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REVISIONIST HISTORY: THE ASSAULT TO CIRCUMVENT PENNSYLVANIA'S BAD FAITH STATUTE BY ASSERTING COMMON LAW BAD FAITH IN FIRST PARTY AND UM/UIM CLAIMS

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It has been said that lawyers are bad legal historians. Perhaps no legal issue illustrates this better than recent developments and trends regarding common law bad faith and insurance claims in Pennsylvania. Nearly 30 years ago in the landmark case *D'Ambrosio v. Pennsylvania Natl Mut. Cas. Ins. Co*., 431 A.2d 966 (Pa. 1981), the Pennsylvania Supreme Court held that there was no cause of action for breach of the implied duty of good faith and fair dealing a/k/a common law bad faith in a first party property insurance claim. In 1997, the U.S. Court of Appeals for the Third Circuit agreed. *Polselli v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524 (3rd Cir. 1997). Subsequently, both the Superior Court and the Third Circuit specifically held that there was no common law bad faith in uninsured and underinsured motorist claims. *Keefe v. Prudential Prop. and Cas. Ins. Co*., 203 F.3d 218 (3rd Cir. 2000); *Williams v. Nationwide Mut*. Ins Co., 750 A.2d 881 (Pa. Super. 2000). The only bad faith remedy in Pennsylvania in a first party claim and an uninsured and underinsured motorist claim was pursuant to Pennsylvania's Bad Faith Statute, 42 Pa.C.S.A. § 8371.

Despite these clear and controlling holdings from Pennsylvania's highest appellate courts, plaintiffs' attorneys are asserting in increasing numbers common law bad faith in first party and UM/UIM claims. Some courts have (incorrectly) permitted these claims. Besides ignoring the controlling caselaw, asserting common law bad faith in first party and UM/UIM claims is nothing short of revising 50 years of Pennsylvania jurisprudence. Historically, Pennsylvania has never recognized common law bad faith in any form in a first party claim and a UM/

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THE EFFECT ON *MCDONNELL-DOUGLAS* BURDEN SHIFTING ANALYSIS IN ADEA CASES SINCE THE U.S. SUPREME COURT DECISION IN *GROSS V. FBL FINANCIAL SERVICES, INC.*

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I. INTRODUCTION

The Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc*., __ U.S. __, 129 S. Ct. 2343 (June 18, 2009), significantly reworks the analysis to be applied in age discrimination claims, and clarifies the burden of persuasion in such cases. The issue before the Court in *Gross* was whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." *Id.* at 2348. In a bold move, the Court went beyond this issue and held that the burden of persuasion in an ADEA claim never shifts to the employer. Thus, as the Court concluded, the mixed-motive analysis can never apply in an ADEA case because age must be the "but for" cause of the adverse employment action, and not simply a motivating factor. In other words, *Gross* instructs that a plaintiff must prove age is **the** reason that the employer engaged in an adverse employment action. *Id.* at 2350.

At first blush, this holding appears to be difficult to reconcile with the application of the *McDonnell-Douglas* burden shifting analysis employed by the U.S. Court of Appeals for the Third Circuit in analyzing summary judgment motions. Several recent Third Circuit decisions have clarified how *Gross* and *McDonnell-Douglas* are to be applied at the summary judgment stage. This article is intended to summarize the holding of *Gross* and recent Third Circuit cases interpreting it to provide guidance to persons pursuing summary judgment in ADEA cases.

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UIM claim.

The revisionist tactic is aimed at circumventing four principal parts of Pennsylvania's bad faith law, including circumventing two recent Pennsylvania Supreme Court cases: 1) the bench trial[1], 2) the two-year statute of limitations[2], 3) the clear and convincing evidence standard[3], and 4) the bad faith statute's four permitted damages (attorney fees, costs, interest and punitive damages). The revisionist tactic seeks to nullify the bad faith law by: 1) creating a state court jury trial, 2) lowering the burden of proof to preponderance of the evidence, 3) expanding the damages recoverable for bad faith to include compensatory damages and emotional distress, and 4) expanding the statute of limitations from two years (tort) to four years (contract). The goal is to re-write Pennsylvania law and expand bad faith into liability based on mere negligence and mere breach of contract. The goal is also to recover more damages than what is expressly permitted in the bad faith statute.

Common law bad faith exists only in *third party liability claims*. There is no legal, logical or historical basis for common law bad faith in a first party claim or a UM/UIM claim. The caselaw that has held otherwise shows that there is a significant misunderstanding about the nature of insurance claims and, in particular, the legal and historical underpinnings giving rise to common law bad faith in third party liability claims. The decisions that have allowed common law bad faith outside of third party liability claims are based on legal principles from third party liability claims that are misunderstood and misapplied in first party claims.

Pennsylvania's case law regarding the duty of good faith and fair dealing dates from 1957 when in *Cowden v. Aetna Casualty Insurance Company*, 134 A.2d 223 (Pa. 1957), the Pennsylvania Supreme Court held that an insurance bad faith cause of action could exist against the insurer at common law regarding the insurer's defense of its insured in a third party liability action where an excess verdict was entered against the insured. In *Cowden*, the insured brought a cause of action in tort against his liability insurer after being subject to an excess jury verdict regarding an automobile accident claim. The Pennsylvania Supreme Court held that the insurer, pursuant to and in addition to its express contractual duty (the provision in the policy regarding the insurer's duty to defend), also had an *implied* duty to act in good faith in the defense of the third party action to the insured:

> It is established by the greatly preponderant weight of authority in this country that an insurer against public liability for personal injury may be liable for the entire amount of the judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on part of the insurer and the discharge of its contractual duty [to defend the insured].

Cowden, 134 A2.d at 227 (brackets added).

Four points must be emphasized from the Pennsylvania Supreme Court's holding in *Cowden*.

- First, the duty of good faith did not expressly exist in the insurance policy but was *implied* from the policy due to the insurer's express contractual duty in the policy to defend the insured.
- Second, the court judicially created an *extra-contractual* remedy for the insurer's bad faith in that the insurer could be liable for the entire excess verdict amount, even though under the policy the insurer was only contractually obligated to pay the liability limits contained in the policy.
- Third, the insurer would not be liable for bad faith if it was merely negligent or breached the policy, but only if the insurer engaged in conduct constituting *bad faith* by the *clear and convincing* evidence standard.
- Fourth, the common law bad faith cause of action in *Cowden* was brought as a *tort* (in trespass) claim against the insurer.

Until 1990 Pennsylvania did not recognize a bad faith cause of action by the insured against his own policy. Historically, in the 1970s some states began to recognize common law bad faith by insureds for first party property claims. The first state supreme court to do so was California in the seminal case *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 510 P.2d 1032 (1973). In 1981, in *D'Ambrosio*, the Pennsylvania Supreme Court addressed the issue whether common law bad faith existed in Pennsylvania regarding an insured's property damage claim.

In *D'Ambrosio* the insured filed a claim for damages to his motor boat from the weather. The insured brought a cause of action against the insurer for common law bad faith. As in *Cowden*, the plaintiff brought the common law bad faith claim as a tort. The Pennsylvania Supreme Court dismissed the bad faith cause of action. In doing so, the Pennsylvania Supreme Court expressly stated that the question whether first party insurance bad faith existed was for the Pennsylvania legislature:

Surely it is for the Legislature to

> announce and implement the Commonwealth's policy in governing the regulation of insurance carriers. In our view, it is equally for the Legislature to determine whether sanctions beyond those created under the Act (the Pennsylvania Unfair Insurance Practices Act) are required to deter conduct which is less than scrupulous.

D'Ambrosio, 431 A.2d at 970.

Importantly in reaching its holding, the Pennsylvania Supreme Court considered *Gruenberg v. Aetna*, stating:

> In arguing for the reinstatement of his count in trespass, appellant would have this Court adopt the position of the Supreme Court of California which, in *Gruenberg v. Aetna Insurance Co*., 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973), held that where an insurer:
>
> > "fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing." 9 Cal.3d at 574, 108 Cal.Rptr. at 485, 510 P.2d at 1037.
>
> Appellant's argument is based on his belief that such an action "is the only remedy which will prevent insurance industry abuse in handing first party claims, and which will place the consumer on more equal footing with insurers." (Footnote omitted).

D'Ambrosio, 431 A.2d at 968-969.

Again, it is important to remember that the cause of action for common law bad faith in *Gruenberg* was *a tort* and that *Gruenberg* was the first state supreme court case in the United States to adopt a common law bad faith cause of action, either in contract or tort, in a first party claim. Also, the issue in *Gruenberg* was whether the common law bad faith cause of action from third party liability cases should be extended in California to first party cases.

In 1990 the Pennsylvania legislature passed "Act 6" which included a statutory tort cause of action for bad faith, 42 Pa.C.S.A. § 8371. Since 1990, many courts have repeatedly held that the enactment of the bad faith statute was in direct response to *D'Ambrosio*. The history and purpose of the bad faith statute in this regard was aptly stated by Judge Nealon in *Olsofsky v. Progressive Ins. Co.*, 52 D.&C.4th 449, 456-457 (Lackawanna County 2001):

> Prior to the passage of Act 6, Pennsylvania recognized a cause of action for third party bad faith, see *Cowden v. Aetna Casualty and Surety Co.*, 389 Pa. 459, 134 A.2d 223 (1957), but declined to acknowledge a claim for first-party bad faith beyond the administrative remedies set forth in the Unfair Insurance Practices Act. (citations omitted). However, in the same amendatory legislation which promulgated the peer review provisions in 75 Pa.C.S. § 1797, the General Assembly enacted 42 Pa.C.S. § 8371, which established a private cause of action against an insurer that has acted in bad faith towards its insured. § 8371 was adopted in response to the *D'Ambrosio* court's refusal to create common-law action for first-party bad faith.

