White and Williams LLP

Workers' Compensation

In *Neidert v. Charlie*, the **Superior Court of Pennsylvania** examined the **"dual capacity" exception** to immunity under the **Workers' Compensation Act**, which imposes liability on an employer for an employee's injury **if the employer occupies a second capacity** that confers on him obligations independent of those imposed on him as an employer. The court determined that the **exception did not apply** where the employee's injury occurred **while he was engaged in the performance of his job**, which was not extraneous to the employment scheme. (June 29, 2016)

In *Renner v. AT&T*, the **Supreme Court of New Jersey** addressed the application of the **cardiovascular injury, disease or death** standard defined by N.J.S.A. 34:15-7.2 to an employee who died after suffering a **pulmonary embolism while working**, which an expert causally related to the sedentary nature of her work. The court held that benefits under the statute are only available to persons who suffer injury from a **work effort or strain involving a substantial condition or event**, and that the employee was not entitled to benefits because prolonged sitting without breaks fails to meet that standard. (July 30, 2014)

In *Baracia v. Board of Trustees of the State Police Retirement System,* the **Superior Court of New Jersey, Appellate Division,** addressed whether an award of a *pro rata* share of attorney's fees could be used to offset a recipient's accident disability retirement allowance. Because an award of **attorney's fees incurred in bringing a third-party action does not constitute compensation** under New Jersey's workers' compensation law, the court held that it could not be used to offset a recipient's accidental disability retirement allowance. (May 13, 2011)

In *McDaniel v. Man Wai Lee,* the **New Jersey Superior Court, Appellate Division,** addressed N.J.S.A. 34:15-8, the **fellow-servant provision** of the Workers' Compensation Act, which prohibits **co-workers** involved in a work-related accident **from suing each other,** and also **bars a third-party action by a tortfeasor against the plaintiff's coworker.** The court considered whether counsel could represent both the plaintiff and his co-worker in their respective personal injury actions. The court found no conflict, reasoning that the one co-worker's claim against the other co-worker was without legal basis under the Worker's Compensation Act, and therefore, their interests were not adverse. (April 27, 2011)

In *Taylor v. Diamond State Port Corp.,* the **Supreme Court of Delaware** reviewed a decision by the Industrial Accident Board regarding the

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methodology for calculating the injured claimant's **weekly wage** under **19 Del. C. § 2302.** The court held that the statute's definition of the term **"worked"** was ambiguous and accepted the claimant's argument that the legislative intent was to include **"work actually performed."** (February 16, 2011)

In *Lancaster General Hosp. v. W.C.A.B. (Weber-Brown),* the **Supreme Court of Pennsylvania** granted a Petition for **Allowance of Appeal,** agreeing to consider the following question: "Whether the Commonwealth Court erred in concluding that **Section 309 of the Workers' Compensation Act,** 77 P.S. § 582, permits a claimant's workers' compensation benefits to be calculated based on **wages earned with an employer different from the one paying the benefits** and where the change in employer took place more than 52 weeks before the date of the injury?" (November 30, 2010)

In *Frazier v. W.C.A.B (Bayada Nurses, Inc.),* the **Supreme Court of Pennsylvania** granted a **Petition for Allowance of Appeal,** agreeing to consider the following issue: "Whether Section 23 of [Act 44, Act of July 2, 1993, P.L. 1990,] provides **sovereign immunity from subrogation** and/or reimbursement claims sought against an employee who has entered into a third[-]party **settlement with a Commonwealth Party** such as Southeastern Pennsylvania Transportation Authority (SEPTA)." (October 29, 2010)

