

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH MARCH 28, 2008

PENNSYLVANIA APPELLATE COURT DECISIONS

FEATURED CASE

*Workers' Compensation - Conflict of Laws -
Pennsylvania Workers' Compensation Act & the Federal Longshore & Harbor Workers' Act*

*McElheney v. Workers' Compensation Appeal Board (Kvaerner Philadelphia Shipyard),
No. 15 EAP 2007 (Pa., February 19, 2008)*

- **Holding:** A graven dry dock is a land-based site within the jurisdiction of both the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* and the Pennsylvania Workers' Compensation Act 77 P.S. § 1 *et seq.* Thus, an injured worker is entitled to receive concurrent compensation under the state and federal acts.

The Law Offices of Daniel J. Siegel, LLC collaborated on the Pennsylvania Supreme Court Brief with Mr. McElheney's counsel, the Law Offices of Steiner, Segal, Muller and Donan. We congratulate them on this result.

I. Civil Procedure

A. Appeal - Interlocutory Orders

- ☐ *Druot v. Coulter, 2008 PA Super 49 (March 216, 2008)*

- **Holding:** A final (appealable) order under Pa.R.A.P 342 must dispose of all claims of all parties. An order disposing of only the plaintiff's claims, while counterclaims remain viable, is not a final appealable order.

B. Evidence & Defenses - Rape/Consent

- ☐ *C.C.H. v. Philadelphia Phillies, Inc., No. 4 EAP 2007 (Pa., February 19, 2008)*

- **Holding:** When the victim is less than 13 years of age, evidence of the victim's consent to sexual contact, as in criminal proceedings, is not an available defense in determining a defendant's civil liability. Chief Justice Castille filed a concurring and dissenting opinion, in which Justice Eakin joined.

C. Releases

- ☐ *Maloney v. Valley Medical Facilities, Inc., 2008 PA Super 32 (March 7, 2008)*

- **Holding/Discussion:** Under the Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S.A. §§ 8321-27. the discharge of one joint tortfeasor does not operate to discharge the

other(s) unless so specified in the Release. When interpreting the language of a Release, the words "arising out of" and "arising from" connote causal connection. Thus, when a Release specifically and comprehensively discharges the liability of specific parties, including direct or indirect claims (vicarious or ostensible liability), it extinguishes all claims against those parties.

D. Witnesses - Lay Witness Testimony

□ [Fisher v. Central Cab Co., 2008 PA Super 37 \(March 12, 2008\)](#)

- **Holding:** A lay witness may testify concerning his or her estimation of speed if the witness has (1) observed the vehicular movement in question, and (2) offers a recognition of impressions of like vehicles at relative speeds.

II. Workers' Compensation

A. Description of Injuries - Amendment During Litigation

□ [Westmoreland County v. Workers' Compensation Appeal Board \(Fuller\), No. 1277 C.D. 2007 \(Pa.Cmwlt., January 24, 2008\)](#)

- **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.

B. Claims - Denial

□ [Gumm v. Workers' Compensation Appeal Board \(J. Allan Steel\), No. 599 C.D. 2007 \(Pa.Cmwlt., January 28, 2008\)](#)

- **Holding:** A Notice of Compensation Denial is proper and precludes the finding of an unreasonable contest when it denies a claim based upon the lack of disability, and the employer defends the claim on that basis.

C. Job Availability

□ [Rosenberg v. Workers' Compensation Appeal Board \(Pike County\), No. 17 C.D. 2007 \(Pa.Cmwlt., February 5, 2008\)](#)

- **Holding:** In a modification petition, when a claimant raises the question whether there are any available suitable jobs with an Employer, the burden shifts to the employer to contest this evidence. Satisfaction of this burden thus becomes a prerequisite to an employer's reliance on expert testimony of the claimant's earning power.

D. Limitations - Reinstatement of Benefits/Specific Loss

□ [Romanowski v. Workers' Compensation Appeal Board \(Precision Coil Processing\), No. 1174 C.D. 2007 \(Pa.Cmwlt., March 12, 2008\)](#)

- **Holding:** A claimant's failure to timely challenge a Supplemental Agreement or to seek reinstatement of partial disability benefits within the applicable 500-week limitations period bars any claims under Section 413(a) of the Act, 77 P.S. § 772. In this case, Claimant was injured in 1978, his benefits were suspended in 1993, and the 500-week period following the suspension ended in July 2002. In a petition filed in October 2004, claimant alleged a worsening condition and sought specific loss benefits. His petition was denied, and the denial has now been upheld by the Commonwealth Court.

