THE PENNSYLVANIA APPELLATE CASE REVIEW

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REPORTING STATE COURT DECISIONS THROUGH AUGUST 28, 2024

PENNSYLVANIA APPEALS COURT OPINIONS

Featured Case of the Month

Impairment Rating Evaluations

***Sicilia v. API Roofers Advantage Program (Workers' Compensation Appeal Board)*, No. 14 MAP 2023 (Pa., July 17, 2024)**

- **Holding:** Impairment Rating Evaluators may consider additional diagnoses as impairments caused by the injured worker's compensable injuries. This split (3 to 3) decision affirms *Duffey v. Workers' Compensation Appeal Board (Trola-Dyne, Inc.),* 152 A.3d 984 (Pa. 2017).

Attorney Daniel J. Siegel argued the appeal on behalf of the injured worker, Vincent Sicilia.

- **Analysis:** The Bureau of Workers' Compensation website explains that "An Impairment Rating Evaluation (IRE) is a medical examination requested by the insurer and/or their counsel *to determine an injured worker's whole-body impairment due to the compensable injury***.** The process may be found in section 306(a)(2) of the Pennsylvania Workers' Compensation Act."

  Under this standard, a physician who performs the IRE exam must consider what other injuries or limitations have arisen as a result of the work injury throughout the whole body rather than only the part of the body injured at work. Historically, Pennsylvania courts, when analyzing statutes, apply the newest changes when possible, because it is presumed that if the legislature makes a provision that modifies a previous statute or includes new language in the statute, the new language controls it. And the legislature passed this amendment twice. The *AMA Guides* evaluate whole-body impairment. Traditionally, Pennsylvania law had only looked at the specific body part injured. Thus, the provisions are inconsistent.

  For example, a worker with a back injury may have pain and limitations in the legs or other parts of the body that arise from the injury. Those would matter to the IRE physician because he is examining the whole body, not just the "accepted injury." However, under the Pennsylvania Workers' Compensation Act, the "accepted injury" is generally determined

unilaterally in a document issued by the insurance company called a Notice of Compensation Payable. This document, commonly called an NCP, specifies what the injury was.

For example, it could specify a back injury, a herniated disc, or a strain and sprain. This is not a partisan description of an NCP. To the contrary, Pennsylvania Workers' Compensation Practice and Procedure, commonly called "The Bible," says that an NCP "is the form by which the employer unilaterally acknowledges a compensable injury." The Bible is published by PBI and is considered an unbiased and authoritative source of information.

It is unclear, however, if the Supreme Court fully recognizes this distinction. In *Sicilia*, both the Opinion in Support of Affirmance and the Opinion in Support of Reversal indicate - incorrectly - that an "A notice of compensation payable ("NCP") is the "agreement between an employer or an insurer and a claimant regarding liability for the claimant's injury."

This represents a significant misapprehension of workers' compensation law and practice. As the Bible says, the NCP is a unilateral form issued by the employer/insurer. Injured workers have no say in what is listed as the compensable injury; they do not participate and are not consulted in the document's preparation. That is and always has been the case. While an NCP can be modified, when issued, it is the employer's statement only as to what the compensable injury is.

II. Civil Litigation

A. *Automobile Insurance - "Regular Use" Exclusions*

- ☐ ***Jones v. Erie Insurance Exchange*, 2024 PA Super 139 (Pa.Super., July 3, 2024)**
  - **Holding**: Under the Pennsylvania Motor Vehicle Financial Responsibility Law, 74 Pa. C. S. A. § 1701, an automobile insurance policy can validly include a "regular use" exclusions that denies underinsured motorist (UIM) coverage for injuries sustained while operating a vehicle that is not owned by the policyholder. These "regular use" exclusions have also been consistently upheld by the Supreme Court.

B. *Sovereign Immunity - Vehicle Exception*

- ☐ ***Brown-Boyd v. Southeastern Pennsylvania Transportation Authority*, No. 1167 C.D. 2022 (Pa.Cmwlth., July 15, 2024)**
  - **Holding**: Under *Balentine v. Chester Water Authority*, 191 A.3d 799 (Pa., 2018), the "operation" of a motor vehicle is a continuum of acts and decisions made that transport an individual from one place to another. Thus, a SEPTA bus's failure to lower a handicap ramp for a passenger is considered part of the bus's "operation," which exempts SEPTA from sovereign immunity under the vehicle exception at Section 8522(b)(1) of the Judicial Code, 42 Pa. C.S. § 8522 (b)(1).

Attorney Daniel J. Siegel was appellate counsel for plaintiff in this matter.

C. *Spousal Communications - Confidentiality*

- ☐ ***Smith v. O'Brien*, 2024 PA Super 170 (Pa.Super., August 7, 2024)**
  - ➢ **Holding**: Under 42 Pa.C.S. § 5923, confidential communications between spouses are generally protected from disclosure in civil cases. However, in cases involving child abuse, section 6381(c) of the Child Protective Services Law, 23 Pa.C.S. § 6831, restricts the exclusion of such evidence.

