

# A Summary of Recent Pennsylvania Appellate Court Decisions

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REPORTING DECISIONS THROUGH NOVEMBER 30, 2013

## PENNSYLVANIA APPELLATE COURT DECISIONS

### I. CIVIL LITIGATION

#### A. *Civil Procedure – Consolidation*

- [\*Knox v. SEPTA, No. 125 C.D. 2013 \(Pa.Cmwlt., November 12, 2013\)\*](#)

- **Holding:** Where actions are consolidated for purposes of discovery and trial, an appeal must be filed in each individual case to preserve any appellate claims. An appeal filed under only the consolidated docket number does not preserve the individual parties' claims.

#### B. *Civil Procedure – Coordinate Jurisdiction Rule*

- [\*Hunter v. City of Philadelphia, No. 14 C.D. 2013 \(Pa.Cmwlt., November 20, 2013\)\*](#)

- **Holding:** The "coordinate jurisdiction rule" does not apply to a motion for summary judgment and a request for non-suit filed during different procedural phases of a case.

#### C. *Civil Procedure – Writs of Execution*

- [\*Korman Commercial Properties, Inc. v. The Furniture.com, 2013 PA Super 295 \(Pa.Super., November 12, 2013\)\*](#)

- **Holding:** The effective date of a writ of execution relates back to the date of service when objections to service are waived.

#### D. *Judgments*

- [\*ISN Bank v. Rajaratnam, 2013 PA Super 304 \(Pa.Super., November 25, 2013\)\*](#)

- **Holding:** Separate judgments entered against a husband and wife may not be consolidated so that assets held as tenants by the entirety may be executed upon to satisfy a joint indebtedness.

#### E. *Medical Malpractice – Informed Consent*

- [\*Brady v. Urbas, 2013 PA Super 296 \(Pa.Super., November 12, 2013\)\*](#)

- **Holding:** Evidence of informed consent is irrelevant in a medical malpractice action because the evidence could mislead or confuse a jury by leading it to believe that the plaintiff's injuries were simply a risk of the surgeries and that the plaintiff accepted such risks, regardless of whether the doctor's negligence caused the risks to occur.

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 decision for you to read in its entirety. Try it!

□ [\*Bell v. Willis, 2013 PA Super 293 \(Pa.Super., November 8, 2013\)\*](#)

- **Holding:** A lack of informed consent claim cannot lie against a chiropractor for performing chiropractic manipulations because they are non-surgical procedures and informed consent is not required in cases involving non-surgical procedures.

F. *Premises Liability Claims - Trivial Defects*

□ [\*Shaw v. Thomas Jefferson University, No. 619 C.D. 2013 \(Pa.Cmwlt., November 20, 2013\)\*](#)

- **Holding:** Questions whether a sidewalk defect is trivial and whether a defendant has been negligent in permitting the sidewalk defect to exist should be submitted to the jury when there are issues of material fact based on the surrounding circumstances.

II. WORKERS' COMPENSATION

A. *Bureau Verification Forms*

□ [\*McCafferty v. Workers' Compensation Appeal Board \(Trial Technologies, Inc.\), No. 208 C.D. 2013 \(Pa.Cmwlt., November 21, 2013\)\*](#)

- **Holding:** An employee may return the LIBC-760 (and other) Verification forms by fax. The form must be dated by the claimant, however, pursuant to Section 311.1(e) of the Workers' Compensation Act, 77 P.S. § 631.1, because the form contains information needed by an employer to compute the amount of compensation it owed.

B. *Medical Bills - Timely Submission*

□ [\*Gupta v. Bureau of Workers' Compensation Fee Review Hearing Office \(Erie Insurance Co.\), No. 753 C.D. 2013 \(Pa.Cmwlt., November 21, 2013\)\*](#)

- **Holding:** When a provider has submitted a bill to an insurer that is denied for failure to include the documentation required under the Act, if the provider resubmits the bill with the proper documentation and the insurer again denies the bill, the provider has 30 days following the notification of the denial of the properly documented bill to seek review of the fee dispute. Section 306(f.1)(5) of the Workers' Compensation Act, 77 P.S. § 531(5), does not permit a provider to open another 30 day window simply by resubmitting a properly documented bill that has already been denied.

