

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH MAY 18, 2008

This has been a relatively quiet period for Pennsylvania's appellate courts. In particular, there have been fewer opinions (and fewer opinions of note) released by the Pennsylvania Supreme Court and Pennsylvania Superior Court. The Commonwealth Court has continued to release numerous workers' compensation decisions. As a result, a "Practice Tip" follows. The summaries of appellate decisions begin on page two.

PRACTICE TIP

Beware of Workers' Compensation Uninsured Employers Guaranty Fund Claims

When the legislature created the Uninsured Employers Guaranty Fund under the Pennsylvania Workers' Compensation Act, it was hailed as a major step forward to assure that employees who are injured while working for uninsured employers have a source of wage loss and medical benefits.

In reality, the Fund has become a trap for claimant attorneys. Compounding the situation, it appears that the Fund is defending virtually every claim it receives similar to the way in which the Assigned Claims Plan has bedeviled auto accident victims and their attorneys for decades. Here is my experience:

Under Section 1603 of the Act, an injured worker is required to notify the Fund within 45 days after the worker *knew* that the employer was uninsured; no claim petition may be filed against the Fund, however, until at least 21 days after notice of a claim is made to the fund. The regulations require that notice to the Fund consist of completing and mailing a "Notice of Claim Against Uninsured Employer" form to the Department. An injured worker may not seek an award against the Fund, unless the worker has completed and filed a "Claim Petition for Benefits from the Uninsured Employer Guaranty Fund."

Here are the problems. First, an injured worker (or his or her attorney) has a 45-day window to notify the Bureau that an employer is uninsured. It is unclear how a Judge will determine when the worker "knew" his or her employer was insured. For example, if the employer told the worker, is that enough? On the other hand, if an employer does not answer a traditional Claim Petition, is that sufficient? In addition, if so, when does the employee "know?" Finally, why is the time for notifying the Fund only 45 days, when an employee has 120 days to notify an employer under the Act that he or she was injured?

In other words, make sure you file a Notice of Claim Against Uninsured Employer as soon as you have any inkling that an employer is uninsured. Otherwise, the Fund will defend against the claim on the issue of notice – and you may have to notify your professional liability carrier.

To read about the Uninsured Fund, obtain copies of the Act, the Regulations and both of the forms, just go to: <http://www.dli.state.pa.us/landi/cwp/view.asp?A=138&Q=239046>.

Pennsylvania Supreme Court – Allocatur Petitions Granted

The Pennsylvania Supreme Court has granted allocatur in the following cases on the stated issues:

- **[Burger v. Blair Medical Associates, Inc. \(No. 377 WAL 2008\)](#)**
 - Is an action for damages for the disclosure of confidential patient information an action for invasion of privacy for the purposes of the one year statute of limitations set forth in 42 Pa. C.C. 5523(1)?
- **[Dooner v. Didonato \(No. 649 EAL 2007\)](#)**
 - Does the Securities and Exchange Act of 1934 preempt Pennsylvania state-law claims arising from personal injuries sustained on a stock exchange floor by a securities industry employee?
- **[Barnish v. Bussard \(No. 56 WAL 2007\)](#)**
 - Did the Superior Court err in affirming the grant of summary judgment to Respondent? The parties are directed to address the effect of the continued successful use of a product on a plaintiff's ability to withstand summary judgment under the malfunction theory of strict product liability.
- **[In the Matter of the Estate of Laird M. Wolfe, Deceased \(No. 136 WAL 2007\)](#)**
 - Whether damages recovered from a wrongful death action can be distributed to a decedent's beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy, pursuant to 42 Pa. C.S. § 8301, regardless of whether those beneficiaries personally suffered no pecuniary loss whatsoever?
- **[Julia Ribaldo Senior Services v. Dept. of Public Welfare \(No. 144 WAL 2007\)](#)**
 - Whether the Commonwealth Court erred in concluding that an administrative agency's notice that clearly advises the recipient of the effective date of the agency's action but that does not specifically designate a "date of mailing", is insufficient to begin the appeal period? If the notice is sufficient, is the recipient entitled to an appeal nunc pro tunc?
- **[Merlini v. Gallitzin Water Authority \(No. 543 WAL 2007\)](#)**
 - Whether the Superior Court's published decision below is inconsistent with its decision in Varner v. Classic Communities Corporation, [890 A.2d 1068 (Pa.Super. 2006)] relative to professional negligence claims?
 - Whether a cause of action is one of professional negligence if it depends upon expert testimony for elucidation?
 - Whether the Superior Court erred in concluding that, although expert testimony is required as to [Petitioner]'s negligence, [Respondent]'s cause of action was not one of professional negligence?
 - Whether the Superior Court erred in failing to apply the plain language of the Engineer, Land Surveyor and Geologist registration law in holding that the subject of complaint did not assert a professional negligence claim?

