

A Summary of Recent Pennsylvania Appellate Court & Other Decisions By Daniel J. Siegel, Esquire

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REPORTING DECISIONS THROUGH JUNE 30, 2017

FEATURED DECISION OF THE MONTH

[*Protz v. WCAB \(Derry Area School District\)*](#), 6 WAP 2016 (Pa., June 20, 2017)

The Pennsylvania Supreme Court declared as unconstitutional the impairment rating evaluation (IRE) provision in Section 306(a.2) of the Workers' Compensation Act. The decision in *Protz v. WCAB (Derry Area School District)* means that injured workers will no longer be subject to a cap on the length of wage loss benefits they received. Attorney Dan Siegel of the Law Offices of Daniel J. Siegel, LLC authored the friend of the court brief on behalf of the Pennsylvania Association for Justice (formerly the Pennsylvania Trial Lawyers Association).

In the 6-1 majority opinion authored by Justice Wecht, the Court concluded that the Pennsylvania legislature violated the state Constitution when it passed this provision because it (1) gave "unfettered discretion over Pennsylvania's impairment-rating methodology" to the American Medical Association, and (2) "did not include ... any of the procedural mechanisms that this Court has considered essential to protect against 'administrative arbitrariness and caprice.'"

Chief Justice Saylor authored a concurring opinion. Justice Baer filed a dissenting opinion. Pittsburgh attorney Tom Baumann represented claimant.

[Click here to read the Protz opinion.](#)

[Click here to read Dan Siegel's Amicus brief.](#)

Before the decision, Section 306(a.2) of Act permitted employers to require an injured worker to undergo an IRE after receiving 104 weeks of disability benefits. If the IRE physician determined that the injured worker's whole body impairment was less than 50 percent, as determined by the *AMA Guides to the Evaluation of Permanent Impairment*, the worker was limited to 500 weeks of future wage losses. The Court held that the delegation of the impairment determination was impermissible because only the legislature can make those decisions.

PENNSYLVANIA APPELLATE COURT DECISIONS

I. Procedural Law

A. *Local Rules of Civil Procedure - Petition Practice*

- [*US Spaces, Inc. v. Berkshire Hathaway Homeservices, 2017 PA Super 174 \(Pa. Super., June 5, 2017\)*](#)

- **Holding:** When a Court of Common Pleas issues a local rule requiring the issuance of a Rule to Show Cause "as of course," the court must issue the rule in all but the most egregious cases.

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!

B. *Electronic Filing - Unemployment Claims*

- [*Chapman v. Unemployment Compensation Board of Review, 1405 C.D. 2016 \(Pa. Cmwlth., June 13, 2017\)*](#)

- **Holding:** Pursuant to 34 Pa. Code § 101.82(b)(4), which permits a party to file an appeal by electronic transmission (email), the date of filing is the date on which the filing was received by the Department. Thus, where an appeal is sent by email at 11:59:46 p.m. on the final date for filing the appeal, but is not received until 12:00 a.m., the filing is untimely.

C. *Prevailing Party - Limited Tort Claims*

- [*Oliver v. Irvello, 2017 PA Super 184 \(Pa. Super., June 13, 2017\)*](#)

- **Holding:** In order for the injured party to be considered the "prevailing party" in a limited tort claim under Section 1705(a)(1)(A) of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A., the injured party must establish that he or she sustained a serious injury. Absent a favorable determination on the limited tort claim, the injured party is not entitled to recover costs under 42 Pa.C.S.A. § 1726(a)(2).

II. Substantive Law

A. *Unemployment Compensation - Incarcerated Employees*

- [*Harmon v. Unemployment Compensation Board of Review, 787 C.D. 2015 \(Pa. Cmwlth., June 7, 2017\)*](#)

- **Holding:** Under Section 402.6 of the Unemployment Compensation Law, 43 P.S. § 802.6(a), an employee is considered "incarcerated" even if the incarceration is only on weekends. The employee is therefore ineligible for unemployment benefits during any weeks in which he is incarcerated.

