A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH NOVEMBER 21, 2008

PENNSYLVANIA APPELLATE COURT DECISIONS

ALLOCATUR PETITIONS GRANTED

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

All decisions are "hyperlinked" to the slip opinion. All you have to do is "click" (or "ctrl + click") on the title of the case, and if connected to the Internet, your browser will open up the decision for you to read in its entirety. Try it and see!

A. ***Riddle v. Workers' Compensation Appeal Board (Allegheny City Electric Inc.)*, No. 96 WAL 2008 (October 14, 2008)**

- ☐ Under Section 306(b) of the Worker's Compensation Act, 77 P.S. § 512(2), may an employer meet its burden of proof to justify modification of an award of workers' compensation benefits to an injured non-resident employee, based on an earning power assessment which focused on the location of the employee's residence, as opposed to the location where the injury occurred?

B. ***Kelly v. Workers' Compensation Appeal Board (US Airways Group, Inc.)*, No. 535 WAL 2007 (October 3, 2008)**

- ☐ Is claimant's employer entitled to the severance benefit offset, pursuant to Section 204(a) of the Pennsylvania Workers' Compensation Act, when the benefits were paid due to a layoff or furlough and not a permanent separation?

C. ***Abrams v. Pneumo Abex Corp., No.* 45 EAL 2008 (June 10, 2008)**

- ☐ Does prior recovery of damages for increased risk and fear of developing cancer due to asbestos exposure, awarded under the one-disease rule, preclude a plaintiff from recovering damages for cancer that developed and was diagnosed after the separate disease rule was adopted in Marinari v. Asbestos Corporation, Ltd., 612 A.2d 1021 (Pa.Super. 1992) (en banc)?

D. ***Rae v. Pennsylvania Funeral Directors Assoc.*, No. 517 MAL 2007 (June 11, 2008)**

- ☐ Must an appellate court separately apply the collateral order test laid out in Pa.R.A.P 313 and this Court's decision in Ben v. Schwartz, 729 A.2d 547 (Pa. 1999), to every legal question it addresses on collateral appeal, or is it sufficient that the legal question giving rise to the order itself satisfies the collateral order test?

E. ***Cree v. West Penn Allegheny Health System, Inc.*, No. 564 WAL (July 15, 2008)**

- ☐ When a plaintiff has failed to file a timely certificate of merit pursuant to Pa. R.C.P. 1042.3 and files a petition to open a resulting judgment of non pros pursuant to Pa. R.C.P. 3051, should a

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court's scope of inquiry be limited to the facts alleged in the petition to open or should such inquiry extend to expert reports procured for purposes of filing a certificate of merit?

F. ***Bassett v. Kia Motors America Inc.*, No. 91-92 EAL (July 11, 2008)**

- ☐ Whether, in an issue of first impression, the lower courts disregarded class action procedures and fundamental principles of Pennsylvania contract law by presuming that a class action could be pursued based solely on proof of breach of the named plaintiff's individual express limited warranty contract, as evidence of proof of breach as to all other limited warranty contracts for all the other members of the class?
- ☐ Whether long-standing Supreme Court precedent requires reversal of the judgment improperly entered and affirmed in favor of all class members, in circumstances where the trial court accepted proof of breach of the named plaintiff's express limited warranty contract as proof of breach as to all limited warranty contacts as to all other members of the class, even where the only class-wide evidence was that the defendant had honored its express warranty?
- ☐ Whether, in an issue of first impression, the trial court violated the defendant's due process rights by entering judgment for the entire range of class members without requiring proof of breach of all of their express limited warranty contracts?

G. ***Pennsylvania Electric Company v. Dodson*, No. 2 WM 2008 (August 27, 2008)**

- ☐ Whether a tort action filed by an employee against his employer is barred by the Workers' Compensation Act's exclusivity provision where the alleged work-related injury is not compensable under the Workers' Compensation Act since it was not discovered until more than three hundred weeks after the employee's last occupational exposure.

H. ***Muretic v. Workers' Compensation Appeal Board (Department of Labor and Industry)*, No. 1038 MAL 2007 (August 7, 2008)**

- ☐ Did the Commonwealth Court commit an error of law, under Mitchell v. WCAB (Steve's Prince of Steaks), 572 Pa. 380, 815 A.2d 620 (2003), in determining that Petitioner's failure to report to an offered job, because of her incarceration, was an act of "bad faith," which would then relieve Respondent of the burden of showing job availability following any period of subsequent total disability experienced by Petitioner?
- ☐ Did the Commonwealth Court commit an error of law in holding that Petitioner was barred by collateral estoppel from arguing that Respondent was, once again, required to show job availability following a period of total disability?

PENNSYLVANIA APPELLATE DECISIONS

I. Appellate Procedure

A. *Appealability of Order*

- ☐ ***The Law Office of Douglas T. Harris, Esquire v. Philadelphia Waterfront Partners, LP*, 2008 PA Super 222 (September 22, 2008)**
  - ➢ Holding: An appellant that invokes the "colorable claim" standard for determining whether underlying Orders are collateral in nature, fails to satisfy this standard when it implicitly waived the claim of attorney-client privilege pursuant to Pa.R.A.P. 302(a) based upon counsel's failure to invoke and/or assert the privilege before the trial court. Because the

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Orders subject to appeal were not collateral in nature, the Court did not have jurisdiction to consider the merits of the appeals.

