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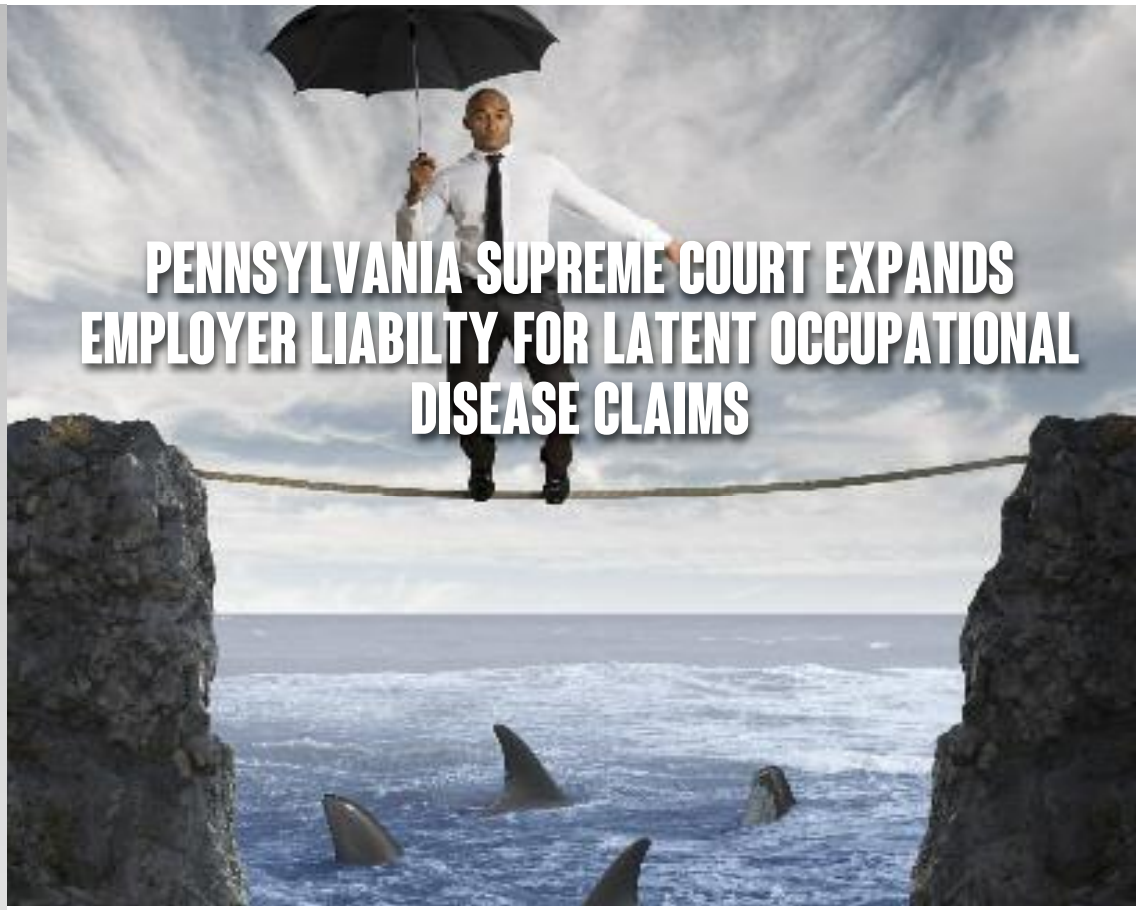
In This Issue...



TOOEY V. A.K. STEEL DECISION MAY OPEN FLOODGATE OF ASBESTOS LAWSUITS AGAINST EMPLOYERS

by G. Daniel Bruch, Jr., Esquire, William T. Salzer, Esquire and Jane Ann Lombard, Esquire

The Pennsylvania Supreme Court in Tooey v. A.K. Steel et al,No. 21 WAP 2011, 2013 WL 6150887 (Pa. Nov. 22, 2013) has newly created employer liability for long tail environmental exposure claims brought by employees, finding that the Pennsylvania Worker's Compensation Act does not confer employer immunity for occupational disease claims that have manifested 300 weeks after the date of last employment. Previously, Pennsylvania employers were immune from suit for tort claims of former employees under Section 303(a) of the Worker's Compensation Act, 77 P.S. § 481, even though those employees were foreclosed from recovering worker's compensation benefits for occupational disease claims that manifested more than 300 weeks following their last day of employment. Employers may now expect to be sued and be joined to pending cases for a variety of toxic tort claims that result in an occupational disease as defined by Section 108,brought by Pennsylvania workers and their dependents.

In Tooey, the plaintiff was a salesman of asbestos products between 1964 and 1982 and was exposed to asbestos dust. He developed mesothelioma in 2007 and died a year later. Summary judgment on the employer immunity defense was denied by the trial court, but reversed by the Pennsylvania Superior Court, which had concluded that Section 303(a) of the Act provided that liability of an employer under the Act was exclusive of any other remedy for either an injury or occupational disease sustained in the course of employment. The Act defines "occupational disease" to include asbestosis and cancer resulting from exposure or contact with asbestos. 77 P.S. § 27.1. However, Section 301(c)(2) of the Act

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specifies that whenever occupational disease is the basis for compensation under the Act, it shall apply only to disability or death resulting from such disease and occurring within three hundred weeks of the last date of employment in the occupation which created the exposure. 77 P.S. § 411(2).