In the area of UM/UIM claims, the controlling and still valid Pennsylvania case law from the Superior Court and the Third Circuit has specifically held that there is no common law bad faith. *Williams v. Nationwide Mut. Ins Co*., 750 A.2d 881, 866 (Pa. Super. 2000) ("[w]e conclude initially that common law claims for bad faith [in a UM/UIM claim] on the part of insurers are not remediable in Pennsylvania.... [t]hus we are left to deal only with the insureds' statutory claim of bad faith") (brackets added); *Keefe v. Prudential Prop. and Cas. Ins. Co.*, 203 F.3d 218, 224 (3rd Cir.2000) ("[a]though there is no common law remedy for bad faith in the handling of [UM/UIM] insurance claims under Pennsylvania law, ... the Pennsylvania legislature has provided a statutory remedy") (bracket added).

Ignoring the controlling precedent of *D'Ambrosio*, *Poselli*, *Keefe*, and *Williams*, the revisionist tactic makes several flawed arguments for its viability. The first and most commonly asserted argument by the revisionists is based on a tort-contract distinction. The revisionist tactic argues that Pennsylvania has recognized common law bad faith in contract since *Cowden* in 1957. The argument continues that *D'Ambrosio* only spoke to a prohibition of common law bad faith in tort in a first party claim. As such, the revisionist argument asserts that *D'Ambrosio* does not bar common law bad faith in contract and only bars common law bad faith in tort. Accordingly, the revisionists assert that a first party or UM/UIM claimant can assert two *separate* "bad faith" causes of action: 1) a statutory tort pursuant to 42 Pa.C.S.A. § 8371, and 2) a common law bad faith claim in contract. This is incorrect.

The tort-contract argument has several fundamental flaws. First, it ignores the fact that the holding in *D'Ambrosio* was sweeping – *D'Ambrosio* barred *all* common law bad faith regardless of the classification as a tort or contract claim. ("There is no evidence to suggest, and we have no reason to believe, that the system of sanctions established under the Unfair Insurance Practices Act must be supplemented by a judicially created cause of action.") *D'Ambrosio*, 431 A.2d at 970). Second, the argument ignores the fact that the common law bad faith cause of action under consideration in *D'Ambrosio* was the *same* cause of action set forth in the California case of *Gruenberg* and that the California Supreme Court did not recognize any common law bad faith for first party claims in contract or in tort prior to *Gruenberg*. Third, up and until the time of *D'Ambrosio* in 1981, there was no Pennsylvania Supreme Court case that had recognized first party bad faith either in tort or contract. The *only* common law bad faith claim that existed in Pennsylvania before *D'Ambrosio* was a third party liability excess bad faith claim under *Cowden*. The absence of any such caselaw in the first party realm that expanded common law bad faith in contract is telling. Fourth, the tort-contract argument is inherently flawed because it relies on an illogical and flatly wrong legal premise - that common law bad faith in contract exists in first party claims because Pennsylvania has recognized common law bad faith in contract since *Cowden* in 1957. The revisionists forget that the cause of action in *Cowden* was brought as a tort and the bad faith cause of action in *Cowden* was implied from the *liability insurer's* duty to defend. A first party insurer or UM/UIM insurer does not have a duty to defend. Thus, because a first party policy and a UM/UIM policy do not have a contractual duty to defend, there

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is no legal or logical basis for common law bad faith in those claims.

In fairness, the belief that a *Cowden* claim is a contract claim has a historical basis. In *Gray v. Nationwide Mut. Ins. Co*., 223 A.2d 8 (Pa. 1966), a liability claimant received an assignment of the insured's bad faith cause of action for failing to settle within the policy limits as set forth in *Cowden.* The question before the Supreme Court was whether the insured could assign his common law bad faith cause of action under *Cowden* to the liability claimant. The court framed the issue as "[o]ur task is to determine whether… the insured, has a cause of action in assumpsit or in tort against the insurer for its wrongful refusal to settle." In reaching its holding the Pennsylvania Supreme Court did not specifically address whether a cause of action existed in both contract and tort, or only in tort, but did hold that an action in contract existed.

> We believe that this recent case law, employing contractual terms for the obligation of the insurer to represent in good faith the rights of the insured, indicates that a breach of such an obligation constitutes a breach of the insurance contract for which an action in assumpsit will lie.

223 A.2d at 11.[4]

Returning to the tort-contract revisionist argument, if a *Cowden* common law bad faith cause of action is considered a contract claim the tort-contract argument especially fails.[5] It fails because the contract aspect of *Cowden* involved the liability insurer's contractual duty to defend the insured for his mis-conduct regarding a third party liability claim. In a first party or UM/UIM policy, there is no such contractual duty. Just as important, prior to 1990 there is no caselaw from the Pennsylvania Supreme Court or otherwise holding that common law bad faith exists in contract in a first party and/or UM/UIM claim.

Another reason why there is no common law bad faith cause of action "in contract" is because there is nearly 30 years of controlling caselaw that has held, without limitation, that there is no such thing as common law bad faith in first party or the hybrid UM/UIM claim.[6] The overwhelming precedent cannot be ignored.

Finally, the last argument the revisionist tactic asserts is that *Birth Center v. St. Paul Companies, Inc.,* 787 A. 2d 376 (Pa. 2001) in 2001 changed *D'Ambrosio*. The *Birth Center* argument is simply without any merit whatsoever and is based on the tactic of taking incomplete sound bite excerpts from the *Birth Center* decision and placing them out of context. There is nothing in the *Birth Center* decision that states that the court is expressly overruling *D'Ambrosio* or that even touches on the issue.

First, it must be remembered that *Birth Center* was a third party liability excess verdict case. No first party claim was involved. All the *Birth Center* court says is that in a *Cowden* common law excess verdict bad faith claim, the insured may also pursue consequential damages in addition to pursuing the entire excess verdict amount. The majority opinion in *Birth Center* limits its holding to third party claims and *Cowden* cases:

> We affirm the decision of the Superior Court. *Where an insurer refuses to settle a claim that could have been resolved within policy limits* without "a bona fide belief that it has a good possibility of winning," it breaches its contractual duty to act in good faith and its fiduciary duty to its insured. *Cowden v. Aetna Casualty and Surety Company*, 389 Pa. 459, 134 A.2d 223, 229 (Pa. 1957). Therefore, the insurer is liable for the known and/or foreseeable compensatory damages of its insured that reasonably flow from the bad faith conduct of the insurer. The fact that the insurer's intransigent failure to engage in settlement negotiations forced it to pay damages far in excess of the policy limits so as to avoid a punitive damages award, does not insulate the insurer from liability for its insured's compensatory damages where the insured can prove that the insurer's bad faith conduct caused the damages.

Birth Center, 787 A.2d at 379 (emphasis added).

The words "[w]here an insurer refuses to settle a claim that could have been resolved within policy limits" confines the holding to third party liability excess verdict cases. There is nothing that states that *D'Ambrosio* is being overruled. There is nothing that states that common law bad faith is being expanded to first party claims or UM/UIM claims. In fact, the *Birth Center* holding confirms that common law bad faith "in contract" does not exist outside third party excess verdict cases because the holding states that the common law duty of good faith and fair dealing arises from the duty to defend, which is exclusive to liability insurance policies.[7]

It also should be pointed out that the revisionist tactic ignores other areas of Pennsylvania law. The tactic mistakenly assumes that common law bad faith "in contract" is controlled by the "preponderance of the evidence" standard for breach of contact. However, this ignores that in *Cowden* the Pennsylvania Supreme Court held there was liability only for bad faith and bad faith alone (not negligence and not breach of contract) by clear and convincing evidence:

> Especially does this become manifest when it is borne in mind that *bad faith, and bad faith alone*, was the requisite to render the defendant liable. Nor is it without presently material significance that the plaintiff does not assert that the defendant's conduct was fraudulent or even negligent; and, of course, bad judgment, if alleged, would not have been actionable.
>
> ... bad faith must be proven by clear and convincing evidence and not merely insinuated.

Cowden, 134 A.2d at 229 (emphasis original).

As to the revisionist claim seeking emotional distress through a common law bad faith claim in contract, it must be noted that Pennsylvania does not recognize emotional distress for breach of an insurance policy. *Rodgers v. Nationwide Mut. Ins. Co*., 496 A.2d 811 (Pa. Super. 1985); *Baker v. Pennsylvania Nat'l Mut. Casualty Ins. Co*., 536 A.2d 1357 (Pa. Super. 1987); *Fennell v. Nationwide Mut. Fire Ins. Co*., 603 A.2d 1064 (Pa. Super. 1987).

As to the revisionist assertion that a common law bad faith claim allows a plaintiff to obtain compensatory damages, the revisionists forget that

the ability to obtain compensatory damages for a breach of contract is extremely limited and is allowed only to the damages that were reasonably foreseeable and within the contemplation of the parties at the time *they made the contract*. *Ferrer v. Trustees of the Univ. of Pa*., 825 A.2d 591, 610 (Pa. 2002) (emphasis added). The revisionist tactic omits that the damages are to be foreseeable *at the time of contract*, not at the time of the breach.

Last, two Pennsylvania Supreme Court cases from the 1990s warrant historical note. The first, while neither controlling nor persuasive, is the Pennsylvania Supreme Court's 3-2 holding in *Miller v. Keystone Ins. Co*., 636 A.2d 1109 (Pa. 1994). As a preliminary matter, the court's opinion in *Miller* can at best be characterized as messy and confusing. Furthermore, the decision expressly states that it has no application outside the specific facts presented in the case. Because of the 3-2 holding, the opinion has no weight. Nonetheless, it provides some insight. In the underlying Superior Court decision (which was reversed by the Pennsylvania Supreme Court), the Superior Court held that the implied duty of good faith and fair dealing applied to a first-party automobile claim under the now repealed No Fault Act. In doing so the Superior Court cited two California cases that followed *Gruenberg*. On appeal, the Pennsylvania Supreme Court reversed the Superior Court citing *D'Ambrosio*. The point here is that in 1994 the Pennsylvania Supreme Court squarely had the opportunity to adopt common law bad faith in either contract or tort and in a first party automobile claim. Instead of doing so, the Pennsylvania Supreme Court declined.

