

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH JANUARY 24, 2008

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Appellate Procedure

A. Pa.R.A.P. 1925 Statements

- [*Eiser v. Brown & Williamson Tobacco Corp.*, 39 EAP 2006 \(Pa., Dec. 28, 2007\)](#)

- HOLDING: The mere volume of issues raised in a Pa.R.A.P. 1925(b) Statement is not, in and of itself, a basis to find waiver when an appeal otherwise complies with the mandates of appellate practice. Justice Saylor filed a [concurring opinion](#), Justice Castille filed a [dissenting opinion](#), and Justice Eakin also filed a [dissenting opinion](#).

- [*Tucker v. R.M. Tours*, 2007 PA Super 352 \(Nov. 28, 2007\)](#)

- HOLDING: The filing of a lengthy and voluminous Pa.R.A.P. 1925(b) statement breaches the duty of good faith and fair dealing, and constitutes a waiver of all issues on appeal.

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!

II. Causes of Action

A. Asbestos

- [*Gregg v. V-J Auto Parts Co.*, 38 EAP 2005 \(Pa., Dec. 28, 2007\)](#)

- HOLDING: For asbestos litigation, the Pennsylvania Supreme Court has adopted the frequency, regularity and proximity factors enumerated in *Tragarz v. Keene Corp.*, 980 F.2d 411 (7th Cir., 1992). In particular, the Court holds that the criteria are not an absolute threshold necessary to support liability. Rather, they are to be applied in an evaluative fashion to aid in distinguishing cases in which the plaintiff can adduce evidence that there is a significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent because of casual or only minimal exposure to the defendant's product. The application of this test should be tailored to the facts and circumstances of the case. Chief Justice Cappy filed a [dissenting opinion](#) in which Justice Baldwin joined; Justice Baer filed a [dissenting opinion](#) in which Justice Baldwin also joined. **Note: Asbestos practitioners should read this case and *Tragarz* carefully.**

B. *Bad Faith*

□ [*Greene v. United Services Automobile Assoc., 2007 PA Super 344 \(Nov. 20, 2007\)*](#)

- HOLDING: In order to succeed on a statutory claim for bad faith pursuant to 42 Pa.C.S. § 8371, a plaintiff must show by clear and convincing evidence that : (1) the insurer did not have a reasonable basis for denying benefits under the policy, and (2) the insurer knew or recklessly disregarded its lack of reasonable basis in denying a claim. In addition, the requirement that a party must show that insurer breached its duty of good faith through some motive of self-interest or ill will is probative of the second element of this test and is not a third element required for finding bad faith.

C. *Indemnification*

□ [*Miix Insurance Co. v. Epstein 2007 PA Super 346 \(Nov. 26, 2007\)*](#)

- HOLDING: In a claim for indemnification -- in which the there was no determination of liability in the underlying malpractice action upon which the matter is based -- plaintiff is required to produce the expert reports necessary to determine whether the doctor was medically negligent.

D. *Negligence -- Real Property*

□ [*Jones v. Levin, 2007 PA Super 412 \(Dec. 31, 2007\)*](#)

- HOLDING 1. Generally, a landlord out of possession is not liable for injuries incurred by third parties on the leased premises. The landlord may be liable, however, if the landlord has reserved control over a defective portion of the leased premises which is necessary to the safe use of the property (the "reserved control" exception).
- HOLDING 2. Under the "public use" exception, a landlord out of possession may be liable for injuries to third parties on the premises if the landlord has leased the premises for a purpose involving admission of the public and has failed to inspect for or repair dangerous conditions prior to transferring the property. The Court then concludes that employees may recover under this exception, but only if their injuries were sustained in an area of the leased premises that was open to the public and not reserved for employees.

E. *Negligent Misrepresentation*

□ [*Excavation Technologies, Inc. v. Columbia Gas Co. of Pa., 2007 PA Super 327 \(Nov. 7, 2007\)*](#)

- HOLDING: A cause of action for negligent misrepresentation does not exist under Section 552 of the *Restatement (Second) of Torts* when there is no physical injury or property damage, and the losses are solely economic in nature.