The Pennsylvania Supreme Court, relying on the humanitarian purposes of the Act, and principles of statutory construction, held that the statute conferred employer immunity only where an occupational disease claim was compensable under the Act which would not apply to occupational disease claims that manifested after 300 days. The court noted that because of the 300 day limitation provision governing occupational disease claims, the historic quid pro quo between employer immunity for tort liability and compensability for statutory benefits, could not be achieved. Additionally, the court noted that the 300 day limitation was essentially an unintended carve-out for long tail claims such as mesothelioma.

Pennsylvania employers and their insurers are now exposed to a new species of liability for asbestos and other toxic tort/ occupational disease claims for which claimants will contend that employers knew or should have known of the injurious consequences of exposure. The Supreme Court's decision in Tooey likely applies to injuries which pre-date the decision as the Supreme Court's construction of a statute generally applies to cases arising from the date of enactment of the statute. Mihalcik v. Celotex Corp., 511 A. 2d 239 (Pa. Super. 1986).

The Pennsylvania Supreme Court gave no indication that the decision would apply on a prospective basis only. An argument could be had that the decision should apply prospectively, notwithstanding the general presumption, based on the establishment of a new principle of law on which litigants may have relied. An argument might be made that retroactive application of the decision exposes employers to a new species of liability previously unanticipated for which employers might not have secured adequate insurance protection. The Court could find, however, that it simply construed an existing statute and did not create a new legal remedy, such that its application should apply retroactively to any injury that pre-dated the decision.

The Insurance Landscape: The Workers Compensation/ Employer's Liability Policy Should Respond to Tooey Claims

Typically, an environmental exposure claim would be tendered to a commercial general liability (CGL) insurer or for some businesses, an environmental liability policy. However, the CGL Policy removes coverage for a bodily injury to an employee sustained in the course of employment, as well as their dependents and estate. Typically, the insured employer would not be presented with such a claim because of the exclusivity provisions of the Worker's Compensation Act. However, under Tooey, the Act does not confer immunity—yet coverage is not available under the CGL policy irrespective of whether an employee's injury is compensable under the Act. Further, many CGL policies include asbestos exclusions that remove liability coverage for injurious exposure to asbestos.

Employers, therefore, will need to turn to what is referred to as Part B or Part Two of the Worker's Compensation/ Employer's Liability policy for a defense and indemnification. The Part B of the coverage serves as a "gap filler" to protect the employer from tort liability by reason of employee injury claims that are not encompassed by the worker's compensation system.

This coverage applies to bodily injury by accident or disease sustained in the course of employment. A typical policy requires that the employee's last day of exposure to the conditions causing or aggravating the condition occur during the policy period. Therefore, where multiple policies were procured during the exposure period, only the last such policy would be triggered. However, the last day of employment might not coincide with the last day of injurious exposure or the employer might not know the date of last injurious exposure. In such an instance, if coverage has been provided by different carriers, agents should tender notice to all carriers that potentially may be on the risk.

While there are exclusions to coverage under the Employer's Liability coverage form, the standard form does not remove coverage for asbestos related diseases. The policy will often include an endorsement identifying the states for which coverage is afforded. As with all policies, the insured must provide notice to the insurer if an injury occurs that may be covered by the policy. Those employers who are aware that their employees, dependents or survivors have instituted claims against manufacturers may well be advised to tender notice of the injury to their Employer Liability insurer that was on the risk as of the date of last exposure, even if the employer has not been formally placed on notice of a claim.

The policy confers the right to a legal defense and certain other defense related benefits such as judgment interest, taxed costs and the premium for appeal bonds. Part B coverage limits are often less than standard CGL liability limits; therefore, employers will need to look to umbrella/excess policies that confer coverage for damages in excess of limits conferred by the Employer's Liability insurer.

Pennsylvania has applied a continuous trigger model for asbestos injury claims with respect to identifying which CGL policies must respond on behalf of an insured. J.H. France Refractories Co. v. Allstate Ins. Co., 626 A. 2d 502

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(Pa. 1993). All CGL policies on the risk from the time of injurious exposure through manifestation of the asbestos related disease are jointly and severally liable to respond for defense and indemnification of the policyholder. This is a function of the unique etiology of asbestos related disease for which a precise point of determining bodily injury cannot be obtained. A CGL policy requires that a bodily injury occur during the policy period. In J.H. France, the Pennsylvania Supreme Court observed that based on expert medical evidence a direct cellular injury occurs upon exposure to asbestos fibers leading to the production of tissue scarring which progresses to the point of functional impairment of the lungs. The progression of the disease process and the length of the latency of the disease until the time of recognizable manifestation when considered against the CGL policy language justified the use of the continuous trigger model.

The Employer's Liability policy requires that a bodily injury by accident occur during the policy period; however, with respect to occupational disease claims, some policies require that the last day of last exposure to the injurious conditions occur during the policy period. Strictly applied, coverage under the Employer's Liability policy would not be governed by the continuous trigger model of J.H. Franceasthe policy language is distinct from that considered in J.H. France. It can be anticipated that litigants will contest whether the continuous trigger model of J.H. France will apply to all latent toxic tort claims or whether the specific language of the Employer's Liability policy mandates a different outcome. This will also be significant when considering the impact of aggregate annual policy limits which may significantly restrict indemnification for multiple employee injury claims.