B. Right-to-Know Law - Disclosure of Motor Vehicle Recordings/Dashcam Video

□ [*Pennsylvania State Police v. Grove*, 25 MAP 2016 \(Pa., June 20, 2017\)](#)

- **Holding:** Video footage from dashcams on police vehicles (also known as Motor Vehicle Recordings (MVRs)) are not exempt from disclosure under the Right-to-Know Law, 65 P.S. § 67.101-67.3104 or the Criminal History Record Information Act, 18 Pa.C.S. §§ 9101-9183, unless the MVR contains criminal investigation material, a determination that must be made on a case-by-case basis. Justice Wecht file a [concurring opinion](#) in which Justice Todd joined. Chief Justice Saylor filed a [concurring and dissenting opinion](#). Justice Mundy filed a [concurring and dissenting opinion](#).

C. Medical Malpractice - Informed Consent

□ [*Shinal v. Toms*, 31 MAP 2016 \(Pa., June 20, 2017\)](#)

- **Holding:** Under the Medical Care Availability and Reduction of Error Act (MCARE), 40 Pa.C.S. § 1303.504, a physician must obtain informed consent from a patient or a patient's authorized representative before performing treatment on the patient. A physician may not delegate this duty to another person. Justice Baer filed a [dissenting opinion](#) which Chief Justice Saylor joined and in which Justice Mundy joined in part.

D. Personnel Files Act - Access to Employment Records

□ [*Thomas Jefferson University Hospitals, Inc. v. Pennsylvania Department of Labor and Industry*, 30 EAP 2016 \(Pa., June 20, 2017\)](#)

- **Holding:** The definition of "employee" under the Inspection of Employment Records Law (the Personnel Files Act), 43 P.S. §§ 1321-24 does not include former/terminated employees. As a result, former/terminated employees are precluded from inspecting their personnel files after their employment has ended.

E. Evidence - Intoxication

□ [*Partlow v. Gray*, 2017 PA Super 187 \(Pa. Super., June 15, 2017\)](#)

- **Holding:** In a wrongful death action involving motor vehicles, evidence of a driver's intoxication is admissible provided there is substantial corroborating evidence to the driver's intoxication and unfitness to drive.

F. Utility Exception to Governmental Immunity

□ [*Metropolitan Edison Co. v. City of Reading*, 58 MAP 2016 \(Pa., June 20, 2017\)](#)

- **Holding:** Under the Utility Exception to governmental immunity in the Tort Claims Act, 42 Pa.C.S. § 8542(b)(5), the negligent act necessary to trigger the exception is the local agency's failure to remediate a dangerous condition of which it has notice. Justice Mundy filed a [concurring opinion](#) in which Justice Baer joined. Chief Justice Saylor filed a [dissenting opinion](#).

G. Federal Arbitration Act - Applicability to Whistleblower Claims

- [*Saltzman v. Thomas Jefferson University Hospitals, Inc.*, 20178 A Super 206 \(Pa. Super., June 30, 2017\)](#)
 - **Holding:** Under the Federal Arbitration Act, which Pennsylvania courts apply, there is a strong presumption favoring arbitration. Consequently, claims under the Pennsylvania Whistleblower Law, 43 P.S. §§ 1421-28, may be subject to arbitration.

III. Workers' Compensation

A. Loss of Earning Power

- [*Holy Redeemer Health Systems v. WCAB \(Lux\)*, 768 C.D. 2016 \(Pa. Cmwlt., June 6, 2017\)](#)
 - **Holding:** An injured employee suffers a loss of earning power and is eligible for partial disability benefits if her pre-injury employer creates a new position specifically for the employee at a loss of wages. The Court noted that an employer may not evade the payment of pre-injury wages or partial disability benefits by creating and offering permanent, lower-paying positions to claimants that are within the restrictions imposed by the claimants' work-related injuries even if the claimant accepts the position.

Attorney Dan Siegel served as appellate counsel in this matter; claimant was represented by Attorney Paula Robinson before the WCJ.