II. Causes of Action

A. *Generally*

- ***Schmidt v. Boardman Co.*, 2008 PA Super 203 (September 2, 2008)**
  - Holding: Emphasizing that the tort of infliction of emotional distress is a distinct and separate cause of action in Pennsylvania, the Court ruled that a bystander who witnesses injury to a close relative can recover emotional distress damages when the injured person's underlying cause of action is based on strict liability. The case also provides a detailed analysis of when a party is subject to liability under the product line exception to the general rule that a successor company does not incur the liability of the selling company.

B. *Dog Bites*

- ***Underwood v. Wind*, 2008 PA Super 158 (July 18, 2008)**
  - Holding: In a dog bite case, jury instructions were proper that stated that: (1) the defendant was negligent per se because her dogs escaped from her property and were running free because the instructions advised jurors to consider whether the defendant's explanation for the dogs' escape was reasonable; and, (2) the dogs' actions could be considered by the jury in determining the dogs' dangerous propensities because the propensity to attack may be proven by a single incident inflicting severe injury or attack on a human being. The jury instructions constituted reversible error, however, when they failed to distinguish between the tenant "keeper of the dog" and the landlord, because the court included the phrase "or should have known" in addition to the correct standard, "knows of the presence of a dangerous animal," when instructing the jury on the standard of care applicable to an out-of-possession landlord.

C. *Medical Malpractice*

- ***Toney v. Chester County Hospital*, 2008 PA Super 268 (November 12, 2008)**
  - Holding: A cause of action for negligent infliction of emotional distress is restricted to four factual scenarios: (1) situations where the defendant had a contractual or fiduciary duty toward the plaintiff; (2) the plaintiff was subjected to a physical impact; (3) the plaintiff was in a zone of danger, thereby reasonably experiencing a fear of impending physical injury; or (4) the plaintiff observed a tortious injury to a close relative. Thus, a Complaint alleging that a mother was advised that her unborn child was normal and healthy, but was instead born with profound physical deformities, states a cause of action for negligent infliction of emotional distress. Conversely, the Court concluded that the facts did not support a claim for intentional infliction of emotional distress. The Court added that, as defined in Section 46 of the Restatement (Second) of Torts, a claim for intentional infliction of emotional distress has never been explicitly recognized as a cause of action by the Pennsylvania Supreme Court, although the Supreme Court has cited the section as setting forth the minimum elements necessary to sustain such a cause of action.
- ***Sabo v. Worrall*, 2008 PA Super 223 (September 18, 2008)**
  - Holding: Counsel's paralegal's failure to submit a Certificate of Merit, when the statement was secured prior to the filing of the judgment of non pros, was an inadvertent mistake or

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oversight that constituted a reasonable explanation or legitimate excuse warranting relief from a judgment of non pros.

- ☐ ***Glenn v. Mataloni*, No. 264 C.D. 2008 (Pa.Cmwlth., June 4, 2008)**
  - ➢ Holding: A trial court properly denied a motion to open a judgment of non pros when the petitioner (a pro se prisoner) failed to include in his pleading specific reasons why he needed extra time to obtain a Certificate of Merit in accordance with Pa.R.Civ.P. 1042.3.
- ☐ ***Dental Care Associates, Inc. v. Keller Engineers, Inc.*, 2008 PA Super 143 (July 2, 2008)**
  - ➢ Holding: An Order denying a Petition to Strike/Open Judgment of Non Pros was proper when the non pros was entered as the result of the plaintiff's failure to timely file a Certificate of Merit within the time specified under Pa.R.Civ.P. 1042.3.

D. ***Negligence***

- ☐ ***Craig v. Amateur Softball Assoc. of America*, 2008 PA Super 123 (June 4, 2008)**
  - ➢ Holding: The defendant softball association owed no duty of care to the plaintiff, a softball player who was not wearing a helmet and suffered a head injury while playing a slow-pitch softball game. Under these circumstance, the softball player assumed the risk of injury inherent to the sport.

E. ***Non-Profit Organizations***

- ☐ ***Colmar Volunteer Fire Co. v. Dept. of State, Bureau of Charitable Organizations*, No. 2023 C.D. 2007 (Pa.Cmwlth., June 5, 2008)**
  - ➢ Holding: A volunteer fire company was required to provide Bureau of Charitable Affairs with audited financial statements for the fiscal years in question, and was prohibited from soliciting charitable contributions until it properly registered with the Bureau. In this case, the volunteer fire company's use of a professional fundraising entity for a direct mailing campaign disqualified it from the exemption for volunteer firefighter organizations under Section 6(a)(3)(ii) of the Solicitation of Funds for Charitable Purposes Act, 10 P.S. § 162.5(a) and required it to register with the Bureau of Charitable Organizations.

F. ***Political Subdivision Tort Claims Act***

- ☐ ***Stanton v. Lackawanna Energy, Ltd.*, 2008 PA Super 132 (June 23, 2008)**
  - ➢ Holding: A bright yellow swing-arm gate erected by a utility on land left open without any fee and without any apparent business motive constituted "land" for purposes of the Recreational Use of Land and Water Act, 68 P.S. §§ 477-1 - 477-8, entitling the defendant to immunity under the Act.

G. ***Products Liability/Strict Liability***

- ☐ ***Commonwealth, Dept. of General Services v. U.S. Mineral Products Co.*, No. 75 MAP 2007 (Pa., September 26, 2008)**
  - ➢ Holding: Because the incineration of building materials was not an intended use of the product, strict liability is not available for the harm caused by the unintended use.

