

IN THE
SUPERIOR COURT OF PENNSYLVANIA

NO. 20 EDA 2008

ANTONIO RANALLI, Individually and as Administrator of the ESTATE OF OLIVIA
ANN RANALLI, formerly OLIVIA ANN ZAGRABBE

Appellee,

v.

ROHM AND HASS COMPANY

Appellant.

BRIEF FOR AMICUS CURIAE, THE PENNSYLVANIA INSURANCE
FEDERATION, INC. IN SUPPORT OF BRIEF FOR APPELLANT,
ROHM AND HAAS COMPANY

On Interlocutory Appeal by Permission from the
November 20, 2007 Order of The Honorable Paul P.
Panepinto of the Court of Common Pleas of Philadelphia
County, Docketed at May Term, 2007, No. 1541,
Overruling Appellant's Preliminary Objections

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I. STATEMENT OF JURISDICTION

The Insurance Federation hereby incorporates the Statement of Jurisdiction submitted by Rohm and Haas.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The Insurance Federation hereby incorporates the Statement of Scope and Standard of Review submitted by Rohm and Haas.

III. STATEMENT OF INTEREST OF AMICUS CURIAE

The Insurance Federation of Pennsylvania, Inc. (“Insurance Federation”) is a non-profit trade association representing more than two hundred commercial insurers conducting business in Pennsylvania. As the Commonwealth’s leading insurance trade association, the Insurance Federation includes members that issue all forms of insurance coverage. Among the Insurance Federation’s members are insurers that write casualty and business insurance, covering homes, businesses and Pennsylvania’s corporate and private citizens.

The Insurance Federation is committed to ensuring a balanced and fair coverage environment within the Commonwealth. The Insurance Federation and its members have a significant interest in the outcome of this case since it could affect not only workers’ compensation insurance underwriting and claims handling, but also the underwriting practices and claims litigation in the areas of general liability and products liability, both under direct policy terms and through subrogated interests. The Insurance Federation believes that the submission of this amicus brief will benefit this Honorable Court in reaching its decision.

IV. ORDER IN QUESTION

“AND NOW, this 20th day of November, 2007, upon consideration of defendant Rohm and Haas Company’s Motion to Determine its Preliminary Objections to Plaintiff’s Second Amended Complaint, it is HEREBY ORDERED that defendant’s preliminary objections are overruled”.

(Order of The Honorable Paul P. Panepinto, Court of Common Pleas of Philadelphia County, dated 11/20/07)

V. STATEMENT OF QUESTIONS INVOLVED

WHETHER ROHM AND HASS SHOULD BE STRIPPED OF ITS IMMUNITY FROM SUIT, AFFORDED BY THE "EXCLUSIVE REMEDY" PROVISION OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT, WHERE PLAINTIFF'S RECOVERY UNDER THE ACT IS PRECLUDED BY OPERATION OF THE STATUTE'S DISEASE MANIFESTATION TIME RESTRICTION.

(Answered in the affirmative below)

WHETHER ROHM AND HASS SHOULD BE STRIPPED OF ITS IMMUNITY FROM SUIT, WHERE THERE HAS BEEN NO ALLEGATION THAT IT FRAUDULENTLY MISREPRESENTED INFORMATION REGARDING WORK CONDITIONS TO DECEDENT WHILE SHE WAS AN EMPLOYEE OR THAT ANY ALLEGED FRAUDULENT MISREPRESENTATION CAUSED AN AGGRAVATION OF A THEN-EXISTING OCCUPATIONAL DISEASE.

(Answered in the affirmative below)

VI. STATEMENT OF THE CASE

The Insurance Federation hereby incorporates the Statement of Case submitted by Rohm and Haas.

VII. SUMMARY OF ARGUMENT

The Judge below committed error by overruling the meritorious Preliminary Objections of Rohm and Haas.

