was deliberately engaged in an activity wholly foreign to his employment, i.e., polishing a bolt for his child's go-cart. In the court's view, although the claimant was gone from the machine shop for only five minutes when he sustained the injury, his departure from the course of his employment was not trivial or insignificant. The court further noted that the claimant was not injured attending to personal comfort, such as getting a drink of water or using the restroom. Rather, he was injured while actively disengaged from his work responsibilities. The court held that the evidence supported the legal conclusion that the claimant's injury occurred during a pronounced departure from his job and, therefore, not in the course and scope of employment.

Testimony from the claimant's medical expert regarding the cause of the decedent's death was not equivocal simply because the expert offered alternate theories regarding the exact cause of death.

Manitowoc Co., Inc. and Sentry Insurance v. WCAB (Cowan); 472 C.D. 2013; filed 8/20/13; by Sr. Judge Friedman

The claimant filed a fatal claim petition, alleging that the death of his decedent was caused by injuries he sustained from a fall from a crane platform at work. The decedent and a co-worker were working, without harnesses, on an elevated crane platform with no handrails approximately six feet from the ground. While in a crouched position, the co-worker saw the decedent's eyes roll back, and the decedent fell off the platform, striking his head on the floor. The co-worker testified that the decedent had gone limp and did not try to catch his fall. Within seconds of the fall, the decedent began turning blue and blood was coming from his mouth. The decedent soon stopped breathing, and he was transported to the hospital and placed on life support. Diagnostic tests later revealed that the decedent was brain dead, and life support was disconnected. The autopsy report stated that the cause of death was cardiac dysrhythmia due to mitral valve prolapse.

In support of the fatal claim petition, the claimant's medical expert concluded that cardiac arrest was not experienced at the time of the fall because, once on the ground, the decedent clearly had a pulse. The expert further opined that the decedent did not die from mitral regurgitation or heart disease but from falling onto his head, which caused a closed head injury with a massive concussion.

The employer's medical expert testified that it was highly possible a cardiac episode caused the decedent to lose consciousness. This expert also opined that the decedent's brain injury stemmed primarily from cardiac arrhythmia and secondarily from the blow to the head when he hit the floor. Both experts agreed that the decedent suffered brain death.

The WCJ granted the claimant's petition, and the Appeal Board affirmed. The employer appealed to the Commonwealth Court, arguing that the testimony of the claimant's medical expert was equivocal since he offered alternate theories regarding the exact cause of the decedent's death.

The Commonwealth Court disagreed and affirmed the decisions below. It noted that, although the claimant's expert set forth four possible explanations regarding the connection between the decedent's fall and his death, under each scenario, his ultimate conclusion was that the fall and blunt force head trauma was the cause of death. The expert further testified that, absent the head trauma, the decedent would still be alive.

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.

Jamie Whitesell v. WCAB (Staples, Inc.); 205 C.D. 2013; filed July 10, 2013; Judge Pellegrini

The decedent suffered a work injury on October 15, 2003, which was acknowledged by notice of compensation payable (NCP) as a "lumbar strain/sprain." Later, in connection with a petition to review, the parties stipulated to amending the description of the work injury to "lumbar strain/sprain and lumbar disc disruption L4-5, resulting in total disc arthroplasty at L4-5 level." The WCJ's decision granting the review petition was dated June 28, 2006.

On June 8, 2011, the claimant filed a fatal claim petition, alleging the decedent died on June 13, 2010, as a result of mixed drug toxicity from medications prescribed by her treating physician. The employer requested a dismissal of the petition since the decedent's death did not occur within 300 weeks of the date of the work injury, as required by §301 (c) (1) of the Act. The judge denied the claimant's petition, concluding that it was barred under this provision of the Act. The Workers' Compensation Appeal Board (Board) affirmed.

On appeal to the Commonwealth Court, the claimant argued that the 300-week limitation to file a death claim starts from the date that the additional injuries occurred. In other words, the claimant took the position that the 300-week limitation should be extended since the decedent had sought and received an expansion of the work injuries by a WCJ's decision in June of 2006.

The Commonwealth Court rejected the claimant's argument, finding it irrelevant that the decedent's work injury was legally expanded by the judge in 2006. The compensable injury for the decedent commenced in 2003. The Commonwealth Court, therefore, affirmed the dismissal of the fatal claim petition on the basis that it was time barred.

An employer is not obligated to reinstate benefits and need not show continuing availability of suitable work when a claimant, with a residual disability who seeks to return to work at a light-duty job, suffers a non-work-related total disability preventing him/her from working at all.

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Southeastern Pennsylvania Transportation Authority (SEPTA) v. WCAB (Cunningham); 2045 C.D. 2011; filed July 12, 2013; by Judge McCullough

In June 1996, while working under permanent, light-duty restrictions, the claimant suffered a work injury to his right knee. The claimant filed a claim petition, and benefits were awarded after a WCJ granted the petition. Shortly after the June 1996 injury, the claimant returned to his pre-injury light-duty job. However, in July of 1996, the claimant was involved in a non-work-related car accident, suffering injuries to his left knee, low back and left hand. Again, the claimant went out of work and again returned to his light-duty job in April of 1997. On December 24, 1998, the claimant was in a second non-work-related accident, suffering injuries to his left knee, low back, left hand and left shoulder. During the week of December 26, 1998, the claimant unsuccessfully tried a brief return to work and has not returned to work in any capacity since then.