The revisionist tactic also overlooks or forgets the 1995 case from the Pennsylvania Supreme Court of *Johnson v. Beane*, 664 A.2d 96, 99 n.3 (Pa. 1995), where the Pennsylvania Supreme Court stated:

> There is no common law remedy in Pennsylvania for bad faith on the part of insurers. *Terletsky v. Prud. Prop. & Cas. Ins. Co*., 649 A2d. 680, 688, 437 Pa.Super. 108, 124 (1994). However, the Pennsylvania legislature created a statutory remedy in 42 Pa.C.S. § 8371 which became effective on July 1, 1990.

So as recently as 1995, the Pennsylvania Supreme Court confirmed that there was no common law bad faith, in any form, in a first party claim. The caselaw allowing common law bad faith outside of third party claims does not discuss this.

An historical irony in the current movement to revise Pennsylvania bad faith law is that prior to the enactment of 42 Pa. C.S.A § 8371 it was long asserted that a bad faith law was needed to level the playing field between the insurer and the insured because the insurer had a distinct advantage over the insured when there was no threat of an extra-contractual punishment for bad faith conduct. *D'Ambrosio*, 431 A.2d at 968 - 969.[8] Now, even though there has been a bad faith statute in effect in Pennsylvania for nearly 20 years with substantial extra-contractual punishment for bad faith, including punitive damages, plaintiffs' attorneys are seeking to significantly shift the playing field. However, the shift is not to make the playing field fair or level, but to stack the deck against insurers through revisionist history. With the protections of the bad faith statue in place, the only reason for the assertion of common law bad faith outside of third party claims is to circumvent the bad faith statute. Revisionism is currently assaulting bad faith law in Pennsylvania, and it remains to be seen how far the courts will let the attack go.

ENDNOTES

[1]*Mishoe v. Erie Ins. Co*., 824 A.2d 1153 (Pa. 2003).

[2]*Ash v. Continental Ins. Co*., 932 A.2d 877 (Pa. 2005).

[3]*Terletsky v. Prudential Property & Casualty Ins. Co*., 649 A.2d 680 (Pa. Super 1992), *appeal denied*, 659 A.2d 560 (Pa. 1995).

[4]The *Gray* court did not discuss or consider the fact that *Cowden* was brought as a tort.

[5]It is submitted that the classification of a *Cowden* claim as a "contract" claim is technically incorrect. Among the reasons is the fact that the bad faith claim in *Cowden* was implied from the policy (i.e. the claim did not exist in the insurance policy itself) and allowed the insured to recover damages outside the insurance policy (the amount of the excess verdict). These damages and the nature of them (being implied and existing outside the contract itself) sound in tort. Furthermore, the leading commentary at the time when *Cowden* was decided considered common law bad faith a tort. *See* Keaton, *Liability Insurance and Responsibility for Settlement*, 67 Harv.L.R. 1136 (1953); *Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R.2d 168 (1955). Also, the classification of common law bad faith arising from the liability insurer's duty to defend as a contract cause of action has been criticized as flawed. Steven S. Ashley, *Bad Faith Actions*, 2:14, 6:10 (2nd Ed. West 1997).

[6]*D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co*., 431 A.2d 966 (Pa. 1981); *Smith vs. Harleysville Insurance Company*, 431 A.2d 974 (Pa. 1981); *Johnson v. Beane*, 664 A.2d 96, 99 n.3 (Pa. 1995); *Meyers vs. USAA Casualty Insurance Company*, 444 A.2d 1217 (Pa. Super. 1982); *Epstein vs. State Farm Insurance Company*, 453 A.2d 1084 (Pa. Super. 1982); *McClaine vs. Allstate Insurance Company*, 463 A.2d 1131 (Pa. Super 1983); *Solomon vs. Century Insurance Company*, 471 A.2d 863 (Pa. Super. 1984); *Terletsky v. Prudential Property & Casualty Ins. Co*., 649 A.2d 680, 688 (Pa. Super 1992); *O'Donnell v. Allstate Insurance Co*., 734 A.2d 901, 905 (Pa. Super. 1995); *Romano v. Nationwide Mutual Fire Ins. C*o., 646 A.2d 1228 (Pa. Super. 1994); *MGA Ins. Co. v. Bakos*, 699 A.2d 751, 754 (Pa. Super. 1997); *Williams v. Nationwide Mut. Ins. Co*., 750 A.2d 881, 886 (Pa. Super. 2000); *Ridgeway v. United States Life Credit Life Ins. Co*., 793 A.2d 972, 977 n.2 (Pa. Super. 2002); *Mishoe v. Erie Ins. Co*., 762 A.2d 369, 375, n.6 (Pa. Super. 2000); *DiGregorio v. Keystone Health Plan East*, 840A.2d 361, 371 n.2 (Pa. Super 2003); *Brickman Group, Ltd. v. CGU Ins. Co*., 865 A.2d 918, 926 (Pa. Super. 2004); *Ash v. Cont'l Ins. Co*., 861 A.2d 979, 982-983 (Pa. Super. 2004); *Olsofsky v. Progressive Ins. Co.,* 52. D.& C.4th 449 , 456-457 (Lackawanna County 2001); *Polselli v. Nationwide Mut. Fire Ins. Co*., 126 F.3d 524, 529 (3rd Cir. 1997); *Keefe v. Prudential Prop. and Cas. Ins. Co*., 203 F.3d 218 (3rd Cir. 2000); *Kauffman v. Aetna Cas. & Sur. Co*., 794 F. Supp. 137, 139-40 (E.D. Pa. 1992); *Leo v. State Farm Mut. Auto. Ins. Co*., 908 F. Supp. 254, 257 (E.D. Pa. 1995)

[7]It also must be remembered that first party property coverage protects the insured's own actual losses upon the happening of certain covered casualty. In third party liability coverage the insurer agrees to defend the insured and to indemnify the insured for his conduct in causing harm to a third party. *Zimmerman v. Harleysville Mutual Ins. Co*., 860 A.2d 167, 175 (Pa. Super. 2004) (dissent); *see also, Port Authority v. Affiliated FM Ins. Co*., 311 F.3d 226 (3rd Cir. 2002) (discussing differences between first party and third party coverage in a New Jersey case).

[8]The *D'Ambrosio* plaintiff's public policy plea to the Pennsylvania Supreme Court for the court to create a bad faith remedy further shows that up to the time that *D'Ambrosio* was decided in 1981, there was no recognized cause of action for common law bad faith in Pennsylvania in a first party property claim.

The Effect on *McDonnell-Douglas*

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II. *SUMMARY OF* GROSS V. FBL FINANCIAL SERVICES, INC.

In *Gross*, the plaintiff, Jack Gross, was employed by defendant FBL as a claims project director. When he was 54 years old, he was transferred to the position of claims project coordinator. Contemporaneously, many of his former job responsibilities were transferred to the newly-created position of claims administration manager. This new position was given to a female in her early forties, Lisa Kneeskern. Although Gross and Kneeskern received identical compensation, Gross considered his new position to be a demotion. Gross then filed an ADEA claim alleging that his demotion was based at least in part on his age. At trial, the district court gave an instruction that a verdict for Gross would be appropriate "if he proved, by a preponderance of the evidence, that FBL 'demoted [him] to claims project coordinator' and that his age was a 'motivating factor' in FBL's decision to demote him."

FBL appealed, arguing that such a "mixed motives" analysis was improper under the ADEA. *Id*. at 2348. The Court of Appeals for the Eighth Circuit concluded that it was improper to provide a mixed-motive jury instruction "because [it] allowed the burden to shift to FBL upon presentation of *any* category of evidence showing that age was a motivating factor, not just 'direct evidence" related to FBL's alleged consideration of age." *Id*. Rather, the Eighth Circuit opined that the proper consideration was whether Gross proved that "age was the determining factor in FBL's employment action." *Id*.

The Supreme Court granted certiorari and vacated the decision of the Eighth Circuit. *Id*. The Supreme Court held that in considering Gross's claim,

> we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA. We hold that it does not.

Id. The Court noted that while a burden-shifting analysis exists for Title VII claims in which a plaintiff can prove that her membership in a protected class "'played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account.'" *Id*. at 2349 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (alterations in the original)). This shifting of the burden of proof to the defendant was expressly rejected by the *Gross* Court, which held that it "has never held that the burden-shifting framework applies to ADEA claims. And, we decline to do so now." *Id*.

Examining the statutory text of Title VII and the ADEA, the Court opined that "the Court's interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* [*Inc., v. Costa*, 539 U.S. 90 (2003)] and *Price Waterhouse*." *Id.* The Court noted that the "ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of age is that age was **the** 'reason' that the employer decided to act.'" *Id.* at 2350 (citing *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993) (Emphasis added). Therefore, the Court concluded that the burden never shifts to the defendant to prove that it would have taken the challenged action even in the absence of consideration of age. *Id.* at 2351. "[T]he plaintiff retains the burden of persuasion to establish that age was the 'but for' cause of the employer's adverse action." *Id.*

The Court then summarized the appropriate test as follows:

> We hold that a plaintiff bringing a disparate treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Id. at 2352.

III. APPLICATION OF *MCDONNELL-DOUGLAS* BURDEN SHIFTING ANALYSIS TO ADEA CLAIMS AFTER *GROSS*

While *Gross* speaks to the burden of persuasion and the propriety of mixed motive jury instruction, its holding has implications at the summary judgment stage as well. It has been the practice of the U.S. Court of Appeals for the Third Circuit to apply the *McDonnell-Douglas* test in cases where there is only indirect evidence of discrimination, including cases involving ADEA claims. *Heilman v. Allegheny Energy Service Corp.*, 2009 WL 3792419 at *2 (3d Cir. Nov. 12, 2009); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994). The *McDonnell-Douglas* test is a burden shifting analysis that requires a plaintiff to prove a prima facie case of discrimination, whereupon the burden shifts to the defendant to show a legitimate, non-discriminatory reason for why it took an adverse employment action against the plaintiff. The plaintiff must then prove the proffered reason is simply pretext, and the true reason for the employment action was unlawful discrimination. *Id.* at *3.