The occupational disease alleged in the Civil Complaint filed by plaintiff in this case - cancer attributable to exposures to halogenated hydrocarbons - is cognizable under the Pennsylvania Workers' Compensation Act.¹

Since the Act provides the exclusive remedy for plaintiff's occupational disease claim, the liability of Rohm and Haas, decedent's former employer, is limited to whatever remedy the Act affords. The administrative framework of the Act constitutes a complete substitute for the common law system and is a product of a series of legislative compromises between Pennsylvania employers and employees. The practical measure of this compromise is reflected in a number of substantive provisions of the Act that either limit or prohibit certain recoveries for various occupational injuries and diseases. These restrictions - including the disease manifestation time restriction at issue in this case - were established not for the purpose of affording employees access to civil damage awards, but to facilitate the legislative goal of providing a viable no-fault system that benefits the many.

Although in some cases a particular recovery restriction may adversely impact certain individuals, application of the restriction does not convey upon an injured worker the right to strip his or her employer of its immunity from suit.

¹ Section 108(c) enumerates coverage for the specific disease process alleged by plaintiff. 77 P.S. § 27.1.

In this case, plaintiff's argument that application of the disease manifestation time restriction set forth in Section 301 (c)(2) of the Act necessarily sanctions the instant civil action, mistakes a temporal limitation on recovery under the Act for a lack of coverage under the Act. Since the occupational disease alleged by plaintiff in this case is fully cognizable under the Act, plaintiff's effort to pierce the immunity from suit to which Rohm and Haas is legally entitled, should be disallowed.

VIII. ARGUMENT

- A. SINCE THE PENNSYLVANIA WORKERS' COMPENSATION ACT AFFORDS THE EXCLUSIVE FRAMEWORK FOR RECOVERING BENEFITS FOLLOWING THE DEVELOPMENT OF AN ALLEGED OCCUPATIONAL DISEASE, ROHM AND HASS MAY NOT BE STRIPPED OF ITS IMMUNITY FROM CIVIL SUIT EVEN THOUGH ITS FORMER EMPLOYEE IS PRECLUDED FROM RECOVERING BENEFITS UNDER THE ACT BY OPERATION OF THE STATUE'S APPLICABLE DISEASE MANIFESTATION TIME RESTRICTION.

The lawsuit that has prompted this appeal represents the latest effort by the plaintiffs' bar to establish judicially what the Pennsylvania Legislature has refused to enact - an "intentional tort exception" to the longstanding "exclusive remedy provision" of the Pennsylvania Workers' Compensation Act.

It is respectfully submitted that a full review of the origin and evolution of the Act, and perhaps its primary component - the exclusive remedy provision set forth in Section 303(a) - is necessary in order to fully appreciate the inherent defect in plaintiff's effort to procure civil damages from Rohm and Haas on the basis of an alleged occupational disease.

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 more certain 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 was also designed to reduce employer litigation costs and to relieve employers

from the unpredictable and potentially devastating results occasioned by civil tort litigation.

Before the workers' compensation regime was introduced in Pennsylvania, the traditional tort system that was in place, Fritz v. Elk Tanning Company, 258 Pa. 180, 101 A. 958 (1917) had become an unsatisfactory method for adjudicating claims arising out of occupational 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).

This was so, from the employer perspective, because success in the civil forum came with a price. The cost of discovery, expert witnesses, attorneys fees, jury trials, and appeals imposed a substantial financial burden, while employers also faced the possibility that some injured workers might actually prevail, resulting in large damages awards for wage loss, medical treatment and the more intangible notions of loss of consortium, pain and suffering and punitive loss.

The convergence of the new industrial economy with the traditional tort system, therefore, had 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 civil 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 level of predictability in handling their legal 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).

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 laws that had been introduced in Germany and England.

In 1911, the Pennsylvania legislature established a Commission to study the operation and effect of the proposed 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, 2nd ed., 2002) .

Thereafter, in 1913, the Legislature authorized the Commission to report to the General Assembly 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. §1 (Purdon's Pennsylvania Statutes Annotated 1992).