In *Diehl v. Workers' Compensation Appeal Board,* the **Supreme Court of Pennsylvania** considered the question of whether an **employer, seeking to change a claimant's workers' compensation disability status from total disability to partial disability** under 77 P.S. § 511.2, but not to change the amount of compensation, must present evidence of job availability or earning power in order to support the status change. In pertinent part, § 511.2 authorizes an automatic change of status from total to partial disability when an **employer requests an Impaired Rating Evaluation (IRE) within 60 days after a claimant has received 104 weeks of total disability benefits,** and the IRE reveals that the claimant's impairment is less than 50 percent. The court affirmed the Commonwealth Court's decision holding that an **employer who seeks to change a claimant's disability status under § 511.2, but not disturb the compensation amount, need not establish job availability or earning power.** In addition, the court held that the means by which an employer can establish that a claimant's disability status has changed from total disability to partial disability is through an IRE, regardless of whether the IRE is requested within the 60-day window. An employer who requests an IRE outside the statutorily-defined 60-day window and seeks to reduce a claimant's disability status based upon the IRE must do so through an adjudication or agreement. Discussing the proof required to secure a change in disability status, the court held that if the IRE is requested within the 60-day period and the claimant's impairment rating is less than 50 percent, then the change in disability status is automatic. If, however, the employer requests the IRE outside of the 60-day window and claims that the claimant's impairment rating is less than 50 percent, the IRE merely serves as evidence that the claimant's disability status should be changed from total to partial. (September 29, 2010)

In *City of Philadelphia v. W.C.A.B. (Kriebel),* the **Supreme Court of Pennsylvania** granted a **Petition for Allowance of Appeal** to address the following issue: "Whether the Commonwealth Court's decision to reverse the decision of the **Workers' Compensation Appeal Board** and reinstate the decision of the Workers' Compensation Judge is supported by substantial competent evidence, given (1) the rebuttable statutory presumption, under Section 301(e) of the Workers' Compensation Act, that Decedent's **occupational disease, *i.e.,* hepatitis C,** arose out of and in the course of his

employment as a **firefighter;** and (2) the absence of any evidence establishing that Decedent was an intravenous drug user, shared needles, and/or came in contact with contaminated needles." (September 9, 2010)

In *Bufford v. Workers' Compensation Appeal Board (North American Telecom),* the **Supreme Court of Pennsylvania** addressed the appropriate allocation of the relevant **burdens of proof** when workers' compensation claimants seek **reinstatement of suspended benefits** pursuant to **Section 413(a) of the Workers' Compensation Act.** The court held that a **claimant seeking reinstatement of suspended benefits must prove** that his or her earning power is once again adversely affected by his or her disability, and that such disability is a continuation of that which arose from his or her original claim. The **claimant need not reprove** that **the disability resulted from a work-related injury** during his or her original employment. Once the claimant meets this burden, the **burden then shifts** to the party opposing the reinstatement petition. In order to prevail, the opposing party must show that the claimant's loss in earnings is not caused by the disability arising from the work-related injury. This burden may be met by showing that the claimant's loss of earnings is, in fact, caused by the claimant's bad faith rejection of available work within the relevant required medical restrictions or by some circumstance barring receipt of benefits that is specifically described under provisions of the Act or in the Supreme Court's decisional law. (August 17, 2010)

In *Rhodes v. Diamond State Port Corp,* the **Supreme Court of Delaware** addressed whether Delaware's Industrial Accident Board misapplied or failed to apply the **"last injurious exposure" rule.** The rule "puts the whole burden of compensation payments upon the last insurer in the case of a compensable occupational disease which developed over a lengthy period of time." The court found the "last injurious exposure" rule did not apply because the plaintiff failed to prove an injurious exposure while working for the defendant. (July 29, 2010)

In *Gentex Corp., et. al. v. Workers' Compensation Appeal Board (Morack),* the **Supreme Court of Pennsylvania** granted a **Petition for Allowance of Appeal** to consider an issue related to workers' compensation. In particular, the court agreed to consider the following question: "What constitutes sufficient **notice,** including how specific the **description of the injury** must be, **under Section 312 of the Workers' Compensation Act.** 77 P.S. § 632. In addressing this issue, the parties are also to address **if, and when, the burden shifts** to the employer to conduct a reasonable investigation into the circumstances surrounding the injury?" (June 1, 2010)

