

IN THE  
SUPERIOR COURT OF PENNSYLVANIA

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NO. 592 WDA 2008

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MARY KAY SEDLACEK, Executrix of the Estate of EDWARD SEDLACEK, and  
MARY KAY SEDLACEK in her own right

Appellant,

v.

ALCOA, INC.

Appellee.

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BRIEF FOR AMICI CURIAE, INSURANCE FEDERATION OF  
PENNSYLVANIA, INC. AND THE AMERICAN INSURANCE  
ASSOCIATION IN SUPPORT OF BRIEF FOR APPELLEE, ALCOA,  
INC.

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Appeal by Allowance from the Final Order of the Court  
of Common Pleas of Westmoreland County, Docketed at  
No. 5904 of 2005, Entered March 5, 2008, Specifically with  
Regard to the Order of February 21, 2006, Granting  
Summary Judgment Against Plaintiff and in Favor of  
Defendant.

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**I. STATEMENT OF JURISDICTION**

The Insurance Federation of Pennsylvania hereby incorporates the Statement of Jurisdiction submitted by Alcoa, Inc.

**II. STATEMENT OF SCOPE AND STANDARD OF REVIEW**

The Insurance Federation of Pennsylvania hereby incorporates the Statement of Scope and Standard of Review submitted by Alcoa, Inc.

### **III. STATEMENT OF INTEREST OF AMICUS CURIAE**

The Insurance Federation of Pennsylvania (“the Federation”) is a non-profit trade association representing more than two hundred commercial insurers doing business in Pennsylvania. The Commonwealth’s leading insurance trade association, the Federation includes members who issue all types of insurance policies, including the Standard Workers’ Compensation and Employers Liability policy sanctioned by the Pennsylvania Bureau of Workers’ Compensation. Included in the Federation’s membership are insurers who write casualty and business insurance covering businesses, employees, homes and corporate and private citizens of the Commonwealth of Pennsylvania.

The Federation is committed to ensuring a balanced and fair coverage environment in the Commonwealth. The Federation and its members have a significant interest in the outcome of this case since the outcome of this litigation will likely affect both claims administration and claims litigation arising out of occupational injuries and diseases under direct policy terms and through subrogated interests. The Federation believes that its Amicus Brief will be of beneficial interest to this Honorable Court in reaching its decision.

**III. ORDER IN QUESTION**

“AND NOW, this 21<sup>st</sup> day of February 2006, the motion for summary judgment filed by the above defendant, **ALCOA, INC.** is granted and summary judgment is entered in favor of defendant, **ALCOA, INC.**, only and against the plaintiffs.

(Order of The Honorable Daniel J. Ackerman of the Court of Common Pleas of Westmoreland County, dated 2/21/06)

**IV. STATEMENT OF QUESTIONS INVOLVED**

1. WHETHER ALCOA, INC. MAY BE STRIPPED OF ITS IMMUNITY FROM CIVIL SUIT, WHERE, REGARDLESS OF THE RAMIFICATIONS OF THE APPLICATION OF DISEASE MANIFESTATION TIME RESTRICTION PROVISIONS SET FORTH IN BOTH STATUTES, THE OCCUPATIONAL DISEASE ALLEGED BY PLAINTIFF IS COGNIZABLE UNDER THE WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE ACTS.

(Answered in the negative below)

2. WHETHER APPLICATION OF THE "EXCLUSIVE REMEDY" PROVISIONS SET FORTH IN THE PENNSYLVANIA WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE ACTS, VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE REMEDIES CLAUSE OF THE PENNSYLVANIA CONSTITUTION.

(Answered in the negative below)

**V. STATEMENT OF CASE**

The Insurance Federation of Pennsylvania hereby incorporates the Statement of Case submitted by Alcoa, Inc.

## **VI. SUMMARY OF ARGUMENT**

The Judge below correctly granted the Summary Judgment Motion of Alcoa, Inc. The occupational disease that underlies the Civil Complaint filed by plaintiff is cognizable under the Pennsylvania Workers' Compensation and Occupational Disease Acts. Since the two no-fault statutes provide the exclusive remedy for plaintiff's personal injury claim, the liability of Alcoa, Inc., decedent's employer, must be limited to whatever administrative remedy the Acts provide. The administrative scheme set forth in the two Acts constitutes a complete substitution for the common law system that includes a series of compromises between employers and employees. While the Acts include various substantive provisions that either limit or prohibit certain recoveries for occupational injuries and diseases, the restrictions, including the disease manifestation time restrictions at issue in this case, are necessary to facilitate the legislative determination to provide a no-fault system that benefits the many.

Although in some cases the recovery restrictions adversely impact certain individuals, application of the restrictions do not convey upon the injured worker the right to strip the employer of its immunity from civil suit. Indeed, plaintiff's argument that application of the disease manifestation time restrictions set forth in Section 301(c)(2) of the Act and Section 310(c) of the Occupational Disease Act should sanction the instant civil action mistakes a temporal limitation on recovery under the two Acts for a lack of coverage under the two Acts. Rather, since the occupational disease alleged by plaintiff falls within the ambit of the two Acts, Alcoa, Inc. must retain its immunity from suit.

Finally, since the Acts are constitutionally derived and reflect a rational exercise of the state police power, plaintiff's constitutional challenge, one that was laid to rest long ago, is an exceedingly groundless one.

## VII. ARGUMENT

- A. SINCE THE WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE ACTS PROVIDE EXCLUSIVE COVERAGE FOR THE OCCUPATIONAL DISEASE ALLEGED BY PLAINTIFF, THE JUDGE'S RULING BELOW THAT ALCOA, INC. MAY NOT BE STRIPPED OF ITS IMMUNITY FROM CIVIL SUIT, REGARDLESS OF RAMIFICATIONS OF THE APPLICATION OF THE DISEASE MANIFESTATION TIME RESTRICTIONS SET FORTH IN BOTH ACTS, SHOULD BE AFFIRMED.

It is respectfully submitted that a full review of the origins and evolution of the Pennsylvania Workers' Compensation Act and Pennsylvania Occupational Disease Act, and a primary component of their establishment - the "exclusive remedy" provision set forth in Section 303(a) of the Act and Section 303 of the Occupational Disease Act - is necessary in order to best appreciate the inherent defect in this effort to strip Alcoa, Inc. of its immunity from the civil suit filed by the husband of its former employee.

Indeed, the Pennsylvania Supreme Court has observed that while the language of the Acts varies slightly, "the same analysis of the historical underpinnings of the exclusive remedy doctrine applies equally to both." Barber v. Pittsburgh Corning Corporation, 521 Pa. 29, \_\_\_, 555 A.2d 766, \_\_\_ (1989).

1. The Social and Economic Factors Underlying the Pennsylvania Workers' Compensation Act.

The standard characterization of the Pennsylvania Workers' Compensation Act is that of a remedial law that was enacted in the wake of a developing industrial revolution in order to provide employees and their families with a guaranteed means of obtaining compensation for work injuries that were becoming more common and more severe. Wagner v. National Indemnity Company, 492 Pa. 154, 161-62, 422 A.2d 1061, 1068 (1980).

The law also aimed to reduce employer litigation cost and to relieve employers from the unpredictable and potentially devastating results occasioned by civil tort litigation.

Before workers' compensation was introduced to Pennsylvania, the traditional tort system had become an unsatisfactory means of adjudicating occupational injuries and accidents.

This was so, from the employee perspective, because employers generally prevailed in personal injury lawsuits through the interposition of three reliable affirmative defenses: assumption of the risk, contributory negligence and the co-employee rule. Keller v. Old Lycoming Township, 286 Pa. Super. 339, 428 A.2d 1358 (1981).

From the employer perspective, frequent success in the civil forum came with a price. The cost of discovery, expert witnesses, attorney fees, jury trials, and appeals began to impose an acute financial burden, while the employer faced the possibility that the injured worker might actually prevail, exposing the employer to substantial damages awards for wage loss, medical treatment and the more intangible claims for loss of consortium, pain and suffering and punitive damages.

The convergence of the new industrial economy with the traditional tort system brought to bear the worst of all worlds: (1) too many workers were becoming physically incapable of supporting themselves and their families; (2) too many workers and their families were unable to obtain financial relief in the courts; (3) the public was being asked to assume responsibility for injured workers and their families as "wards of the state"; (4) there was little incentive for employers to improve safety conditions in the workplace; (5) employers were being forced to expend increased costs to defend employee tort claims; and (6) both sides lacked a satisfactory degree of predictability in handling their affairs:

"Prior to workers' compensation, the traditional common law tort system of recovery often proved inadequate for injured workers [because] [t]he common law defenses available to employers left many injured workers without compensation. With little financial incentive for employers to improve work place safety the number of industrial accidents escalated and society became increasingly burdened with providing for disabled workers."