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

□ [*Keenan v. City of Philadelphia, 2186 C.D. 2007 \(Pa.Cmwlt., Nov. 28, 2007\)*](#)

- HOLDING: The transcripts, jury instructions, and verdict sheet from the underlying trial may establish a sufficient basis to deny a request for indemnification under the Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8550.

G. *Preemption*

- [*Mastrocola v. Southeastern Pa. Transportation Authority*, 1662 C.D. 2006 \(Pa.Cmwlth., Jan. 8, 2008\)](#)
 - HOLDING: The Federal Railroad Safety Act of 1970 and the Interstate Commerce Commission Termination Act preempt state law tort. Because preemption is a question of subject matter jurisdiction, it is not waivable, even if the defendant fails to plead preemption as an affirmative defense in its New Matter.

H. *Unfair Trade Practices and Consumer Protection Law*

- [*Beyers v. Richmond*, 38 EAP 2006 \(Pa., Dec. 28, 2007\)](#)
 - HOLDING: The Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S. §§ 201-1-9 does not apply to attorneys collecting and distributing settlement proceeds. Justice Cappy filed a [concurring opinion](#) in which Justice Baer joined. Justice Saylor filed a [dissenting opinion](#), and Justice Eakin also filed a [dissenting opinion](#).

III. Civil Procedure & Trial

A. *Amount in Controversy -- Arbitration Appeals*

- [*Vanden-Brand v. Port Authority of Allegheny County*, 2081 C.D. 2006 \(Pa.Cmwlth., Nov. 30, 2007\)](#)
 - Holding: Once an appeal from compulsory arbitration is perfected, the parties proceed to trial with no evidentiary limitations other than those applicable to the original trial. Plaintiff is not required to amend the Complaint to seek or be entitled to damages in excess of the jurisdictional limits on compulsory arbitration claims.

B. *Arbitration*

- [*Moscatiello v. Hilliard*, 6 WAP 2007 \(Pa., Dec. 27, 2007\)](#)
 - HOLDING: Regardless whether an arbitration agreement provides for arbitration pursuant to the Uniform Arbitration Act, 42 Pa.C.S. § 7301 *et seq.*, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, or common law, the application of a 30-day time limit for challenging arbitration awards applies and does not conflict with the goals of the FAA. Accordingly, Pennsylvania courts should apply Pennsylvania's procedural rules to the filing of arbitration award challenges because they more quickly render arbitration awards final.
- [*Gaffer Insurance Co., Ltd. v. Discovery Reinsurance Co.*, 2007 PA Super 339 \(Nov. 16, 2007\)](#)
 - HOLDING: A service of suit/consent to jurisdiction provision in a contract does not override an agreement to submit all disputes under the contract to arbitration.

C. *Judgments by Confession -- Striking*

- [*M & P Management, L.P. v. Williams*, 41 EAP 2006 \(Pa., Nov. 20, 2007\)](#)
 - HOLDING: If a confessed judgment is void, it can be challenged at any time. Thus, the party against whom judgment was confessed is not bound by the thirty-day time limit under Pa.R.Civ.P. 2959(a)(3).

D. *Judgments by Default -- Striking*

□ [*Knickerbocker Russell Co., Inc. v. Crawford*, 2007 PA Super 343 \(Nov. 19, 2007\)](#)

- HOLDING: A default judgment will not be stricken if there was sufficient evidence for the prothonotary to conclude that the Complaint was properly served upon the defendant.

□ [*Brooks v. B&R Touring Co.*, 2007 PA Super 387 \(Dec. 18, 2007\)](#)

- HOLDING: An amended complaint "invalidates" the original complaint for purposes of taking a default judgment. When it is filed, an amended complaint becomes the operative complaint and must be properly served upon all parties. If an amended complaint is not properly served (or was never served), plaintiff cannot properly enter a judgment by default, which should be stricken.

