

A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH FEBRUARY 17, 2012

PENNSYLVANIA APPELLATE COURT DECISIONS

I. CIVIL LITIGATION

A. *Attorney-Client Privilege*

- [*Custom Designs & Manufacturing Co. v. Sherwin-Williams Co., 2012 PA Super 33 \(February 15, 2012\)*](#)

- **Holding:** The attorney-client privilege relates only to a fact of which an attorney was informed by the client for the purpose of securing either an opinion of law, legal services, or assistance in a legal matter. Further, the burden is on the party seeking to invoke the attorney-client privilege to produce evidence to support the applicability of the privilege.

B. *Cause of Action - Negligent Infliction of Emotional Distress*

- [*Toney v. Chester County Hospital, Nos. 60 & 61 MAP 2009 \(Pa., December 22, 2011\)*](#)
 - **Holding (*Per Curiam, Equally Divided Court*):** Pennsylvania permits liability for claims for negligent infliction of emotional distress in those cases where there exists a special relationship where it is foreseeable that a breach of the relevant duty would result in emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress. Moreover, a physical impact is not required in order to recover in a claim for negligent infliction of emotional distress. Finally, a claim for negligent infliction of emotional distress is not available in garden-variety "breach of contractual or fiduciary duty" cases. Justice Orié Melvin did not participate in the consideration or decision of the case. Justice Baer filed an [**opinion in support of affirmance**](#) in which Justice Todd and Justice McCaffery joined. Justice Todd filed an [**opinion in support of affirmance**](#). Chief Justice Castille filed an [**opinion in support of reversal**](#). Justice Saylor filed an [**opinion in support of reversal**](#) in which Mr. Justice Eakins joined.

C. *Defamation - Counsel Immunity*

- [*Richmond v. McHale, 2012 PA Super 1 \(January 4, 2012\)*](#)

- **Holding:** Statements between counsel, made during a judicial proceeding, including statements during a discussion regarding discovery in a pending case, are privileged and do not give rise to a claim for defamation.

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!

D. *Dragonetti Actions*

□ **[Betts Industries, Inc. v. Heelan, 2011 PA Super 265 \(December 12, 2011\)](#)**

- **Holding:** An action is proper under the Dragonetti Act, 42 Pa.C.S.A. § 8351(a)(2), when all of the federal claims have been dismissed and/or withdrawn, *i.e.*, all of the federal claims have been decided in favor of the defendant. Where, as here, there remain pending state law claims, the Dragonetti action should be stayed until disposition of the state law claims.

E. *Made Whole Doctrine - Subrogation*

□ **[Jones v. Nationwide Property and Casualty Insurance Co., 61 EAP 2010 \(Pa., December 21, 2011\)](#)**

- **Holding:** The "made whole doctrine," which applies generally in Pennsylvania, does not apply to reimbursement of collision deductible payments for motor vehicle insurance policies. Because application of the doctrine would essentially force an insurer to cover the risk of the deductible where the insured has not paid the premiums to cover that risk, reimbursement of subrogated property damage claims may be done on a *pro rata* basis. Justice Eakin filed a **[concurring opinion](#)**.

F. *Motor Vehicles - Vicarious Liability*

□ **[Price v. Leibfried, 2011 PA Super 274 \(December 22, 2011\)](#)**

- **Holding:** A person who authorizes or permits a non-licensed driver to operate a vehicle is vicariously liable, pursuant to 75 Pa.C.S.A. § 1574, for any injuries the person suffers as a result of the unlicensed driver's negligence.

G. *Motor Vehicle Insurance - Uninsured/Underinsured Motorist Rejection Form*

□ **[Jones v. Unitrin Auto and Home Insurance Co., 2012 PA Super 24 \(February 6, 2012\)](#)**

- **Holding:** An uninsured/underinsured motorist coverage rejection form, which adds language regarding stacking that does not comply with the mandated rejection form in Section 1731 of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. § 1731(c), is void.

