



## A Summary of Recent Pennsylvania & Federal Appellate Court Decisions

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### Amendments to the Workers' Compensation Act Create Uninsured Employer Guaranty Fund, Require Mediation & Make Other Changes

*(To View Act 147, Click Here)*

Governor Ed Rendell has signed H.B. 2738, now known as Act 147, which amends the Pennsylvania Workers' Compensation Act. Among its provisions, Act 147:

- Increases the minimum weekly workers' compensation rate to \$100.00 if:
  - a. The injury occurred prior to August 31, 1993; and
  - b. The employee continues to receive total temporary disability benefits for the injury as of January 1, 2007;
- Creates a "resolution hearing" to expedite approval of Compromise & Release Agreements;
  - Requires Workers' Compensation Judges to set mandatory trial schedules at the first hearing in a case.
    - a. WCJs are required to "strictly enforce their schedules, and no party will be excused from honoring the schedule absent good cause shown;"
    - b. Every trial schedule must include a specific date and time for a mediation conference, which shall occur no later than thirty (30) days before the date set for filing Proposed Findings of Facts and Conclusions of Law or Legal Briefs unless, upon good cause shown, mandatory mediation would be futile;
  - Changes the structure of the Workers' Compensation Appeal Board (WCAB):
    - a. Creates specific procedures governing the manner in which decisions are prepared;
    - b. Requires WCAB members to attend and participate in at least eight (8) hours of workers' compensation-related CLE;
    - c. Creates a Code of Ethics for WCAB members; and,
    - d. Requires that at least two opinion writers are assigned to each member of the WCAB;
  - Precludes the Bureau from assigning more than 75 percent of all petitions, including resolution hearings, to any one WCJ within a particular county;
  - Limits counsel fees to no more than twenty (20) percent, which must be approved by a Workers' Compensation Judge or the Workers' Compensation Appeal Board, subject to the following guidelines:
    - a. Upon good cause show, a hearing official may allow a reasonable counsel fee exceeding twenty (20) percent;
    - b. When the efforts of Claimant's counsel produce a result favorable to the Claimant, but there is no immediate award of compensation, the hearing official shall allow an award a reasonable counsel fee, as agreed upon by the Claimant and his attorneys without regard to a per centum; and
    - c. Counsel fees for representation for Compromise and Release Agreements shall not exceed twenty (20) percent of the settlement amount;
  - Creates an Uninsured Employers Guaranty Fund.

# A Summary of Recent Appellate Decisions From Pennsylvania & New Jersey State Courts & Selected Federal Courts of Appeal

By Daniel J. Siegel, Esquire

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REPORTING DECISIONS THROUGH NOVEMBER 13, 2006

## PENNSYLVANIA STATE COURT DECISIONS

### 1. CIVIL PROCEDURE

#### 1.1. Amendment of Pleadings

##### ► Superior Court of Pennsylvania

- ◆ [Chaney v. Meadville Medical Center](#)  
2006 PA Super 295 (October 19, 2006)

**Holding:** Amendments to a Complaint are permissible when they merely amplify the factual background of the Complaint, and do not allege a new theory of liability.

#### 1.2. Appeals & Procedure

##### 1.2.1. Pa.R.A.P. 1925

##### 1.2.2. Conflict of Laws

##### ► Superior Court of Pennsylvania

- ◆ [Astorino v. New Jersey Transit Corp.](#)  
2006 PA Super 297 (October 24, 2006)

**Holding 1:** The Superior Court reverses a trial court's determination that an appellant had waived all issues on appeal because the Pa.R.A.P. 1925(b) statement was too vague to permit the Judge to draft a Pa.R.A.P. 1925(a) opinion.

**Holding 2:** A trial court may apply the New Jersey Tort Claims Act and dismiss a claim filed by a Pennsylvania resident injured in an accident in New Jersey while riding a bus operated by New Jersey Transit.