Note, *Intentional Employer Misconduct and Pennsylvania's Exclusive Remedy Rule after Poyser v. Newman & Co.: A Proposal For Legislative Reform*, 49 U.PITT.L.REV. 1127 (1988).

The new paradigm had become intolerable.

Indeed, the civil tort system simply could not accommodate the needs and interests of both employees and employers.

For that reason, the Commonwealth of Pennsylvania, along with a number of other states, began to study the feasibility of adopting workers' compensation legislation similar to programs that had been introduced in Germany and England.

In 1911, the Pennsylvania legislature established a Commission that was appointed in order to study the operation and effect of proposed workers' compensation legislation.

In 1912, the Industrial Accidents Commission published proposed legislation designed to provide injured workers with wage loss compensation and medical coverage that was modeled on the British Workman's Compensation Law of 1906. See PENNSYLVANIA WORKERS' COMPENSATION LAW AND PRACTICE § 1:26 (Thomson-West, 2<sup>nd</sup> ed., 2002).

Thereafter, in 1913, the Legislature authorized the appointment of an industrial accidents commission to study the causes and ramifications of industrial accidents, methods for improving occupational safety and the operation and effect of the proposed

Workman's Compensation Law of 1913. See Historical and Statutory Notes, 77 P.S. (Purdon's Pennsylvania Statutes Annotated 1992).

Two years later, on June 2, 1915 "The Pennsylvania Workman's Compensation Act"<sup>1</sup> was enacted. For the first time in the Commonwealth of Pennsylvania, employer liability for work-related accidents would be assessed on a no-fault basis:

"[The Act was designed] to provide for prompt payment of all costs for all medical expense and reasonable income loss payments to the employee or his dependents; to reduce the costs and delays of personal injury court trials and eliminate unnecessary payments of fee to lawyers, witnesses as well as time consuming trials and appeals; and to accomplish this without assessing fault to the employee or employer while the employer is freed from the threat of court suit."

Greer v. United States Seteel Corp., 237 Pa. Super. 597, 352 A.2d 450, (1975) *rev'd* 475 Pa. 448, 380 A.2d 1221 (1977).

In an early ruling, the Supreme Court of Pennsylvania explained that the workers' compensation law sought to **replace** the unsatisfactory common law system:

"[A]ll will agree that its primary and general purpose was **to substitute** a method of accident insurance in place of common law rights and liabilities . . .It was a humanitarian measure, enacted in response to a strong public sentiment that the remedies afforded by actions at common law . . . had failed to accomplish that measure of protection against injuries and of relief in case of accident, which it was believed should be afforded the workman."

Blake v. Wilson, 268 Pa. 469, 112 A. 126, 15 A.L.R. 1467 (1920)(emphasis supplied).

In its original form, however, the Act did not deliver a complete substitution for the traditional tort system. For example, the Act, as it was originally drafted, was not mandatory, but elective, meaning that employers were permitted to opt out of the system,

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<sup>1</sup> In 1993 the name of the Act was changed to "The Pennsylvania Workers' Compensation Act." 77 P.S. § 1. The contemporary name for the legislation is used throughout the remainder of this submission.

forcing injured employees to seek relief in the traditional civil forum. Furthermore, the original version of the Act did not cover all injuries but only those arising out of “accidents”<sup>2</sup> and exposed employers to civil actions for contribution or indemnification by third-parties targeted by the injured worker. Finally, and perhaps most conspicuously, the original version of the Act omitted coverage for occupational disease claims.

For disease claims, the occupational tort system was particularly anachronistic since liability remained tethered to negligence in industries where work involved exposures to inherent health risks. The shortcomings of the tort system – as it was implemented for occupational disease claims – became quite celebrated.

Accordingly, in 1939, the Legislature afforded no-fault coverage for occupational disease claims by enacting “The Pennsylvania Occupational Disease Act,”<sup>3</sup> and in 1972 as discussed in detail below, incorporated occupational disease coverage into the injury Act.

It is clear, therefore, that despite an early hesitance to afford no-fault coverage for disease claims, the Legislature was determined to substitute the unsatisfactory common law system with the administrative system for all occupational injuries and diseases.

## **2. The “Exclusive Remedy Provision”**

The transition from the traditional tort system to a no-fault system necessarily required employers and employees to engage a fundamental *quid pro quo*:

"On the one hand, the employer is forced to surrender the numerous defenses which might be available in an employee's action at common law. However, the injured employee's recourse is strictly confined to those remedies

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<sup>2</sup> As discussed below, the original language that predicated recovery upon the occurrence of an “accident” thereby affording the injured employee the opportunity to seek civil damages against the employer for intentional torts. See Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963).

<sup>3</sup> The Act was amended in 1937 to include disease coverage. For various reasons, however, the amendments were soon repealed.

provided by the statute itself, thus providing the employer with some degree of certainty in its legal affairs."

Alston v. St. Paul Insurance Companies, 389 Pa. Super. 396, \_\_\_\_, 567 A.2d 663, 665 (1989).

The legal mechanism that facilitated this trade-off came in the form of what is commonly referred to as the "exclusive remedy provision," set forth in Section 303(a) of the contemporary version of the Act as follows:

"The liability of an employer under this act shall be exclusive and in place of **any and all other liability** to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages **in any action at law** or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in Section 108."

77 P.S. §481(a). (emphasis supplied).<sup>4</sup>

Section 303 of The Occupational Disease Act includes similar language:

"Such agreement shall constitute an acceptance of all the provisions of article three of this act, and **shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any disability or death resulting from occupational disease, or to any method of determination thereof**, other than as provided in article three of this act. Such agreement shall bind the employer and his personal representatives, and the employe, his or her wife, or husband, widow or widower, next of king, and other dependents."

77 P.S. § 1403 (emphasis supplied).

The Pennsylvania Supreme Court has observed that the language of Section 303 of Occupational Disease Act actually "is stronger than that used in the [Workers' Compensation Act] in that it clearly states that acceptance of the [Occupational Disease]

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<sup>4</sup> As discussed below, the Pennsylvania Supreme Court has declared the exclusive remedy provision constitutional. Kline v. Arden H. Verner Company, 503 Pa. 251, 469 A.2d 158 (1983).

Act operates as a forfeiture by the employee of any and all common law causes of action that the injured employee may wish to pursue.” Barber v. Pittsburgh Corning Corporation, 521 Pa. 29, \_\_\_, 555 A.2d 766, \_\_\_ (1989).

A corollary to the exclusive remedy provision is the well-settled proposition that when applicable, the Act deprives common pleas courts of subject matter jurisdiction over civil actions that seek damages from employers for the effects of work-related injuries. Blouse v. Superior Mold Builders, Inc., 363 Pa. Super. 516, 526 A.2d 798 *citing* LeFlar v. Gulf Creek Industrial Park #2, 511 Pa. 574, 580, 515 A.2d 875, 879 (1986).

### **3. Expansion of Workers’ Compensation Coverage and Employer Immunity from Civil Suit.**

As foreshadowed above, when it was originally drafted, the Pennsylvania Act was not a complete substitute for the erstwhile common law regime.

The relative inadequacy of coverage for occupational injuries and diseases in Pennsylvania and in other jurisdictions, along with other perceived deficiencies, prompted threats of federal preemption of the individual state programs.

When it enacted the Occupational Safety and Health Act of 1970, the United States Congress articulated its concerns over the state workers’ compensation laws as follows:

“The vast majority of American workers, and their families, are dependent on workmen’s compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen’s compensation as well as an effective program of occupational health and safety regulation...In recent years, serious questions have been raised concerning the fairness and adequacy of present workmen’s compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of

employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.”

See, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS INTRODUCTION & SUMMARY (JULY 31, 1972).

Compelled to “undertake a comprehensive study and evaluation of State workmen’s compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation” Congress established the “National Commission on State Workmen's Compensation Laws;” a blue-ribbon panel of fifteen members that included representatives from State workers’ compensation agencies, the business community, organized labor, insurance carriers, the medical profession, educators and the general public.

Following a comprehensive re-examination of the history, evolution and efficacy of “workmen’s compensation in light of historical changes noted by Congress,” the Commission submitted its Report to Congress and the President on July 31, 1972.