The *McDonnell-Douglas* burden shifting analysis in ADEA cases appears to be at odds with the principles espoused in *Gross*. The *McDonnell- Douglas* test, in effect, shifts the burden to the defendant to show a non-discriminatory reason for the adverse employment action. *Gross*, on the other hand, holds that the burden of persuasion remains with the plaintiff at all times. But if the burden of persuasion always remains with the plaintiff to prove age was **the** reason for the adverse employment action, should courts ever use the *McDonnell-Douglas* test in ADEA cases at the summary judgment stage?

A review of recent Third Circuit decisions assists in answering this inquiry. The Third Circuit has held that *McDonnell-Douglas* continues to be proper in ADEA cases at summary judgment, and can be applied in conjunction with *Gross*. In *Connolly v. The Pepsi Bottling Group, LLC.*, 2009 WL 3154445 (3d. Cir. Oct. 2, 2009), the Third Circuit affirmed the grant of summary judgment in an ADEA claim. Plaintiff claimed that he had been terminated because of his age, citing comments including descriptions of him as "the old man of the group'" and statements like "'listen, old man, I know you are lying to me.'" *Id*. at *2, n.2. The defendant, on the other hand, argued that poor job performance was the reason for plaintiff's termination. *Id*. at *2. The defendant filed a motion for

summary judgment, which the United States District Court for the Western District of Pennsylvania evaluated under the *McDonnell- Douglas* standard. *Id*. The court determined that there was not sufficient evidence to prove that the termination was pretextual. *Id*.

On appeal, the Third Circuit affirmed the grant of summary judgment. The Third Circuit cited *Gross*, noting that "'[a] plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action.'" *Id*. (citing *Gross*, 129 S.Ct. at 2352). It noted that "'[a]n act or omission is not regarded as the cause of an event if the particular event would have occurred without it.'" *Id*. at *2 n.2 (citing *Gross*, 129 S.Ct. at 2350). The Third Circuit held that plaintiff did not show sufficient evidence of pretext, stating that "we do not believe plaintiff has demonstrate[d] such weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered reasons for its actions that a reasonable factfinder could rationally find them 'unworthy of credence.'" *Id*. at *3 (quoting *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d. Cir 1997). The allegedly discriminatory remarks were made outside the decisionmaking process through which plaintiff was fired. *Id*. Finally, the Third Circuit noted that given the probative weight of plaintiff's evidence of pretext, "we do not believe that a reasonable factfinder could conclude that plaintiff . . . would not have been terminated but for his age." *Id*. (citing *Gross*, 129 S.Ct. at 2352).

The importance of considering *Gross* at the summary judgment stage was also affirmed by the Third Circuit in *Milby v. Greater Philadelphia Health Action*, 2009 WL 2219226 (3d. Cir. July 27, 2009), in which the Third Circuit affirmed the Eastern District's grant of summary judgment to the defendants in an ADEA disparate treatment claim. In *Milby*, the Third Circuit observed that "to succeed on the disparate treatment claims *Milby* has asserted under the ADEA and PHRA, she 'must prove, by a preponderance of the evidence . . . that age was the but for cause of defendants' decision not to hire her." *Id*. (citing *Gross v. FBL Fin. Servs., Inc.*, [129 S. Ct. 2343 (2009)]). Because plaintiff could not produce sufficient evidence at the summary judgment stage from which a reasonable jury could conclude that age discrimination was the "but for" reason for the adverse employment action, summary judgment was appropriate. *Id*.

The application of *Gross* at the summary judgment stage was once again affirmed by the Third Circuit in *Kelly v. Moser, Patterson And Sheridan*, LLP, 2009 WL 3236054 (3d. Cir. October 09, 2009). In affirming a district court's grant of summary judgment in an ADEA claim, the Third Circuit reiterated that the "burden of proof remains with the plaintiff at all times" in proving that age was the "but for" cause of the adverse employment action. *Id.* at *2 (citing *Gross,* 129 S.Ct. at 2350). Furthermore, the Third Circuit observed that:

> [a] plaintiff may demonstrate that a legitimate factor acts as a proxy for age, with the employer "suppos[ing] a correlation between the two factors and act[ing] accordingly." [*Hazen Paper Co. v. Biggins*, 507 U .S. 604, 612-13 (1993).]. *But to prove a violation of the ADEA, it does not suffice to show that age played some minor role in the decision*. *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2350-51 (2009). The plaintiff must show that age was the "but for" cause of the adverse employment action-that age had "a determinative influence on the outcome." *Id*. at 2350.

Id. at *2. (Emphasis added). The Third Circuit affirmed the district court's finding that plaintiff failed to meet his burden of proof, and affirmed the grant of summary judgment.

Finally, the Third Circuit in *Heilman v. Allegheny Energy Service Corp.*, *supra*, side-stepped the issue of whether the application of the *McDonnell- Douglas* test was appropriate in ADEA cases, and instead simply cited the Supreme Court's note in *Gross* that it had "not definitively decided whether the evidentiary framework of *McDonnell-Douglas* . . . is appropriate in the ADEA context." *Heilman*, 2009 WL at *2 (citing *Gross*, 129 S.Ct. at 2349, n.2). The Third Circuit held that absent specific guidance by the Supreme Court on this issue, it would continue to apply the *McDonnell-Douglas* analysis in ADEA cases. *Id.* In applying the *McDonnell-Douglas* burden shifting analysis, the Third Circuit stressed that a plaintiff, in order to overcome summary judgment, "must either present enough evidence to cast sufficient doubt on the employer's legitimate, non-discriminatory reason to create a genuine issue of material fact as to it, or offer sufficient evidence to create a genuine issue of material fact that discrimination was the real reason for the action. *Id.* (citing *Fuentes*, 32 F.3d at 765).

IV. CONCLUSION

The Third Circuit's holdings in *Heilman*, *Connolly*, *Kelly*, and *Milby* appear to demonstrate that the *McDonnell-Douglas* analysis will be applied in ADEA cases in the Third Circuit even after *Gross*, at least until the U.S. Supreme Court provides some direction on whether it is appropriate in such cases. However, the holding in *Gross* requiring the plaintiff to prove age was **the** reason for the employment action, and not merely a motivating factor, will certainly make it more difficult for plaintiff's to overcome summary judgment by forcing them to show a genuine issue of material fact on the issue of pretext rather than relying on the more forgiving mixed-motive standard.

An important note for this discussion is legislation that has been proposed in the U.S. House of Representatives, H.R. 3721, 111th Cong. (2009), that would effectively abrogate the Supreme Court's decision in *Gross*, and amend the ADEA to provide the same standards of proof for claims under the ADEA as those brought pursuant to Title VII, i.e., that age need only be a motivating factor to prove unlawful discrimination. This legislation, if passed, may bring the ADEA back in line with Title VII such that there would be no question as to whether the application of the *McDonnell-Douglas* test is inappropriate. Until this issue is clarified, however, while employees have the benefit of the Court's view in *Gross,* employers in ADEA cases must continue to apply the *McDonnell-Douglas* test when defending against claims involving indirect evidence of age discrimination.

IN WUTZ JUDGE WETTICK FURTHER DEFINES DISCOVERY AND TRIAL PROCEDURE FOR UNDERINSURED MOTORIST (UIM) CASES WHEN A BAD FAITH CLAIM PURSUANT TO 42 Pa. C.S.A. § 8371 IS ALSO ALLEGED.

By Wesley Payne, Esquire. White and Williams, Philadelphia, PA

I. INTRODUCTION

In *Wutz v. Smith and State Farm Insurance Company*, No. GD07-021766 (Court of Common Pleas, Allegheny County Sept. 9, 2009), Judge Wettick, of the Court of Common Pleas of Allegheny County revisited the problematic discovery and procedural issues presented in cases containing underinsured motorist (UIM) and, possibly, uninsured motorist (UM) claims (hereinafter "UM/UIM claims"), and alleged bad faith claims. Previously, Judge Wettick in *Gunn v. The Automobile Insurance Company of Hartford*, Civil No. GD07-002888, PICS Case No. 08-1266 (C.P. Allegheny July 25, 2008) had ruled that discovery for the UM/UIM claim and bad faith claim should be conducted at the same time and that the claims could proceed to trial simultaneously. However, in this case the ruling of the court, although following the same rational, was slightly different and may have a substantively different impact upon the trial of the matter. Instead of requiring the defendant carrier to produce the discovery relating solely to the bad faith claim during the discovery period, the court held that the bad faith discovery should not be turned over to the plaintiff until immediately after the UM/UIM claim is submitted to the jury. Further, if plaintiff believed that his or her case would be prejudiced by receiving the bad faith discovery at that point in time, plaintiff can request a continuance of the bad faith trial. Accordingly, Judge Wettick has established a procedure that prevents prejudice to defendants and provides adequate discovery to plaintiffs.

II. PRIOR HISTORY – THE *KOKEN* AND *GUNN* CASES

Prior to 2005, the issue of how to try a UM/UIM claim with a bad faith claim before a jury did not exist in the Commonwealth of Pennsylvania because the Pennsylvania Insurance Commission required all auto insurance carriers to include in their policies a provision which required all UM/UIM claims to be adjudicated before mandatory UM/UIM arbitration panels. Accordingly, UM/UIM matters were rarely if ever tried before a jury in state courts. However, in a case referenced herein as *Koken*, the Pennsylvania Supreme Court ruled that the Insurance Commissioner did not have the authority to require mandatory arbitration provisions for UM/UIM claims. *Insurance Federation of Pennsylvania, Inc. v. Com., Dept. of Ins*., 889 A.2d 550 (Pa. 2005). After the *Koken* case, many insurance companies changed the terms of their Pennsylvania insurance policies so that mutual consent was required in order to go to arbitration. Therefore, without a mutual agreement between the parties to proceed with the UM/UIM matter via binding arbitration, the only forum left to hear UM/UIM matters is the state trial courts.

As a result, several UM/UIM matters have made and are making their way through the courts. Additionally those cases that also contain a bad faith claim, have presented challenging discovery and procedural issues for trial courts. One of the cases was *Gunn v. The Automobile Insurance Company of Hartford*, *supra*.