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III. Civil Procedure & Trial

A. *Indemnification*

- ***Lane v. Commonwealth, Dept. of Transportation*, 2008 PA Super 157 (July 17, 2008)**
  - Holding: The defendant/general contractor was not entitled to indemnification from a defendant/ subcontractor that performed the work at the site of the injury because the jury found that the subcontractor was not negligent and, therefore, the general contractor was seeking indemnification for its own negligence. The decision affirmed that, if parties intend to include a provision in a contract that covers losses because of the indemnitee's own negligence within the scope of their indemnity agreement, they must do so in clear and unequivocal language.

B. *Concurrent Claims*

- ***State Farm Mutual Automobile Insurance Co. v. Ware's Van Storage*, 2008 PA Super 134 (June 24, 2008)**
  - Holding: An insurer's subrogated claim for property damage reimbursement need not be joined with the insured's personal injury claim because the right to recover on each claim existed independently pursuant to Pa.R.Civ.P. 1020.

C. *Judgments by Confession*

- ***RAIT Partnership L.P. v. E Pointe Properties I, Ltd.*, 2008 PA Super 225 (September 26, 2008)**
  - Holding: A confession of judgment that includes an attorney's collection commission of 15 percent was enforceable.

D. *Releases*

- ***Haas v. Four Seasons Campground, Inc.*, 2008 PA Super 136 (June 26, 2008)**
  - Holding: A defendant that operated a camp ground in New Jersey, was incorporated in New Jersey, operated an interactive website advertising the camp ground but did not allow seasonal contract purchases to be made online, mailed brochures and newsletters to Pennsylvania residents, purchased products from Pennsylvania vendors, made a significant number of direct sales to Pennsylvania residents, and published a toll-free number, had insufficient contacts with Pennsylvania to allow Pennsylvania courts to exercise jurisdiction over the defendant when the accident occurred in New Jersey on campgrounds occupied by the plaintiff under a contract signed in New Jersey.
- ***Tayar v. Camelback Ski Corp.*, 2008 PA Super 204 (September 18, 2008)**
  - Holding: Addressing the enforceability of releases relating to recreational activities by commercial entities, the Court concluded that the phrase "negligence or any other improper conduct," when used in a release of liability, without other warnings, does not clearly convey the releasor's intent to waive all claims against the facility for reckless or intentional conduct.
- ***Ford Motor Co. v. Buseman*, 2008 PA Super 146 (July 7, 2008)**
  - Holding: Summary judgment is appropriate in a claim against a vehicle manufacturer and dealer when the plaintiff had previously executed a release discharging the driver of the vehicle involved in the accident and "all other persons, firms, or corporations."

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E. *Standing*

- ***Information Systems Services, Inc. v. Platt*, No. 109 MAP 2007 (Pa., August 19, 2008).**
  - Holding: A shareholder may not maintain a cause of action in a Pennsylvania court on behalf of a foreign corporation that lacked good standing in its home state and failed to obtain a certificate of authority in Pennsylvania.

IV. Evidence

A. *Character*

- ***Stumpf v. Nye*, 2008 PA Super 122 (June 3, 2008)**
  - Holding: Evidence of previous violence tending to show a character or a trait of character is not admissible under Pa.R.E. 404 and 405. In addition, evidence that the plaintiff pled guilty to disorderly conduct was properly excluded because guilty pleas to summary offenses and other minor matters are generally inadmissible in subsequent civil proceedings arising out of the same incident.

V. Insurance

A. *Coverage*

- ***Brethren Mutual Insurance Co. v. McKernan*, 2008 PA Super 270 (November 18, 2008)**
  - Holding: Public policy prohibits insurance coverage for an order of restitution imposed pursuant to a criminal conviction.

VI. Insurance -- Motor Vehicle

A. *UM & UIM Coverage -- Reduction of Limits & Stacking*

- ***Nationwide Insurance Co. v. Schneider*, No. 11 MAP 2007 (Pa., November 19, 2008)**
  - Holding 1. Section 1733 of the Motor Vehicle Financial Responsibility Law does not require primary underinsured motorist benefits to be exhausted before secondary coverage is implicated. Affirming the Superior Court, and stating that Section 1733 of the MVFRL "makes no mention of exhaustion of limits," the Court noted that the claimant had followed the statutory order of priority by first pursing recovery from the insurer of the vehicle he occupied at the time of the accident, which is all that was required by Section 1733.
  - Holding 2: Examining consent to settle clauses in the context of UIM claims, the Court declined to determine whether a showing of prejudice is required of all insurers. Rather, the Court stated that it remains "the prevailing law of this Commonwealth under Lehman and its progeny unless and until a meritorious challenge to the rule is presented to this Court."

B. *UM & UIM Coverage -- Regularly Used Non-Owned Vehicle Exclusion*

- ***Government Employees Insurance Company v. Ayers*, 2008 PA Super 193 (August 18, 2008)**
  - Holding: A household vehicle exception, which precluded the claimant from stacking the UIM coverage contained in his truck's policy on top of the UIM coverage contained in his motorcycles' policy, does not violate the Pennsylvania Motor Vehicle Financial Responsibility Law or public policy. In this case, the claimant (Ayers) was involved in two motor vehicle accidents on the same day. In the first accident, Ayers was injured while operating a motorcycle as a result of being struck by a pick-up truck. The second accident

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occurred when the pick-up truck rolled backwards over Ayers' body while he was lying in the street following the first accident. Both accidents resulted in serious bodily injuries.