The primary observation of the Commission was simple – although the State workers’ compensation laws at the time were “neither adequate nor equitable” the no-fault regime remained superior to the traditional tort system.<sup>5</sup>

Indeed, the Commission firmly rejected the notion advanced by some that state workers’ compensation programs should be abolished and that employers and employees should return to the tort system that was “abandoned 50 years ago”:

“This [traditional tort law] option is still inferior to workmen’s compensation: its deficiencies include uncertainties for both employer and worker and the

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<sup>5</sup> The Commission articulated five major objectives of workers’ compensation legislation: (1) broad coverage of employees and of work-related injuries and diseases; (2) substantial protection against interruption of income; (3) provision of sufficient medical care and rehabilitation services; (4) encouragement of safety; and (5) an effective system for delivery of the benefits and services.

substantial costs arising from litigation over the degree and source of impairment. Such litigation also has serious adverse effects on efforts at rehabilitation.”

See, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS (JULY 31, 1972) at 25.

The Commission issued a series of formal recommendations, most of which insisted that the workers’ compensation law become a **complete substitution** for the traditional common law scheme:

(a) “We recommend that coverage by workmen’s compensation laws be compulsory and that no waivers be permitted;”

(b) “We recommend that the ‘accident’ requirement be dropped as a test for compensability;”

(c) “We recommend that all States provide full coverage for work-related diseases;”

(d) “We recommend that workmen’s compensation benefits be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease;” and

(e) “We recommend that suits by employees against negligent third parties generally be permitted. Immunity from negligence actions should be extended to any third party performing the normal functions of the employer.”

See, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS (JULY 31, 1972) at 7-18.

The Commission’s fundamental conclusion was that claims arising out of occupational injury and disease should be addressed exclusively within a no-fault system.

4. Pennsylvania Response to the Report of the National Commission on State Workmen's Compensation Laws.

Seeking to comply with the National Commission's injunction that the administrative apparatus of workers' compensation legislation be expanded to include **all** work-related injuries and diseases and should constitute the exclusive means for compensating such conditions, the Pennsylvania Legislature took appropriate action.

In 1972, the Legislature broadened the Act to cover all work-related physical and emotional conditions. It did so by converting the traditional compensability phrase "**accident** in the course of employment" into the contemporary phrase "an **injury** to an employe...arising in the scope of his employment and related thereto". Alston v. St. Paul Insurance Companies, 389 Pa. Super. 396, 567 A.2d 663, 670, n.1 (1989).<sup>6</sup>

Two years later, in 1974,<sup>7</sup> the Legislature eliminated elective participation in the Pennsylvania system, Fonner v. Shandon, Inc., 555 Pa. 370, 724 A.2d 903 (1999), rendering the Act "a complete substitute for, not a supplement to, common law tort action." Hefferin v. Stempkowski, 247 Pa. Super. 366, 372 A.2d 869 (1977) (emphasis added). No longer could the employer opt-out of the Act and voluntarily expose itself to civil liability for the effects of an occupational injury.

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<sup>6</sup> As employer compensation liability was broadened, employer civil exposure was eliminated since the an injured employee could no longer seek civil damages against the employer simply by claiming that his or her injury resulted not from an "accident", but from an intentional act of the employer. See Barber v. Pittsburgh Corning Corporation, 521 Pa. 29, 555 A.2d 766 (1989) citing Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963); Brooks v. Marriott Corp., 361 Pa. Super. 350, 522 A.2d 618 (1987); McGinn v. Valloti, 363 Pa. Super. 88, 525 A.2d 732 (1987).

<sup>7</sup> In 1963 Section 205 of the Act was added, affording co-employees immunity from suit except in situations where the co-employee engaged in intentional wrong. 77 P.S. § 72.

In order to completely foreclose employer civil tort liability, the Legislature also adopted Section 303(b), which granted employers immunity from civil actions filed by third-party tortfeasors seeking contribution or indemnification:

"In the event injury or death to an employe is caused by a third party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, **may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at least their requests shall not be liable to a third-party for damages, contribution, or indemnity in any action at law,** or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in written contract entered into by the parties alleged to be liable prior to the date of the occurrence which gave rise to the action."

77 P.S. § 481(b) (emphasis supplied).<sup>8</sup>

In Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 412 A.2d 1094 (1980), the Supreme Court recognized that the purpose of Section 303(b) "was to restrict the remedy available to an employee against the employer to compensation, and to close to the employee, and to third parties, any recourse against the employer in tort for negligence." 488 Pa. at 519, 412 A.2d at 1097.

Section 305 of the Act extends the employer's immunity to workers' compensation insurers:

"Every employer liable under this act to pay compensation shall insure the payment of compensation in the State Workmen's Insurance Fund, or in any insurance company...authorized to insure such liability in this Commonwealth...**such insurer shall assume the employer's immunities and protection hereunder....** " (emphasis supplied).

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<sup>8</sup> The legislation, referred to as "Act 263 of 1974" became effective on February 3, 1975.

77 P.S. §501 (emphasis supplied).

The protection afforded to insurers has been maintained even in those instances where the injured worker accuses the carrier of intentional mishandling the worker's compensation claim.

In Kuney v. PMA Insurance Companies, 525 Pa. 171, 578 A.2d 1285 (1990), for example, the Pennsylvania Supreme Court ruled that the employer's workers' compensation carrier was immune from suit filed by an injured worker who alleged that the carrier had engaged in deceit and fraud in an effort to deprive him of those benefits to which he believed he was entitled under the Act. The facts in the case were not particularly noteworthy. The claimant filed a Claim Petition alleging that he had suffered an injury while in the course of his employment. During the course of the administrative proceedings he alleged that his employer's workers' compensation carrier had refused to provide him with benefits even though it was aware of the work injury and its ramifications. He also alleged that the carrier had sought to conceal its denial of his claim in order to defeat his claim. Ultimately, claimant was awarded benefits under the Act and was awarded counsel fees for the carrier's unreasonable contest of his claim.

In conjunction with his administrative claim, claimant filed a civil action against the carrier seeking damages for the carrier's alleged fraudulent handling of his compensation claim. In dismissing the tort action, the Supreme Court reasoned that the remedies available to the injured worker for the ramifications of his work injury were limited to those provided by the Act. "The exclusivity provisions of the workers' compensation law prohibit a tort action against the insurance carrier for damages caused by the insurer's allegedly intentional mishandling of the injured employee's compensation claim." The Court held that "exclusivity is not destroyed and the employee does not acquire additional

remedies” where the Act fails to provide what the injured worker deems to be adequate compensation for injuries allegedly sustained.

The Pennsylvania courts have foreclosed employee access to the civil courts by extending employer/insurer immunity to agents retained to assist in the administration of workers’ compensation claims.

In Alston v. St. Paul Companies, 531 Pa. 261, 612 A.2d 421 (1992), the employee suffered injury to his upper extremities, neck and back after falling from a ladder in the course of his employment. His workers’ compensation claim was accepted as compensable. Thereafter, the workers’ compensation carrier retained a vocational rehabilitation company to monitor claimant’s work-related condition. While doing so, the company assigned claimant’s case to a vocational rehabilitation nurse who urged claimant to participate in an examination with an orthopedic surgeon. Following the examination, the orthopedic surgeon declared claimant fully recovered from his work injury, prompting the carrier to offer claimant a lump sum settlement of his claim. When claimant refused the settlement offer, the carrier filed a Termination Petition in an effort to end its liability for wage loss and medical benefits under the Act. Although claimant was successful in defeating the Termination Petition, he nevertheless filed a civil tort action against the workers’ compensation carrier the vocational rehabilitation company and the orthopedic surgeon, seeking compensatory and punitive damages for their conspiracy to defraud claimant of his benefits under the Act. 531 Pa. at \_\_\_, 612 A.2d at \_\_\_.

In affirming the dismissal of the civil action, the Pennsylvania Supreme Court was emphatic that the Act provides the exclusive forum for resolving all disputes arising out of a claim for workers’ compensation benefits: “The workmen’s compensation system encompasses all disputes over coverage and the payment of benefits, whether they arise

from actions taken by the employer, the employer's insurance carrier, or the insurance carrier's employees or agents."

In yet another effort to broaden workers' compensation coverage, the Pennsylvania Legislature further amended the Act in 1974, extending no-fault liability, and the attendant immunity from civil suit, to the so-called "statutory employer," that is, "a master [of the injured worker] who is not a contractual or common-law [employer] but is made one by the Act." 77 P.S. §§ 52, 462; Peck v. Delaware County Board of Prison Inspectors, 572 Pa. 249, 814 A.2d 185 (2002) *quoting* McDonald v. Levinson Steel Co., 301 Pa. 287, \_\_\_, 152 A. 424, 425 (1930). **This is so even in those instances where the non-employer is not required to provide the injured worker benefits under the Act.** Peck v. Delaware County Board of Prison Inspectors, *supra*, *citing* Fonner v. Shandon, Inc., 555 Pa. 370, 724 A.2d 903 (1999).<sup>9</sup>

##### 5. One Statutory Exception to the Exclusive Remedy Provision.

Though it has been encouraged by the plaintiffs' bar to create various exceptions to the exclusive remedy provision, the Legislature has enacted only two.