In *Gunn*, the insured brought a UIM claim for breach of contract and bad faith. The insurance carrier, Hartford, sought to sever and stay the bad faith claim while the UIM claim was decided by a jury. Hartford also sought to preclude discovery from proceeding in the bad faith case while the underlying UIM claim was at issue. Hartford argued that the bad faith claim was dependent on the outcome of the UIM claim, and that considerations of judicial economy, prevention of unnecessary expense to the parties, and prejudice to the insurer, required the bad faith claim to be stayed pending the outcome of the UIM claim. Judge Wettick rejected these arguments. He reasoned, notwithstanding the fact that the UIM claim and bad faith claim were plead in the same complaint, that procedurally and substantively the claims were very different. Even though the claims were proceeding to trial together, the cases would be decided in different forums. The UM/UIM matter would be decided by the jury; the bad faith matter would be decided by the judge. Further, there was the potential that the requested discovery arguably applied to both the UIM and bad faith claim.

Judge Wettick based his rationale, in part, on the case of *Mishoe v. Erie Ins. Co*., 573 Pa. 267, 824 A.2d 1153 (2003), which holds that there is no right to a jury trial in a bad faith claim brought pursuant to 42 Pa. C.S.A. § 8371. The court reasoned that the UM and bad faith actions were already severed because the breach of contract or UIM claim would be decided by a jury and that the bad faith claim would be heard by the trial judge. As Judge Wettick wrote, "Obviously, plaintiff's bad faith claim will be severed because plaintiffs UIM claim will be resolved through a jury trial while bad faith claims are tried nonjury." Further the court ruled that the discovery on the bad faith claim should not be stayed because "a trial of the bad faith claim held immediately after the trial of the UIM claim is likely to be the most efficient and fairest method of resolving the UIM claim because it avoids duplicate testimony and permits the judge to make his or her decision when the judge best recollects the relevant evidence." Therefore, the court stated that there would be no prejudice to defendant by turning over the bad faith discovery prior to the beginning of the UIM trial. *Gunn*, *supra*.

However, in the *Gunn* opinion, Judge Wettick noted that he would consider other remedies to prevent prejudice to the carrier short of severing the trial if the carrier made a showing that it would be prejudiced by a court order allowing discovery relevant *only* to the bad faith claim before the UIM claim is tried. The options included: (1) restricting the scope of discovery because of the back-to-back trials and (2) providing for compliance with specific discovery

requests immediately after the trial of the UIM claim. *Gunn*, *supra*.

Hartford appealed the decision to the Superior Court; however, the appeal was quashed as interlocutory. *Gunn v. Automobile Ins. Co. of Hartford*, No. 1345 WDA 2008 (Pa. Sup. Ct. Apr. 6, 2009), 2009 PA. Super. 70; 2009 Pa. Super. LEXIS 85 (April 15, 2009). Against this backdrop, State Farm sought similar relief to Hartford's before the same judge. However, the insurance carrier limited the area of discovery to be withheld to the discovery pertaining to the bad faith claim only.

III. UNDERLYING FACTS IN *WUTZ*

In *Wutz*, State Farm, was defending a UIM action, where the insured claimed breach of contract for failure to pay UIM benefits and bad faith for that alleged failure to pay. State Farm sought to stay discovery on its evaluation of the value of the claim and how it reached its evaluation, pending the outcome of the breach of contract claim. The discovery that State Farm sought to protect only related to the bad faith claim. State Farm argued that requiring it to furnish information as to the values it placed on the UIM claim, how it reached those values and its opinions on the strengths and weaknesses of the UIM claim would be prejudicial to the carrier. However, State Farm did not raise an advice of counsel defense in the bad faith claim. Plaintiff took the position that they were entitled to the discovery and failure to produce the discovery would delay the trial of the bad faith claim. Plaintiff also requested an in camera inspection of the requested bad faith discovery.

IV. DISCUSSION

Interestingly, in *Wutz*, all parties agreed that information sought to be withheld was limited and relevant solely to the bad faith claim. State Farm argued that to allow discovery relating to State Farm's evaluation of the underlying, UM/UIM, breach of contract claim would be unfairly prejudicial. State Farm argued that the release of the information would be akin to "the defense in a football game [being required] to furnish its defensive formation for the upcoming play to the Plaintiff before the Plaintiff selected the play that it would call." After evaluating the arguments, the trial court noted that it would not necessarily permit discovery of information in the files of the insurance company relevant to the bad faith claim, and that the insurance company should have an opportunity to show that the discovery of certain information relevant to the bad faith claim will unfairly prejudice the insurance company in the breach of contract claim. Thus, the trial court in *Wutz* refused to allow discovery of State Farm's evaluation ranges relating to the underlying claim, as well as the factors that were considered in evaluating the claim.

The court ruled consistent with its earlier rational as stated in *Gunn* and disallowed the discovery. The court required that State Farm furnish the bad faith discovery when the UIM claim went to the jury and that State Farm should have ready for use at the UIM trial an unredacted copy of the claims activity log. The court further refused plaintiff's request for an in camera inspection of the discovery because the parties had agreed to the discovery related to the bad faith claim only. Additionally, the court ruled that once the jury returned its verdict, the trial court judge would begin trying the bad faith claim. Further, the trial court noted in its order that, even though State Farm did not assert an advice of counsel defense in the bad faith claim, it retained the right to assert attorney-client privilege and protect documents that otherwise would not be discoverable in a bad faith case.

Finally, the court stated that if the situation arises where a plaintiff believes the bad faith claim cannot immediately go to trial because of the postponement of discovery until the time of jury deliberations, then that plaintiff should file a motion under Pennsylvania Rule of Civil Procedure 213 to stay the bad faith trial. Such a motion must be filed promptly or immediately after the court's ruling to withhold the bad faith discovery and that the basis of the motion should be that there was not adequate time to prepare for the bad faith trial. In addition, the court would also consider postponing the bad faith trial if plaintiff, upon receipt of the bad faith discovery, offers a compelling explanation as to why the trial cannot proceed at that time, and as to why the request for a later trial was not made shortly after the court issued the order delaying the discovery.

V. CONCLUSION

What we can take from this case is that Judge Wettick has attempted to balance the interests of the parties and to prevent prejudice to either party by ensuring full and complete discovery at a point when neither party's case will be prejudiced or given an unfair advantage. In this post *Koken* world, where UM/UIM and bad faith claims can be brought in the same proceeding, the potential for prejudice against a defendant insurance carrier is great. Judge Wettick's ruling attempts to prevent the potential prejudice and allow plaintiffs all the discovery necessary and adequate time to fully prepare for the prosecution of a bad faith claim. Finally, even if plaintiff's counsel does not originally request additional time for evaluation of the bad faith discovery, but, based upon the bad faith discovery received after the UM/UIM matter is submitted to the jury believes additional time may be required to properly prepare for the bad faith trial, plaintiff's counsel may still request a delay of the bad faith trial to prepare for the bad faith tried before the judge.

The above procedure relies upon counsel making the trial judge aware of the potential issues that may arise. It also relies upon the discretion of the trial judge as a gatekeeper of what discovery is related to the UM/UIM claim and what discovery is related to the bad faith claim and what discovery is related to both claims. It further relies upon the judge's discretion as to whether the bad faith discovery provided while the jury is deliberating on the UM/UIM claim can be digested in a timely fashion to immediately start the bad faith trial. But, if plaintiff believes the discovery may require additional review, the procedure does allow plaintiff's counsel two (2) opportunities to request a continuance of the trial of the bad faith claim. Overall, the system is workable. There are kinks to be worked out in future cases but Judge Wettick's process and procedure demonstrates when appropriate procedural safeguards are taken, all parties can receive a fair trial.

SAFEGUARDING PRIVILEGE THROUGH THE PROTECTIONS OF FEDERAL RULE OF EVIDENCE 502

By Stephen J. Finley, Jr., Gibbons P.C., Philadelphia, PA

I. INTRODUCTION

On September 19, 2008 the newly minted Rule 502 of the Federal Rules of Evidence became effective. Rule 502 serves as a limitation on waiver of attorney-client privilege and work product protection in the context of certain unintended disclosures made in the course of litigation. The Rule represents an effort by its authors to address the problems associated with large-scale document productions, including the substantial cost associated with lengthy privilege review and the ever-present risk that, despite the best efforts of a producing party, privileged documents may nevertheless mistakenly appear in a party's production. The Rule also addresses the implications of an ever-increasing number of disputes concerning electronic discovery practice. The Advisory Committee set forth the following explanation of the purpose of the Rule:

> The Rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

Prior to the enactment or Rule 502, courts were divided as to whether an inadvertent disclosure of privileged information constituted a waiver. Many courts applied a multi-factor test to determine if a disclosure constituted a waiver of privilege.[1] Typically, courts examined (1) the reasonableness of the precautions taken to prevent the disclosure; (2) the number of disclosures; (3) the extent of the disclosure; (4) the promptness of the measures taken by the disclosing party to rectify the disclosure; and (5) whether the overriding interests of justice are served by relieving the party of its error. No one of these factors was controlling under the pre-Rule 502 common law test. Furthermore, this list of factors was not necessarily exhaustive, as courts were free to consider factors unique to the case at bar. Rule 502 represents an effort to adopt a variation of this approach. The Advisory Committee notes that "the Rule does not explicitly codify [the common law] test, because it is really a set of non-determinative guidelines that vary from case to case. The Rule is flexible enough to accommodate any of those listed factors."

II. SCOPE OF RULE 502

As an initial matter, Rule 502 does not alter federal or state law as to whether or not a communication, or other information, is protected by either the attorney client privilege or the work product doctrine. Instead, the Rule seeks to address the effect of an unintended disclosure of privileged information. Section (a) of Rule 502 limits the extent to which a disclosure of privileged information shall constitute a waiver to those circumstances where "(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."[2] This section of the Rule stands for the proposition that a *voluntary* disclosure of privileged information in a federal proceeding generally results only in a waiver of the privilege as to the information or material disclosed.

Section (b) is the crux of Rule 502, as it concerns inadvertent disclosure of privileged information. A disclosure made in a federal proceeding "does not operate as a waiver in a federal or state proceeding if (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."[3] This three part test is the main inquiry to be employed by a court in evaluating whether an inadvertent disclosure of privileged material constitutes a waiver of the privilege.