- At the time of the accidents, Ayers was the named insured on two separate motor vehicle policies issued by Geico. One policy insured two motorcycles, the second insured two pick-up trucks. Both policies provided for stacking coverage. Geico's underwriting policies required that the motorcycles and pick-up trucks be insured under two separate policies. Ayers collected the liability limits for both accidents and made a claim for underinsured motorist coverage under both Geico policies. Geico acknowledged Ayers' right to stack the coverages on the two separate insurance polices for the second accident because Ayers was not "occupying" the motorcycle at the time of the second accident. GEICO denied Ayers the right to stack the coverages from the two polices for the first accident because he was "occupying" the motorcycle when the truck struck him. Geico relied on the household vehicle exclusion in the insurance policy covering the two trucks when it denied coverage for the first accident. The trial court ruled that Ayers was entitled to stack the UIM coverage for the second accident, and the Superior Court reversed.

VII. Unemployment Compensation

A. *Eligibility -- Refusal of Work*

- **Ductmate Industries, Inc. v. Unemployment Compensation Board of Review, No. 1912 C.D. 2007 (Pa.Cmwlth., March 12, 2008)**
  - Holding: A worker's refusal of a work assignment, when the employer's work rules prohibited employees from refusing assigned tasks, constituted willful misconduct, and supported the denial of unemployment compensation benefits under Section 402(e) of the Unemployment Compensation Law 43 P.S. § 802(e).

B. *Employment Status*

- ***Glatfelter Barber Shop v. Unemployment Compensation Board of Review*, No. 1736 C.D. 2007 (Pa.Cmwlth., July 3, 2008)**
  - Holding: A claimant was not an independent contractor/self-employed and was entitled to unemployment compensation benefits when the evidence established that the employer (a barber shop): (1) set the hours of operation of the business; (2) paid the claimant on a weekly basis; (3) set the general price for a haircut given by the claimant; (4) provided all equipment and supplies to its barbers except razors and scissors; (5) provided its own business cards without the individual names of its barbers on them; (6) did not display any of its barbers' names on the outside window of its building; (7) required attendance at meetings and notice of vacations; (8) required the employee to execute an agreement that contained a non-compete clause; and, (9) required a manager to be on the premises to supervise the work of the claimant and other non-manager barbers.
- ***Weems v. Unemployment Compensation Board of Review*, No. 1783 C.D. 2007 (Pa.Cmwlth., June 26, 2008)**
  - Holding: A claimant's absenteeism from work as a result of incarceration for an assault conviction constituted willful misconduct under Section 402(e) of the Unemployment Compensation Law, rendering Claimant ineligible for benefits.

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C. *Voluntary Termination of Employment*

- ***Port Authority of Allegheny County v. Unemployment Compensation Board of Review*, Nos. 193, 194, 195 and 196 C.D. 2008 (Pa.Cmwlth., September 4, 2008)**
  - Holding: A claimant did not voluntarily quit, and was entitled to benefits, when the evidence establishes that the claimant: (1) executed the employer's Deferred Retirement Option Plan (DROP) program under protest; (2) would not have left his employment or participate in the DROP program except for the employer's decision to terminate the program; (3) was able and available for suitable work; and (4) no alternative offer of work was made to the claimant.

VIII. Workers' Compensation

A. *Appellate Procedure -- Remand*

- ***Repash v. Workers' Compensation Appeal Board (City of Philadelphia)*, No. 114 C.D. 2008 (Pa.Cmwlth., November 10, 2008)**
  - Holding: The Workers' Compensation Appeal Board errs when it ignores a Workers' Compensation Judge's finding that a claimant was entitled to the firefighter's presumption under Section 108(o) of the Act and that, consequently, his heart disease disabled him from firefighting.

B. *Compromise & Release Agreements -- Enforceability*

- ***Crawford v. Workers' Compensation Appeal Board (Centerville Clinics, Inc.)*, No. 2231 C.D. 2007 (Pa.Cmwlth., October 10, 2008).**
  - Holding: When a Compromise & Release Agreement contains a certification from the claimant that she is suffering from no known life-threatening or terminal illness(es) unrelated to her work injury and agrees that the C&R is null and void upon her death if not approved by a judge, the C&R was in fact null and void because the Claimant died one day before the Judge approved it.

C. *Employment - Scope of Employment*

- ***Waronsky v. Workers' Compensation Appeal Board (Mellon Bank)*, No. 367 C.D. 2008 (Pa.Cmwlth., October 22, 2008)**
  - Holding: Injuries suffered crossing the street, on the way to work, are not compensable when the employee was injured crossing a public street to the employer's premises from a parking garage that was not part of the employer's premises.

D. *Evidence -- Presumptions*

- ***Allegheny Power Service Corp. v. Workers' Compensation Appeal Board (Cockroft)*, No. 242 C.D. 2007 (Pa.Cmwlth., July 22, 2008)**
  - Holding: In a decision that seems destined to reach the Pennsylvania Supreme Court, the Commonwealth Court has ruled that, under Section 306(c)(23) of the Act, there is a presumption of total disability for workers with certain bilateral losses, requiring appropriate compensation without regard to a claimant's earning power. Because the employer in this case stipulated that the claimant suffered such a severe bilateral loss and the WCJ found that the claimant remained totally disabled under Section 306(c)(23), the employer was obligated to pay total disability benefits. Of note, Section 306(c)(23) states

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that, "Unless the board shall otherwise determine, the loss of both hands or both arms or both feet or both legs or both eyes shall constitute total disability, to be compensated according to the provisions of [Section 306](a)."