E. *Pre-Trial Procedures -- Motions in Limine*

□ [*Houdeshell v. Rice*, 2007 PA Super 406 \(Dec. 31, 2007\)](#)

- HOLDING: Absent an abuse of discretion, a trial court's rulings on motions in limine will not be disturbed. In this case, however, the Superior Court ruled that the trial court erred when it precluded plaintiff from introducing evidence regarding a prior similar incident. In this negligence case, the Superior Court affirmed the trial court's rulings (1) permitting plaintiff's expert to explain the difference between safety glass and plate glass, and (2) precluding the plaintiff's expert from testifying that the defendants "should have" replaced the glass on the door involved in the accident.

F. *Structured Settlements*

□ [*In Re: Petition of Michelle S. Jacobs*, 2007 PA Super 341 \(Nov. 19, 2007\)](#)

- HOLDING: Under the Structured Settlement Protection Act, 40 P.S. §§ 4001-09, a Court is required to determine, on an independent basis, that any transfer made pursuant to the Act serves the best interest of the petitioner. A judge may utilize guidelines detailing the contents of any proposed petition when those guidelines are intended to ensure that a petition contains the information necessary to support a finding that the transfer will be in the petitioner's best interests.

Note: This case specifically approves the guidelines set forth by Judge Wettick, which are now essentially codified by Pa.R.Civ.P. 229.2.

G. *Trial -- Continuance*

□ [*Zarrin v. Jeffries-Baxter*, 2007 PA Super 354 \(Nov. 29, 2007\)](#)

- HOLDING: Confusion about the date of trial is not an adequate reason for granting a request for a continuance of a scheduled trial.

H. *Trial -- New Trial*

□ [*Bostanic v. Barker-Barto*, 2007 PA Super 332 \(Nov. 9, 2007\)](#)

- HOLDING: When plaintiff's and defendant's expert medical witnesses agree that the plaintiff suffered an injury as the result of an accident, a jury's finding that no injury occurred is against the weight of the evidence and a new trial should be granted limited to the uncontroverted injuries.

- [**Poust v. Hylton, 2007 PA Super 370 \(Dec. 10, 2007\)**](#)
 - HOLDING: When counsel makes an obviously prejudicial remark, it is an abuse of discretion for a trial court to refuse to order a new trial. Thus, when defense counsel violated a Court Order by introducing evidence of plaintiff/decedent's cocaine use, the trial court erred by not ordering a new trial.
- [**Carroll v. Avallone, Nos. 14 and 15 EAP 2006 \(Pa., Dec. 28, 2007\)**](#)
 - HOLDING: While a verdict must bear a relation to the evidence, a jury is generally free to reject any evidence offered. In general, if there is no argument or opposition to a particular point, the jury is not free to disregard the evidence. To be "uncontroverted," the evidence must be unopposed or unchallenged, not merely uncontradicted. Justice Saylor filed a [**concurring and dissenting opinion**](#) in which Justice Baer joined.

IV. Evidence

A. *Expert Witnesses -- Foundation*

- [**Novitski v. Rusak, 2008 PA Super 9 \(Jan. 4, 2008\)**](#)
 - HOLDING: Vocational and economics expert may render opinions about the degree to which a medical condition affects a person's ability to work and any resulting economic losses. The Court specifically found that "it is within the vocational expert's expertise to establish the extent to which a plaintiff's injuries prevent him from working," even if those restrictions were, as here, arguably not in evidence.

B. *Expert Witnesses -- Scope of Testimony*

- [**Vanden-Brand v. Port Authority of Allegheny County, 2081 C.D. 2006 \(Pa.Cmwlt., Nov. 30, 2007\)**](#)
 - HOLDING: An expert may not be permitted to testify about matters that are inconsistent with or beyond the fair scope of matters testified to in discovery proceedings or not included in a separate report.