The practical implications of that outcome would be less coverage for employers who would not be able to call on multiple primary policies to respond to a claim. Likewise, this increases the risk to excess insurers who are exposed to a claim in a single policy year and where horizontal exhaustion of limits might not be available to mitigate loss exposure. Further, there may be disagreement on when the employee's last injurious exposure took place if there are conflicting accounts of when asbestos was last used in the workplace. Employers will need to cast a wide net when tendering these claims to the Worker's Compensation/Employer's Liability insurer as well as to the excess insurer.

Statute of Limitations Issues

For wrongful death/survival act claims, the statute of limitations commences from the date of death. For non-fatal claims, a discovery rule may be employed which provides that the statute of limitations commences to run from the date on which the claimant knew or reasonably should have known of the connection between their injury and their occupational exposure. The question arises as to whether claims against employers that heretofore were not cognizable prior to Tooey are actionable even if the death or date of discovery of injury is more than two years prior to the commencement of the civil action against the employer.

For purposes of application of a Pennsylvania statute of limitations, the time period commences to run when the cause of action has accrued. 42 Pa. C.S.A. § 5502 (a). A cause of action accrues when a plaintiff could first have maintained his action to a successful conclusion. Kapil v. Association of Pennsylvania State College and University Faculties, 470 A. 2d 482 (Pa. 1983). The statute of limitations does not commence to run until there is an existing right to sue. Konidaris v. Portnoff Law Associates, 884 A. 2d 348 (Pa. Comm. 2005), citing New York & Pennsylvania Co. v. New York Cent. R.R. Co., 150 A. 480 (Pa. 1930).

Prior to Tooey, the Pennsylvania Superior Court had ruled that the exclusivity provisions of the Act did not apply to an occupational disease claim that had manifested more than 300 days after the last day of employment. Sedlacek v. A.O. Smith Corp., 990 A. 2d 801 (Pa. Super. 2010) ("there is no question that, as currently interpreted, the exclusivity clause in most instances effectively abolishes the common law tort action against one's employer for work-related injury"). Courts might hold that until the date of the Tooey decision, a plaintiff employee did not have a cause of action against an employer for a 300 week plus occupational disease claim, such that the time period to sue did not commence to run until after the date of the decision. Presumably, those claims that have previously been adjudicated or settled against manufacturer, premises or other defendants, would have resulted in a complete release of liability for any and all potential defendant such that it would bar the revival of a claim against an employer. However, for pending claims, plaintiffs may seek to join employers as additional defendants or commence new proceedings against the employer.

An application for re-argument has been filed with the Court and is pending.

The Pennsylvania Fair Share Act Implications

Existing manufacturer/distributor defendants might also seek to join employers for contribution as a joint tortfeasor. For a cause of action that accrues after the effective date of Pennsylvania's Fair Share Act, June 28, 2011, liability is several and not joint for a defendant who is adjudged to have less than 60% causal negligence for an injury. Where the Fair Share Act applies to a claim, existing defendants have an interest to broaden the defendant pool, so as to decrease the likelihood that any one defendant will be jointly and severally liable for the entire verdict value.

An interesting question arises in this context because a cause of action against an employer might be found to have accrued no later than the date of the Tooey decision, while a claim against a manufacturer defendant would have accrued at the time the plaintiff knew or reasonably should have

Cont. on page 7

SIDEBAR

LEGAL MALPRACTICE CASE LAW UPDATE

by Nicole Graham, Esquire

The case of Kappe v. Lentz Cantor & Massey, 39 A.3d 1008 (Pa. Super. 2012), involves the issue of forum shopping in legal malpractice cases. The plaintiff, Kappe, is a lawyer who brought a legal malpractice claim against the defendant law firm arising out of an underlying guardian petition.

A woman by the name of Nelda, a resident of Chester County, executed a power of attorney in which she named her husband, also a Chester County resident, as attorney-in-fact and named her son and Kappe, both Chester County residents, as alternate agents. Kappe never acted as attorney-in-fact.

Six years later, Nelda's daughter filed a guardianship petition in Chester County alleging Nelda's son commingled $1.4 million of Nelda's assets with his own. Cont. from page 5 Malpractice Case Law Update The defendant law firm, which maintains its principle place of business in Chester County, was retained to represent the interests of Nelda. The law firm determined that because it represented Nelda it also represented her designated guardians. The law firm told Kappe that he was required to participate in the litigation as a co-defendant. The guardianship petition went to trial and Kappe was held jointly and severally liable for mishandling Nelda's affairs and a judgment in the amount of $1.46 million was entered against Kappe. Kappe filed for bankruptcy and settled the judgment for $350,000.

Kappe filed a legal malpractice action against the defendant law firm. Where do you think he filed it? Chester County? No, of course not, he filed it in Philadelphia County. The defendant law firm filed preliminary objections to have the case transferred to Chester County. The trial court granted the preliminary objections. Kappe appealed. The Superior Court reversed and remanded the case without comment.