The employer filed a petition to modify/suspend the claimant's benefits, alleging that, but for his December 1998 non-work-related injuries, the claimant was able to return to work as of November 9, 2005. The WCJ concluded that the employer met its burden of proving that the claimant's work-related injury had resolved to the point that he could perform sedentary work but for the non-work-related injuries he suffered in the motor vehicle accidents. The judge found that the claimant's non-work-related injuries rendered him incapable of all possible work activity and suspended the claimant's benefits.

The claimant appealed the suspension of his benefits to the Appeal Board. The Board reversed the decision of the judge. According to the Board, because the employer failed to establish the availability of a job equal to or greater than the claimant's pre-injury average weekly wage, the suspension was not warranted.

The employer appealed to the Commonwealth Court, which reversed the Board's decision. In doing so, the court was guided by the Supreme Court's decision in *Schneider, Inc. v WCAB*, 650 Pa. 608, 747 A.2d 845 (2000), wherein the court held that the employer was not required to show job availability where a claimant was totally disabled by non-work-related conditions. In *Schneider*, after the claimant suffered work-related injuries to his head and neck, he was involved in a non-work-related incident, causing severe brain damage and paralysis, leaving him permanently unable to work in any capacity. The court further held that, although there was no obligation on the part of the employer to show job availability in cases like this, the employer was still required to provide the claimant with a notice of ability to return to work, as required by §306 (b)(3) of the Act.

Denial of unemployment benefits under §402 (e.1) of Unemployment Compensation Law is proper for claimant's termination from employment due to a violation of the employer's substance abuse policy.

Dillon v. Unemployment Compensation Board of Review; 786 C.D. 2012; filed June 18, 2013; by Judge Ledbetter

The claimant worked for the employer as a pipefitter. The claimant's job duties included handling chemicals, using power tools and operating a forklift. The employer prohibited its employees from working with breath alcohol content in excess of 0.02% and conducted random tests for compliance purposes. In December 2010, the claimant tested positive and signed a "last-chance agreement," which subjected him to additional testing for a year and potential disciplinary action, including discharge, in the event of another positive test. In September 2011, the claimant tested positive again, and he was terminated.

The Commonwealth Court considered the issue of whether the claimant's eligibility for unemployment benefits should be analyzed under §402 (e.1) or §402 (e) of the Unemployment Compensation Law. The court pointed out that, in prior holdings, they found that the proper provision under which to analyze discharges where an employee fails to submit and/or pass a drug test is §402 (e.1), not §402 (e). In this case, the Unemployment Compensation Board of Review (Board), in affirming the referee's denial of benefits, concluded that §402 (e) of the law was applicable. The Commonwealth Court, however, disagreed with that analysis.

According to the court, although the legislature did not include the word alcohol in §402 (e.1), the court felt that a strict interpretation of this exclusion would lead to an unreasonable result and potentially rise to the level of absurdity. Moreover, the court concluded that the legislature intended to include alcohol as a substance that is subject to abuse within the meaning of the provision. Although the Commonwealth Court disagreed with the Board's analysis, nevertheless, it affirmed the denial of the claimant's unemployment benefits.

The denial of unemployment benefits was proper where the employee violated the employer's "return home" policy.

Dike v. Unemployment Compensation Board of Review; 1993 C.D. 2012; filed June 18, 2013; by Judge McCullough

In this case, the employer had a "return home" policy that permitted employees to return home for certain reasons, such as attending a funeral for a family member. The policy stated that, in order for an employee to request "return home leave" to attend a funeral, the employee must submit a completed application, a copy of a plane ticket or travel itinerary and written documentation of the death or funeral, including a doctor's note, document from a funeral home, death certificate or other written record. The claimant in this case requested a five-week leave to attend his grandfather's funeral in Nigeria. The claimant was given the application and asked to submit his travel itinerary or plane ticket along with a written record of the death or funeral. The claimant replied that he did not know how to obtain written documentation of the funeral from Nigeria and asked what would happen if he did not report for his next scheduled shift. The employer's Job Abandonment Policy was then explained to the claimant.

The claimant did not provide the employer with the completed application or other documentation. Also, the claimant failed to appear for a scheduled work shift. The employer then notified the claimant that it deemed his action job abandonment, and the claimant was terminated. The claimant filed for unemployment benefits.

Benefits were denied by the service center, and an evidentiary hearing was then conducted by a referee. The referee found that the claimant was ineligible for benefits under §402 (b) of the Law, holding that he voluntarily left his job for personal reasons and did not attempt to preserve his employment by complying with the employer's "return home leave" policy.

The Unemployment Compensation Board of Review affirmed the referee's denial of benefits, as did the Commonwealth Court. According to the court, the claimant's decision to take leave when he was fully aware that it would result in termination if his request for leave were not approved was tantamount to voluntarily leaving his job.

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Committee Preference

Please select up to three committees in which you would like to serve, numbering them in order of preference.

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General Liability . . . . . ____

House Counsel . . . . . ____

Insurance Coverage and Subrogation . . . . . ____

Motor Vehicle Law . . . . . ____

Products Liability . . . . . ____

Professional Liability . . . . . ____

Publications . . . . . ____

Transportation and Trucking . . . . . ____

Workers' Compensation . . . . . ____

Young Lawyers Committee . . . . . ____