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Civil Procedure & Litigation

A. Appeals from Arbitration - Limited Damages Trials

□ [Kopytin v. Aschinger, 2008 PA Super. 68 \(April 14, 2008\)](#)

- **Holding:** If a jury makes an uncontested finding that a defendant's negligence was a factual cause of a plaintiff's injuries, resulting in pain and suffering, but fails to award compensation for pain and suffering, the verdict must be reversed.

The Court also addressed how a party may use evidence and testimony under Pa.R.Civ.P. 1311.1 ("Procedure on Appeal. Admission of Documentary Evidence."), holding that the a party's election to subpoena and cross-examine a witness under Rule 1311.1(d) does not preempt a party's right to submit reports in lieu of testimony at trial. Thus, the trial court erred by refusing to allow a treating physician's report to be placed before the jury, either orally or in print, prior to showing jurors the witness' videotaped cross examination.

Judge Klein filed a Concurring Opinion in which he suggested areas in which Pa.R.Civ.P. 1311.1 merited clarification.

B. Automobile Insurance - Exclusions

□ [Burdick v. Erie Insurance Group, 2008 PA Super 67 \(April 4, 2008\)](#)

- **Holding:** An insurance policy that excludes uninsured motorist benefits for collisions involving motor vehicles designed for use mainly off of public roads (such as a dirt bike) is contrary to public policy and violates the Motor Vehicle Financial Responsibility Law.

C. Delay Damages

□ [Sopko v. Murray, 2008 PA Super 87 \(April 29, 2008\)](#)

- **Holding:** Delay damages can be assessed pursuant to Pa.R.Civ.P. 238 against a bankrupt defendant during the time the plaintiff failed to obtain relief from the automatic bankruptcy stay.

D. Interest

□ [Hutchison v. Luddy, 2008 PA Super. 58 \(April 2, 2008\)](#)

- **Holding:** The erroneous entry of a Judgment NOV does not preclude a party from collecting post-judgment interest as of the date of the original jury verdict.

E. Orders - Finality

□ [Fastuca v. L.W. Molnar & Assocs., 2008 PA Super 99 \(May 9, 2008\)](#)

- **Holding:** Ruling on an issue of first impression, the Court held that a trial court's order terminating common law arbitration proceedings is a final order for purposes of appellate review. The Court further held that the trial court abused its discretion in attempting to terminate the arbitration or alter the findings of the arbitrator prior to the entry of a final award.

F. Settlements - Child Support Liens

□ [Faust v. Walker, 2008 PA Super 38 \(March 11, 2008\)](#)

- **Holding:** When distributing funds from a personal injury settlement (including personal injury and workers' compensation cases) to a person who is subject to a child support order and owes arrearages under 23 Pa.C.S.A. §4308.1, the first \$5,000.00 of the proceeds are not subject to attachment. In other words, an injured worker is entitled to the first \$5,000.00 of the proceeds, then counsel fees and costs are deducted, with the balance applied to the child support lien.

G. Expert Witness Testimony

□ [Griffin v. University of Pittsburgh, 2008 PA Super 104 \(May 19, 2008\)](#)

- **Holding:** Despite offering opinions to a "reasonable degree of medical certainty," a witness' testimony that limits his or her conclusion to a 51 to 49 percent probability that an event occurred is legally insufficient.