In *Quereshi v. Cintas Corp.,* the **Superior Court of New Jersey**, **Appellate Division,** considered whether a workers' compensation judge (WCJ) **must assess attorneys' fees** and a **penalty** when an employer fails to make a timely payment of **temporary disability benefits.** In Quereshi, the employee sought the assessment of a penalty and attorneys' fees, pursuant to **N.J.S.A. 34:15-28.1**, after her employer failed to timely pay temporary disability benefits. Although the WCJ assessed a penalty for the late payment, the WCJ declined to award attorneys' fees. The Superior Court reversed and held that, pursuant to the plain words of the statute, when a WCJ finds that the payment of temporary disability benefits was unreasonably or negligently withheld, the WCJ "**must award both the statutory penalty and a reasonable legal fee."** The court further held that a "reasonable legal fee" under the statute is not subject to a cap, but instead should **"be calculated in accordance with the standard factors for constructing a fee award."** (May 28, 2010)

In *Giant Eagle, Inc. v. Workers' Compensation Appeal Board (Givner),* the **Supreme Court of Pennsylvania** granted a **Petition for Allowance of Appeal.** The issue the court agreed to consider is: "Whether 'compensation' must include **medical benefits** as well as wage loss benefits under [S]ection 314(a) of the Workers' Compensation Act." (May 19, 2010)

In *Kelly v. WCAB (US Airways Group, Inc.),* the **Pennsylvania Supreme Court** considered whether an employer was **entitled to a credit** against the workers' **compensation benefits** it paid to an employee-claimant for the amount of a **furlough allowance** paid to that employee. Under **Section 204(a)** of the **Workers' Compensation Act, 77 P.S. § 71 (a),** an employer is entitled to credit against workers' compensation benefits for any amount paid to the employee as a severance benefit. In affirming the Commonwealth Court's decision, the Supreme Court agreed that the use of the phrase "severance benefits" in Section 204(a) is clear and free from ambiguity, and noted that such benefits are occasioned only by an employee's **complete and permanent separation from employment.** A furloughed employee is not dismissed from employment; rather, he maintains an employment relationship with the employer to the extent that the employee can be recalled to work. The Supreme Court held that an employer is not entitled to a credit against workers' compensation/severance benefits for a furlough allowance simultaneously paid to the claimant. (April 4, 2010)

In *Sedlacek v. A.O. Smith*, the **Supreme Court of Pennsylvania** addressed a defendant's immunity from suit under the **Workers' Compensation Act (WCA)** for **mesothelioma** developed as a result of exposure to **asbestos**. The WCA grants immunity to employers from tort suits brought by employees. The plaintiffs brought suit because their claims were barred by the statute of limitations set forth in the WCA. Although the court recognized that the exclusivity provisions of the WCA have not been interpreted as providing to an employer an all-encompassing immunity from suit for work-related occupational diseases, the court held that **simply because an injury is not compensable under the WCA by virtue of a time limitation, this does not mean that the workers' compensation bar may be overlooked**. Particular to this case, the court held that the plaintiff's **mesothelioma was an occupational disease** triggering the employer's immunity and, thus, the plaintiffs' sole remedy was to pursue administrative proceedings under the WCA. (February 25, 2010)

In *Duferco Ferrell Corp. v. Workers' Compensation Appeal Board*, the **Commonwealth Court of Pennsylvania** addressed an **issue of first impression: whether a claimant's receipt of a pension from a source other then the employer triggers a presumption that the claimant has withdrawn from the workforce**. In this case, the claimant accepted both Social Security retirement benefits and a union pension. The court held that a claimant who accepts a pension is presumed to have left the workforce. In addition, the court held that because the claimant did not rebut the presumption by establishing either that he was seeking employment or that the work injury forced him to retire, the Workers' Compensation Appeal Board erred when it affirmed the Workers' Compensation Judge's decision granting the claimant's reinstatement petition. (January 14, 2010)