Of note, however, is the concurring opinion of Judge Strassburger who acknowledged that under the current rules and case law, since the law firm derived 1.7% of its revenue from representing clients in Philadelphia County, the trial court erred in transferring the case to Chester County. Judge Strassburger pointed out that despite a rather tenuous connection to Philadelphia County, its citizens must bear all of the costs a legal case entails. Judge Strassburger felt that where the events giving rise to the cause of action occurred in Chester County, and all the parties live in Chester County, logic dictates that the case should be tried in Chester County. Judge Strassburger noted that the Supreme Court and its rules committee corrected a similar problem by generally requiring all med mal cases be brought in the county where the cause of action arose. Judge Strassburger suggested that the rules committee might want to consider an analogous rule for legal malpractice cases. We will have to wait and see if the Supreme Court and rules committee takes Judge Strassburger's advice.

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A SUMMARY OF AMENDMENTS TO THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT

by Josh J. T. Byrne, Esquire

On October 22, 2013, the Supreme Court of Pennsylvania ordered the Pennsylvania Rules of Professional Conduct be amended effective in 30 days. The order adopted the changes suggested in 43 Pa. B. 1997, Notice of Proposed Rulemaking to "address the need for changes in detection of conflicts of interest, outsourcing, technology and client development, and technology and confidentiality." Rules changed include RPC's 1.0, 1.1, 1.4, 1.18, 4.4,5.3, 5.5, 7.1, 7.2, and 7.3. (All the changes can be found here.) Many of the changes are minor, such as the substitution of "electronic communications" for "e-mail," and adding "information in electronic form" to types of information that need to be screened. But some of the changes are more significant:

Retaining or Contracting With Other Lawyers- Rule 1.1, Comment

The concept of outsourcing legal services has been in the news for several years. The amendments to RPC 1.1 include two completely new sections relating to retaining or contracting with other lawyers. In essence, they require an attorney "reasonably believe" the services provided by the other lawyer will be competent and ethical. The new provisions also state the lawyers " ordinarily" should consult with their clients about the scope of their respective representations.

Maintaining Competence- Rule 1.1, Comment

Much of the focus on these amendments has been on the requirement lawyers "keep abreast of changes in the law and its practice including the benefits and risks associated with relevant technology. . ." The essence of this rule is the practicing attorney must have a modicum of understanding of technologies associated with the profession.

Confidentiality of Information and Detection of Conflicts- Rule 1.6

The amendments to Rule 1.6 include very specific language regarding the disclosures of information permitted in performing conflict checks across firms. There is also significant new language regarding attorneys' duty to guard against the "unauthorized access by third parties" of confidential client information.

Use of Nonlawyers Outside the Firm- Rule 5.3, Comment

There is significant new language regarding the use of Nonlawyers Outside the Firm added to the comment to Rule 5.3. The Nonlawyers include retention of "investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation. . ." and use of third parties for scanning or printing documents. The amendment requires attorneys make "reasonable efforts" to ensure "the services are provided in a manner that is compatible with the lawyer's professional obligations."

As always, although the Rules of Professional Conduct cannot form the basis of a cause of action, professional liability and malpractice avoidance best practices include a working knowledge of the Rules of Professional Conduct. The Rules of Professional Conduct are evolving along with the practice of law, and the practicing lawyer needs to keep up.

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When Brady and the Attorney-Client Privilege Collide: How the Government can Preserve a Defendant's Privilege While Meeting its Duty to Disclose

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Suppose a group of individuals entrust their life savings to a company that, rather than investing the money as promised, distributes the funds among its board members. The government, upon discovering the company's duplicity, investigates anyone that may have been involved, including bankers, accountants, and attorneys, and decides to prosecute some or all of the above parties. Toward the investigation's close, government agents seize electronic and paper files, some of which they know will likely contain attorney-client communications.

The attorneys prosecuting the matter cannot review the seized files because they are prohibited from considering privileged information. Thus, the Department of Justice assembles a discrete team of attorneys to review the files for privilege. This privilege-review team has only one job: screen the privileged information from the attorneys who will be prosecuting the case.

But in solving one problem the government has created another. Under the doctrine established in Brady v. Maryland, the government must disclose all exculpatory or impeachment information it knows or should know exists. See, e.g., Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution's failure to disclose exculpatory evidence violated the defendant's due process rights). This constitutionally imposed duty encompasses even privileged information. See, e.g., United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994) (Posner J.). Here, however, the prosecution cannot review the privileged files; so how can it determine whether the files contain any exculpatory or impeachment information?

One solution would be to permit the government to disclose the privileged files to all defendants without reviewing them. But while this proposal solves the government's Brady dilemma, it ignores the privilege holder's rights. Indeed, if the government could freely disclose a defendant's privileged information, the attorney-client privilege's efficacy would evaporate since future litigants would know their communications would be unprotected once the government seized them. See Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981) (the attorney-client privilege exists to "foster full and frank communication between attorneys and their clients.").

Another solution is for all defendants to enter into a joint-defense agreement. This way, the government could disclose the files to all parties without rupturing the parties' respective privileges. But a joint-defense agreement sometimes is infeasible and other times, unwanted.