Section (c) of the Rule gives a party protection from the effects of a disclosure made in a state court proceeding. Under the Rule, an inadvertent disclosure made in a state proceeding that is not the subject of a state-court order governing waiver, does not operate as a waiver in a federal proceeding so long as the disclosure (1) would not qualify as a waiver if it had been made in a federal proceeding; and (2) if the disclosure does not qualify as a waiver under the law of the state where the disclosure occurred.[4]

Sections (d) and (e) of the Rule provide additional protection through the use of "clawback" and "quick peek" agreements. Such agreements permit a party to produce documents, without prior review, while still protecting privilege. Under a "clawback" agreement, a producing party reserves the right to retrieve privileged documents subsequent to their production, without resulting in a waiver. Where a "quick peek" agreement is used, a producing party makes all potentially responsive material available for inspection by the requesting party. The requesting party then takes a "quick peek" at the material and designates the material it believes is responsive; the producing party then reviews the designated portions for privileged material and makes appropriate redactions and/or prepares a privilege log identifying the documents withheld. Both techniques are designed to reduce the cost associated with large scale document productions, while still preserving all privileges. The Advisory Committee notes that "confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery." Importantly, in order for the parties to ensure that the agreement binds non-parties, the agreement must be incorporated into a court order.

III. PENNSYLVANIA DISTRICT COURT CASE LAW

To date, two of Pennsylvania's United States District Courts have applied Rule 502.

A. *Rhoads Industries, Inc. v. Building Materials Corp. of America, et. al.*[5]

In *Rhoads*, Judge Baylson of the United States District Court examined whether

plaintiff's inadvertent production of over 800 electronic privileged documents, some of which were identified in a privilege log, constituted a waiver of privilege, or fell within the protections of Rule 502. Defendants took the position that plaintiff's production was careless, that plaintiff delayed too long in seeking return of the privileged documents and that plaintiff failed to prepare an adequate privilege log, which would have identified all of the documents at issue prior to their production. This case was brought before the district court just two months after the enactment of Rule 502 and the court noted that the Third Circuit had not yet stated "a specific test for determining inadvertent disclosure of privileged material."

Judge Baylson began his analysis by considering the five factor test employed by courts prior to the enactment or Rule 502.[6] He also noted the increasing difficulty of resolving privilege issues in the context of e-discovery disputes, where keyword searches and other electronic queries are typically utilized to identify responsive documents; such means, however, are by no means foolproof. The court applied the three factor test embodied in Rule 502(b), but ultimately looked to the common law five factor test to resolve the dispute stating "I conclude that once the producing party has shown at least minimal compliance with the three factors in Rule 502, but reasonableness is in dispute, the court should proceed to the traditional five factor test."[7] The court found that while plaintiff took steps to prevent disclosure, those steps were not entirely reasonable. Thus, the first four factors of the five factor balancing test were found to favor defendants' contention that plaintiff had waived privilege by producing the documents at issue. However, the court was swayed by the fifth factor - the interest of justice - finding that the loss of the attorney client privilege is a severe sanction that can lead to enormous prejudice. Therefore, the court found that defendants had not met their burden of proof and that plaintiff had not waived its privilege as to those documents inadvertently produced, which were also included in its privilege log. The court cautioned the parties that despite the development of Rule 502, the understandable desire to minimize client costs associated with a detailed privilege review cannot excuse a producing party's failure to screen privileged material prior to production.

B. *Rhoades v. YWCA of Greater Pittsburgh*[8]

In *Rhoades v. YWCA of Greater Pittsburgh, et.al.*, the United States District Court for the Western District of Pennsylvania examined Rule 502 in the setting of plaintiff's claims of violation of the Equal Pay Act and Fair Labor Standards Act, alleging she was paid at a rate inferior to male colleagues. Defendants claimed that four pages of privileged documents were inadvertently produced with their initial disclosures. In examining whether the disclosure amounted to a waiver of privilege under Rule 502, the court wrote "[i]n cases where a party argues inadvertent disclosure, a two-step analysis must be followed. First, it must be determined whether the documents in question were privileged or otherwise protected." Second, "if privileged documents are produced then a waiver occurs unless three elements of F.R.E. 502(b) are met: (1) the disclosures must be inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent the disclosure; and (3) the holder promptly took reasonable steps to rectify the error." The district court noted that despite the advent of Rule 502, district courts in the Third Circuit have continued to follow the multi-factor test employed prior to the amendments. *See* discussion of *Hopson v. City of Baltimore*, *Hartford Fire Ins. Co. v. Garvey, supra.*

To support their contention that the four pages of documents were both privileged and inadvertently produced, defendants produced an affidavit from their counsel stating that the four pages in question were prepared by defendants' director of human resources at the request of counsel for the specific purpose of defending the lawsuit. The verification stated that the documents were reviewed prior to their production and that the production was the result of an administrative error. The court accepted the contents of counsel's verification and determined that the documents were indeed privileged. The court also noted that defendants sent a letter to plaintiff's counsel just five days after the documents were produced requesting their return. Accordingly, the court found that defendants had satisfied the requirements of Rule 502 and granted defendants' motion to compel plaintiff return the four pages of documents at issue.

IV. CONCLUSION

Rule 502 offers a party meaningful protection from the implications of an inadvertent disclosure of privileged material. A party anticipating a large scale document production should be mindful of Rule 502 and incorporate the guidelines of the Rule into its production protocol to ensure it can avail itself of the protection of the Rule in the event a privileged document slips through the cracks in a document production. For guidance in developing appropriate safeguards that will find favor with a court, parties should look to decisions applying both the three part test of Rule 502 as well as the five-factor common law test developed prior to the enactment of Rule 502.

Parties to litigation should also develop appropriate clawback and quick peek agreements, and incorporate these agreements into court orders. Such agreements can be very broadly drafted to protect the parties' interests, yet can also be tailored to the specific facts present in a lawsuit. Moreover, court approval is vital as only court-approved agreements are enforceable in unrelated state and federal litigation. An effective clawback agreement gives the greatest level of protection available to inadvertently produced documents.

Of course, a producing party is best served by developing sound production protocols, well-crafted search terms and appropriate safeguards to prevent the disclosure of privileged or otherwise protected materials. While the case law cited above shows that courts may be willing to excuse inadvertent disclosures in certain circumstances, it is by no means a guarantee that a party will be successful in safeguarding privileged materials simply by asserting the protection of Rule 502.

ENDNOTES

[1]*See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N.D. Cal. 1985).

[2]Fed. R. Evid. 502(a).

[3]Fed. R. Evid. 502(b).

[4]Fed. R. Evid. 502(c)

[5]254 F.R.D. 216 (E.D. Pa. 2008).

[6]*See*, *Fidelity & Deposit C. of Md. V. McCulloch* 168 F.R.D. 516 (E.D. Pa. 1996).

[7]254 F.R.D. at 226.

[8]2009 U.S. Dist. LEXIS 95486 (W.D. Pa. October 14, 2009).

PENNSYLVANIA EMPLOYMENT LAW UPDATE

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

The United States Supreme Court Holds That A City Violated Title VII By Discarding A Firefighter's Promotion Examinations.

Ricci v. Destefano, 129 S. Ct. 2658 (June 29, 2009)

The United States Supreme Court held that a city's race-based action in discarding test results to the detriment of white and Hispanic firefighters violated Title VII, unless the employer could "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." In this matter, the city conducted an examination in order to determine which firefighters would be considered for promotions over a two-year time period. The city contracted with an outside consultant to develop the test. After the test was administered, the results demonstrated that seventeen whites and two Hispanics scored the highest results on the test and, therefore, would have been given the promotions. After realizing that the test results created a disparate impact to minorities, hearings were held before the Civil Service Board, which voted not to certify the test results. After first noting that the city's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense, the Court addressed "whether the purpose to avoid disparate-impact liability excuses what would otherwise be disparate-treatment discrimination" and concluded that an employer "must have a strong basis in evidence to believe it will be subject to disparate-impact liability" before it "can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact." In rejecting the city's argument, the Court stated while minority firefighters who would not have been promoted would have a prima facie disparate-impact claim, there was no evidence that the tests administered were flawed because they were not job-related or because there was an equally valid and less discriminatory test available to the city. In so holding, the Court expressly reasoned that "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."

The Third Circuit Allows Gender Stereotyping Case To Proceed To Trial.

Prowel v. Wise Business Forms, Inc., 2009 U.S. App. LEXIS 19350 (3d. Cir. Aug. 28, 2009)

The Third Circuit vacated the judgment entered in favor of the defendant on its employee's sexual harassment claim. Specifically, the plaintiff filed a Title VII sexual harassment claim, arguing that the sexual harassment from his co-workers stemmed from "gender stereotyping" as he was harassed based upon his "effeminacy." The defendant, however, argued that the plaintiff was packaging a sexual orientation discrimination claim—which is not permitted under Title VII—as a "gender stereotyping" claim of sexual harassment. The Third Circuit, in remanding the sexual harassment claim back to the trial court, noted that although "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw," the plaintiff presented sufficient evidence that he was harassed because he did not conform to the traditional stereotypes of the "typical male" at the defendant's place of employment to survive summary judgment.

The Third Circuit Holds That Independent Contractors May Bring A Section 1981 Action For Discrimination Occurring Within The Scope Of The Independent Contractor Relationship.

Brown v. J. Kaz, Inc., 2009 U.S. App. LEXIS 20293 (3d. Cir. Sept. 11, 2009)

The Third Circuit—in a matter of first impression—held that an independent contractor may bring a racial discrimination claim under Section 1981 against the entity which they contracted. The plaintiff was hired as a sales representative for the defendant and entered into an independent contractor agreement. During the plaintiff's training session, she alleged that she and the recruiting manager engaged in a heated argument and the recruiting manager used racial slurs. Thereafter, the defendant decided not to use the plaintiff as a sales representative, and the plaintiff filed her lawsuit for violation of Title VII, the Pennsylvania Human Relations Act, and Section 1981. The Third Circuit upheld dismissal of the plaintiff's Title VII and PHRA claims, holding that the plaintiff—as a result of her independent contractor status—was not an employee for purposes of Title VII or the PHRA and she, therefore, could not obtain protection under those statutes. The Third Circuit, however, specifically noted that the language of Section 1981 provides that "all persons…shall have the same right…to make and enforce contracts… as is enjoyed by white citizens," and such language would also refer to contracts entered into by independent contractors.