H. *MCARE - Attorney's Fees*

□ **[Sayler v. Skutches, 2012 PA Super 23 \(February 6, 2012\)](#)**

- **Holding:** Under Section 1303.509 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.509(b)(1), counsel is entitled to an award of attorney's fees based upon the present value of the future damages that had accrued before the decedent's death.

I. *Professional Liability - Certificates of Merit*

□ **[Skonieczny v. Cooper, 2012 PA Super 25 \(February 7, 2012\)](#)**

- **Holding:** The requirement that a party file a Certificate of Merit pursuant to Pa.R.C.P. 1042.3 applies only to actions commenced after the Rule became effective on January 27, 2003.

J. *Uninsured Motor Vehicle Claims - Notice & Prejudice*

□ [Vanderhoff v. Harleysville Insurance Co., 2012 PA Super 22 \(February 6, 2012\)](#)

- **Holding:** An insurer may deny coverage for an uninsured motorist claim based upon an insured's failure to inform the insurer of the involvement of the unidentified vehicle provided it establishes that it was prejudiced by the delay.

K. *Workers' Compensation - Exclusivity of Remedy*

□ [Canot v. City of Easton, No. 564. C.D. 2011 \(Pa.Cmwlt., February 9, 2012\)](#)

- **Holding:** When analyzing whether the exclusivity provisions of the Workers' Compensation Act, 77 P.S. § 481(a), the overriding factor to consider is "the right to control the performance of the work."

II. UNEMPLOYMENT COMPENSATION

A. *Appeal - Evidence of Timely Filing*

□ [Bennett v. Unemployment Compensation Board of Review, No. 2703 C.D. 2010 \(Pa.Cmwlt., December 16, 2011\)](#)

- **Holding:** The absence of an appeal document in the record creates, at best, an inference that the document was not received and, therefore, that it was not filed. A claimant may rebut this inference, however, with evidence at a hearing before a Referee.

B. *Evidence*

□ [Saleem v. Unemployment Compensation Board of Review, No. 152 C.D. 2011 \(Pa.Cmwlt., January 27, 2012\)](#)

- **Holding:** When the Board's analysis of the factual basis for a claimant's dismissal differs from the Referee's, the determination is in error and should be reversed.

C. *Evidence Generally*

□ [Wright v. Unemployment Compensation Board of Review, No. 2739 C.D. 2010 \(Pa.Cmwlt., December 16, 2011\)](#)

- **Holding:** Although the Unemployment Compensation Board of Review, as the ultimate fact-finder, is free to accept or reject testimony, it cannot utterly ignore evidence. By failing to address, let alone acknowledge, claimant's uncontroverted evidence before the Referee, the Board capriciously disregarded competent evidence.

D. *Independent Contractor*

□ [Hartman v. Unemployment Compensation Board of Review, No. 1794 C.D. 2010 \(Pa.Cmwlt., January 27, 2012\)](#)

- **Holding:** A claimant is an employee rather than an independent contractor when the employer supplies all equipment, pays a fixed rate even when a job does not take place, requires that its business cards be distributed and that other business cards be collected, and also determines how early the claimant must arrive at a job and what clothing the claimant is to wear. Thus, the claimant is entitled to unemployment compensation benefits under Section 402(h) of the Unemployment Compensation Law.

- [Osborne Associates, Inc., d/b/a Generations Salon Services v. Unemployment Compensation Board of Review, No. 194 C.D. 2011 \(Pa.Cmwlt., January 10, 2012\)](#)
 - **Holding:** No single factor is, in and of itself, dispositive when determining whether a claimant is an employee or an independent contractor. In this case, the claimant was a cosmetologist, and the Court considered a variety of factors specific to that occupation.
- [Minelli v. Unemployment Compensation Board of Review, No. 440 C.D. 2011 \(Pa.Cmwlt., February 9, 2012 en banc\)](#)
 - **Holding:** In order to be deemed an independent contractor for purposes of Section 4(l)(2)(B) of the Unemployment Compensation Law, 43 P.S. § 753(l)(2)(B), an employer must establish that the claimant was not, and never has been, customarily engaged in an independently established trade or business.