Instead, to best balance a party's right to shield privileged, non-exculpatory information against the government's duty to disclose, a court should require the government's privilege-review team to also review seized files for Brady material. Under this approach, the prosecution would educate the privilege-review team about the case, and the privilege-review team would disclose only those files that it determined contained Brady information. Because the privileged materials would be disclosed only if they contained Brady information, the privilege protecting the undisclosed files would remain intact. And subordinating the privilege protecting the files that would be disclosed is appropriate because the Constitution-based Brady doctrine supersedes the common-law doctrine of the attorney-client privilege. See, Rainone, 32 F.3d at 1206 (holding that "[e]ven the attorney-client privilege . . . hallowed as it is, yet not found in the Constitution," may be trumped by constitutional rights).

This approach is also consistent with the attorney-client privilege's purpose. In most instances, an individual's communication with his or her attorney, made for the purpose of obtaining informed legal counsel, will not contain Brady material and therefore would not be disclosed. For a privileged communication to be disclosed under this proposed solution, it must be seized lawfully, must be material to the case, and must contain Brady material that is not otherwise available to a defendant. Permitting the prosecution to disclose privileged materials that contain Brady information, therefore, is a narrow excision into an individual's expected attorney-client protection, and is unlikely to chill attorney-client communications.

This article was co-authored by Eli Granek, Esquire, an associate in the firm's General Litigation Department.

Employer Liabilty... Cont. from page 3

known of the asbestos-related injury. Ordinarily, a cause of action accrues at the same time for any defendant because it is based on the time when the plaintiff knew or reasonably became aware that some defendant was legally responsible for their injury. Perhaps, in these cases, a uniform date will be selected such that all defendants will be governed by the same standard.

Liability Defenses

As with any tort claim the plaintiff must establish the existence of duty, breach, causation and injury. Employer safety obligations to their workers will no doubt establish the existence of a legal duty, leaving the key question of whether the employer knew or should have known of the particular asbestos exposure hazard. Causation will always be a hot topic, particularly if the claimant had other workplace exposures as well as exposures to other harmful substances. Employers will be defendants along with manufacturers, retailers, creating a difficult task of for apportionment of causal negligence. Employers might contend that they should be held only secondarily liable to a manufacturer/distributor based on the idea that asbestos was introduced into the workplace by the product liability defendant. Employers might argue that they had no greater knowledge than the employee about the asbestos hazard.

Ordinarily, the employee's negligence in the handling of asbestos containing materials does not enter the equation at trial as the product defendants are strictly liable for a defective product, foreclosing considerations of comparative negligence. Employers can only be liable on a negligence theory which can bring into play an employee's comparative negligence in the workplace, e.g. refusal to wear available personal protective gear.

As evident from this discussion, numerous legal and tactical considerations will surface in the handling of asbestos and other toxic tort litigation now that employers are potentially responsible parties. Of course, the outcome of any of these issues is fact driven and harbors uncertainty until court rulings are obtained. The commentary expressed is that of the authors and is not intended to serve as legal opinions or legal advice. Questions regarding the practical implications of this landmark ruling, whether from a toxic torts, worker's compensation or insurance coverage perspective may be addressed to:

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FIVE YEAR SUSPENSION FOR ACCUSATIONS OF JUDICIAL MISCONDUCT

by Josh J.T. Byrne, Esquire

Donald A. Bailey, a former US Congressman, and Auditor General of Pennsylvania, has been suspended from the practice of law for five years. According to the report and recommendation of the Disciplinary Board, Bailey has a history of a Private Reprimand in 2009 for violation of several rules of professional conduct, including a case in which he "used vulgar language" in response to a motion to dismiss, and a case in which he "engaged in a discourse on the competence of the court and persisted in attacking the court's integrity." Bailey also has a history of federal court sanctions resulting from allegations of fraud and judicial misconduct.

A matter in which federal court sanctions were levied is the basis for the current suspension. In 2007, Bailey filed two actions in the Middle District of Pennsylvania. Judge Malcolm Muir granted motions to dismiss and for summary judgment against Bailey's clients in the first action, and Judge John E. Jones granted a motion to dismiss in the second action. The defendants then filed a motion for sanctions, requesting attorneys fees and costs. Magistrate Judge Timothy Rice recommended an award of $28,041.71 in attorneys fees and costs, and Judge Jones subsequently issued an order awarding an additional $19,240.19 in attorneys fees and costs. Bailey filed a motion for a rehearing en banc. In his motion for a rehearing, Bailey accused Judges Scirica, Jones, Conner, Kane, McLure, Muir, Rambo and Magistrate Judge Rice of judicial misconduct and favoritism. Bailey accused several judges of being part of a "highly unethical 'clique.'"

At the disciplinary hearing, Judges Conner and Jones testified. Judges Conner and Jones testified they were not involved in any conspiracy to "get" Bailey, nor were they involved in any "clique," with the purpose to "get" Bailey. Bailey testified he believed his accusations were true. The Disciplinary Board found Bailey violated RPC 4.1(a) (making a false statement of material fact in the course of representing a client); RPC 8.2(a) (making a statement the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or the integrity of a judge); and RPC 8.4(c) (engaging in conduct involving dishonesty, deceit, or misrepresentation). Bailey has announced his intention to continue to fight the suspension.

The obvious lesson from this case is when accusing a judge of impropriety, you had best have your proofs of the alleged impropriety lined-up. A practitioner who calls into question the integrity of a judge is likely to have a battle (with the judge among others) on his or her hands.