III. Workers' Compensation

A. *Pension Offset Credit*

- ☐ ***Bradford County v. Pasko (Workers' Compensation Appeal Board)*, No. 926 C.D. 2022 (Pa.Cmwlth., August 14, 2024)**
  - ➢ **Holding:** An employer may not claim a pension offset credit pursuant to Section 204(a) of the Workers' Compensation Act, 77 P.S. § 71(a), against wage loss benefits received by an employee who began receiving a pension from his employer, subsequently returns to part-time work for the same employer, and the offset would prevent the worker from receiving any wage loss benefits.

B. *Remedies Outside the Act*

- ☐ ***Elite Care, RX, LLC v. Premier Comp Solutions, LLC*, No. 25 WAP 2023 (Pa., July 17, 2024)**
  - ➢ **Holding:** A lawsuit for fraud, civil conspiracy and unjust enrichment filed in Common Pleas Court is outside the exclusive remedy provisions of the Workers' Compensation Act, and future actions such as this will not be allowed. (Both the Opinion in Support of Affirmance and the Opinion in Support of Reversal agree on this point, but the Opinion in Support of Affirmance allows the remedy only in this action.)

C. *Stipulation of Facts - False Claims*

- ☐ ***VNA of St. Luke's Home/Hospice, Inc., v. Ortiz (Workers' Compensation Appeal Board)*, No. 1312 C.D. 2022 (Pa.Cmwlth., July 23, 2024)**
  - ➢ **Holding**: Under Section 413(a) of the Workers' Compensation Act, 77 P.S. § 771, an employer who initially agrees to a Stipulation of Facts can set aside the Stipulation if it is shown that the claimant falsely provided information material to the Stipulation.

D. ***Subcontractor Liability & Voluntary Workforce Withdrawal***

- ☐ ***England v. Merion Construction (Workers' Compensation Appeal Board)*, No. 304 C.D. 2021 (Pa.Cmwlth., August 7, 2024)**
  - ➢ **Holding**: Under Section 204(a) of Workers' Compensation Acts, 77 P.S § 71(a), a subcontractor that purchases workers' compensation insurance through a general contractor's controlled insurance program may be held directly liable for compensation to an injured employee.

E. ***Wage Loss Benefits - Reinstatement***

- ☐ ***Marinack v. City of Pittsburgh (Workers' Compensation Appeal Board)*, No. 1161 C.D. 2022 (Pa.Cmwlth., July 12, 2024)**
  - ➢ **Holding:** Under Section 311.1 of the Workers' Compensation Act, 77 P.S. § 631.1(a), a claimant's wage loss benefits may not be reinstated based only upon return of the LIBC-760 form to the claimant's employer. A claimant must also provide credible testimony and raise the suspension of benefits as the basis for seeking reinstatement.

IV. Allocatur Petitions

A. ***The Pa. Supreme Court has granted appeal in the following matters based upon the issue(s) stated:***

- ☐ ***Brown v. Gaydos*, No. 12 WAL 2024 (Pa., July 23, 2024)**
  - ➢ Where the record is clear that the plaintiff and defendant were employed by the same company and the plaintiff's injury was compensable under the Workers' Compensation Act, must the court consider whether the defendant was working in the course of his performance of duties for the employer to determine if the defendant is entitled to immunity as a co-employee?
- ☐ ***Gidor v. Mangus*, No. 42 WAL 2024 (Pa., July 23, 2024)**
  - ➢ Whether the Superior Court erred by construing Section 7512 of the Home Inspection Law, 68 Pa.C.S. § 7512, as a statute of repose, which barred all claims raised in Petitioner's amended complaint, as opposed to a statute of limitations.
- ☐ ***Erie Insurance Exchange v. United Services Automobile Assoc.*, No. 27 WAL 2024 (Pa., July 15, 2024)**
  - ➢ Did the Superior Court rule inconsistently with this Court's decision in *Pyeritz v. Commonwealth*, 32 A.3d 687 (Pa. 2011) [,] by ignoring that Erie's "promissory estoppel" claim was a masked cause of action for negligent spoliation of evidence not recognized in Pennsylvania, which also posed an issue of substantial public importance, and was its decision also inconsistent with Pennsylvania law on promissory estoppel?

- Was the Superior Court's decision inconsistent with Pennsylvania law on subrogation, as Erie's suit against [Petitioner] as the subrogee of its insureds was limited to their rights to recover from the party responsible for their property loss, and Erie had no right of recovery against [Petitioner] as a matter of law as it was undisputed that [Petitioner] did not cause the fire?

☐ ***Federated Insurance Co. v. Summit Pharmacy (Bureau of Workers' Compensation Fee Review Hearing Office)*, No. 61 MAL 2024 (Pa., August 27, 2024)**

- Did Commonwealth Court exceed its authority when it substituted its judgment for that of the General Assembly, by limiting the authority of the Bureau of Workers' Compensation to specify which prescription drug fee schedule it may choose to resolve disputes, 34 Pa. Code § 127.131(b), when that function is properly reserved for the legislature and the Bureau of Workers' Compensation?
- By invalidating the Red Book as the standard for determining the "average wholesale price" of pharmaceutical products, did Commonwealth Court err by construing "average wholesale price" according to its common meaning rather than according to its meaning within the pharmaceutical industry?
- Did Commonwealth [Court] err by sub silentio invalidating all statutes or regulations in Pennsylvania that base payment for pharmaceuticals on the Red Book, including childhood immunizations and the PACE Program, both of which are also based on Red Book values?

Attorney Daniel J. Siegel represents Summit Pharmacy in this matter.