Section 205<sup>10</sup> of the Act is an unequivocal exception to the rule – an employee who intentionally injures a co-employee is subject to tort liability.

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<sup>9</sup> The typical statutory employer fact pattern is found in the construction industry. The property owner hires a general contractor, who, in turn, hires a subcontractor to perform specialized work on the jobsite. The employee of the subcontractor suffers injury while performing duties on the site. The subcontractor fails to procure workers' compensation insurance, requiring the general contractor to emerge from its reserve role and assume liability for the injury under the Act. While sympathetic to the argument advanced by injured workers that the general contractor should not be immune from suit where it is not forced to provide workers' compensation coverage, the Supreme Court has refused to declare the payment of compensation a prerequisite for the statutory employer immunity. Fonner v. Shandon, Inc., 555 Pa. 370, 724 A.2d 903 (1999).

<sup>10</sup> 77 P.S. § 72.

Section 305(d) of the Act permits the injured employee to seek damages by civil action for a work-related injury or disease where the employer has failed to secure workers' compensation insurance coverage:

“When any employer fails to secure the payment of compensation under this act as provided in sections 305 and 305.2, the injured employee or his dependents may proceed either under this act or in suit for damages at law as provided by article II.”

77 P.S. §501(d).<sup>11</sup>

While the foregoing provision constitutes an “exception,” in the strictest sense, it is better construed as a punitive measure designed to funnel all occupational injury and disease claims through the no-fault system.

Finally, Section 301(c)(1) of the Act provides, in pertinent part, as follows:

“The term ‘injury arising in the course of his employment,’ as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment.”

77 P.S. §411(2).

While some might construe the foregoing provision as an “exception” to the exclusive remedy rule, the better interpretation is that the section merely clarifies one element of compensability – injury arising out of employment.<sup>12</sup>

The language of Section 301(c)(1),<sup>13</sup> contemplates a scenario where the employee imports a personal risk into the workplace. Because the imported dispute is “personal,”

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<sup>11</sup> Article II of the Act establishes the parameters for such civil claims. For example, Section 201 of the Act strips the employer who has failed to secure workers' compensation insurance of the affirmative defenses normally available to alleged civil tortfeasors; namely contributory or comparative negligence, assumption of the risk and co-employee negligence. 77 P.S. §41.

<sup>12</sup> Section 301(c)(1) sets forth the elements of compensability: (1) employer-employee relationship; (2) injury; (3) occurring in the course of employment; and (4) arising out of employment. 77 P.S. § 411.1.

the ensuing injury is not viewed as having resulted from actions taken by the employee in furtherance of the business interests of his or her employer, rendering the injury non-compensable.<sup>14</sup>

Ultimately, therefore, the exclusive remedy provision for employers remains a nearly pristine component of the Pennsylvania Act that the courts and the Legislature have refused to pierce.

6. **Efforts to Create Judicial “Intentional Tort” Exception to the Exclusive Remedy Provision.**

Efforts over the years in Pennsylvania to create the so-called “intentional tort exception”<sup>15</sup> to the exclusive remedy provision of the Act have failed.

In the seminal case, Poyser v. Newman & Company, Inc., 514 Pa. 32, 522 A.2d 548 (1987), the Pennsylvania Supreme Court, reasoned that since the Legislature did not incorporate an intentional tort exception into the statute, it was constrained from doing so:

"Since it is clear that the legislature had the issue of intentional harm in mind, and yet did not mention it in connection with Section 303(a), we are constrained to conclude that the legislature did not intend the result for which the [employee] argues."

514 Pa. at \_\_\_\_, 522 A.2d at 548.

The Poyser case involved an employee, who, while operating a "notching" machine designed by the employer, lost a portion of his small finger when his hand came into contact with six sharp blades that spun while the machine operated. In

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<sup>13</sup> 77 P.S §411(1).

<sup>14</sup> For example, in the midst of contentious divorce proceedings, the employee’s estranged husband enters the employee’s workplace and assaults the employee. Under such circumstances the employee’s injury is not considered to have arisen out of the employment relationship but involves a personal dispute brought into the workplace.

<sup>15</sup> The reference “intentional tort” is perhaps a misnomer since the concept encompasses acts of indifference or gross negligence.

addition to various other claims, the employee brought an intentional tort suit against his employer alleging that the employer was aware that the design of the notching machine violated OSHA standards yet knowingly prohibited its workers from using a "feeding" device that would have greatly reduced the possibility of hand injury. The employee further alleged that the employer had removed the machine from its premises in order to prevent OSHA regulators from observing the defect during a routine inspection.

Although the Court found the employee's argument "interesting" that the employer's deceitful actions "should disqualify it from having the protection of [Section 303(a)]" it, nevertheless, refused to carve out an "intentional tort exception" to the exclusive remedy provision which, in its view, the Legislature "did not see fit to put there." *Id.*

The ruling in Poyser has remained the law of the land.

In Blouse v. Superior Mold Builders, Inc., 363 Pa. Super. 516, 526 A.2d 798 (1987), this Honorable Court held that the ruling in Poyser precluded a group of employees from seeking civil damages for injuries allegedly caused by intentional and fraudulent exposures to toxic chemicals. The employees in Blouse alleged in support of their civil tort action that their employer had intentionally failed to warn them of known dangers inherent in chemicals to which they had been exposed. Indeed, the employees asserted that the employer had knowingly removed warning labels from the containers in which the toxic chemicals had been stored. In affirming the trial court's dismissal of the plaintiffs' civil complaint, however, this Honorable Court ruled that "Poyser is controlling of the instant case." 363 Pa. Super. at \_\_\_\_ 526 A.2d at 801. See also Snyder v. Specialty Glass Products, Inc., 441 Pa. Super. 613, 658 A.2d 366 (1995).

In Barber v. Pittsburgh Corning Corporation, 521 Pa. 29, 555 A.2d 766 (1989), the Supreme Court was asked to determine whether an exception to the exclusive remedy provision of the Occupational Disease Act existed “for injuries to employees caused by the alleged intentional misconduct of their employer.”

The initial civil action at issue was consolidated in the Allegheny Court of Common Pleas with two other similar actions, that together involved seventy-five former and current employees and their spouses “who claimed they were injured and damaged as a result of exposure to asbestos dust” in the course of their employment.

Following the trial court’s granting of the defendants’ motion for summary judgment, this Honorable Court reversed the trial court ruling, following which the issue was presented to the Supreme Court.

In affirming the dismissal of the employees’ civil action, the Court declared that its ruling in Poyser was “dispositive.”

It is important to recognize that the employees’ allegations in Barber were even more provocative than those alleged in this case: (1) the employer knew of the danger of asbestos exposure but deliberately did nothing to protect the workers; (2) the employer allowed the levels of asbestos dust in the workplace to “substantially exceed the safe levels recommended by experts and government standards”; (3) the employer deliberately refused to implement safety standards recommended by its own engineering team, which would have reduced airborne levels of asbestos dust; and (4) the employer “knowingly decided not to warn employees of the health hazard presented by exposure to high levels of asbestos dust.” 521 Pa. at \_\_\_, 555 A.2d at \_\_\_.<sup>16</sup>

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<sup>16</sup> The employer admitted that its employees were exposed to asbestos and that it knew or should have known that the work conditions constituted a health hazard. The employer also admitted

In refusing to create an intentional tort exception in the appalling occupational setting described above, the Court once again felt constrained from doing so, while taking note of the Legislature's conspicuous inaction since the circulation of its ruling in Poyser:

"In this Court's decision in Poyser, supra, we expressly held under similar provisions of the WCA that there was no intentional tort exception to the exclusivity provision of the WCA. **That decision, filed in March 1987, apprised the General Assembly that the WCA, as interpreted by this Court, preserved no common law cause of action for intentionally inflicted harm.** Now, two years later, the legislature has not acted in any way, nor in any manner which would indicate that that decision did not reflect their intention. Because of the similarity of the two provisions, our action in Poyser was a clear signal that the same result would likely obtain under the ODA when and if the question was raised. The legislature has not attempted, since our decision in Poyser, to indicate that such an interpretation, although proper under the WCA, should not be applicable to the ODA. Since we find no basis in the statutory scheme to make such a distinction, we must accept the view that the legislature intended the same result under the ODA."