Two years later, on June 2, 1915 "The Workman's Compensation Act"² became law.

For the first time in Pennsylvania, employer liability for work-related accidents would be assessed on a no-fault basis³:

"[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 fees 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 Steel 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).

² In 1939 the word "Pennsylvania" was added to the name of the law. 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.

³ Section 201 abolished the common law defenses of assumption of the risk, contributory negligence and negligence of a co-employee. 77 P.S. § 41. An early constitutional challenge to Section 201 was rejected by the Pennsylvania Supreme Court in Anderson v. Carnegie Steel Company, 255 Pa. 33, 99 A. 215 (1916).

In its original form, however, the Act did not deliver a **complete** substitution for the traditional tort system. This was so, because the Act, as it was originally drafted, was not mandatory, but was elective, meaning that employers were allowed to opt out of the system, forcing their injured employees to seek relief in the traditional civil forum. Moreover, the original version of the Act did not provide coverage for all injuries, but only for those arising out of “accidents.”⁴ In addition, the original version of the Act exposed employers to civil actions for contribution or indemnification by third-parties targeted by the injured worker, and perhaps most conspicuously, omitted coverage for occupational disease claims.

For disease claims, the occupational tort system was particularly anachronistic since liability remained tethered to employer “negligence” in industries where the work necessarily involved exposures to inherent health risks.

The shortcomings of the tort system – as it was applied to occupational disease claims – became quite celebrated.

Accordingly, in 1939 the Legislature introduced no-fault coverage for occupational disease claims by enacting the “Pennsylvania Occupational Disease Act,”⁵ and in 1972, as discussed below, incorporated occupational disease coverage into the Workers’ Compensation Act.

It is clear, therefore, that despite an early hesitance to afford no-fault coverage for disease claims, the Legislature was determined to substitute, in its entirety, the

⁴ As discussed below, the original language that predicated recovery upon the occurrence of an “accident” afforded 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).

⁵ The Act was amended in 1937 to include disease coverage. For various reasons, however, the amendments were soon repealed.

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 embrace 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 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 statutory 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:

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).⁶

A corollary to the exclusive remedy provision is the proposition that when applicable, the Act deprives common pleas courts of subject matter jurisdiction over civil actions that seek recovery against employers for the effects of occupational injuries or

⁶ In Kline v. Arden H. Verner Company, 503 Pa. 251, 469 A.2d 158 (1983) the Pennsylvania Supreme Court declared the exclusive remedy provision constitutional.

diseases. 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 described above, when it was originally enacted, the 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 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 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 AT 13 (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.

Its primary observation was simple – although the State workers’ compensation laws at the time were “neither adequate nor equitable,” the no-fault administrative regime remained superior to the traditional tort system.⁷

Indeed, the Commission flatly rejected the notion advanced by some that the individual state workers’ compensation programs should be abolished and that employers and employees should return to a tort system that had been “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 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 INTRODUCTION & SUMMARY AT 25 (JULY 31, 1972).

⁷ 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.

The Commission issued a series of formal recommendations most of which insisted that workers' compensation be rendered 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 INTRODUCTION & SUMMARY (JULY 31, 1972) AT 7-18.

The Commission's fundamental conclusion, therefore, was that **all claims** arising out of occupational injury and disease should be addressed within the workers' compensation 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 workers' compensation law be broadened to include **all** occupational injuries and diseases and to

afford the exclusive means for compensating such work-related conditions, the Pennsylvania Legislature took appropriate action.

In 1972, the Legislature amended the Act to cover all work-related physical and emotional conditions, 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).⁸

Two years later, in 1974,⁹ the Legislature eliminated elective participation in the workers' compensation 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); Cranshaw Construction, Inc. v. Ghrist, 290 Pa. Super. 286, 434 A.2d 756 (1981). Indeed, no longer could the employer opt-out of the Act and voluntarily expose itself to civil liability for the effects of an occupational injury.