E. ***Concurrent Benefits***

- ☐ ***YDC New Castle-PA DPW v. Workers' Compensation Appeal Board (Hedland)*, No. 230 C.D. 2008 (Pa.Cmwlth., June 11, 2008)**
  - ➢ Holding: A claimant who receives benefits under 61 §§ 951-952 (Act 534) is also entitled to benefits under the Workers' Compensation Act that were not paid under Act 534. Thus, a claimant is entitled to benefits for the first two days that his injury kept him out of work, despite failing to provide the employer with documentation of a medical examination on the first day of his absence as required by employer's policy, where concerns about potential abuse of employer's policies were not present under the circumstances.

F. ***Defenses -- Violation of Work Order***

- ☐ ***Scott v. Workers' Compensation Appeal Board (Ames True Temper Inc.)*, No. 647 C.D. 2008 (Pa.Cmwlth., September 29, 2008)**
  - ➢ Holding: The defense that a claimant violated a work order does not apply if the activity was part of the workers' job duties. Thus, an injured worker who engaged in an activity that was part of his work duties, even though the activity was in direct violation of a positive work order, is entitled to benefits. In this case, the employer alleged that the Claimant violated a positive work order when he removed an object from a metal press.
- ☐ ***Bayada Nurses v. Workers' Compensation Appeal Board (Gallagher)*, No. 123 C.D. 2008 (Pa.Cmwlth., July 29, 2008)**
  - ➢ Holding: Minor violations of the law, such as traffic violations, are not a sufficient basis to deny benefits because of a violation of the law. Rather, the phrase, "violation of the law," has been interpreted to mean the commission of a felony or misdemeanor. Although a summary offense may constitute a violation of the law when it is a necessary element of a felony or misdemeanor conviction, where a Claimant was cited for several summary offenses, the evidence did not establish a "violation of law" under Section 301(a) of the Act.

G. ***Disfigurement***

- ☐ ***Dart Container v. Workers' Compensation Appeal Board (Lien)*, No. 550 C.D. 2008 (Pa.Cmwlth., October 23, 2008)**
  - ➢ Holding: The Workers' Compensation Appeal Board may modify a disfigurement award if the modification is explained and consistent with case law.
- ☐ ***City of Pittsburgh v. Workers' Compensation Appeal Board (McFarren)*, No. 1701 C.D. 2007 (Pa.Cmwlth., June 4, 2008)**
  - ➢ Holding: The Workers' Compensation Appeal Board may modify a Workers' Compensation Judge's disfigurement award only if it concludes that the WCJ capriciously disregarded competent evidence by entering an award significantly outside the range of benefits most WCJs would select for a particular scar. In so doing, and to allow for meaningful appellate review, the Board must adequately explain its change in the award, including what range is acceptable under the circumstances, what most WCJs would award

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within that range or how the WCAB reached its conclusion that most WCJs would award greater compensation.

H. ***Evidence***

- ***Erisco Industries, Inc. v. Workers' Compensation Appeal Board (Luvine)*, No. 657 C.D. 2008 (Pa.Cmwlth., September 3, 2008)**
  - Holding: An employer's failure to independently establish the required chain of custody for a worker's drug test sample in a Claim Petition precludes the employer from using the same drug test as proof in a subsequent suspension petition that the claimant's pre-injury job was unavailable because of his own misconduct.
- ***Patton v. Workers' Compensation Appeal Board (Lane Enterprises, Inc.)*, No. 2363 C.D. 2007 (Pa.Cmwlth., October 22, 2008)**
  - Holding: An employer may overcome the presumption that a worker suffered from a work-related occupational disease under Section 301(e) of the Workers' Compensation Act, 77 P.S. §413, by presenting credible medical evidence that the Decedent did not suffer from an occupational disease.
- ***Albert Einstein Healthcare v. Workers' Compensation Appeal Board (Stanford)*, No. 2189 C.D. 2007 (Pa.Cmwlth., August 4, 2008)**
  - Holding: The Appeal Board erred by relying on claimant's testimony in place of expert testimony when the Workers' Compensation Judge determined that the credible expert testimony established the date of disability and the claimant failed to present any evidence supporting an earlier date of disability.
- ***Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette)*, No. 38 C.D. 2008 (Pa.Cmwlth., July 29, 2008).**
  - Holding: A Workers' Compensation Judge may reject a medical expert's testimony for failure to credibly establish causation even if the Judge concludes that the opinions themselves are credible.

I. ***Fee Review***

- ***Crozer Chester Medical Center v. Dept. of Labor and Industry*, No. 251 M.D. 2008 (Pa.Cmwlth., September 3, 2008)**
  - When an employer/insurer disputes its liability for an alleged work injury, an application for fee review is premature and inappropriate. What makes this case unusual is the fact that the employer had issued a Medical Only Notice of Compensation Payable that appeared to encompass the treatment under review. The employer disputed this, however, and the Court agreed that the dispute precluded the Bureau from hearing the fee review petition.

J. ***Impairment Ratings -- Modification of Benefits***

- ***Diehl v. Workers' Compensation Appeal Board (IA Construction)*, No. 1507 C.D. 2007 (Pa.Cmwlth., June 24, 2008)**
  - Holding: Order Vacated: The Commonwealth Court has vacated its April 28, 2008 Opinion and Order, which ruled that 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 the

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Kachinski standards or conduct a Labor Market Survey. Reargument was held on November 12, 2008 before an en banc Court.