V. Insurance -- Motor Vehicle

A. *First Party (PIP) Benefits -- Causes of Action*

- [**Schappell v. Motorists Mutual Insurance Co., 51 MAP 2005 \(Pa., Nov. 20, 2007\)**](#)
 - HOLDING: A private cause of action exists for medical providers seeking interest on unpaid bills pursuant to 75 Pa.C.S. §1716. When a provider is seeking interest on an overdue bill, the provisions of 31 Pa.Code §69.26 are not applicable as a remedy.

B. *UM & UIM Claims -- Recoverable Damages (Workers' Compensation Benefits)*

- [**Burke v. Erie Insurance Exchange, 2007 PA Super 405 \(Dec. 31, 2007\)**](#)
 - HOLDING: Pursuant to Sections 1720 and 1722, a workers' compensation claimant is entitled to plead, prove and recover, *i.e.*, seek subrogation or reimbursement, in a tort claim the amount of workers' compensation and other benefits the claimant has received. In this case, however, claimant was precluded from doing so because the workers' compensation had waived its right to subrogation when it entered into a settlement/Compromise and Release Agreement; thus, to allow such a recovery would permit claimant to receive a double recovery.

C. UM & UIM Coverage -- Reduction of Limits & Stacking

□ **[Blood v. Old Guard Insurance Co., 2 WAP 2007 \(Pa., Nov. 20, 2007\)](#)**

- HOLDING: When an insured reduces the limits of liability on an existing motor vehicle insurance policy, an insurance provider is required to obtain new UM/UIM waivers under the Motor Vehicle Financial Responsibility Law by requiring them to secure a new written sign-down of UIM coverage when the insured is reducing liability coverage on an already existing policy. Of note, in this case, the insureds had previously purchased \$500,000 in liability coverage, but only \$35,000 in UM/UIM coverage, and maintained this policy for 14 years. They then reduced their liability limits from \$500,000 to \$300,000, and argued (unsuccessfully) here that the insurer's failure to obtain new UM/UIM waivers here entitled them to \$300,000 in UM/UIM coverage.

□ **[Sackett v. Nationwide Mutual Insurance Co. \(Sackett II\), 8 WAP 2006 \(Pa., Dec. 27, 2007\)](#)**

- HOLDING: Reversing its **prior opinion**, the Pennsylvania Supreme Court holds that the extension of coverage under an after-acquired vehicle provision to a vehicle added to a pre-existing multi-vehicle policy is not a new purchase of coverage for purposes of Section 1738(c) of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. Thus, the extension of coverage does not trigger an obligation on the part of the insurer to obtain new or supplemental UM/UIM stacking waivers. Where coverage under an after-acquired vehicle clause is expressly made finite by the terms of the policy, however, then *Sackett I* (591 Pa. 416, 919 A.2d 194 (2007)) controls and requires the execution of a new UM/UIM stacking waiver upon the expiration of the automatic coverage in order for the unstacked coverage option to continue in effect subsequent to such expiration. Justice Castille filed a **dissenting opinion**, in which Justices Eakin and Fitzgerald joined.

□ **[Everhart v. The PMA Insurance Group, 13 WAP 2007 \(Pa., Dec. 27, 2007\)](#)**

- HOLDING: The Motor Vehicle Financial Responsibility Law does not mandate the stacking of UM/UIM coverage under a commercial fleet policy. Justice Baldwin filed a **concurring opinion**.

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

□ **[Erie Insurance Exchange v. E.L., 2008 PA Super 5 \(Jan. 3, 2008\)](#)**

- HOLDING: A motor vehicle insurance policy, which excludes underinsured motorist benefits for "bodily injury to you or a resident using a non-owned motor vehicle" that is undefined in the policy, is ambiguous and must be construed in favor of the insured. Of note, the policy here defined "occupying" as "in or upon, getting into or getting out of," but did not define "use" or "using." Thus, the Court considered the common usage of "use" or "using" in reaching its decision.