#### 1.3. Discovery From Expert Witnesses

##### ► Supreme Court of Pennsylvania

- ◆ [Cooper v. Schoffstall](#)  
No. 212 MAP 2004 (September 7, 2006)

**Holding:** Pa.R.Civ.P. 4003.5 restricts the scope of all discovery from non-party witnesses retained as experts in trial preparation. The threshold showing to establish cause for supplemental discovery intended to show favoritism by a non-party expert witness is of reasonable grounds to believe that the witness may have entered the

Every decision is "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.

professional witness category. Proponents of such discovery should demonstrate a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his or her testimony in light of the substantial financial incentives. The appropriate entry point, upon a showing of cause, is a deposition by written interrogatory under Pa.R.Civ.P. 4004. The Court declines, however, to foreclose the trial court, after an assessment of interrogatory responses and upon appropriate motion, from determining whether there is cause to support further supplemental discovery.

#### 1.4. Fair-Share Act (Joint & Several Liability)

##### ► Supreme Court of Pennsylvania

- ◆ [\*Estate of Hicks v. Dana Corp.\*](#)  
No. 24 EAP 2005 (September 27, 2006)

**Result:** In a *Per Curiam* Order, the Supreme Court affirmed the determination that the Fair-Share Act was unconstitutional. The Act had changed the law of joint and several liability and contribution.

#### 1.5. Jury Verdicts

##### ► Supreme Court of Pennsylvania

- ◆ [\*Fritz v. Wright\*](#)  
No. 116 MAP 2005 (October 18, 2006)

**Holding:** Any ten jurors who agree on a given jury interrogatory furnish a sufficient majority as to that question, and a verdict that requires a series of responses to interrogatories is sufficient even when a different group of ten jurors comprise the required majority for each individual question posed in a set of special interrogatories.

#### 1.6. Pre-Trial Procedure & Pleadings

##### 1.6.1. Identity & Naming of Defendants

##### ► Superior Court of Pennsylvania

- ◆ [\*Clark v. Wakefern Food Corp.\*](#)  
2006 PA Super 298 (October 25, 2006)

**Holding:** Pursuant to Pa.R.Civ.P. 2176, an action against a corporation must be prosecuted in its “corporate name,” which means any name, real or fictitious, under which a corporation or similar entity was organized, or conducts business, whether or not such name has been filed. Accordingly, a trial court errs by denying a plaintiff leave to amend a complaint to correct the name of the corporate owner of a defendant when the defendant was served under its “corporate name”, the corporate owner had actual knowledge of the claim and the complaint, and the corporate owner’s agent – the insurance adjuster – provided the wrong corporate name to plaintiff’s counsel.

## 1.7. Professional Negligence Actions

### 1.7.1. MCARE Act

#### 1.7.1.1. Retroactive Application

##### ► Superior Court of Pennsylvania

###### ◆ [George v. Ellis](#)

2006 PA Super 306 (October 31, 2006)

**Holding:** Section 512 of the MCARE Act is a procedural law that describes in detail the qualifications that a medical expert must possess to testify in a medical malpractice liability action, does not deal with any party's substantive rights, and affects only a procedural avenue by which a party may attempt to enforce its substantive rights. Accordingly, Section 512 of the MCARE Act may be applied retroactively.

## 2. INSURANCE

### 2.1. Insurance

#### 2.1.1. Automobile Insurance

##### 2.1.1.1. Taxicabs

##### ► Superior Court of Pennsylvania

###### ◆ [Love-Diggs v. Tirath](#)

2006 PA Super 315 (November 8, 2006)

**Holding:** A taxicab insurance policy must contain the Form E and F endorsements mandated by the Pennsylvania Public Utility Commission. Therefore, even when a specific cab is not listed on the insurance policy, coverage is available to claimants pursuant to *Insurance Coverage Requirements for Motor Carriers*, Declaratory Order, 2005 WL1876133 (Pa. P.U.C., May 23, 2005).