E. Medical Equipment - Cost Containment Provisions

- [*Griffiths v. Workers' Compensation Appeal Board \(Seven Stars Farm, Inc.\)*](#),
[No. 148 MAP 2005 \(Pa., March 19, 2008\)](#)

- **Holding:** A van, and not merely the wheelchair lift and modifications installed in the van, modified to make it wheelchair accessible for a workers' compensation claimant rendered a quadriplegic by a work-related injury is an "orthopedic appliance" under Section 306(f.1)(1)(ii) of the Workers' Compensation Act. The extent of an employer's obligation will depend, however, upon the specific facts of the case. In addition, the cost containment provisions of the Act do not apply when the provider - in this case a car dealer - is not a health care provider. Justice Eakin filed a [dissenting opinion](#).

F. Medical Testimony - Sufficiency of Evidence

- [*Westmoreland County v. Workers' Compensation Appeal Board \(Fuller\)*](#),
[No. 1277 C.D. 2007 \(Pa.Cmwlt., January 24, 2008\)](#)

- **Holding:** If a doctor testifies that he or she does not recognize the work-relatedness of an injury previously determined to be work-related, then any subsequent testimony to support a termination petition is fatally flawed.

G. Retirement - Withdrawal from the Work Force

- [*Mason v. Workers' Compensation Appeal Board \(Joy Mining Machinery\)*](#),
[No. 1906 C.D. 2007 \(Pa.Cmwlt., March 18, 2008\)](#)

- **Holding:** To overcome the presumption that an employee has left the workforce, a claimant who accepts a pension must establish that (1) he or she is seeking employment, or (2) the work-related injury forced him or her to retire. To show that he has not left the workforce under the second part of this test, a claimant has to establish that he or she is incapable of working at any job in the entire labor market, not just that he or she is incapable of performing his or her pre-injury position. Once a claimant establishes either, the employer can only modify benefits by offering suitable alternative employment.

H. Specific Loss Benefits - Testimony Required

- [*Jacobi v. Workers' Compensation Appeal Board \(Wawa, Inc.\)*](#),
[No. 1110 C.D. 2007 \(Pa.Cmwlt., February 12, 2008\)](#)

- **Holding:** A claimant seeking specific loss benefits must present competent medical evidence of the permanent loss of use of the body part for all practical intents and purposes. A claimant's testimony by itself is insufficient.

I. Supersedeas Fund Reimbursement

- [*Land O'Lakes, Inc. v. Workers' Compensation Appeal Board \(Todd\)*](#),
[No. 1085 C.D. 2007 \(Pa.Cmwlt., February 11, 2008\)](#)

- **Holding:** An employer may not receive reimbursement from the Supersedeas Fund as the result of a claimant's unwillingness to receive medical treatment. In this case, the employer filed a petition alleging that benefits should be suspended for refusing reasonable medical treatment under Section 306(f.1)(8) of the Act. The Workers' Compensation Judge granted the petition, after which the employer sought Supersedeas Fund reimbursement, which was denied. In its decision, the Court held that a forfeiture petition is not the equivalent of a suspension or termination petition under Section 413 or Section 430 of the Act.

J. Utilization Review - Timeliness

☐ [**Sueta v. Workers' Compensation Appeal Board \(City of Scranton\),
No. 1905 C.D. 2007 \(Pa.Cmwlt., March 7, 2008\)**](#)

- Holding: A medical provider must mail its records to a utilization reviewer within 30 days of the request pursuant to 34 Pa.Code § 127.464 because the Act does not require that the records be received within 30 days.

RULES CHANGE

A. Voir Dire

☐ [**Pennsylvania Rule of Civil Procedure 220.1 \("Voir Dire"\)**](#)

- By Order dated March 11, 2008, the Supreme Court has approved an additional explanatory comment concerning the types of questions a juror may be asked during voir dire. In particular, citing *Capoferri v. Children's Hospital of Philadelphia*, 893 A.2d 133 (Pa.Super. 2006), the Court specifically permits voir dire questions concerning the "effect of pre-trial publicity on prospective jurors' attitudes regarding medical malpractice and tort reform."

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