II. Workers' Compensation

A. Impairment Rating Examinations (IREs)

□ [Diehl v. Workers' Compensation Appeal Board \(IA Construction\), No. 1507 C.D. 2007 \(Pa.Cmwlth., April 28, 2008\)](#)

- **Holding:** Employers that do not request an Impairment Rating Exam (IRE) in a timely manner, *i.e.*, until after the expiration of the 60-day period following the 104-week total disability period, must either perform a work availability analysis under *Kachinski* or conduct a Labor Market Survey. This decision dramatically changes how employers and employees will view IREs. It is likely that the employer will seek review by the Pennsylvania Supreme Court.

B. Description of Injury - Amendment of Notice of Compensation Payable

□ [City of Philadelphia v. Workers' Compensation Appeal Board \(Smith\), No. 768 C.D. 2007 \(Pa.Cmwlth., April 25, 2008\)](#)

- **Holding:** A Workers' Compensation Judge may amend the description of a work injury listed in a Notice of Compensation Payable if it is materially incorrect. The WCJ may do so if the evidence supports such a conclusion, even if the claimant has not filed a review petition and even in the context of a termination petition.

C. Notice of Ability to Return to Work

□ [Melmark Home v. Workers' Compensation Appeal Board \(Rosenberg\), No. 899 C.D. 2007 \(Pa.Cmwlth., April 2, 2008\)](#)

- **Holding:** An employer must issue a Notice of Ability to Return to Work within a reasonable time after receiving a relevant report, lest it becomes stale. The employer must also wait a reasonable amount of time after providing notice to a claimant before acting upon the information. The Court declined to impose a strict thirty (30) day requirement on employers for issuing an NARW.

D. Physical Examinations - Diagnostic Testing

- [Peters Township School District v. Workers' Compensation Appeal Board \(Anthony\), No. 2084 C.D. 2007\(Pa.Cmwth., April 2, 2007\)](#)
 - **Holding:** When an employer seeks to compel an injured worker to undergo diagnostic testing, it must demonstrate that the testing is necessary, involves no more than minimal risk, and is not unreasonably intrusive. In this case, the Court held that an employer was not entitled to require a claimant to submit to a "diagnostic test 72-ambulatory EEG" prescribed by a physician who performed an independent medical examination.

E. Average Weekly Wage Calculations

- [Mullen v. Workers' Compensation Appeal Board \(Mullen's Truck & Auto Repair\), No. 1461 C.D. 2007 \(Pa.Cmwth., April 3, 2008\)](#)
 - **Holding:** When calculating an injured worker's average weekly wage, a Workers' Compensation Judge should consider the "economic reality" of the employee's wages. Thus, the WCJ properly calculated claimant's average weekly wage based upon his net business income, which more accurately reflected his earnings, rather than his W-2 wages.

F. Pension Offsets

- [City of Philadelphia v. Workers' Compensation Appeal Board \(Andrews\), No. 1915 C.D. 2007 \(Pa.Cmwth., May 12, 2008\)](#)
 - **Holding:** Under Section 204(a) of the Workers' Compensation Act, the benefits of a pension plan shall be credited against a claimant's worker's compensation award to the extent the benefits were funded by the employer directly liable for the payment of the compensation received by the employee. In addition, an award of penalties is proper if an employer fails to issue a Notice of Workers' Compensation Benefit Offset before unilaterally ceasing payment of a claimant's benefits based upon the claimant's receipt of pension benefits.

G. Job Availability

- [Pa. Dept. of Corrections v. Workers' Compensation Appeal Board \(Zvara\), No. 1614 C.D. 2007 \(Pa.Cmwth., May 12, 2008\)](#)
 - **Holding:** An employer does not meet its burden under *Kachinski* by failing to show that claimant has access to transportation to and from work, *i.e.*, factors such as the geographic accessibility of a referred position are relevant under *Kachinski*.

H. Statutes of Limitation

- [Brockway Pressed Metals v. Workers' Compensation Appeal Board \(Holben\), No. 43 C.D. 2008 \(Pa.Cmwth., May 12, 2008\)](#)
 - **Holding:** When a worker suffers a work-related injury that is not a disease as defined under the Occupational Disease Act, the "disease-as-injury" claim will be subject to the Section 301(c)(1) death manifestation requirements. If an original claim is granted, and the employee dies more than 300 weeks after the injury, a fatal claim petition will be barred.

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