#### 2.1.2. Policy Interpretation

##### 2.1.2.1. Coverage

##### ► Supreme Court of Pennsylvania

###### ◆ [Kvaerner Metals Div. v. Commercial Union Insurance Co.](#)

Nos. 47 & 48 MAP 2004 (October 25, 2006)

**Holding:** In determining whether an insurer has a duty to defend or indemnify an insured, a court will look to the language of the policy itself to determine in which instances it will provide coverage, and then examine the filed Complaint to determine whether the allegations constitute the type of instances that will trigger coverage.

##### ► Superior Court of Pennsylvania

###### ◆ [Love-Diggs v. Tirath](#)

2006 PA Super 315 (November 8, 2006)

**Holding:** A taxicab insurance policy must contain the Form E and F endorsements mandated by the Pennsylvania Public Utility Commission. Therefore, even when a specific cab is not listed on the insurance policy, coverage is available to claimants pursuant to *Insurance Coverage Requirements for Motor Carriers*, Declaratory Order, 2005 WL1876133 (Pa. P.U.C., May 23, 2005).

### 3. NEGLIGENCE

#### 3.1. Automobile Claims

▶ Superior Court of Pennsylvania

- ◆ [\*Progressive Halcyon Insurance Co. v. Kennedy\*](#)  
2006 PA Super 262 (September 21, 2006)

**Holding:** An insured party injured in a car covered by the full tort option may not be denied full tort benefits because the insured also owns an uninsured vehicle.

#### 3.2. Medical Malpractice

##### 3.2.1. Certificate of Merit

▶ Supreme Court of Pennsylvania

- ◆ [\*Womer v. Hilliker\*](#)  
No. 25 MAP 2005 (October 17, 2006)

**Holding:** By failing to file a Certificate of Merit in a medical malpractice action, even one that is defective, a plaintiff does not comply with Pa.R.Civ.P. 1042.3, and it is appropriate to enter a judgment of non pros. To seek relief from a judgment of non pros, a plaintiff must fulfill the requirements of Pa.R.Civ.P. 3051. Justice Baer filed a [dissenting opinion](#), which was joined by Justice Castille.

##### 3.2.2. Res Ipsa Loquitor

▶ Supreme Court of Pennsylvania

- ◆ [\*Quinby v. Plumsteadville Family Practice, Inc.\*](#)  
No. 20 MAP 2005 (October 18, 2006)

**Holding:** A trial court errs by not permitting the *res ipsa loquitor* inference of negligence when the defendant offers no explanation for the underlying event, which is of a type that does not occur without negligence. Under such circumstances, the grant of judgment n.o.v. may also be proper.

##### 3.2.3. Standard of Care

▶ Superior Court of Pennsylvania

- ◆ [\*Freed v. Geisinger Medical Center\*](#)  
2006 PA Super 274 (September 29, 2006)

**Holding:** An otherwise qualified non-medical expert may give a medical opinion as long as the expert witness has sufficiently specialized knowledge to aid the jury in its factual quest.

#### 3.3. Pedestrians

▶ Superior of Pennsylvania

- ◆ [\*Jenkins v. Wolf\*](#)  
2006 PA Super 321 (November 9, 2006)

**Holding:** A trial court errs by failing to instruct the jury regarding negligence *per se* when evidence is introduced that the defendant motor vehicle driver failed to yield to a pedestrian in violation of 75 Pa.C.S.A. § 3112(a)(1)(i), which requires vehicles to yield to, *inter alia*, “pedestrians lawfully within the intersection or an adjacent crosswalk at the time the [green] signal is exhibited.”

#### 4. WORKERS' COMPENSATION (ALL COMMONWEALTH COURT CASES)

##### 4.1. Agreements

- ◆ [\*Sharon Tube Co. v. Workers' Compensation Appeal Board \(Buzard\)\*](#)  
No. 2354 C.D. 2005 (June 23, 2006, Order Published September 28, 2006)

**Holding:** Pursuant to Section 407 of the Act, all agreements for compensation, including supplemental agreements, shall be considered valid and binding until properly modified.