The Pennsylvania Supreme Court Rejects An Employee's Wrongful Termination Sexual Harassment Claim Against An Employer With Less Than Four Employees.

Weaver v. Harpster & Shipman, 975 A.2d 555 (Pa. July 20, 2009)

The Pennsylvania Supreme Court held that Pennsylvania does not recognize a common law discriminatory termination claim where an at-will employee would not be able to pursue a remedy under the Pennsylvania Human Relations Act (PHRA). The plaintiff alleged that her employer sexually harassed her over several months, causing her to resign her employment. The plaintiff then filed an administrative complaint with the Pennsylvania Human Relations Commission (PHRC) alleging sexual harassment and seeking remedies pursuant to the Pennsylvania Human Relations Act (PHRA). The plaintiff's complaint, however, was dismissed by the PHRC because the PHRA does not apply to employers with less than four employees. Thereafter, the plaintiff filed suit in state court alleging, *inter alia*, wrongful termination. In rejecting the plaintiff's claim for wrongful termination, the Pennsylvania Supreme Court noted that employers may terminate an at-will employee for any reason unless that reason "violates a clear mandate of public policy emanating from either the Pennsylvania Constitution or statutory pronouncements." While noting that the Pennsylvania Legislature has articulated a public policy to eliminate discrimination, the Legislature has declined to "make sex discrimination

actionable against employers of fewer than four employees" in the PHRA. Accordingly, the Pennsylvania Supreme Court expressly determined that there is no public policy exception to the at-will employment doctrine for sex discrimination by an employer not covered by the PHRA.

WORKERS' COMPENSATION UPDATE

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

The Supreme Court Of Pennsylvania Holds That The Claimant Is Not Required To File A Review Petition In Order To Support A Corrective Amendment To A Notice Of Compensation Payable.

Cinram Manufacturing Company, Inc. v. W.C.A.B. (Hill); 37 MAP 2008; decided July 21, 2009; by Justice Saylor

The Supreme Court of Pennsylvania addressed the issue of whether, during a termination proceeding, a WCJ may correct a Notice of Compensation Payable (NCP) to subsume injuries not specifically contemplated by the original Notice.

In the underlying case, following the claimant's work-related injury, the employer filed a petition to terminate the claimant's workers' compensation benefits. The NCP the employer issued identified the claimant's injury as "lumbar strain/sprain." The WCJ denied the employer's petition and directed amendments to the NCP to conform with his findings that the claimant aggravated a pre-existing disc herniation, resulting in nerve impingement. The Workers' Compensation Appeal Board and the Commonwealth Court affirmed the WCJ's decision, holding that the NCP was properly amended under §413 (a) of the Pennsylvania Workers' Compensation Act.

The employer appealed to the Supreme Court, arguing that the decisions of the Appeal Board and the Commonwealth Court conflicted with the Supreme Court's holding in *Jeanes Hospital v. W.C.A.B. (Haas)*, 582 Pa. 405, 872 A.2d 159 (2005). The Supreme Court, however, rejected the employer's argument and held that the WCJ's amendment of the NCP without a petition to review was proper. According to the Supreme Court's interpretation of §413 (a) of the Act, the Legislature intended to allow corrective amendments at any time and at any procedural context; whereas, amendments based on consequential conditions were to be made only upon consideration of a specific Review petition. The court disapproved *Jeanes Hospital* to the extent it suggested that an absolute requirement of a review petition was a prerequisite to corrective amendments. The Supreme Court, thus, held that the claimant was not required to file a review petition to support a corrective amendment to the NCP.

The Commonwealth Court Clarifies The Definition Of Usual Employment Area For Purposes Of Modification Petitions Filed Under §306 (b) (2) Of The Act.

Doug Rebeor v. W.C.A.B. (Eckerd), 2328 C.D. 2008; filed July 9, 2009; by Judge Cohn Jubelirer

The claimant suffered a work-related injury in 2002 in Lawrence County, Pennsylvania. He returned to work with the employer at a modified duty position until the position was eliminated. The employer filed a modification petition based upon a labor market survey performed in Lawrence County. The claimant did not present medical evidence or vocational evidence to the petition.

The employer's vocational expert utilized Lawrence County, Pennsylvania, as the usual employment area as defined in §306 (b) (2) of the Act. She met with the claimant for an interview in July of 2006 and located three positions that were available at that time and within the restrictions of the employer's medical expert. At the initial meeting, the claimant indicated to the vocational expert that he was planning to move to South Carolina sometime before the end of the year.

The WCJ modified the claimant's benefits. The claimant appealed, arguing that the modification was inappropriate because the WCJ should have used South Carolina as the usual employment area. Further, the claimant argued the employer failed to act in good faith pursuant to the decision in *Kachinski v. W.C.A.B. (Vepco Construction Co.)*, 516 P.A. 240, 532 A.2d 374 (1987), because the claimant was moving to South Carolina and the employer knew about the move.

The Commonwealth Court affirmed the Appeal Board and the WCJ. The court held that the claimant suffered his injury in Lawrence County. At the time of the vocational interview, he was living in Lawrence County. The claimant did not move to South Carolina until two months later. The court went on to distinguish the holding in *Riddle v. W.C.A.B. (Allegheny City Electric, Inc.)*, 940 A.2d 1251 (Pa. Cmwlth. 2008). The court noted that the claimant was living out of state at the time of the petition.

The Commonwealth Court Holds That A Subrogation Lien Sufficiently Established In Prior Proceedings Is Basis For Penalty For Failure To Satisfy The Lien.

William Lusby v. W.C.A.B. (Fischler Co. and Sparmon, Inc.), 804 C.D. 2008; filed July 9, 2009; by Judge Simpson

The Commonwealth Court upheld the ruling of the WCJ, which had been reversed by the Appeal Board, on the issue of whether a subrogation lien had sufficiently been established in the initial proceedings.

The claimant suffered a work-related injury in 2002. On August 8, 2005, the parties entered into a compromise and release agreement. The claimant's private healthcare insurer had paid some of the bills that were the responsibility of the workers' compensation carrier. The claimant's attorney represented the private healthcare insurer. The compromise and release agreement included language referring to the lien.

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Workers' Compensation Update *continued from page 13*

The claimant's attorney had placed a separate fee agreement into evidence in reference to his representation of the private healthcare insurer. On September 1, 2005, an Amended Order was issued by the WCJ that specifically referenced the lien of the private healthcare insurer. Neither party appealed the Orders.

A year later, in May of 2006, the claimant's attorney filed a penalty petition alleging that the employer had failed to pay the $22,154.71 lien of the private health insurer. The WCJ granted the penalty petition with a 50% penalty. This was appealed to the Workers' Compensation Appeal Board. The employer argued that the WCJ erred on the basis of the doctrine of mutual mistake of facts to the terms of the August 8, 2005, compromise and release agreement. The attorney for the private health insurer had placed correspondence in the evidentiary record establishing that the day before the compromise and release, on August 7, 2005, a fax was sent to the claims representative of the workers' compensation carrier outlining the exact amount of the compromise and release agreement and providing the bills in question. The Commonwealth Court held that the Workers' Compensation Appeal Board had incorrectly relied upon the theory of mutual mistake in overturning the award of the WCJ.

An Employer's Pro-Rata Share Of Attorney's Fees From A Third Party Settlement Arising Out Of A Work Injury Should Be Calculated Based On The Actual Amount Ultimately Paid Where Counsel Has Reduced His Fee.

Good Tire Service v. W.C.A.B. (Wolfe); 729 C.D. 2008; filed July 15, 2009; by Judge Leadbetter

In this case, the claimant sustained a work-related injury and thereafter was paid workers' compensation benefits. Eventually, the claimant filed a third party lawsuit arising out of the work injury and reached a settlement of that case. The claimant and his counsel entered into a contingent fee agreement for 40% of the amount recovered. After receiving the settlement check, claimant's counsel deposited the 40% fee ($30,000) and then remitted to the claimant $9,205.92 of the fee.

Claimant's counsel took the position that the 40% contingent fee applied to the calculation of the employer's pro-rata recovery of its compensation lien, regardless of the voluntary decision to refund a portion of the fee to the claimant. Claimant's counsel paid $28,478.67 to the employer's insurer from the $75,000 recovery. The insurer, however, did not accept that amount as full payment. It calculated the recovery using a fee of $20,974.08, or what the attorney kept as a fee after deducting the refunded amount. The employer filed a petition to review benefit offset on the issue, and the WCJ granted the petition. The Workers' Compensation Appeal Board, however, reversed, characterizing the fee waiver as a gratuity. In doing so, the Appeal Board held that to recalculate the subrogation amount to reduce the third party recovery to the claimant would be contrary to the humanitarian purpose of the Act.

The Commonwealth Court reversed the Appeal Board. Guided by the well-established law that the statutory right of subrogation is absolute and cannot be altered or made subject to equitable principles, the court held that the fee actually paid was the amount upon which the employer's pro-rata share of costs must be calculated under the Act. The employer is obligated under the Act to pay a pro-rata share of the fee paid to generate the funds subject to subrogation, not some hypothetical fee that might have been paid.

A Notice Of Ability To Return To Work That Was Sent Shortly After The Results Of A Functional Capacity Evaluation And Before A Vocational Interview Constitutes Prompt Written Notice Under Section 306(b)(3) Of The Act.

Anthony Bentley v. W.C.A.B. (Pittsburgh Board of Education); 1560 C.D. 2008; filed July 29, 2009; by Judge Leavitt

The claimant underwent a functional capacities evaluation (FCE) following his work injury. Thereafter, based on the FCE results, the claimant's treating physician released him to light duty work. Approximately two months after the FCE, the claimant met with a vocational expert, who performed an earning power evaluation/labor market survey. The employer later filed a petition to modify claimant's benefits based on the labor market survey results.