C. *Modification/Suspension Based Upon a Claimant's Earning Power*

□ [\*Phoenixville Hospital v. Workers' Compensation Appeal Board \(Shoap\), No. 32 EAP 2011 \(Pa., November 21, 2013\)\*](#)

- **Holding:** Section 306(b) of the Workers' Compensation Act, 77 P.S. § 512, which permits an employer to modify an injured worker's benefits, does not require that a claimant be offered a job in order to establish a claimant's earning power, except when the employer itself has an appropriate opening. Earning power under Section 306(b) is based on the employer's evidence of the claimant's ability to engage in existing "substantial gainful employment" within his or her physical, medical and vocational restrictions or skills, not on whether he or she actually receives a job offer. Thus, an employer need not show that the claimant had obtained employment. The proof required to reduce or suspend a claimant's benefits must rest upon the existence of

meaningful employment opportunities, and not the simple identification of jobs found in want ads or employment listings. An employer must therefore prove a claimant's earning capacity (absent an offer of employment with the employer) with evidence that potential employers are in search of an employee (as evidenced by, among other things, job listings, placement agencies, or advertisements) within the claimant's physical, medical and vocational restrictions. The jobs that a claimant is "capable of performing" must be those jobs that are actually open and potentially available, not simply jobs that are already filled with existing employees. A claimant may, however, present evidence that he or she pursued but failed to obtain gainful employment with the employers identified by the employer's expert, but such evidence is not proof *per se* of a claimant's substantial gainful employment and is not dispositive of the earning power inquiry. Justice Saylor filed a [dissenting opinion](#), in which Justice Eakin joined.

- **Practice Tip:** *Attorneys should scrutinize this case, which does not create a clear avenue for employers or injured workers to prove or disprove a particular aspect of a modification/suspension petition. Instead, these cases are likely to be as fact-specific as those under Kachinski, which clearly overshadowed the facts and legal analysis here.*

□ [Reichert v. Workers' Compensation Appeal Board \(Dollar Tree Stores\), No. 42 C.D. 2013 \(Pa.Cmwlt., November 8, 2013\)](#)

- **Holding:** Under Section 306(b) of the Workers' Compensation Act, 77 P.S. § 512, an employer does not have the burden of proving the non-existence of available work at its own facility as a necessary element of a modification petition. Once an employer has presented evidence that it did not have any available position, a claimant may rebut that evidence. To do so, the claimant must present facts showing that, during the period in which the employer has or had a duty to offer a specific job, the employer is or was actively recruiting for a specific job vacancy that the employee is capable of performing or the employer posted or announced the existence of such a vacancy.

D. *Occupational Disease - Statutes of Limitation*

□ [Tooey v. AK Steel Corp., No. 21 WAP 2011 \(Pa., November 22, 2013\)](#)

- **Holding:** An occupational disease that manifests itself outside of the 300-week period prescribed by Section 301(c)(2) of the Workers' Compensation Act, 77 P.S. § 411(2), removes the claim from the purview of the Act, such that the exclusivity provision of Section 303(a) of the Act, 77 P.S. § 481, does not apply. Justice Saylor filed a [dissenting opinion](#).

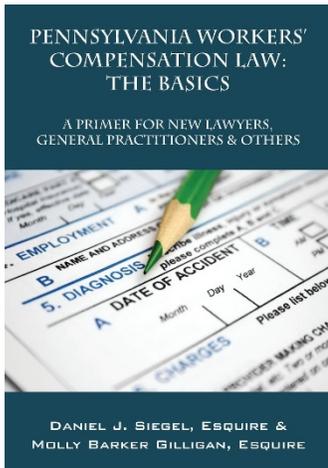
E. *Subrogation - Medical Expenses*

□ [Liberty Mutual Insurance Co. v. Excalibur Management Services, No. 1792 C.D. 2012 \(Pa.Cmwlt., November 8, 2013\)](#)

- **Holding:** In order to assert and protect a claim for subrogation under Section 319 of the Workers' Compensation Act, 77 P.S. § 671, an insurance carrier must establish its subrogation interest during the pendency of the workers' compensation proceedings.

F. *Unreasonable Contest Counsel Fees*

- [\*Commonwealth of Pa. v. Workers' Compensation Appeal Board \(Noll\), No. 819 C.D. 2013 \(Pa.Cmwlt., November 6, 2013\)\*](#)
  - **Holding:** When attorney's fees are assessed against an employer based upon an unreasonable contest under Section 440 of the Workers' Compensation Act, 77 P.S. § 996, they must be based upon a *quantum meruit* standard, and an attorney's fee that simply adds 20% to the claimant's weekly compensation indefinitely does not relate to the work actually done and is not authorized by the Act.



## The Pennsylvania Workers' Compensation Book

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& **Molly Barker Gilligan, Esquire**

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