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**

⁸ 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);

⁹ In 1963 Section 205 of the Act was added, affording co-employees immunity from suit except in situations where the co-employee engages in intentional wrong.

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" (emphasis supplied).

77 P.S. § 481(b). (emphasis supplied).¹⁰

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.

The exclusive remedy provision is of such importance to the integrity of the no-fault system that it has been extended to workers' compensation insurers under Section 305 of the Act:

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).

77 P.S. §501. (emphasis supplied).

The protection afforded to insurers has been maintained even in those instances where the injured worker accuses the insurer of having fraudulently mishandled his or her worker's compensation claim.

¹⁰ The legislation, referred to as "Act 263 of 1974" became effective on February 3, 1975.

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 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 administrative proceedings he alleged that his employer's workers' compensation carrier had refused to provide him with benefits even though it was fully knowledgeable of the work injury and its ramifications. Ultimately, claimant was awarded both wage loss and medical benefits under the Act plus reimbursement of his 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 its alleged fraudulent handling of his compensation claim. In dismissing the civil action, the Supreme Court confirmed that the remedies available to the injured worker 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."

Using language that would appear to foreclose the civil action contemplated by plaintiff in this case, the Court further instructed 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 immunity afforded by Section 303(a) has even been extended to agents retained to assist in the administration of workers' compensation claims. Alston v. St. Paul Insurance Companies, 531 Pa. 261, 612 A.2d 421 (1992).

The Alston case involved an employee who 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 immediately as compensable under the Act. 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 seeking to end its liability for wage loss and medical benefits under the Act. Although claimant was successful in defeating the Termination Petition, he insisted upon filing a civil tort action against the carrier, the vocational rehabilitation company and the orthopedic surgeon, seeking compensatory and punitive damages for their alleged conspiracy to defraud him of his benefits under the Act. 531 Pa. at ___, 612 A.2d at ___.

In affirming the dismissal of the civil action, the Supreme Court reiterated 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 order to further expand workers' compensation coverage, the Pennsylvania Legislature amended the Act in 1974 to extend 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,"¹¹Peck 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), 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).¹²

The "statutory employer" rule evidences the resolute intent of the Legislature to prohibit employees from prosecuting civil tort actions against their employers or against those assuming the role of employer following the occurrence of an occupational injury or disease.

5. One Statutory Exception to the Exclusive Remedy Provision.

Though it has been invited over the years to create exceptions to the exclusive remedy provision by the plaintiffs' bar and by the courts, the Legislature has enacted only one true exception.

¹¹ Sections 203 and 302(b) of the Act. 77 P.S. §§ 52, 462.

¹² 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.

Section 205¹³ of the Act is an unequivocal exception to the rule – an employee who intentionally injures a co-employee is subject to tort liability.

Section 305(d) of the Act permits the injured employee to seek civil damages for the effects of 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).¹⁴

While the foregoing provision constitutes an “exception” in the strictest sense, it is better construed as a punitive measure designed to assure full participation in the no-fault system, thereby promoting the exclusive character of the Act.

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 it merely clarifies one element of compensability – injury “arising out of” employment.¹⁵

¹³ 77 P.S. § 72.

¹⁴ Article II of the Act establishes the parameters for such civil claims. For example, Section 201 of the Act strips the non-complying employer 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.

The language of Section 301(c)(1),¹⁶ contemplates a scenario where the employee imports a personal risk into the workplace. Because the “imported” dispute is “personal,” the ensuing injury is not viewed as having resulted from actions taken in furtherance of the business interests of the employer, thereby rendering the injury non-compensable.¹⁷

Ultimately, therefore, the exclusive remedy provision remains a nearly pristine component of the Pennsylvania Act, the integrity of which the courts and the Legislature have refused to disturb.

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”¹⁸ 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 Supreme Court ruled that since the Legislature did not enact an intentional tort exception, it could not do 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

¹⁵ 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.