□ **[Brink v. Erie Insurance Group, 2008 PA Super 7 \(Jan. 4, 2008\)](#)**

- HOLDING: A police officer who is injured when using his police vehicle is not entitled to uninsured motorist coverage under a "regular use" exclusion in a motor vehicle insurance policy.

E. All-Terrain Vehicle Exclusion

- [*Nationwide Mutual Insurance Co. v. Yungwirth, 2008 PA Super 10 \(Jan. 4, 2008\)*](#)
 - Holding: A motor vehicle insurance policy excluding an all-terrain vehicle from the definition of uninsured motor vehicle does not impermissibly narrow the uninsured motorist coverage mandated by the Motor Vehicle Financial Responsibility Law

VI. Unemployment Compensation

A. Appeals -- Reasonable Excuse

- [*Hessou v. Unemployment Compensation Board of Review, 1528 C.D. 2007 \(Pa.Cmwlt. Jan. 16, 2008\)*](#)
 - Holding: The failure to provide a claimant with transcripts or to return phone calls do constitute sufficient excuses to meet the administrative breakdown exception to the deadline for filing an appeal from the decision of an Unemployment Referee.

B. Cause for Termination – Mandatory Drug Testing

- [*Architectural Testing, Inc. v. Unemployment Compensation Board of Review, 2250 C.D. 2006 \(Pa.Cmwlt., Jan. 24, 2008\)*](#)
 - Holding: When an employer has an established policy permitting it to conduct drug tests, a claimant who refuses to undergo a drug test is ineligible for benefits under Section 402(e.1) of the Unemployment Compensation Law.

VII. Workers' Compensation

A. Appellate Procedure -- Remand

- [*Peterson v. Workers' Compensation Appeal Board \(Wal Mart and CMI, Inc.\), 782 C.D. 2007 \(Pa.Cmwlt., Dec. 4, 2007\)*](#)
 - Holding: An Order of the Workers' Compensation Appeal Board remanding a matter to a Workers' Compensation Judge for further proceedings is interlocutory unless it falls within one of the exceptions under Pa.R.A.P. Rule 311(f). Thus, an Order remanding a case to a WCJ to determine what costs are due is not appealable.

B. Average Weekly Wage - Fire Fighters

- [*Ballerino v. Workers' Compensation Appeal Board \(Darby Borough\), 1113 C.D. 2007 \(Pa.Cmwlt., Dec. 13, 2007\)*](#)
 - Holding: Volunteer firefighters may not stack their actual pre-injury wage with the statutorily presumed average weekly wage under Section 601 of the Workers' Compensation Act. Rather, the Act sets a minimum average weekly wage for all volunteer firefighters injured in the course of their volunteer efforts.
- [*Ingram v. Workers' Compensation Appeal Board \(Ford Electronics & Refrigeration Corp.\), 491 C.D. 2007, 492 C.D. 2007, 493 C.D. 2007 \(Pa.Cmwlt., Dec. 12, 2007\)*](#)
 - HOLDING: A dependent claimant in a fatal claim proceeding is barred from litigating the compensability of a decedent's lifetime disability when the lifetime occupational disease claim was withdrawn pursuant to a Compromise & Release agreement.

C. Calculation of Benefits -- Offsets

- [*Ropoch v. Workers' Compensation Appeal Board \(Commonwealth of Pa.\), 1638 C.D. 2007 \(Pa.Cmwlt., Jan. 14, 2008\)*](#)
 - HOLDING: An employer is entitled to offset a claimant's workers' compensation benefits with Social Security old age benefits even if the claimant received the old age benefits because his Social Security disability benefits were automatically transferred from disability to old age benefits.

D. Compromise & Release Agreements -- Enforceability

- [*Miller v. Workers' Compensation Appeal Board \(Electrolux\), 552 C.D. 2007 \(Pa.Cmwlt., Jan. 4, 2008\)*](#)
 - HOLDING: A Compromise and Release Agreement is not enforceable when the injured worker dies prior to its approval and there was no evidence that the Employer's actions were dilatory or in any other way a deliberate attempt to delay final approval of the C&R.