In *Cooper v. Barnickel Enterprises, Inc.,* the **Superior Court of New Jersey, Appellate Division,** upheld a workers' compensation award of 100 percent disability for a worker who was injured in a car accident on his way to a coffee break away from the job site. In holding that the accident arose in the course of employment, the Superior Court noted that the coffee shop the worker was traveling to was five miles away - which was reasonable. According to the court, **"accidents occurring during coffee breaks for off-site employees, which are equivalent to those of on-site workers, are**

minor deviations from employment which permit recovery of workers' compensation benefits." (January 13, 2010)

The **Supreme Court of Pennsylvania**, in *Dep't of Labor & Indus. Bureau of Workers' Comp. v. Workers' Comp. Appeal Bd. (Crawford & Co.)*, granted a Petition for **Allowance of Appeal** to address an issue associated with the Supersedeas Fund. In particular, the court agreed to consider the following issue: **"Whether the Supersedeas Fund may deny reimbursement of medical treatment** rendered before an insurer requested supersedeas, where the Workers' Compensation Act only permits reimbursement of amounts paid as a result of a denial of supersedeas? (December 17, 2009)

In *Oliver v. City of Pittsburgh*, the **Supreme Court of Pennsylvania** granted a Petition for **Allowance of Appeal** to consider several issues associated with **subrogation rights** under the **Heart and Lung Act.** In particular, the court will decide: 1) whether, in light of Section 25(b) of Act 44, which amended Pennsylvania's Motor Vehicle Financial Responsibility Law, the City of Pittsburgh has a valid subrogation claim against Oliver's settlement with a third-party tortfeasor equal to the amount of benefits she received under the Heart and Lung Act; and 2) whether Oliver, a police officer, has immunity from the City of Pittsburgh's reimbursement claim under Section 23 of Act 44. (December 29, 2009)

The **Superior Court of Pennsylvania**, in *Bowman v. Sunoco, Inc.,* addressed whether a **third-party release, signed by an individual in exchange for employment,** is contrary to public policy. In Bowman, the plaintiff was working as a private security guard for Allied Barton Security Services when she slipped and fell on Sunoco's property and injured herself. Prior to her fall, however, the plaintiff signed a release, in exchange for her employment, that waived any of the plaintiff's rights she might have to recover damages against any customers of Allied Security. Sunoco pled the release as part of its New Matter and argued that the plaintiff waived her right to file claims against it - a customer of Allied Security - for damages otherwise covered by workers' compensation. **In a case of first impression,** the Superior Court ruled that the release was proper because the plaintiff agreed only to extinguish her right to sue third-party customers for amounts additional to workers' compensation benefits. Although Allied Barton could not contract away its own statutory obligation to cover employees for workplace injuries, the release did not violate the Workers' Compensation Act because it did not impede the ultimate goal of the Act - to enable an employee hurt at work to receive from his or her employer compensation benefits for all work-related injuries suffered. (December 16, 2009)

In *Riddle v. WCAB*, the **Supreme Court of Pennsylvania** recently issued a decision regarding Section 306(b) of the Workers' Compensation Act, 77 P.S. § 512(2), which states that "the **usual employment area** where the injury occurred shall apply" when an employer develops an **earning power assessment (EPA) report** for an out-of-state employee. 77 P.S. § 512(2). Specifically, the court determined whether, under Section 306(b), an employer may meet its burden of proof to justify the modification of a workers' compensation award to an injured, non-resident employee with an EPA report that focuses on the location of the employee's residence, rather than the location of injury. In overruling the Commonwealth Court, the Supreme Court held that the statutory language creates a mandatory requirement, and that the EPA report **must** be based on the **location of the injury**. (October 22, 2009)

In *Diehl v. Workers' Compensation Appeal Board (IA Construction, et. al.),* **the Supreme Court of Pennsylvania** granted a petition for **Allowance of Appeal** to address the following question: "Whether the Commonwealth Court erred in its **interpretation of 77 P.S. § 551.2** by holding that respondents did not need to present **evidence of job availability** or earning power in order to **change petitioner's disability status** from total to partial, and whether the court's holding conflicts with *Gardner v. WCAB (Genesis Health Ventures),* 888 A.2d 758 (Pa. 2005)." (October 20, 2009)