- ***Combine v. Workers' Compensation Appeal Board (National Fuel Gas Distribution Corporation)*, No. 539 C.D. 2008 (Pa.Cmwlth., August 14, 2008)**
  - Holding: Section 306(a2) of the Workers' Compensation Act requires a determination of maximum medical improvement (MMI) prior to calculating a claimant's impairment rating.

K. *Judgments*

- ***United Parcel Service v. Hohider*, 2008 PA Super 148 (July 7, 2008)**
  - Holding: An employer may enter a judgment in the Court of Common Pleas based upon a WCJ's Order directing payment by an employee to an employer of a liquidated sum in satisfaction of the employer's right to subrogation. The Court notes that, although Section 428 of the Act, 77 P.S. § 921, permits only employees or dependents to enter a judgment in a court of common pleas as a result of an unpaid Order by a WCJ, precluding an employer from doing so would render the WCJ's order a nullity. The Court based its opinion upon case law and Section 319 of the Act.

L. *Medical Expenses*

- ***Nickel v. Workers' Compensation Appeal Board (Agway Agronomy)*, No. 719 C.D. 2008 (Pa.Cmwlth., October 22, 2008)**
  - Holding: A healthcare provider may not collect the difference between the provider's charge (as repriced under Act 44) and the amount of a DPW lien from an employer or its workers' compensation if the provider has accepted DPW's payment as payment in full.

M. *Modification/Suspension/Termination*

- ***Folmer v. Workers' Compensation Appeal Board (Swift Transportation)*, No. 596 C.D. 2007 (Pa.Cmwlth., October 22, 2008)**
  - Holding: When there have been prior petitions to modify or terminate benefits, an employer must accept the adjudicated condition and establish a change in physical condition into to prove that claimant has recovered from a work-related injury. Although the evidence needed to establish a change of condition would differ in each case, an employee may meet its burden by proving that the claimant's symptoms lacked any objective basis. Judges McGinley, Smith-Ribner and Pellegrini dissented arguing that a change in physical condition can be shown only by objective medical evidence, not subjective testimony. In this case, the WCJ accepted testimony "that the claimant has symptom magnification and is a malingerer."
  - Judges McGinley, Smith-Ribner and Pellegrini dissented form the en banc decision, arguing that a change in physical condition can be shown only by objective medical evidence, not subjective testimony.
- ***National Fiberstock Corp. v. Workers' Compensation Appeal Board (Grahl)*, No. 1456 C.D. 2007 (Pa.Cmwlth., August 29, 2008)**
  - Holding: When a claimant establishes a change in physical condition, the doctrine of res judicata does not prevent an employee from seeking a reinstatement of benefits, even if a termination petition had been granted previously.

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- ***Watson v. Workers' Compensation Appeal Board (Special People in Northeast and Eagle Trust Management)*, No. 1924 C.D. 2007 (Pa.Cmwlth., May 30, 2008)**
  - Holding 1: A Workers' Compensation Judge may terminate benefits in a claim petition, even when no termination petition is filed, when the claimant fails to establish the ongoing nature of his or her injury.
  - Holding 2: A claimant is not entitled to an award of litigation costs when the employer admitted its obligation to pay medical expenses, but disputed its obligation to pay indemnity benefits, and the WCJ declined to award any wage losses. Under the circumstances, the claimant did not prevail on any disputed issue before the WCJ, and is not entitled to an award of costs.
- ***Paul v. Workers' Compensation Appeal Board (Integrated Health Services)*, No. 16 C.D. 2008 (Pa.Cmwlth., June 11, 2008)**
  - Holding: Where there has been no prior determination of a claimant's condition by a WCJ, an employer meets its burden in a termination petition when it presents evidence that the claimant had fully recovered from all of the accepted work injuries. The Court distinguishes this case from Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.), 591 Pa. 490, 919 A.2d 922 (2007), noting that the injuries and disabilities at issue had been the subject of prior proceedings.
- ***Prebish v. Workers' Compensation Appeal Board (DPW/Western Center)*, No. 319 C.D. 2007 (Pa.Cmwlth., July 14, 2008)**
  - Holding: In order to terminate a Claimant's benefits, a WCJ must consider whether Claimant's physical condition has changed materially since the date of the most recent prior decision. In this case, the Court remanded the case in order for the (second or subsequent) WCJ to make a factual finding whether claimant's condition had changed after the date of the first (or most recent prior) decision by a WCJ.

N. *Notice*

- ***Bullen Cos. v. Workers' Compensation Appeal Board (Hausmann)*, No. 409 C.D. 2008 (Pa.Cmwlth., October 23, 2008)**
  - Holding: Pursuant to Section 301(c)(1) of the Workers' Compensation Act, 77 P.S. §411(1), a worker must give notice of an occupational disease claim within 120 days from the date on which the worker discovers that the disease is job-related. Under Section 311, a claimant's discovery of a work related disease requires more than an employee's suspicion, intuition or belief.
- ***Crompton Corporation v. Workers' Compensation Appeal Board (King)*, No. 2142 C.D. 2007 (Pa.Cmwlth., August 5, 2008)**
  - Holding: A Claimant may not be charged with the knowledge of a compensable hearing loss unless and until the claimant is so informed by a health care provider. Section 306(c)(8)(ix) of the Workers Compensation Act is not intended for determining whether Section 311 notice requirements were satisfied.