##### 4.2. Attorney's Fees

###### 4.2.1. Fee Disputes

- ◆ [\*Hendricks v. Workers' Compensation Appeal Board \(Phoenix Pipe & Tube\)\*](#)  
No. 237 C.D. 2006 (October 16, 2006)

**Holding:** When there is a dispute over attorney's fees, if the fee agreement or petition is not filed before the claimant discharges the attorney, any subsequent filing of a fee agreement or petition is outside the workers' compensation system and must be resolved by a court of common pleas or arbitration. If, however, the fee agreement or petition is filed before the claimant discharges the attorney, it is within the workers' compensation system and subject to a decision by a workers' compensation judge.

##### 4.3. Commutations/Review Petitions

- ◆ [\*Seekford v. Workers' Compensation Appeal Board \(R.P.M. Erectors.\)\*](#)  
No. 393 C.D. 2006 (November 2, 2006)

**Holding:** A petition seeking specific loss benefits, which is analogous to a Petition for Review, must be filed within three years of the date on which a commutation payment was made, or it will be deemed time-barred.

##### 4.4. Disfigurement Claims

- ◆ [\*Agnello v. Workers' Compensation Appeal Board \(Owens-Illinois\)\*](#)  
No. 629 C.D. 2006 (September 14, 2006)

**Holding:** Dentures should not be considered when evaluating a claim for disfigurement.

##### 4.5. Hearing Loss Claims

- ◆ [\*City of Scranton v. Workers' Compensation Appeal Board \(Roche\)\*](#)  
No. 1243 C.D. 2006 (November 2, 2006)

**Holding:** A claim for hearing loss as the result of repetitive trauma under Act 1 of 1995 must be filed within three years of the last date of exposure; the discovery rule no longer applies. Thus, claims filed within three years of the date a claimant discovered his or her hearing loss are untimely unless filed within three years of the date of the last exposure to the occupational noise.

##### 4.6. Impairment Rating Evaluations

###### 4.6.1. Res Judicata Effect

- ◆ [\*Schachter v. Workers' Compensation Appeal Board \(SPS Technologies\)\*](#)  
No. 320 C.D. 2006 (October 12, 2006)

**Holding:** An impairment rating evaluation (IRE) is not *res judicata* as to the permanency of a claimant's disability for purposes of a subsequently filed termination petition.

#### 4.7. Judgments

- ◆ [\*Clayton v. City of Philadelphia\*](#)  
No. 1036 C.D. 2005 (October 13, 2006)

**Holding:** Until a supersedeas is issued or other action is taken that would vacate a workers' compensation award or order, an employer cannot challenge the propriety of a judgment filed pursuant to Section 204(a) of the Workers' Compensation Act.

#### 4.8. Medical Expense Payment/Reimbursement

- ◆ [\*Penske Truck Leasing v. Workers' Compensation Appeal Board \(Brunkel\)\*](#)  
No. 87 C.D. 2006 (October 19, 2006)

**Holding:** An employer/carrier is required to pay medical bills related to a compensable injury, regardless whether another source initially paid the medical bills. In addition, the employer/carrier is obligated to pay statutory interest to the entity that initially paid the medical bills.

#### 4.9. Longshoreman's Claims

- ◆ [\*McElheney v. Workers' Compensation Appeal Board \(Kvaerner Philadelphia Shipyard\)\*](#)  
No. 806 C.D. 2006 (September 27, 2006)

**Holding:** The Workers' Compensation Act applies to an injury suffered by a claimant while working on a ship in dry dock even though that injury also falls within the coverage of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2000).

#### 4.10. Penalties

- ◆ [\*Constructo Temps, Inc. v. Compensation Security Fund\*](#)  
No. 1562 C.D. 2005 (September 8, 2006)

**Holding:** The Security Fund, like the Subsequent Injury Fund, is a statutorily-created government entity that pays workers' compensation benefits, and is not an "insurer" under the Act. Accordingly, penalties may not be assessed against the Security Fund. Similarly, an employer cannot be penalized vicariously for conduct properly attributable to the Security Fund.