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MILLER V. MILLARD: THE "VIOLATION OF A POSITIVE WORK ORDER" DEFENSE– ALIVE AND WELL

by Sharon McGrail-Szabo, Esquire

In the context of a Claim Petition under the Pennsylvania Workers' Compensation Act, the claimant bears the burden of proving all of the required elements of the claim in order to be awarded benefits. Specifically, a claimant must prove the following: (1) injury; (2) in the course and scope of his employment; (3) causal relationship between the injury and the employment. A claimant who seeks indemnity benefits must also prove ongoing disability.

Once the claimant has put on a prima facie case regarding the above elements, the employer may raise affirmative defenses with respect to those elements. Because of the remedial nature of the Workers' Compensation Act, however, affirmative defenses are very difficult to prove and are often unsuccessful.

One affirmative defense that may be raised by the employer is the "violation of a positive work order." The purpose of the defense is that if the injured worker violates this order and is injured in doing that exact activity that he was directed not to do, he would not be entitled to benefits as a result. An example of such a positive work order might be "do not climb over this fence to do this work, walk around and enter the work area through the gate."

While this defense sounds simple on its face, it is not quite as easy as it appears, for it is not enough to simply prove that a claimant violated a positive work order, as the language implies. To the contrary, there are several elements to this defense which must be proven. They are: (1) that the violation of the positive work order was the direct cause of the alleged injury; (2) that the claimant knew of the order or rule; and (3) that the order or rule pertained to an activity that is completely unconnected to the claimant's own work duties.

The first prong of the defense is not usually difficult to prove. It is the second and third prongs which prove to be more problematic. For example, most claimants either truly do not know of or will not admit to knowledge of the specific work rule. In addition, most claimants do not stray so far from their work duties as to violate a work order that has nothing to do with their job.

Such was not the case, however, in the case of Miller v. Millard. Ryan Miller sustained a very serious crush injury to his foot on August 12, 2009, while riding a forklift on his employer's premises. (The occurrence of the injury was not contested by the employer). Mr. Miller was a pallet jack operator, and was not certified as required to drive a forklift. Mr. Miller admitted that he was not certified to drive a forklift, and that he was also aware that individuals who were not certified to drive a forklift were not allowed to do so. Nonetheless, he also admitted that

he would sometimes "jump on a forklift" just to drive around for awhile.

Mr. Miller admitted that when he had finished his work on the day in question, instead of leaving the facility, he went to the restroom, and then jumped on the forklift to drive it around the plant. He admitted that he drove the forklift because it was "fun to drive."

Mr. Miller also admitted that he was aware that while operating a forklift, personnel were not to have any part of their bodies extending beyond the platform of the forklift. Despite this knowledge, Mr. Miller admitted that his foot was sticking out past the platform. As a result, as he drove past a metal pole, his foot was crushed between the forklift and the pole.

Workers' Compensation Judge Beverly Doneker found that "Claimant was not acting in the furtherance of his employer's interests at the time of the injury." The following prohibited activities were entirely outside the scope of his job duties: (a) riding around on equipment after his work duties and personal cleanup were complete; (b) riding a piece of equipment he was prohibited from driving; (c) sticking his foot out as he was driving the forklift. Judge Doneker went on to state that "Claimant's activities went beyond mere negligence," and as a result, found that Claimant was not in the course and scope of his employment at the time of his injury. The Workers' Compensation Appeal Board affirmed Judge Doneker's decision, as did the Commonwealth Court. The Pa. Supreme Court denied Claimant's appeal.

Judge Doneker compared this case to the Dickey v. Pittsburgh and Lake Erie R.R. Co. from 1929. In that case, the claimant took a shortcut across railroad tracks rather than using a platform walkway as he had been specifically instructed by his employer to do. He was killed in so doing. The Supreme Court in that case found that Mr. Dickey had removed himself from the course and scope of his employment because his defiance of the employer's positive work rule made him tantamount to a trespasser.

There are three Commonwealth Court cases that have cited Miller v. Millard, one reported and two unreported. Interestingly, only one of the unreported cases cites it for the major issue that was in dispute in the original case, i.e., the course and scope of employment issue. That case is Salt Painting v. WCAB (Kellogg), 2012 WL 8654484 (Pa. Cmwlth.) The Commonwealth Court cited the Miller case in finding that the conduct of the claimant in the Salt case was not egregious enough to take him out of the course and course and scope of his employment. As such, that claimant was awarded benefits.

In Salt, the injured worker was involved in a fistfight instigated by his supervisor, who was apparently upset that Claimant and other workers had refused to go out drinking with him the night before. After defending himself against his supervisor's assault, Claimant walked away from the supervisor, and went to the truck to get his work supplies. The supervisor followed Claimant, and hit him in the back of the head with a baseball bat, causing a skull fracture, brain bruise and three subdural hematomas. The employer argued that Claimant was not in the course and scope of his employment at the time of the injury because he had abandoned his employment when he participated in the fistfight. The Court disagreed, and found that (1) there was no abandonment because he was following his supervisor's directive to come with him when the supervisor attacked him and (2) even if there had been a momentary abandonment of his employment during the fight, Claimant had resumed activities in furtherance of his employer's interests once he walked away and went to the truck to get his supplies to begin working. The Court cited Miller and held that Claimant had met his burden of proving that he was in the course and scope of his employment at the time of his injury.