E. Defenses -- Horseplay

- [*Sysco Food Services of Philadelphia v. Workers' Compensation Appeal Board \(Sebastiano\), 817 C.D. 2007 \(Pa.Cmwlt., Jan. 23, 2008\)*](#)
 - HOLDING: Injuries sustained during horseplay in the workplace are compensable and do not constitute a per se violation of an employer's work rules prohibiting such conduct.

F. Defenses -- Intoxication

- [*Clear Channel Broadcasting v. Workers' Compensation Appeal Board \(Perry\), 179 C.D. 2007 \(Pa.Cmwlt., Dec. 7, 2007\)*](#)
 - HOLDING: In order for intoxication to be an affirmative defense to a claim petition, an employer must establish that the employee's intoxication was "the cause in fact" of the injury, not merely the proximate cause or substantial factor. Further, when a claimant establishes that an injury falls within at least one exception to the "coming and going rule," the claimant is not required to show that he or she was engaged in the furtherance of the employer's business at the time of the injury.

G. Defenses -- Personal Animus

- [*M & B Inn Partners, Inc. v. Workers' Compensation Appeal Board \(Petriga\), 1201 C.D. 2007 \(Pa.Cmwlt., Jan. 18, 2008\)*](#)
 - HOLDING: The personal animus exception only applies when the assailant intends to inflict injury on the claimant for personal reasons.

H. Description of Injuries -- Amendment of NCP

- [*Sears Logistic Services v. Workers' Compensation Appeal Board \(Preston\), 631 C.D. 2007 \(Pa.Cmwlt., Dec. 5, 2007\)*](#)
 - HOLDING: A Workers' Compensation Judge may amend a Notice of Compensation Payable even in the absence of a review petition filed by the claimant. The mistake in the NCP must relate to a fact or condition that existed when the NCP was executed.

□ [*Westmoreland Country v. Workers' Compensation Appeal Board \(Fuller\)*, 1277 C.D. 2007 \(Pa.Cmwlt., Jan. 24, 2008\)](#)

- HOLDING: By denying a termination petition based on injuries not accepted in the Notice of Compensation Payable, a Workers' Compensation Judge implicitly amends the NCP to include these injuries. Further, a medical opinion that does not recognize the work-relatedness of an injury previously determined to be work-related is insufficient to support a termination of benefits.

I. *Impairment Ratings -- Modification of Benefits*

□ [*Sign Innovation v. Workers' Compensation Appeal Board \(Ayers\)*, 681 C.D. 2007 \(Pa.Cmwlt., Dec. 4, 2007\)](#)

- HOLDING: An employer may seek modification of disability benefits even though an impairment rating evaluation (IRE) revealed that the claimant had an impairment of 50 percent or more.

J. *Job Availability -- Labor Market Surveys*

□ [*Riddle v. Workers' Compensation Appeal Board \(Allegheny City Electric, Inc.\)*, 1390 C.D. 2007 \(Pa.Cmwlt., Jan. 8, 2008\)](#)

- HOLDING: An employer is not precluded from conducting a labor market survey and establishing job availability in the area of claimant's residence, even if it is out-of-state rather than doing so for the location of the injury.

K. *Medical Expenses*

□ [*Schenck v. Workers' Compensation Appeal Board \(Ford Electronics\)*, 1011 C.D. 2007 \(Pa.Cmwlt., Dec. 5, 2007\)](#)

- HOLDING: An employer may not deny payment for medical care based upon a prior utilization review determination that similar treatment rendered by a different provider was unreasonable and unnecessary.

L. *Multiple Injuries*

□ [*Kane v. Workers' Compensation Appeal Board \(Glenshaw Glass Co.\)*, 1081 C.D. 2007 \(Pa.Cmwlt., Dec. 28, 2007\)](#)

- HOLDING: When two injuries are each, in and of themselves, totally disabling, a claimant may receive compensation for only the first injury. When the second injury occurs, the insurer responsible for payment of benefits for the first injury continues to be liable. In addition, the claimant's entitlement to benefits for the second injury shall be suspended until entitlement to benefits from the first injury changes.