B. Impairment-Rating Evaluations

- [*Protz v. WCAB \(Derry Area School District\)*, 6 WAP 2016 \(Pa., June 20, 2017\)](#)
 - **Holding:** The Pennsylvania Supreme Court declared unconstitutional the impairment rating evaluation (IRE) provision in Section 306(a.2) of the Workers' Compensation Act. The decision means that injured workers will no longer be subject to a cap on the length of wage loss benefits they received. Attorney Dan Siegel of the Law Offices of Daniel J. Siegel, LLC authored the friend of the court brief on behalf of the Pennsylvania Association for Justice (formerly the Pennsylvania Trial Lawyers Association). In the 6-1 majority opinion authored by Justice Wecht, the Court concluded that the Pennsylvania legislature violated the state Constitution when it passed this provision because it (1) gave "unfettered discretion over Pennsylvania's impairment-rating methodology" to the American Medical Association, and (2) "did not include ... any of the procedural mechanisms that this Court has considered essential to protect against 'administrative arbitrariness and caprice.'" Chief Justice Saylor authored a [concurring opinion](#). Justice Baer filed a [dissenting opinion](#).

Attorney Tom Baumann represented claimant; Attorney Dan Siegel authored the amicus curiae brief for the Pennsylvania Association for Justice.

C. Financial Obligations of Uninsured Employers

- [*CMR Construction of Texas v. WCAB \(Begly\)*, 693 C.D. 2016 \(Pa. Cmwlt., June 26, 2017\)](#)
 - **Holding:** A Workers' Compensation Judge may assess penalties against an employer for failing to pay benefits, even if the employer is uninsured and the Uninsured Employers Guaranty Fund eventually assumed responsibility for payment of the wage losses.

D. Reasonableness of an Injury

- [Wilgro Services, Inc. v. WCAB \(Mentusky\), 1932 C.D. 2016 \(Pa. Cmwlth., June 28, 2017\)](#)
 - **Holding:** An employee is entitled to benefits from the employer for injuries he sustained after intentionally jumping off of a roof at his job when he had no other way to get off the roof. Although claimant's act was misguided and ill-advised, it still fell within the ambit of the Workers' Compensation Act.

E. Pension Benefits

- [Harrison v. WCAB \(Commonwealth of Pennsylvania\), 658 C.D. 2016 \(Pa. Cmwlth. en banc, June 28, 2017\)](#)
 - **Holding:** When calculating the pension offset to which an employer is entitled, claimant's joint and survivor annuity, which includes a full amount survivor annuity payable to the spouse should claimant predecease the spouse, constitutes the benefit claimant constructively received for purposes of an offset under Section 204(a) of the Act, 77 P.S. § 71(a).

IV. Allocatur Petitions

A. *The Pennsylvania Supreme Court has granted appeal in the following matters for the issues stated:*

- [McGuire v. Donald Russo, 901 MAL 2016 \(Pa., June 6, 2017\)](#)
 - Should this Court overturn its decision in *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991), which bars legal malpractice suits following the settlement of a lawsuit absent an allegation of fraud, even in instances where an attorney's negligence led to a lesser settlement?
- [Parker v. WCAB \(County of Allegheny\), 31 WAL 2017 \(Pa., June 6, 2017\)](#)
 - Whether (a) the Commonwealth Court erred when it held, without legal precedent, that a workers' compensation claimant's attorney must disgorge and return unreasonable contest attorney's fees if the employer ultimately prevails; and (b) the disgorgement and return of unreasonable contest attorney's fees when the employer ultimately prevails is better left to the legislature rather than the courts?

V. New Jersey Ethics Opinion

A. *Online Legal Referral Services - Lawyers Participating in Impermissible Lawyer Referral Services*

- [Advisory Committee on Professional Ethics Op. 732, Committee on Attorney Advertising Op. 44, Committee on the Unauthorized Practice of Law Op. 54, Joint Op.](#)
 - **Holding:** New Jersey lawyers are not permitted to participate in Avvo legal services program because they violate Rule 5.4(a) by requiring lawyers to share legal fees with a non-lawyer, and it violates Rule 7.2(c) and 7.3(d) by giving referral fees to non-lawyers. The services provided by LegalZoom and Rocket Lawyer appear to be legal, but lawyers cannot participate in these services because they are not registered with the Administrative Office of the courts which is required by Rule 7.3(e)(4)(vii).