E. Ineligibility Based Upon Workers' Compensation Settlement

- [Lee v. Unemployment Compensation Board of Review, No. 2085 C.D. 2010 \(Pa.Cmwlt., December 21, 2011\)](#)
 - **Holding:** When a workers' compensation claimant resigns as a condition of settling a workers' compensation claim, the claimant has terminated his or her employment voluntarily, without a necessitous and compelling cause, and is not eligible for unemployment compensation benefits.

F. Necessitous and Compelling Resignation

- [Solar Innovations, Inc., v. Unemployment Compensation Board of Review, No. 933 C.D. 2011 \(Pa.Cmwlt., January 5, 2012\)](#)
 - **Holding:** Quitting non-temporary employment to take a new position, which is known to be temporary, does not constitute a firm offer and is not a necessitous and compelling reason to entitle a claimant to receive unemployment compensation benefits.

G. Self-Employment

- [Silver v. Unemployment Compensation Board of Review, No. 1366 C.D. 2010 \(Pa.Cmwlt., December 29, 2011\)](#)
 - **Holding:** Evidence that an unemployed person has accepted an occasional offer of work is insufficient to demonstrate that the individual is customarily engaged in an independently established trade, occupation, profession or business, and does not preclude the receipt of unemployment compensation benefits.

H. Sideline Business

- [Risse v. Unemployment Compensation Board of Review, No. 1111 C.D. 2011 \(Pa.Cmwlt., January 12, 2012\)](#)
 - **Holding:** An award of unemployment benefits is proper following termination of full-time employment when a claimant's sideline business does not incur substantial change in the amount of money earned, the periodic nature of employment, the number of clients, the size of the business, the way business is conducted, or the marketing strategy.

I. *Willful Misconduct*

- [Scott v. Unemployment Compensation Board of Review, No. 466 C.D. 2011 \(Pa.Cmwlt., February 1, 2012\)](#)
 - **Holding:** Evidence of multiple warnings and discipline, including a specific warning that further infractions would result in possible termination, is sufficient evidence of willful misconduct to preclude an award of unemployment compensation benefits.

J. *Work Safety*

- [Royster v. Unemployment Compensation Board of Review, No. 2569 C.D. 2010 \(Pa.Cmwlt., December 27, 2011\)](#)
 - **Holding:** If a claimant performs an intentional and reckless act that is directly inimical to an employer's best interest, even without violating a specific work safety rule, the claimant is terminated with cause and is ineligible for unemployment compensation benefits.

III. WORKERS' COMPENSATION

A. *Claim & Penalty Petitions*

- [Zuchelli v. Workers' Compensation Appeal Board \(Indiana University of Pennsylvania\), No. 817 C.D. 2011 \(Pa.Cmwlt., October 12, 2011\)](#)
 - **Holding:** Denial of both a Claim Petition and a Penalty Petition is proper when the evidence concerning disability is controverted and the employer issues a Notice of Compensation Payable, Notice of Compensation Denial, or Notice of Temporary Compensation Payable within twenty-one days of receiving notice of a work-related injury, and the work incident does not necessitate medical treatment, and does not cause disability related to the work incident.

B. *Equal Protection*

- [Caputo v. Workers' Compensation Appeal Board \(Commonwealth of Pennsylvania\), No. 191 C.D. 2010 \(Pa.Cmwlt., January 5, 2012\)](#)
 - **Holding:** Pursuant to the Pennsylvania Constitution, the offset against disability benefits in Section 204(a) of the Workers' Compensation Act, 77 P.S. § 71(a), for 50 percent of an individual's Social Security retirement benefit, does not violate Equal Protection.

C. *Ineligibility Based Upon Workers' Compensation Settlement*

- [Lee v. Unemployment Compensation Board of Review, No. 2085 C.D. 2010 \(Pa.Cmwlt., December 21, 2011\)](#)
 - **Holding:** When a workers' compensation claimant resigns as a condition of settling a workers' compensation claim, the claimant has terminated his or her employment voluntarily, without a necessitous and compelling cause, and is not eligible for unemployment compensation benefits.