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O. ***Offsets***

- ***Costa v. Workers' Compensation Appeal Board (Carlisle Corp.)*, No. 822 C.D. 2008 (Pa.Cmwlth., October 14, 2008)**
  - Holding: Under Section 204(a) of the Workers' Compensation Act, a Workers Compensation Judge must award an offset for unemployment compensation benefits when the amount is undisputed, whether the employer raises the issue or not.

P. ***Subrogation***

- ***Stout v. Workers' Compensation Appeal Board (Pennsbury Excavating, Inc.)*, No. 1969 C.D. 2007 (Pa.Cmwlth., May 22, 2008)**
  - Holding: An employer has an absolute right of subrogation from a claimant's third party recovery when the claimant received compensation payments from the employer's insurer, which accepted liability for the work injury. The Court declined to rule that, under the facts presented, the employer and its workers' compensation insurer engaged in deliberate bad faith conduct in order to subvert the claimant's third party action, potentially barring its right to subrogation.
- ***Gorman v. Workers' Compensation Appeal Board (Kirkwood Construction)*, No. 1926 C.D. 2007 (Pa.Cmwlth., July 9, 2008)**
  - Holding: An employer is entitled to payment of its subrogation lien even though the parties had entered into a Compromise and Release Agreement (C&R), which stated that there was no lien or potential lien for subrogation. In particular, the WCJ found no evidence that a potential third party action was considered by the parties when they negotiated the C&R, and determined that the parties were mistaken in the relevant subrogation lien averment. Consequently, the WCJ set aside the C&R based upon a mutual mistake.

Q. ***Traveling Employees***

- ***Jamison v. Workers' Compensation Appeal Board (Gallagher Home Health Services)*, No. 339 C.D. 2008 (Pa.Cmwlth., August 19, 2008)**
  - Holding: Ruling on an issue of first impression, the Court determined that a claimant need not work for a single employer in order to be considered a traveling employee. Rather, the inquiry should instead focus on what the claimant was doing at the time of the injury.

R. ***Utilization Reviews***

- ***HCR ManorCare v. Workers' Compensation Appeal Board (Bollman)*, No. 2320 C.D. 2007 (Pa.Cmwlth., July 2, 2008)**
  - Holding: Although a Workers' Compensation Judge lacks jurisdiction to decide the merits of a Utilization Review petition, the WCJ does have jurisdiction to decide the issues of the adequacy of the URO's pursuit of an appropriate verification form, as well as the URO's and the providers compliance with applicable provisions of the Pennsylvania Code.

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S. ***Reasonable Contest***

- ***Hansen v. Workers' Compensation Appeal Board (Stout Road Assocs.)*, No. 524 C.D. 2008 (Pa.Cmwlth., September 26, 2008)**
  - An employer establishes a reasonable basis to contest a claim petition when, at the time it issued a Notice of Compensation Denial, it had not received evidence establishing a causal connection between the injury and the claimant's employment.

PENNSYLVANIA RULES CHANGES

I. ***Pa.R.E. 408***

By Order dated September 18, 2008, effective October 30, 2008, the Supreme Court has amended Pa.R.E. 408 to be identical to F.R.E. 408, which states:

- Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

II. ***Pa.R.A.P. 1921***

By Amended Order dated August 13, 2008, effective immediately, Pa.R.A.P. 1921 has been amended to require that, when a trial court record consists of electronically filed documents, hard copies of documents electronically filed shall become part of the record on appeal and must be filed with the appellate courts.

III. ***Pa.R.A.P. 1115***

By Order dated September 25, 2008, effective as to all Petitions for Allowance of Appeal filed more than 30 days after entry of the Order, the Supreme Court amended Pa.R.A.P. 1115(6) to require that copies of any Applications for Reargument filed in the Superior Court or Commonwealth Court, and any Orders granting or denying the application for reargument, be appended to the petition.

IV. ***Pa.R.Civ.P. 1042.1 to 1042.9***

By Order dated June 16, 2008, effective immediately, the Pennsylvania Supreme Court amended Rules of Civil Procedure 1042.1, 1042.2, and 1042.3 (Professional Liability Actions), promulgated new Rule 1042.6 and renumbered Rules 1042.6, 1042.7 and 1042.8 as Rules 1042.7, 1042.8 and 1042.9.

- ***Under the new and amended Rules, the Court:***
  - Clarified that the Rules apply to claims "by or on behalf of a patient or client of the licensed professional) (Rule 1042.1(a));
  - Applied the Rules to partnerships, unincorporated associations, corporations or similar entities responsible for a licensed professional who deviated from an acceptable professional standard (rule 1042.1(a)(2)); and,
  - Specified that "A professional liability claim asserted against a licensed professional includes a claim for lack of informed consent" (Rule 1042.1(b));

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- The filing of Preliminary Objections is not a prerequisite to the filing of a notice of intent to enter a judgment of non pros on a professional liability claim under 1042.6 (Note to Rule 1042.2(b));
- Defendants filing a cross-claim are not required to file a Certificate of Merit (Rule 1042.3(c)(2));
- Extended the time to file a Motion to Extend the Time for Filing a Certificate of Merit "by the thirtieth day after the filing of a notice of intention to enter judgment of non pros on a professional liability claim under Rule 1042.6(a) or on or before the expiration of the extended time where a court has granted a motion to extend the time to file a certificate of merit, whichever is greater" (Rule 1042.3(d));
- Created Rule 1042.6 ("Notice of Intent to Enter Judgment of Non Pros for Failure to File Certificate of Merit. Motion to Determine Necessity to File Certificate. Form of Notice"), which specifies that a Notice of Intention to Enter Judgment of Non Pros must be served on a party's attorney of record (or an unrepresented party), along with the form of the Notice;
- Clarifies that the prothonotary may enter a judgment of non pros provided that (1) there is no pending motion for determination that the filing of a certificate is not required or no pending timely filed motion seeking to extend the time to file the certificate, (2) no certificate of merit has been filed, (3) the defendant has attached to the praecipe a certificate of service of the notice of intention to enter the judgment of non pros, and (4), the praecipe is filed no less than thirty days after the date of the filing of the notice of intention to enter the judgment of non pros.(Rule 1042.7)