The employer presented evidence from a claims adjustor regarding the notice of ability to return to work form. Although the exact date the notice was sent could not be pinpointed (the LIBC-757 form in use at the time did not have a space for the date sent), the adjustor, nevertheless, testified that the notice was sent shortly after receiving the release from the claimant's physician and before the vocational interview was performed.

The WCJ granted the petition to modify, and the Workers' Compensation Appeal Board affirmed. The Commonwealth Court also affirmed, rejecting the claimant's argument that the notice of ability to return to work was not sent in a timely manner and that the employer was required to prove that the notice was sent on a specific date before it took any action on the information contained therein. According to the court, the claimant was not prejudiced in any way by the timing of the notice. The court held that the employer promptly sent the notice of ability to return to work to the claimant in compliance with §306 (b) (3) of the Act.

The WCJ Properly Dismissed A Claim Petition For A Psychic Injury Where The Claimant Failed To Show That His Exposure To Dangerous Passengers As A Bus Driver Was An Abnormal Working Condition.

Craig McLaurin v. W.C.A.B. (SEPTA); 40 C.D. 2009; filed June 5, 2009; by Judge Smith-Ribner

The claimant had been employed for six months as a bus driver. On the date of the incident, several hooded young men entered his bus without paying their fares. At the end of the route, one of the men approached the claimant and pulled a gun out of his pocket. The claimant pleaded with the gunman, who put away his weapon and disembarked. The claimant immediately drove to the bus depot and informed his supervisor of the incident. Later, he filed a claim petition, alleging that the incident caused post-traumatic stress disorder, anxiety, chest pains/angina and impotence.

The employer presented testimony from witnesses who explained that new bus drivers are advised to expect dangerous passengers and are trained on how to deal with them. The employer also offered as exhibits a training DVD and a rules and

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Workers' Compensation Update *continued from page 14*

regulations manual that instruct drivers on how to handle dangerous passengers. The employer's workers' compensation coordinator testified about the record of assaults on bus drivers in an effort to show that the incident was not abnormal. The WCJ dismissed the claim petition, concluding that the incident was not an abnormal working condition that other employees in the claimant's classification would not be exposed to.

The Commonwealth Court affirmed the WCJ's decision, noting that life-threatening situations have been found to be normal work conditions for employees such as police officers and nurses in maximum security prisons. The court held that the claimant failed to meet his burden of proving by objective evidence that his injury was not a subjective reaction to normal working conditions. The court also found that the claimant offered no proof that the incident represented something that other bus drivers could not anticipate, whereas the employer had offered evidence showing that the incidents did occur with enough regularity that the handling of them had been built into the operator's training program.

The Bureau Properly Rejected The Provider's Application For Fee Review As Untimely Where The Employer Promptly Notified The Provider That Any Pay Dispute Should Be Handled Through The Fee Review Process, But The Provider Chose To Pursue Reconsideration Of The Denied Charges From The Employer.

Pittsburgh Mercy Health System v. Bureau of Workers' Compensation, Fee Review Hearing Office (U.S. Steel Corporation); 2104 C.D. 2008; filed May 29, 2009; by Senior Judge Friedman

The provider appealed an order issued by the Bureau of Workers' Compensation (Bureau) Fee Review Hearing Office, dismissing as untimely the provider's application for fee review pursuant to §306 F.1 (5) of the Act. The provider had billed the employer for services rendered to the claimant. Approximately 30 days after the billing date, the provider was informed by the employer that the provider's claim was being denied in part. An explanation of review (EOR) also included the following language:

> If you feel that you have been paid incorrectly or untimely, you may file a Fee Review with the Bureau of Workers' Compensation.

Thereafter, the provider received a check from the employer. The provider then contacted the employer to see if it would reconsider the denied charges and sent records to the employer in connection with the request. The provider also followed up on the reconsideration request on multiple occasions. Ultimately, the provider was advised by the employer that the reconsideration request was being denied. The provider then filed an application for fee review with the Bureau, which was rejected as untimely. The provider appealed, and a hearing officer concluded that the application for fee review was properly denied.

The Commonwealth Court affirmed the hearing officer's decision. The court dismissed the provider's argument that the application was timely filed since the filing was not made within 30 days of being notified by the employer that the request for reconsideration was being denied. According to the court, the provider had standing to challenge the amount of the employer's payment using the fee review process but, instead, chose to seek additional payment outside the fee review process. The court further rejected the provider's argument that the employer should not be permitted to assert that the application was untimely since the provider was lulled into delaying its application based on representations made by the employer that they were reviewing the reconsideration request. The employer notified the provider that any dispute should be handled through the fee review process. The provider, however, opted to pursue reconsideration.

An Award Of Benefits For Facial Disfigurement Under §306 (c) (22) For A Scar Related To A Compensable Work Injury Is Not Subject To The Payment Of Benefits Concurrently.

Community Service Group v. W.C.A.B. (Peiffer), 90 C.D. 2009; filed May 5, 2009; by Judge Pellegrini

In January 2002, the claimant sustained a work-related injury. A notice of compensation payable was issued recognizing the injury as strains and sprains to her arms, neck, knees and low back, as well as a temporary exacerbation of pre-existing neck fusion. In April 2005, an agreement identifying the injury as a neck sprain and strain resolved the disfigurement claim made by the claimant as the result of a surgical procedure. The employer agreed to pay 57.5 weeks of specific loss benefits when the claimant ceased receiving total disability benefits. In January of 2006, a supplemental agreement identifying the injury as a cervical fusion reinstated the claimant to temporary total disability benefits.

The employer successfully prosecuted a petition for modification based upon an impairment rating evaluation. The WCJ modified the claimant's benefits accordingly. The WCJ also ordered the award of facial disfigurement benefits to be paid concurrently.

The employer argued on appeal that the WCJ erred in requiring the payment of specific loss benefits to run concurrently with the payment of partial disability benefits because both payments arose from the same work injury.

The employer relied on §306 (d) in making this argument. There is an exception that allows for the payment of specific loss benefits, such as disfigurement, if the specific loss was incurred in a separate and distinct injury from the one for which compensation is being paid or if the injury was to a separate and distinct part of the body. *Faulkner Cadillac v. W.C.A.B. (Tinnery)*, 831 A.2d 1248 (Pa. Cmwlth. 2003). The Commonwealth Court held that this exception did not apply since the disfigurement was caused by surgery to treat the original work injury of January 2002.

Reliance On Collective Bargaining Agreement By The Claimant Upheld In Reference To The Employer's Petition For Credit For The Payment Of Sick And Vacation Time. Commonwealth Court Relies On Precedent To Dispose Of Ancillary Issues Of Voluntary Retirement And Review Of Description Of Injury.

ESAB Welding & Cutting Products v. W.C.A.B. (Wallen), 60 C.D. 2009; Filed May 22, 2009; By Judge Butler

This action involved multiple petitions. The employer filed a petition maintaining

that they were entitled to a credit for holiday and vacation payments made to the claimant pursuant to a collective bargaining agreement. The employer also argued that the WCJ and Appeal Board had erred in finding that there was insufficient evidence to determine that the claimant had voluntarily retired from the work force, thereby entitling the employer to a suspension. Finally, the claimant had filed a petition to expand the description of his injury in the notice of compensation payable.

The claimant successfully defended against all of the employer's petitions and prevailed in reference to his own petition.

The court held that a review of the collective bargaining agreement established that the employer was not entitled to the credit demanded in the petition. Specifically, the Pennsylvania Workers' Compensation Act at §450 (a) (1) provides that the employer and an employee union may agree through a collective bargaining agreement to establish certain binding obligations and procedures related to workers' compensation benefits as long as the scope of the agreement is limited to benefits supplemental to those provided in §§ 306 and 307 of the Act. The court, in reviewing the agreement, held that the employer was not entitled to the credit.

The employer argued that the claimant had voluntarily resigned from the work force. This argument was based upon the fact that in the four years following his work injury, the claimant had not attempted to obtain employment. However, the claimant was still actually considered an active employee and, despite his willingness to accept another position with the employer, none was available.

The court followed the line of precedent in the case of *Jeanes Hospital v. W.C.A.B. (Hass)*, 582 P.A. 405, 872 A.2d 159 (2005), in concluding that the claimant had established the burden of proof in reference to the Review petition.

The Claimant Voluntarily Removed Himself From The Work Force By Moving To Portugal.

Carlos Mendez v. W.C.A.B. (Lisbonne Contractors, Inc.), 154, C.D. 2009; Filed May 29, 2009; By Judge McGinley

The claimant suffered a work-related injury on July 2, 1990. At the time of the injury, he had resided in Philadelphia, Pennsylvania. At some point thereafter, the claimant returned to his native Portugal. The parties stipulated that he had resided in Portugal since at least December 13, 2001. On June 15, 2007, the employer filed a petition to suspend the claimant's benefits based upon the 2006 decision in *Blong v. W.C.A.B. (Fluid Containment)*, 890 A.2d 1150 (Pa. Cmwlth. 2006). In *Blong*, the claimant had moved to New Zealand, and the court determined that he had removed himself from the work force, entitling the defendants to a suspension. The claimant in *Blong* argued that in order to suspend his benefits, the employer was required to establish job availability in the Mount Union, Pennsylvania, area where he had previously resided. The court disagreed.

In the instant matter, the claimant challenged, based upon the first prong of the test in *Kachinski v. W.C.A.B. (Veepco Construction Company)*, 516 P.A. 240, 532 A.2d 374 (1987), that in order to modify the claimant's benefits, the employer must satisfy the following four-step test:

1. The employer must produce medical evidence of a change in the employee's condition.

2. The employer must produce evidence of a referral or referrals to a then open job (or jobs), which fit the occupational category which the claimant has been given medical clearance.

3. The claimant must then demonstrate that he has in good faith followed through on the job referrals.

4. If the referral fails to result in a job, then the claimant's benefits should continue.

The claimant in this matter tried to attack the *Blong* decision by arguing that the employer did not present any testimony concerning a change in his condition. The court did not agree and suspended the claimant's benefits.

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