D. Medical Expert Testimony

- [Bemis v. Workers' Compensation Appeal Board \(Perkiomen Grille Corp.\), No. 2687 C.D. 2010 \(Pa.Cmwlt., December 27, 2011\)](#)
 - **Holding :** A medical witness' use of words such as "certainly could have," "probably" and "very likely" does not necessarily render the opinion as equivocal. Provided the testimony, read in its entirety, is unequivocal, *i.e.*, after providing a foundation, the expert testifies that he believes or thinks the fact exists, it is legally sufficient to establish a causal relationship between a work injury and subsequent medical condition.

E. Pension Offsets

- [School District of Philadelphia v. Workers' Compensation Appeal Board \(Davis\), No. 166 C.D. 2011 \(Pa.Cmwlt., December 22, 2011\)](#)
 - **Holding:** When seeking a pension offset, an employer may present actuarial proof of the extent of the employer funding, rather than proof of actual contributions, sufficient to calculate the amount of the pension benefits offset. Moreover, an employer satisfies its burden to prove its contributions if a WCJ finds the actuarial testimony credible.

F. Pre-Existing Condition

- [City of Philadelphia v. Workers' Compensation Appeal Board \(Whaley-Campbell\), No. 981 C.D. 2011 \(Pa.Cmwlt., December 23, 2011\)](#)
 - **Holding:** Following *Bethlehem Steel Corp. v. Workmen's Compensation Appeal Board (Baxter)*, 550 Pa. 658, 708 A.2d 801 (1998), the Court held that an employer is not entitled to a termination of benefits when the condition from which the claimant suffers - in this case, chronic conjunctivitis that was specifically caused by employment-related conditions - was directly caused by the claimant's employment and further exposure would result in recurrence of the condition.

G. Reasoned Decision

- [Amandeo v. Workers' Compensation Appeal Board \(Conagra Foods\), No. 889 C.D. 2011 \(Pa.Cmwlt., February 17, 2012\)](#)
 - **Holding:** A Workers' Compensation Judge may rely upon his or her own observations of a witness when assessing credibility. Further, the WCJ may render a reasoned decision based upon summarized testimony if the reason given constitutes an objective basis for explaining why the WCJ did not find a witness credible.

H. Reinstatement of Benefits - Generally

- [Verity v. Workers' Compensation Appeal Board \(Malvern School\), No. 356 C.D. 2011 \(Pa.Cmwlt., October 11, 2011\)](#)
 - **Holding:** Reinstatement of benefits is not appropriate when a claimant voluntarily leaves a light duty position even though the claimant was aware that he or she could perform the job. In this case, the claimant was aware that the restrictions placed upon her by her own physician were inaccurate and claimant knowingly failed to correct the restrictions; thus, it was claimant's conduct, not the medical condition or the employer's actions, that was responsible for the loss of employment.

□ [Allen v. Workers' Compensation Appeal Board \(Delaware County SPCA, Inc.\), No. 1170 C.D. 2011 \(Pa.Cmwlt., December 29, 2011\)](#)

- **Holding:** If a claimant's benefits are suspended because of a voluntary termination of employment, the benefits may be reinstated if the claimant can prove a change in his or her condition such that the claimant can no longer perform the job that served as a basis for the suspension.

I. **Reinstatement of Benefits - Statute of Repose**

□ [Cozzone v. Workers' Compensation Appeal Board \(PA Municipal/East Goshen Township\), No. 664 C.D. 2011 \(Pa.Cmwlt., January 5, 2012\)](#)

- **Holding:** A claimant who has received 500 weeks of partial disability benefits under Section 306(b) of the Act, 77 P.S. § 512, is subject to the statute of repose in Section 413(a) of the Act, 77 P.S. § 772, which requires a claimant to file a reinstatement petition within 500 weeks from the effective date of the suspension of benefits. Absent circumstances justifying application of the doctrine of equitable estoppel, a reinstatement petition filed outside of the 500-week period will be considered time-barred by the statute of repose.