M. *Res Judicata*

□ [*Ingram v. Workers' Compensation Appeal Board \(Ford Electronics & Refrigeration Corp.\)*, 491 C.D. 2007 \(Pa.Cmwlt., Dec. 12, 2007\)](#)

- HOLDING: A dependent claimant in a fatal claim proceeding is barred from litigating the compensability of a decedent's lifetime disability when the lifetime occupational disease claim was withdrawn pursuant to a Compromise & Release agreement.

N. *Specific Loss Benefits*

- [*J.G. Furniture Div. v. Workers' Compensation Appeal Board \(Kneller\)*, 149 MAP 2005 \(Dec. 27, 2007\)](#)
 - HOLDING: An amputation occasioned by an earlier work injury, for which a Final Receipt was executed, is neither a recurrence nor an aggravation of the initial injury. Rather, the amputation constitutes a separate compensable specific loss injury and claimant is entitled to specific loss benefits based on his wage on the date of the specific loss. Justice Saylor filed a [dissenting opinion](#) in which Justice Castille joined.

Note: This case had intended to clarify whether specific loss benefits should be calculated based on the date of injury wages, but the holding, and the analysis the Court used to reach its conclusion, assure that this case will spawn further litigation seeking to clarify the holding. *Statutes of Limitation*
- [*Stehr v. Workers' Compensation Appeal Board \(Alcoa\)*, 1187 C.D. 2007 \(Pa.Cmwlth., Nov. 29, 2007\)](#)
 - HOLDING: Payment of specific loss benefits for disfigurement does not toll the running of the Section 412(a) three year limitation period for seeking reinstatement of benefits. Therefore, a reinstatement petition filed more than three years after the last payment of disability compensation is time barred.
- [*Stock v. Workers' Compensation Appeal Board \(Food Chek Shopping Bag\)*, 1296 C.D. 2007 \(Pa.Cmwlth., Dec. 19, 2007\)](#)
 - HOLDING: Following a commutation of benefits, the payment of specific loss benefits for disfigurement does not constitute compensation and therefore, does not toll the running of the section 413(a) three-year statute of limitation period.

O. *Subrogation*

- [*Gillette v. Wurst*, 9 WAP 2006 \(Dec. 28, 2007\)](#)
 - HOLDING: Pursuant to Section 671 of the Workers' Compensation Act, 77 P.S., when a compensable injury is caused by a third party, an employer "shall be subrogated to the right of the employe [or] his representative ... against such third party." Thus, a workers' compensation insurer is not subrogated to the amount actually received, but to the share that the claimant (or the Estate) has the right to receive. That right, which in the case of death is governed by either the decedent's Will or the Pennsylvania intestacy statute, effectively passes to the workers' compensation insurer by virtue of its legitimate subrogation claim. The right to disclaim under the intestacy statutes and the right of subrogation under § 671 continue to exist, but the Estate cannot exercise the right to disclaim because that is a right held by the workers' compensation carrier. Chief Justice Cappy filed a [concurring opinion](#), Justice Baer filed a [dissenting opinion](#), and Justice Saylor dissented without opinion.

❑ [**Burke v. Erie Insurance Exchange, 2007 PA Super 405 \(Dec. 31, 2007\)**](#)

- **HOLDING:** Pursuant to Sections 1720 and 1722, a workers' compensation claimant is entitled to plead, prove and recover, *i.e.*, seek subrogation or reimbursement, in a tort claim the amount of workers' compensation and other benefits the claimant has received. In this case, however, claimant was precluded from doing so because the workers' compensation had waived its right to subrogation when it entered into a settlement/Compromise and Release Agreement; thus, to allow such a recovery would permit claimant to receive a double recovery.

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