#### 4.11. Physical Examinations

- ◆ [\*Central Dauphin School District v. Workers' Compensation Appeal Board \(Siler\)\*](#)  
No. 612 C.D. 2006 (October 17, 2006)

**Holding:** A claimant's duty to cooperate in a physical examination includes the duty to release prior medical records. An impairment rating evaluation (IRE) is not *res judicata* as to the permanency of a claimant's disability for purposes of a subsequently filed termination petition.

#### 4.12. Subrogation

- ◆ [\*Kidd-Parker v. Workers' Compensation Appeal Board \(Philadelphia School District\)\*](#)  
No. 2122 C.D. 2005 (April 25, 2006, Published by Order September 6, 2006)

**Holding:** An employer is entitled to subrogation from a claimant's recovery from a third party tortfeasor regardless if it has already recovered a substantial portion of what it had paid from the Supersedeas Fund. An employer's subrogation right is not limited to the amount not recovered from the Supersedeas Fund.

4.13. **Supersedeas Fund Reimbursement**

- ◆ [\*J.P. Lamb Construction, Inc. v. Workers' Compensation Appeal Board \(Bureau of Workers' Compensation.\)\*](#)

No. 923 C.D. 2006 (October 11, 2006)

**Holding:** Section 443(1) of the Act allows reimbursement from the Supersedeas Fund if the following conditions are met: (1) a supersedeas must have been requested; (2) the supersedeas request must have been denied; (3) the supersedeas request must have been made in a proceeding under Sections 413 or 430 of the Act; (4) payments continued based upon the order denying supersedeas; and, (5) it is determined in the final outcome of the proceedings that compensation was not, in fact, payable. In this case, in the underlying litigation, there was no medical dispute about claimant's entitlement to compensation; the only issue was whether compensation was, in fact, payable. Accordingly, the employer/carrier was entitled to reimbursement from the Supersedeas Fund.

4.14. **Timeliness of Appeals**

- ◆ [\*SPS Technologies v. Workers' Compensation Appeal Board \(Marko\)\*](#)

No. 2486 C.D. 2005 (September 7, 2006)

**Holding:** An appeal to the Commonwealth Court from a decision of the Workers' Compensation Appeal Board, which is incorrectly filed with the Appeal Board and not received by the Commonwealth Court within thirty (30) days of the Board's decision, is untimely.

- ◆ [\*Ludwikowski v. Workers' Compensation Appeal Board \(Dubin Paper Co.\)\*](#)

No. 158 C.D. 2006 (October 24, 2006)

**Holding:** Section 111.11 of the Special Rules or Practice and Procedure before the Appeal Board require that an appeal from a Workers' Compensation Judge's decision **shall be filed with the Board and must be mailed directly to the Board** within twenty (20) days from the "circulation date" of the WCJ decision. In this case, claimant's counsel sent his appeal documents by Federal Express on the 20<sup>th</sup> day from the date of the WCJ decision, and the appeal was not received until the next (the 21<sup>st</sup>) day. Thus, any appeal sent by means other than the Post Office must be received no later than twenty (20) days after the circulation date, or it will be deemed untimely filed and quashed.

**FEDERAL COURT OPINION OF NOTE**

1. HIPAA

1.1. Causes of Action

- ▶ U.S. Court of Appeals, 5<sup>th</sup> Circuit

- ◆ [\*Acara v. Banks\*](#)

No. 06-30356 (November 13, 2006)

**Holding:** There is no private cause of action under the Health Insurance Portability and Accountability Act ("HIPAA"). In this case, plaintiff had filed suit under HIPAA against a doctor seeking damages as a result of the doctor's alleged disclosure of the patient information (during a deposition) without the patient's consent.



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