V. *Pa.R.A.P. 2116*

By Order dated July 11, 2008, effective 30 days thereafter, the Supreme Court amended Pa.R.A.P. 2116 to modify the maximum number of pages for a Statement of Questions from one page to two, and making minor changes to the language used in the rule. The Court notes that the amendments reinforce the importance that a party's statement be limited to concise questions that enable the court to understand the nature of the legal issues to be decided. Effective 30 days after adoption.

VI. *Pa.R.Civ.P. 226*

The Supreme Court has amended Pa.R.Civ.P. 226, effective September 1, 2008, to state that requested points for charge presented to a trial judge becomes part of the record when read into the record, or filed in the Office of the Prothonotary prior to filing a Motion for Post-Trial Relief regarding the requested point for charge. The amendment notes that an appellate court will not review an objection to a trial court's ruling regarding a point for charge unless it was (1) presented to the court, and (2) made a part of the record in one of these ways.

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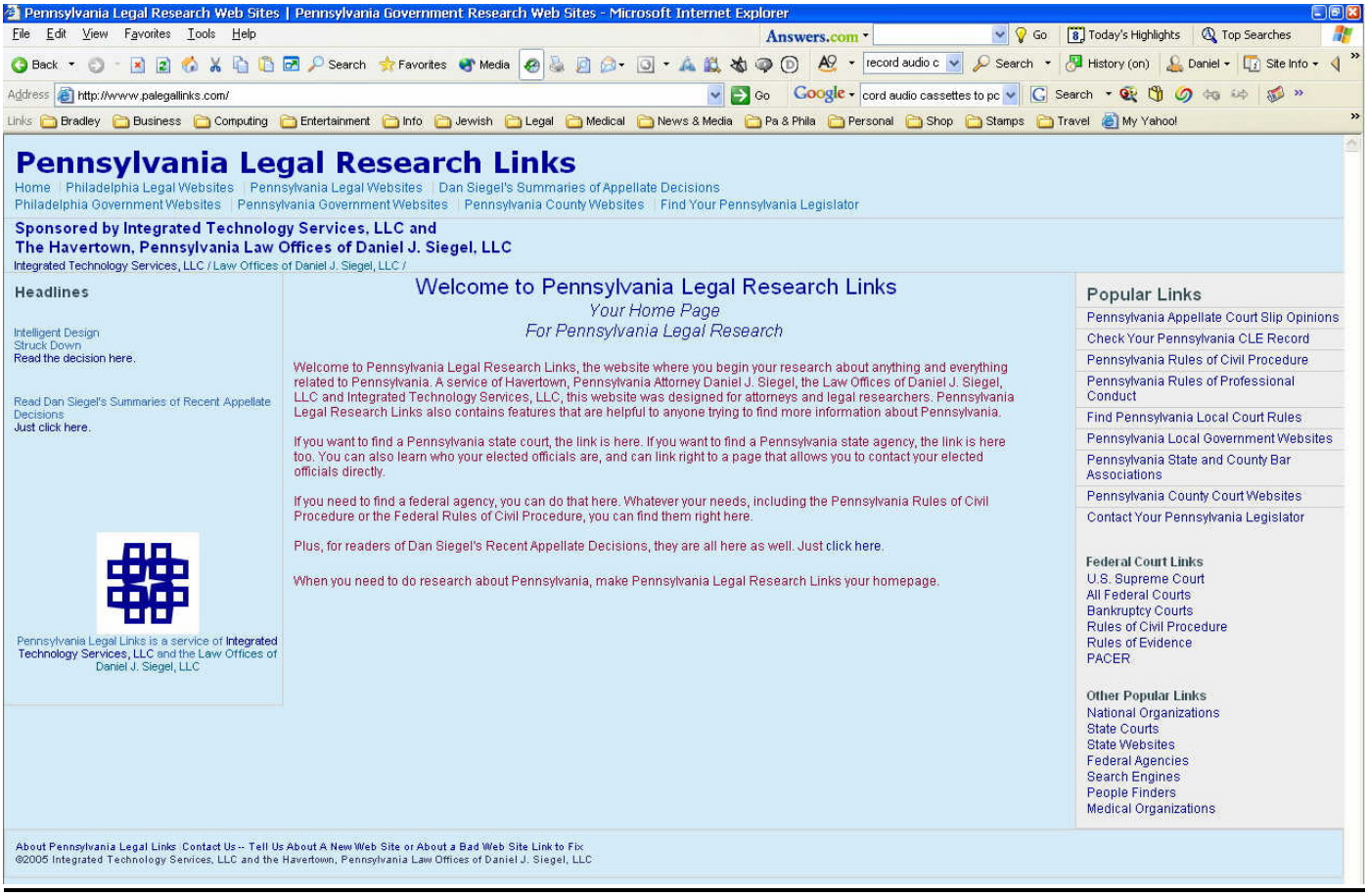

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