The other two cases that have cited Miller are Selfridge v WCAB (Rossi) 2013 WL 6670587 (Pa. Cmwlth.) (unreported) and Glass v. WCAB (City of Philadelphia), 61 A.2d 318 (Pa. Cmwlth. 2013) (reported). Both of these cases cited Miller with regard to the definition of substantial competent evidence, specifically, "where substantial evidence supports the WCJ's findings of fact, those findings are conclusive on appeal, despite the existence of contrary evidence."

Clearly, the Miller case is important for its holding regarding the course and scope of employment issue. It reaffirms the fact that a Claimant who strays too far from his work duties as to make himself akin to a trespasser on his employer's property will still, after many years of little or no case law on the subject, be found not to be acting in the course and scope of his employment. Apparently, however, it is also being used to defend Workers' Compensation Judges' decisions against attacks in cases where there is at least some evidence in the record that is contrary to the Judge's findings. It may be that the case will find more long-lasting and more frequent citation for this purpose. In either event, it is an important case for both reasons.

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PHOENIXVILLE HOSPITAL V. WCAB (SHOAP) – A PARADIGM SHIFT IN THE LABOR MARKET SURVEY SYSTEM

by Gabor Ovari, Esquire

Until recently, modification of workers' compensation benefits based on job availability was a relatively simple process. In 1996, the Legislature implemented the concept of the Labor Market Survey (LMS) as way of employing an empirical, objective, and cost effective means of evaluating earning power. The effect of the 1996 amendments was that employers no longer needed to establish poof of actual job availability; rather, the focus shifted to examining claimant's labor market. This system was intended to simplify the old Kachinski regime by basing the modification of compensation benefits on expert opinion evidence. In essence, the core of this concept was the notion that a Claimant's benefits should be modified if it is determined by a vocational expert that there is available work in that Claimant's "usual employment area." This seemed to be a logical and cost effective solution because the Labor Market Survey allowed the parties to the litigation to get a snapshot of what the employment market is like. Thus, in theory, this objective tool seemed to be much better than an individualized, subjective, and unpredictable system that was dependant upon multiple factors.

However, it seems that this concept is beginning to change, and perhaps the era of the objective LMS is over. At least, this appears to be the direction that the Pennsylvania Supreme Court took in its recent landmark decision in Phoenixville Hospital v. WCAB (Shoap).

This case began in 2003 when Claimant suffered a work-related injury while working at Phoenixville Hospital. She received workers' compensation benefits via a Notice of Compensation Payable. However, in 2007, the employer filed a modification petition based on a change in Claimant's physical condition and the fact that work was available within her physical restrictions in the relevant geographical area. This was demonstrated by two labor market surveys. Yet, during the ensuing litigation, Claimant testified that while she applied to the positions identified in the labor market surveys, she was never contacted by the prospective employers.
The Worker's Compensation Judge agreed with Claimant and determined that the employer failed to establish that modification would be appropriate. This determination was affirmed by the Workers' Compensation Appeal Board. The Board rejected the employer's argument that "by concluding that [Claimant] had made a "good faith" but unsuccessful effort to secure any one of the five jobs listed in employer's labor market survey, the WCJ had improperly incorporated into his legal analysis" some of the Kachinski requirements. Ultimately, the Commonwealth Court reversed the Board, and the case then reached the Supreme Court of Pennsylvania.

Based on existing precedent, it was anticipated that the Supreme Court would agree with the Commonwealth Court, and hold that the critical question under the Act is not whether Claimant applies for the jobs that were offered to her. Rather the focus should be on whether the employer identified positions that were actually open and available to anyone having Claimant's physical limitations and qualifications at the time of the labor market survey. This was the sensible solution based on the existing scheme. However, when the Court published its opinion, the result seemed to be much closer to the Kachinski standard than to the current objective LMS system. In its rationale the Supreme Court acknowledged that while section 306(b) does not require that Claimant be offered a job in order to establish earning power, the employer nevertheless has to show that there is "substantial gainful employment that exists." In order to satisfy this standard, the employer must offer proof of the existence of meaningful employment opportunities, and cannot rely on identification of jobs found in ads or employment listings. The employer is therefore required to prove that the potential employers, identified in labor market surveys, are in search of an employee. Because of this requirement, the job must be one that is actually open and potentially available. Furthermore, the employer is required to prove that the jobs remained open until such time as the Claimant is afforded a "reasonable opportunity" to

apply for them. The Court emphasized that the Act requires more than just "the mere existence of jobs compatible with a Claimant's restrictions that happen to be open at the time they are discovered by the employer's expert witness."

There are a number of lessons that the defense bar should be aware of in the aftermath of this landmark Supreme Court decision. First, the decision creates a number of avenues for Claimant to attack the validity of any labor market survey. The reason for this is that the Court held that employers must establish substantial gainful employment that exists. This, of course, begs the question of the meaning of substantial. This was not defined by the Court, and it will probably be litigated for years to come. Effectively, employers cannot use the LMS to show that employment exists in a theoretical sense. Rather, it will be very important to lay the proper foundation for actually existing job opportunities. It will be imperative to ensure that vocational experts adjust the way they conduct business in order to comply with the Court's holding. Needless to say, this approach represents a departure from the cost effective LMS system and it will require a careful and thorough documentation of not only the employment opportunities, but also Claimant's efforts in following up with job referrals.