521 Pa. at \_\_\_\_ 555 A.2d at 772.

7. **Efforts to Establish "Dual Capacity" Exception to Exclusive Remedy Provision.**

Other strategies aimed at piercing the employer's tort immunity, such as the "dual capacity doctrine,"<sup>17</sup> failed to convince the Court to usurp the role of the Legislature.

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that it did not adequately protect its employees and that it did not sufficiently warn the employees of the risk involved. Finally, the employer admitted that it inaccurately represented to its employees that the work area conditions were safe.

<sup>17</sup> "Under this doctrine, an employer normally shielded from tort liability should be liable in tort to his own employee if, in addition to its capacity as the employer, it occupies a second capacity that confers obligations independent of those imposed by the Act." 2 A. LARSEN, WORKMEN'S COMPENSATION LAW, § 72.80 (1976).

In Budzichowski v. Bell Telephone Company of Pennsylvania, 503 Pa. 160, 469 A.2d 111 (1984), for example, the injured worker sought civil damages for the alleged medical malpractice committed by co-employees who were designated to treat injuries he sustained while in the course of his employment. In that case, plaintiff fell as he attempted to ward off a dog while installing a telephone at a customer's private residence. He reported to the Bell Medical Dispensary for treatment where he was allegedly misdiagnosed and treated by two Bell Telephone doctors. Following the Superior Court's affirmance of the trial court's dismissal of plaintiff's complaint, per the exclusive remedy provision, the Supreme Court affirmed, reasoning that plaintiff's injury was strictly work-related since the Bell Dispensary was not serving a dual purpose of treating both members of the general public **and** Bell Telephone employees, but was operating only "in its capacity as employer of [plaintiff]".

The Supreme Court's refusal to adopt the "dual capacity" doctrine has probably had the most impact in products liability cases such as Heath v. Church's Fried Chicken, Inc., 519 Pa. 274, 546 A.2d 1120 (1988). The Heath case involved an employee of a fried chicken outlet who was injured while operating a "chicken saw" that had been manufactured by the employer. The Court refused to accept the plaintiff's reasoning that a separate relationship between her and the employer-manufacturer had been created – a consumer-manufacturer relationship as opposed to the employer-employee relationship - thereby permitting the proposed civil action to proceed. The Court reasoned that since the employee was injured while actually engaged in the performance of her job, her remedies against her employer were limited to those afforded by the Act.

The evolution of the Pennsylvania Workers' Compensation Act leaves no doubt that one of its primary components – the exclusive means for compensating any and all

occupational injury and disease claims – remains fully intact, thereby limiting the injured worker or the worker’s family to whatever relief the Act provides.

8. **The Effect of Substantive Restrictions on Recovery Under the Act.**

The notion advanced by plaintiff that a tort cause of action sounding in negligence must be allowed to proceed where a worker’s claim for benefits is prohibited by a substantive provision of the Act, ignores a basic compromise that the Act engenders – the injured employee is afforded a very favorable opportunity to recover in a no-fault system, but the extent of recovery is strictly limited.

The most celebrated example is the unavailability of intangible damages such as “pain and suffering” or “loss of consortium.”

In Kline v. Arden H. Verner Company, 503 Pa. 251, 469 A.2d 158 (1983), the Supreme Court acknowledged that an employee who developed impotence following a work-related fall from a ladder was constrained from recovering intangible damages under the Act:

**“The workmen’s compensation law has deprived some of rights in exchange for surer benefits, immunized some, to make possible resources to benefit many, who were heretofore without possible or practical remedies.”**

503 Pa. at \_\_\_, 469 A.2d at \_\_\_. (emphasis supplied).<sup>18</sup>

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<sup>18</sup> Recovery limitations can result from the application of procedural rules set forth in the Act. For example, an employee who fails to file a Claim Petition seeking an award of benefits under the Act for a garden variety work injury within the three-year limitations period set forth in Section 315 of the Act loses the right to recover wage loss benefits or medical expenses since Sections 315 is a “statute of repose.” See Westinghouse Electric Corporation/CBS v. Workers’ Compensation Appeal Board, 584 Pa. 411, 883 A.2d 579 (2005); Schreffler v. Workers’ Compensation Appeal Board (Kocher Coal Company), 567 Pa. 527, 788 A.2d 963 (2002); Berwick Industries v. Workmen’s Compensation Appeal Board (Spaid), 537 Pa. 326, 643 A.2d 1066 (1994), meaning that a worker’s failure to act within the three-year limitations period extinguishes both the remedy sought and the actual cause of action. Westinghouse Electric Corporation/CBS v. Workers’ Compensation Appeal Board, *supra*; Riggle v. Workers’

The Act includes additional substantive restrictions that either prohibit or significantly limit the injured employee's entitlement to compensation following the occurrence of a work injury or disease. Indeed, the intrinsic "compromise" cited by the Court in Kline can be found in numerous instances.

For example, Section 306(c) (1-21)<sup>19</sup> of the Act permits the injured employee to recover a scheduled number of "specific loss" weeks of compensation for the work-related loss of use a body member such as a hand, a foot or a leg, but **prohibits** the employee from recovering wage loss benefits flowing from the loss of the appendage. See Mathies Coal Company v. Workmen's Compensation Appeal Board (Henry), 114 Pa. Cmwlth. 11, 538 A.2d 590 (1988); Bethlehem Mines Corp. v. Workmen's Compensation Appeal Board (Kozlovac), 108 Pa. Cmwlth. 317, 529 A.2d 610 (1987).

Section 306(c)(22)<sup>20</sup> of the Act entitles the injured employee to recover "specific loss" benefits for a work-related "disfigurement" to the "head, neck or face" that is permanent and unsightly, but **prohibits** the employee from recovering benefits for disfigurement to the arms, hands, legs or lower back. See United States Steel Corp. v. Workmen's Compensation Appeal Board (Gouker), 52 Pa. Cmwlth. 641, 416 A.2d 619 (1980).

Section 306(8)(iii)<sup>21</sup> of the Act entitles the injured employee to recover hearing loss benefits calculated by using the binaural formula set forth in the AMA Guides to the Evaluation of Permanent Impairment, **but only for occupational hearing loss that**

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Compensation Appeal Board, (Precision Marshal Steel, Co.), 890 A.2d 50 (Pa. Cmwlth. 2006). The extinguishing of the remedy potentially available under the Act does not, however, convey upon the employ the right to seek relief through the filing of a civil tort action.

<sup>19</sup> 77 P.S. § 513.

<sup>20</sup> 77 P.S. § 513.

<sup>21</sup> 77 P.S. § 513.

**exceeds 10% under the Impairment Guides**, meaning that the employee who suffers a bona fide occupational hearing loss of 10% or less is prohibited from recovering benefits under the Act.

Section 301(a)<sup>22</sup> **prohibits** the employee from recovering benefits under the Act where the work injury results from the employee's violation of law or the employee's intoxication<sup>23</sup> or where the employee's injury is self-inflicted.

Sections 105.2<sup>24</sup> and 306(a)(1)<sup>25</sup> limit the injured employee's wage loss recovery, e.g. where the injured employee who earns a wage of \$2,884.62 per week<sup>26</sup> becomes disabled as a consequence of a 2007 work injury, he or she may only recover wage loss benefits at the reduced rate of \$779.00 per week.

An employee who suffers what is commonly referred to as a "mental-mental" work injury - a psychic injury resulting from work-related stress - is **prohibited** from recovering either wage loss or medical compensation benefits where the stress is caused by normal working conditions. See Philadelphia Newspapers, Inc. v. Workmen's Compensation Appeal Board (Guaracino), 544 Pa. 203, 675 A.2d 1213 (1996)(worker exposed to profane episode of harassment by supervisors suffers non-compensable psychic injury); Pate v. Workmen's Compensation Appeal Board (Boeing Vertol Co.), 104 Pa. Cmwlth. 481, 552 A.2d 166 (1987), *appeal denied*, 517 Pa. 611, 536 A.2d 1335, *cert.*

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<sup>22</sup> 77 P.S. § 431.

<sup>23</sup> The "intoxication" limitation was added to Section 301(a), 77 P.S. § 431, by Act 44 of 1993, as remedial legislation that sought to reduce the cost of Pennsylvania work injuries. See City of Philadelphia v. Workers' Compensation Appeal Board (Cronin), 706 A.2d 377 (Pa. Cmwlth. 1998).

<sup>24</sup> 77 P.S. §25.2. Section 105.2 provides that the maximum weekly compensation rate assigned to a given year is calculated by multiplying by sixty-six and two-thirds the Statewide Average Weekly Wage, which is determined annually by the Department of Labor & Industry.

<sup>25</sup> 77 P.S. §511(1).

<sup>26</sup> Yielding an annual wage of \$150,000.00.