□ [Palaschak v. Workers' Compensation Appeal Board \(US Airways\), No. 1699 C.D. 2010 \(Pa.Cmwlt., January 23, 2012\)](#)

- **Holding:** Reinstatement of benefits is not appropriate under Section 413(a) of the Act, 77 P.S. § 772, when the Reinstatement Petition is filed more than 500 weeks after the date on which disability benefits were suspended.

J. **Social Security Benefits Offset**

□ [White v. Workers' Compensation Appeal Board \(City of Pittsburgh\), No. 673 C.D. 2011 \(Pa.Cmwlt., December 29, 2011\)](#)

- **Holding 1:** Because Social Security benefits, in general, replace the wages of an employee who has retired, offsetting Social Security benefits by the percentage contributed by the employer is rationally related to the purpose of the Workers' Compensation Act. Therefore, the "old age" offset provision under Section 204(a) of the Act does not violate Article I, Section I of the Pennsylvania Constitution on the basis of age.
- **Holding 2:** The Social Security Act clearly distinguished between old age benefits and widow's benefits pursuant to 42 U.S.C. § 402(a), (e). Therefore, it follows that the offset allowed pursuant to Section 204(a) of the Act only applies to the portion of the benefits available to a claimant under Section 402(a) of the Social Security Act, or old age benefits.

K. Utilization Review Determination

- [Commonwealth, Dept. of Transportation v. Workers' Compensation Appeal Board \(Clippinger\), No. 1142 C.D. 2011 \(Pa.Cmwlt., December 30, 2011\)](#)
 - **Holding 1:** A home therapy pool and an addition to house the pool are not orthopedic appliances, *i.e.*, an indispensable device necessary to accommodate a work-related injury, under Section 306(f.1)(1)(i) of the Act, when the claimant is (1) sufficiently mobile to work full-time and travel to a physical therapy facility, (2) there is a viable alternative to a new in-home pool, and (3) alternatives to new construction of the building were not considered.
 - **Holding 2:** If an employer does not require medical reports for all instances for payment of services, the employer cannot argue that Claimant's failure to submit written reports to the employer's insurance carrier excuses an employer from penalties for failure to pay bills.

L. Voluntary Withdrawal from Workforce

- [Burks v. Workers' Compensation Appeal Board \(City of Pittsburgh\), No. 980 C.D. 2011 \(Pa.Cmwlt., January 13, 2012\)](#)
 - **Holding:** When a claimant suffers from both a work injury and a non-work related medical condition, and the work injury does not prevent the claimant from working, the receipt of Social Security Disability benefits is evidence that the claimant is unattached to the workforce for reasons unrelated to the work injury, and has voluntarily withdrawn from the workforce, thereby entitling the employer to a suspension of benefits.
- [City of Pittsburgh and UPMC Benefit Management Services, Inc. v. Workers' Compensation Appeal Board \(Marinack\), No. 100 C.D. 2011 \(Pa.Cmwlt., February 7, 2012\)](#)
 - **Holding:** There is no presumption that a claimant collecting a disability pension has withdrawn from the workforce; rather, it is the employer's burden to prove that the claimant on a disability pension intends not to return to work. By contrast, where a claimant has accepted a retirement pension, for which he or she has become eligible by reason of age and years of service, there is a presumption that the claimant has withdrawn from the workforce.

IV. ALLOCATUR GRANTED

The Pennsylvania Supreme Court has granted allocatur in the following matter on the issue stated:

- [Pulse Technologies, Inc., v. Notaro, 626 MAL 2011 \(January 27, 2012\)](#)
 - Does a Court act improperly by refusing to enforce a restrictive covenant contained in an employment agreement solely because the restrictive covenant was not expressly referenced in a non-binding initial offer letter, and the offer letter conditioned employment on the execution of the employment agreement?