Second, the Court explained that Claimant must be given a reasonable opportunity to apply for the identified positions. However, as this is usually the case, the Court did not sketch out the boundaries of this so-called "reasonable opportunity." Unquestionably, this term will be litigated numerous times in the upcoming years; thus, it is important to get some sort of a handle on the term. The Court pointed out that section 306(b) of the Workers' Compensation Act requires that the jobs identified in the LMS must be open in order to allow Claimant a reasonable opportunity to apply. This is where the thorough documentation of the job search will pay a crucial role. Defense counsel, in conjunction with the vocational experts, must document the exact time period during which the employers in the LMS had a position available. At the same time, Claimant's efforts should be tracked as well in order to see if Claimant applies in good faith during this period. While there is no magic formula that we could all point to as a guide for this reasonable opportunity standard, it seems likely that the standard is satisfied as long as it can be established that for a period of time it was up to the Claimant to seize the opportunity to take the position. A good possible solution to establishing this would be via the use of affidavits by the prospective employers indicating the time period of job availability.

Finally, it cannot be overstated how important it is for employers and insurers to be aware of this decision and to communicate the changes to the vocational experts. The Supreme Court has without a doubt heightened the burden on employers in the labor market survey context. By putting the focus on the statutory requirement that "substantial gainful employment exists" for the claimant, the employer must be able to demonstrate the potential employers are actually seeking to fill a position at the time of the survey and the claimant must be afforded the opportunity to secure that position. A modification of benefits is not dependent on the claimant securing the job, but the timing of the survey and the notice of the positions to the claimant must be adjusted to allow a "reasonable opportunity" to apply for the job. The Court did not define a "reasonable opportunity" and it is likely this will require a case by case assessment. While we are not entirely back to a Kachinski standard, we are back to potentially addressing job availability issues with potential employers rather than relying solely upon expert testimony, the standard which was envisioned when the labor market survey was introduced in 1996.

Of course, the problem with this is uncertainty. Because of the Court's decision, the standard began to shift from an objective measure to the malleable totality of the circumstances test. The problem is compounded by the fact that most light or sedentary duty positions are of the unskilled variety. Therefore, it is likely that the job openings that must remain open for a reasonable length of time will be the ones that get filled rapidly.

These competing interests and priorities will no doubt lead to some tension between employers, defense counsel and claimants. However, there is at least a possible bright side to this new focus. By being forced to carefully document this whole process, claimant runs a greater risk of modification if he does nothing to pursue the positions at issue. A claimant's lack of good faith might be an avenue for employers to exploit.

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NEWS & FIRM NOTES

Bill Jones, a partner in the firm's Philadelphia office, was recently quoted in the Wall Street Journal, in an article titled "For One Asbestos Victim, Justice is a Moving Target" Bill represented a door manufacturer in an asbestos case filed by a Dr. McQueen. The following exchange from the deposition of plaintiff was cited in the Wall Street Journal: "Questions from another defense attorney, William Jones, were more successful for his clients. Dr. McQueen had remembered working around an asbestos-paneled fire door that he could see had "little fibers sticking up on it," he said, when he was living at a U.S. Air Force base in England. One of Mr. Jones's defendant clients manufactured fire doors years ago. But Dr. McQueen struggled to pinpoint the door as one made by any companies he had sued. He couldn't recall specific details about the door or seeing any labeling that would indicate it was made with asbestos or who manufactured it.

"What's the reason that you believe that that panel contained asbestos?" Mr. Jones asked. "I don't know," said Dr. McQueen. "The Brits do crazy things." Mr. Jones shot back, "Well, do you have any reason to believe besides that?" "I don't know. I have no idea," Dr. McQueen answered."

Jane A Lombard, chair of the Workers Compensation department, **Kelly A. Hemple**, a partner in the Philadelphia Workers Compensation Department, and **Melody Cook**, an associate in the Pittsburgh Workers Compensation Department, have been certified as specialists in the practice of workers compensation law by the Pennsylvania Bar Association's Section on Workers Compensation law as authorized by the Pennsylvania Supreme Court. The PBA offered the certification examination for the first time last year. Ms. Lombard , Ms Hemple, and Ms Cook were among the 149 attorneys that were certified as specialists.

William T. Salzer and **Laura K. Hoensch**, partner and associate, respectively, in Swartz Campbell's Labor and Employment Law Practice Group, were presenters at a National Business Institute CLE Seminar. The theme of the seminar was "Advanced Issues in Employment Law". Their presentation included a discussion of complex Family Medical Leave Act ("FMLA") and other leave of absence issues, including important changes in state leave law, the impact of the Genetic Information Nondiscrimination Act ("GINA") on the FMLA, combating intermittent leave abuse, the ADA process post-FMLA, detangling FMLA and ADAAA overlap, and the issue of employee accommodation vs. separation after FMLA leave.

William T. Salzer and **Laura K. Hoensch**, attorneys in the Labor and Employment Law practice group, received a defense verdict in the federal jury trial of Nwegbo v. Colwyn Borough, et al., Docket No. 2:12-cv-05063-SD, a Section 1983 civil rights action in the U.S. District Court for the Eastern District of Pennsylvania.