*denied*, 484 U.S. 1064, 108 S. Ct. 1025, 98 L. Ed.2d 989 (1988)(helicopter manufacturing worker who was subject to repeated criticism over workmanship suffers non-compensable psychic injury); Wilson v. Workmen's Compensation Appeal Board (Alcoa), 542 Pa. 614, 669 A.2d 338 (1996) (employee who is transferred from prestigious work assignment to more menial job suffers non-compensable psychic injury).<sup>27</sup>

These substantive restrictions do not abrogate coverage for work-related injuries and diseases. Moreover, they do not presume to convey upon the injured employee the right to seek damages through the filing of civil tort action. Quite the contrary - these substantive restrictions facilitate the administration of a no-fault regime by apportioning employer resources to benefit the many.

9. **Plaintiff Mistakes a Temporal Limitation on Recovery for Lack of Coverage.**

The provisions that plaintiff complains have precluded decedent's administrative claims - Section 301(c)(2) of the Act<sup>28</sup> and Section 301 (c) of the Occupational Disease Act - are **substantive** limitations<sup>29</sup> that have been described as "disease manifestation time

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<sup>27</sup> The inability of the injured employee to establish a compensable "mental-mental" claim under the Act does not entitle him or her to pursue civil damages. See Snyder v. Specialty Glass Products, Inc., 441 Pa. Super. 613, 658 A.2d 366 (1995); Papa v. Franklin Mint Corporation, 400 Pa. Super. 358, 583 A.2d 826 (1990)("If the employee fails to prove a compensable injury in workmen's compensation proceedings, such failure will not support a second attempt to prove injury in a common law tort action against the same employer.")

<sup>28</sup> 77 P.S. § 411(2).

<sup>29</sup> The Commonwealth Court has construed Section 301(c)(2) as a "statute of repose." See City of McKeesport v. Workers' Compensation Appeal Board (Miletti), 715 A.2d 532 (1998). It is respectfully submitted that such a description is probably inaccurate. A "statute of repose" is a **procedural** concept that defines the time within which a claim must be asserted. For example, Section 315 of the Act is clearly "procedural" because it prescribes a time period within which an original claim for benefits must be filed. It is submitted that Section 301(c)(2) is not "procedural" but "substantive" since it does demand that certain action be taken within a period of time, but rather establishes a "prerequisite to the ascertainment of the compensability of a certain disease." The distinction can be significant since procedural limitations,

restrictions.” D.B. TORREY, *Time Limitations in the Pennsylvania Workmen’s Compensation and Occupational Disease Acts: Theoretical Doctrine and Current Applications*, 24 DUQ. L.R. at 1012.

Section 301 (c)(2) of the Act instructs as follows:

“The terms ‘injury,’ . . . and ‘injury arising in the course of his employment,’ . . . shall apply only to disability or death resulting from such [occupational] disease and **occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease.** And provided further, that if the employe's compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable.”

77 P.S. § 411(2) (emphasis supplied).<sup>30</sup>

Section 301 (c) of the Occupational Disease Act similarly instructs as follows:

“The terms ‘injury,’ . . . and ‘injury arising in the course of his employment,’ . . . shall apply only to disability or death resulting from such [occupational] disease and **occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease.** And provided further, that if the employe's compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable. “

77 P.S. § 1401(c)(emphasis supplied).

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theoretically, can be enlarged through application of the “discovery rule.” See D.B. Torrey, “Time Limitations in the Pennsylvania Workmen’s Compensation and Occupational Disease Acts: Theoretical Doctrine and Current Applications,” 24 DUQ. L.R. at 1013.

<sup>30</sup> A good illustration of the substantive character of Section 301(c)(2) is provided when the provision is juxtaposed with the statute of repose set forth in Section 315 of the Act. It will be recalled that Section 315 generally requires that a Claim Petition seeking benefits under the Act be filed within three years of the subject work injury. If the employee were to die as a consequence of an occupational disease 299 weeks following his last date of employment the claimant would have three years from the date of death to file a Fatal Claim Petition. The substantive provision of Section 301(c)(2) and the procedural provision of Section 315 would permit the filing of the Fatal Claim Petition nearly nine years following the last date of employment with the target defendant.

These substantive restrictions do not abrogate administrative coverage for work-related diseases, but constitute practical limitations on the amount of benefits that employers and the public can provide for such occupational conditions. See Weldon v. The Celotex Corporation, 695 F.2d 67 (3<sup>rd</sup> Cir. 1982) *citing* Gawlick v. Glen Alden Coal Company, 178 Pa. Super. 149, 113 A.2d 346 (1955); Bethlehem Steel Corporation v. Gray, 4 Pa. Cmwlth. 590, 288 A.2d 828 (1972).

Indeed, the disease manifestation time restrictions presume that an allowance of all disease claims would cause a financial burden that the no-fault system could not possibly support, thwarting in its wake the essential goal of apportioning resources to benefit the larger work force community.

In Gray v. Bethlehem Steel Company, 4 Pa. Cmwlth. 590, 288 A.2d 828 (1972), the Commonwealth Court observed that “[l]imitations, because they are arbitrary, are often harsh. The benefits of The Pennsylvania Occupational Disease Act . . . are founded upon actuarial facts. **There is unhappily a practical limit to the amounts of benefits employers and the public can provide. This limit must be established by the Legislature possessed of all the facts, not by a court deciding one case, however unfortunate.**” 4 Pa. Cmwlth at 593-94, 288 A.2d at 829-30 (emphasis supplied).

Professor Larson has confirmed that the origin of disease manifestation time restrictions was the fear of legislators that the no-fault system would be unable to bear the financial impact of full liability for dust diseases.<sup>31</sup>

In Weldon v. The Celotex Corporation, *supra*, the Third Circuit was asked to address the same argument that plaintiff has advanced in this case.

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<sup>31</sup> See D.B. Torrey, “Time Limitations in the Pennsylvania Workmen’s Compensation and Occupational Disease Acts: Theoretical Doctrine and Current Applications,” 24 DUQ. L.R. at 1014-15 *citing* 3 A. Larson Workmen’s Compensation Law, § 41.81 (1983).

The plaintiff in Weldon filed a civil tort action against the employer seeking damages for the death of her husband which she attributed to occupational asbestos exposures. She also maintained that her husband's occupational disease was aggravated by the employer's failure to warn decedent of the health risk posed by his work-related exposures. In advancing her civil action, plaintiff argued, as plaintiff has argued in this case, that the exclusive remedy provision<sup>32</sup> did not shield the employer from civil liability because the disease manifestation time restriction set forth in Section 301(c) of the Occupational Disease Act<sup>33</sup> precluded a recovery of benefits.

The Third Circuit rejected plaintiff's argument, explaining that the restriction set forth in Section 301(c) does not withhold coverage of the diseases enumerated, but "only limits the time within which claims will be recognized." 695 F.2d at \_\_\_\_.

In other words, despite plaintiff's inability to recover compensation under the Occupational Disease Act, the "decedent's illness and death were within the ambit of the Act" thereby precluding the civil action. 695 F.2d at \_\_\_\_.

The distinction between a work injury that is "within the ambit of the Act" but does not yield an administrative recovery versus one that arises out of a work-related event but does not fall "within the ambit of the Act," is elucidated quite well by this Honorable Court's treatment of "defamation" actions brought by employees against their employers.

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<sup>32</sup> Since the occupational exposures occurred between 1952 and 1955, the applicable statute was the Pennsylvania Occupational Disease Act.

<sup>33</sup> Section 301(c) of the Occupational Disease Act provides that "[w]herever compensable disability or death is mentioned as a cause for compensation under this act, it shall mean only compensable disability or death resulting from occupational disease and occurring within three years after the date of his last employment in such occupation or industry."

This Honorable Court has ruled that such actions are not barred by the exclusive remedy provision because the Act does not provide coverage for an injury to reputation, i.e. “defamation” is not cognizable under the Act.

In a thoughtful dissenting opinion issued in Hammerstein v. Lindsay, 440 Pa. Super. 350, 655 A.2d 597 (1995), which was adopted as the law of the land four years later in Urban v. Dollar Bank, 725 Pa. Super. 815 (Pa. Super. 1999), Judge Wieand reasoned that:

“[A] defamation action seeks damages for the harm caused to one’s **reputation**.<sup>34</sup> . . . The essence of the [defamation] action therefore, is not to compensate one for an ‘injury’ as contemplated by the Worker’s (sic) Compensation Act, i.e. a physical or emotional impairment to one’s person which often requires medical treatment. . . **No provision is made in the Worker’s (sic) Compensation Act for the recovery of damages for harm to one’s reputation.** Because there is relation between the injuries sought to be addressed by the Worker’s Compensation Act and the harm or damage alleged in appellant’s defamation action, I would hold that the Act does not allow benefits therefore. For this reason, appellant’s slander action against appellee is not within the exclusivity clause of the Act.”

655 A.2d at 605-06. (emphasis supplied).

The disease process alleged by plaintiff in this case differs from an injury to reputation in a fundamental way - the Act and the Occupational Disease Act afford coverage for the effects of the former, but not the latter. Plaintiff’s civil action misapprehends that contrary to the defamation injury Judge Wieand addressed in Hammerstein, the occupational injury he has alleged falls within the ambit of the Act, even though the Act may not yield a recovery of compensation benefits.

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<sup>34</sup> Judge Wieand quoted this Honorable Court in Berg v. Consolidated Freightways, Inc., 280 Pa. Super. 495, 500, 421 A.2d 831, 833 (1980) that “an action for defamation is based on a violation of the fundamental right of an individual to enjoy a reputation unimpaired by false and defamatory attacks. The gist of such an action is injury to the plaintiff’s reputation.”

Plaintiff's reliance on the holdings in Greer v. United States Steel Corporation, 475 Pa. 448, 380 A.2d 1221 (1977), Boniecke v. McGraw-Edison, 485 Pa. 163, 401 A.2d 345 (1979) and Pollard v. Lord Corporation, 445 Pa. Super. 109, 664 A.2d 1032, affirmed 548 Pa. 124, 615 A.2d 767 (1997) is misplaced.

In Greer and Boniecke, the Supreme Court merely recognized that where the employee suffers from an occupational disease that is not covered by Section 108 of the Occupational Disease Act, a tort action against employers can be maintained.<sup>35</sup>

In this case, decedent's alleged condition - "asbestosis" - is specifically covered in Section 108(l)<sup>36</sup> of the Occupational Disease Act and in Section 108(l) of the Act and is therefore cognizable<sup>37</sup> under the administrative schemes.

The coverage provided, as described above, is not without limitation. Rather, as noted, the disease manifestation time restrictions place limits on what recoveries are permitted under both Acts.

Plaintiff's complaint that the disease manifestation time restrictions are analogous to those situations where the occupational disease is not covered by the Occupational Disease Act fails to distinguish "coverage" from "limitations" on administrative recovery.

To paraphrase the Third Circuit in Weldon, the plaintiff in this case "mistakes a temporal limitation on recovery [under the two Acts] for a lack of coverage [under the two Acts]."

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<sup>35</sup> The ruling in Pollard, described as "anomalous," has limited precedential value since it was issued by an evenly divided court.

<sup>36</sup> 77 P.S. § 1208.8.

<sup>37</sup> Cognizable in the sense that the disease is "capable of being tried or examined before a designated tribunal." See Black's Law Dictionary, 5<sup>th</sup> ed. (1979).

It is inescapable therefore that the rulings in Poyser v. Newman & Company, Inc., supra, Barber v. Pittsburgh Corning Corporation, supra, Kline v. Arden H. Verner Company, supra, and Blouse v. Superior Mold Builders, Inc., supra, are unassailable and controlling of the outcome in this case – plaintiff’s remedies are limited to those afforded by the Pennsylvania Workers’ Compensation and the Pennsylvania Occupational Disease Acts.

Since the exclusive remedy provision remains intact in this case, the instant civil action should be dismissed as a matter of law.

**10. Civil Exposure Would Increase the Cost of Pennsylvania Work Injuries.**

The Pennsylvania Workers’ Compensation Act has undergone four major revisions since 1987 – “Act 44 of 1993,”<sup>38</sup> which overhauled the manner in which work-related medical bills are priced and reviewed; “Act 1 of 1995,” which established a structured methodology for assessing occupational “hearing loss” claims,<sup>39</sup> “Act 57 of 1996”<sup>40</sup> which provided employers with indemnity offsets, introduced Compromise and Release settlements, Impairment Ratings and an innovative vocational earning power

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<sup>38</sup> The primary purpose of Act 44 was to control medical costs associated with work-related injuries. County of Allegheny v. Workers’ Compensation Appeal Board (Geisler), 875 A.2d 1222 (Pa. Cmwlth. 2005).

<sup>39</sup> Prior to the enactment of Act 1 of 1995, the claimant had the burden of establishing a complete loss of hearing for all practical intents and purposes, i.e., the loss prevented the claimant from functioning in his/her usual social, work and familial settings. ARMCO, Inc. v. Workmen's Compensation Appeal Board (Carrodus), 139 Pa.Cmwlth. 326, 590 A.2d 827 (1991), appeal denied 529 Pa. 636, 600 A.2d 955 (1991). The revision brought about by Act 1 requires the employee to establish that he or she suffers from a permanent binaural hearing loss of greater than ten percent that is medically established to be work-related and caused by the long-term exposure to hazardous occupational noise. See Section 306(c)(8)(iii) of the Act, 77 P.S. §513.

<sup>40</sup> The purpose of Act 57 was to continue the process of reducing the cost of Pennsylvania work injuries. Kramer v. Workers’ Compensation Appeal Board (Rite Aid Corporation), 584 Pa. 309, 883 A.2d 518 (2005); Township of Lower Merion v. Workers’ Compensation Appeal Board (Tansey), 783 A.2d 878 (Pa. Cmwlth. 2001).

apparatus; and “Act 147 of 2006” which introduced expedited trial scheduling and Mandatory Mediation.

In none of these instances did the Pennsylvania Legislature adopt exceptions to the exclusive remedy provision.

Had it done so, the Legislature would have contravened the essential goal of each remedial effort by subjecting employers to increased costs for Pennsylvania work injuries.

Every individual workers’ compensation insurance policy written in Pennsylvania is based upon the “Workers Compensation and Employers Liability Policy” formulated by the National Council on Compensation Insurance. See *Workers Compensation: A Complete Guide to Coverage, Laws, and Cost Containment* at VI.C.1. (INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC. 1999).

The standard policy consists of six parts including Part One, the section of the contract that provides coverage for work-related injuries and diseases for which the employer is responsible under the Act and Part Two, the “Employer Liability” section of the contract that is intended to provide coverage to employers for work-related injuries that are not covered by the Act.

Part Two of the standard policy is rarely implicated in Pennsylvania.<sup>41</sup>

That would change dramatically, however, if an intentional tort exception were sanctioned by the courts.

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<sup>41</sup> That is not necessarily true in other jurisdictions. For example, Section 11 of the New York State Workers’ Compensation Act provides that the employer may be held liable for contribution or indemnity to a third-party tortfeasor where the third party proves that the work injury was a “grave injury” e.g., death, blindness, quadriplegia, amputation of an arm etc.

Every policy is directly impacted by what is commonly referred to as the “Experience Modification Factor” – a sophisticated mathematical calculation that is generated by the Commonwealth of Pennsylvania Rating Bureau – a non-profit organization created in 1915 pursuant to the Pennsylvania Insurance Law – for a series of industry classifications.<sup>42</sup>

The Experience Modification Factor is calculated and applied to individual Pennsylvania employers on the basis of their workers’ compensation history or “experience” generally over the course of multiple years.

The employer’s experience is not qualitative – it is quantitative – the greater number of dollars paid in medical and indemnity benefits for each claim, the less favorable the employer’s “experience” and the more expensive the employer’s workers’ compensation coverage becomes.<sup>43</sup>

When a workers’ compensation risk is presented, the underwriter must engage in the processes of “risk pricing” and “risk selection.”

If Pennsylvania were to permit injured workers to pierce employer immunity in the manner suggested by plaintiff in this case, the process of “risk pricing” would be impacted since the cost of the risk would have to take into consideration intangible damages such as loss of consortium and pain and suffering. Furthermore, the underwriter would have to consider the increased premium that a reinsurer would likely require, making it more difficult for the primary insurer to spread its risk.

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<sup>42</sup> See Pennsylvania Compensation Rating Bureau Website at [www.dcrb.com](http://www.dcrb.com).

<sup>43</sup> See Pennsylvania Compensation Rating Bureau, PA Experience Rating Seminar Booklet (June 2007).

It has been observed that if the disease manifestation time restriction set forth in Section 310(c)(2) of the Act were to be construed in the manner urged by plaintiff in this case, the cost of work injuries would increase dramatically:

“Although we are not aware of the legislative intent behind the [three-hundred week] time requirement, it seems to be another example of legislative line-drawing intended to afford employers and insurers reasonable time limits on their exposure under the Act. Premium rates for workmen’s compensation insurance directly reflect risk. Repeal of the 300-week requirement would, without question, require a significant increase in premium.”

D.B. Torrey, “Time Limitations in the Pennsylvania Workmen’s Compensation and Occupational Disease Acts: Theoretical Doctrine and Current Applications,” 24 DUQ. L.R. at 1045, *quoting* BOND & SILVER, *Workmen’s Compensation Employers & Insurers Present Their Side of the Case*, PENNA. L.J. RPTR. (8/5/85) at 8.

The increased cost that civil liability would engender for occupational injuries and diseases would ultimately affect the underwriter’s “risk selection,” meaning that certain industries targeted for occupational tort actions would become less appealing to private insurers, reducing the competition for premium dollars and further increasing the costs of Pennsylvania work injuries.

As noted above, in 1993, 1995, 1996 and 2006 Pennsylvania enacted remedial workers’ compensation legislation designed to reduce the cost of Pennsylvania work injuries.

The cause of action advanced by plaintiff in this case seeks to dismantle in a judicial forum what the Legislature has been attempting to achieve for the last fifteen years – a reduction in the cost of Pennsylvania work injuries.

Plaintiff's effort to expose Pennsylvania employers to tort liability for work-related injuries and diseases through judicial pronouncement should not be permitted.

It is respectfully submitted that a full review of the origins and evolution of the Pennsylvania Workers' Compensation Act, and a primary component of its establishment - the "exclusive remedy" provision set forth in Section 303 of the Act - is necessary in order to best appreciate the inherent defect in this effort to strip Alcoa, Inc. of its immunity from the civil suit filed by the wife of its former employee.

**B. SINCE THE EXCLUSIVE REMEDY PROVISION DOES NOT VIOLATE THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS, THE JUDGE'S REJECTION OF PLAINTIFF'S CONSTITUTIONAL CHALLENGE SHOULD BE AFFIRMED.**

Plaintiff maintains that interposition of the exclusive remedy provisions set forth in Section 303(a) of the Workers' Compensation Act and Section 303 of the Occupational Disease Act violates the Remedies Clause set forth in Article I, Section 11 of the Pennsylvania Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that plaintiff's allegations are without merit.

The most fundamental principle of statutory construction is the presumption that in enacting laws, the legislature has acted constitutionally. Fornataro v. Workmen's Compensation Appeal Board (Cabot Corp.), 663 A.2d 854 (1995); Antonucci v. Workmen's Compensation Appeal Board, (U.S. Steel Corp.), 133 Pa. Cmwlth. 273, 576 A.2d 401 (1990), *petition for allowance of appeal denied*, 527 Pa. 651, 593 A.2d 423 (1991) *citing* School District of Deer Lakes v. Kane, 463 Pa. 554, 345 A.2d 658 (1975).

The presumption of constitutionality is a reflection of the judiciary's respect for the legislature as a co-equal branch of government. Id. The courts will, on that basis,

“properly defer to the legislature in the exercise of its function and may refuse to enforce a statute only if it clearly, palpably, and plainly violates the constitution.” Antonucci v. Workmen’s Compensation Appeal Board (U.S. Steel Corp.), *supra*, *citing Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1975).

The Remedies Clause of the Pennsylvania Constitution provides as follows:

“All courts shall be open; and every man for an injury done him in his lands goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.”

See Article I, Section 11.

Plaintiff’s challenge fails to acknowledge that the Pennsylvania Constitution was amended in 1915 in order to sanction compulsory compensation for work-related injuries and diseases<sup>44</sup>:

“The general assembly **may enact laws requiring the payment by employers**, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases, whether or not such injuries or diseases result in death, and **regardless of fault of employer or employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof**, and providing special or general remedies for the collection thereof.”

See Article III, Section 18. (emphasis supplied).

It is well-recognized that the foregoing provision “empowers the General Assembly, if it chooses, to enact laws to compensate for injuries or diseases, including those that cause the death of an employee, that arise out of their employment.” Daniels

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<sup>44</sup> See Pennsylvania Workers’ Compensation Law and Practice, § 1:26 2<sup>nd</sup> Ed. (West-Thomson 2002).

v. Workers' Compensation Appeal Board (Tristate Transport), 753 A.2d 293 (2000) quoting Antonucci v. Workmen's Compensation Appeal Board, (U.S. Steel Corp.), 133 Pa. Cmwlth. 273, 576 A.2d 401, 404 (1990).

Plaintiff's argument also fails to acknowledge the contemporary view that workers' compensation legislation is "authorized by the police powers of the State . . . ." Workmen's Compensation Appeal Board v. Overmyer Mold Company, 473 Pa. 369, 374 A.2d 689 (1977) quoting Dupree v. Barney, 193 Pa. Super. 331, 336, 163 A.2d 901, 904 (1960).

Regardless of the unequivocal mandate set forth in Article III, Section 18 and the judicial recognition that workers' compensation legislation is sanctioned by the police power of the state, plaintiff's argument ignores the Pennsylvania Supreme Court's ruling twenty-five years ago that the exclusive remedy provision does not violate the Remedies Clause set forth in Article I, Section 11 of the Pennsylvania Constitution. Kline v. Arden H. Verner Company, 503 Pa. 251, 469 A.2d 158 (1983). In support of its holding, the Court in Kline cited its earlier rulings in Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897 (1975)(rejecting appellant's argument that the No Fault Act of 1974 violated the Remedies Clause while observing that "nothing in Article I, Section 11 prevents the legislature from extinguishing a cause of action"); Parker v. Children's Hospital of Philadelphia, 483 Pa. 106, 394 A.2d 932 (1978)("we held that delaying access to trial by jury by arbitration was constitutional because the power of the legislation to abolish a cause of action certainly included the power to create a preliminary administrative remedy"); and Freezer Storage, Inc. v. Armstrong Cork Company, 476 Pa. 270, 382 A.2d 715 (1978)(no one "has a vested right in the continued existence of an immutable body of negligence law").

The Court concluded that “[t]o change, alter or abolish a remedy lies within the wisdom and power of the legislature and in some instances, the courts. Access to a tribunal is not denied when the tribunal has no jurisdiction to entertain either the claim or the remedy. Time and circumstances require new remedies to adjust to new and unforeseen losses and conditons.” 503 Pa. at \_\_\_, 469 A.2d at \_\_\_.

Indeed, the constitutionality of the disease manifestation time restrictions set forth in the Act and the Occupational Disease Act have been upheld on countless occasions. See Sporio v. Workers’ Compensation Appeal Board (Songer Construction), 717 A.2d 525 (Pa. Cmwlt. 1997); Roman v. Workmen’s Compensation Appeal Board (Rohm and Haas), 163 Pa. Cmwlt. 307, 641 A.2d 37 (1994); Antonucci v. Workmen’s Compensation Appeal Board, *supra*.

Claimant’s Fourteenth Amendment must also fail.

It is well-settled that where a party seeks to invalidate a state statute on due process grounds he or she bears the burden of demonstrating a lack of rational relationship between the challenged provision and some legitimate state purpose. Formicola v. Workmen’s Compensation Appeal Board (City of Philadelphia), 97 Pa. Cmwlt. 274, 509 A.2d 434 (1985) *citing* Kelly v. Johnson, 425 U.S. 238 (1976); Bixler v. Workers’ Compensation Appeal Board (Walden Books), 837 A.2d 1278 (Pa. Cmwlt. 2003). Moreover, the analysis that must invoked in response to such a challenge is not whether a more effective legislative enactment might be devised, but whether the challenged provision promotes the stated purpose in any degree whatever. *Id.* *citing* Jefferson v. Hackney, 406 U.S. 535 (1972).

Applying such analysis, the Pennsylvania courts have ruled that the disease manifestation time restrictions set forth in the Act and the Occupational Disease Act do

not violate the Fourteenth Amendment on Equal Protection or Due Process grounds. Formicola v. Workmen's Compensation Appeal Board (City of Philadelphia), *supra*, Fornataro v. Workmen's Compensation Appeal Board (Cabot Corp.), 663 A.2d 854 (1995), *supra*; Antonucci v. Workmen's Compensation Appeal Board, (U.S. Steel Corp.), *supra*.

Since the compensation provisions at issue constitute rational legislative action dervied from constitutional authority, the February 21, 2006 Order of Judge Daniel J. Ackerman, dismissing plaintiff's constitutional challenge should be affirmed.

**VIII. CONCLUSION**

For the reasons set forth above, Amicus Curiae, The Pennsylvania Insurance Federation respectfully urges this Honorable Court to affirm the February 21, 2006 Order of Judge Daniel J. Ackerman, granting the Motion for Summary Judgment of appellee, Alcoa, Inc., dismissing all civil claims and cross-claims filed against it, with prejudice.

All the foregoing is respectfully submitted.

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CERTIFICATE OF SERVICE

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