¹⁶ 77 P.S. §411(1).

¹⁷ For example, in the midst of contentious divorce proceedings, the employee’s estranged husband enters the employee’s workplace and assaults her. Under such circumstances the employee’s injury is not considered to have arisen out of the employment relationship but out of a personal dispute imported into the workplace. In such an instance, the employer could face potential a civil liability provided the injured employee were able to establish, for example, that the employer breached a duty to provide a safe workplace. See Kohler v. McCrory Stores, 395 Pa. Super. 188, 576 A.2d 1107 (1990) *appeal granted* 527 Pa. 587, 588 A.2d 510 (1991) *rev’d* 532 Pa. 130, 615 A.2d 27 (1992).

¹⁸ The reference “intentional tort” is perhaps misleading since the concept encompasses acts of indifference or gross negligence.

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 addition to various other claims, the employee brought a civil action against his employer alleging that the employer was aware that the design of the notching machine violated OSHA standards, but yet knowingly prohibited its workers from using a "feeding" device that would have greatly reduced the possibility of hand injuries. The employee further alleged that the employer at some point 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 that the employer's deceitful actions "should disqualify it from having the protection of [Section 303(a)]" an "interesting" one, 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. Moreover, 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).

It is important to recognize that the employees' allegations in Blouse were more provocative than those alleged in this case - the employer had taken affirmative steps to conceal evidence of known toxic occupational exposures.

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 Act¹⁹ 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, following which the issue was presented to the Supreme Court.

¹⁹ Section 303 of the Occupational Disease Act, 77 P.S. § 1403. The Supreme Court observed that while the exclusive remedy language of the Act and the Occupational Disease Act 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).

In affirming the dismissal of the employees' civil action, the Court declared that its ruling in Poyser was "dispositive."

Again, it is important to recognize that the employees' allegations in Barber were 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; and (4) the employer "knowingly decided not to warn employees of the health hazard presented by exposure to high levels of asbestos dust" but instead misrepresented to its employees that the work conditions were safe. 521 Pa. at ___, 555 A.2d at ___.²⁰

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

²⁰ 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 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.

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 designed to challenge employer tort immunity, such as the “dual capacity doctrine,”²¹ have failed to persuade the Supreme Court to invade the province of the Legislature.

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 the 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 Telephone Dispensary for treatment where he was allegedly misdiagnosed by two Bell Telephone doctors. Following the Superior Court's affirmance of the trial court's dismissal of plaintiff's complaint, the Supreme Court affirmed, reasoning that plaintiff's injury was strictly work-related since the Dispensary was operating only "in its capacity as employer of [plaintiff]".

²¹ The theory posits that 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. See 2A LARSEN, WORKMEN’S COMPENSATION LAW, § 72.80 (1976).

The Supreme Court's refusal to adopt the "dual capacity" doctrine probably has 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 Supreme Court rejected plaintiff's reasoning that a separate relationship had been established between the employee and her employer - a consumer-manufacturer relationship as opposed to the employer-employee relationship - thereby allowing the proposed civil action. In doing so, the Court reasoned that since the employee had been injured while 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 little doubt, therefore, that its primary feature - the exclusive means it affords for compensating any and all claims arising out of work injuries - remains fully intact.

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

The notion advanced by plaintiff in this case that a tort action must be permitted where the worker's claim for benefits is precluded by a substantive provision of the Act, ignores the essential compromise the Act engenders - the injured employee is afforded a very favorable opportunity to recover in a no-fault system, but the extent of the recovery is strictly limited.

The most conspicuous example of the foregoing 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), for example, the Supreme Court

affirmed the dismissal of the injured employee's civil suit filed against his employer even though it acknowledged that the employee could not recover intangible damages under the Act for his development of impotence following a work-related fall from a ladder:

“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 ___ *citing* Scott v. C.E. Powell Coal Company, 402 Pa. 73, 166 A.2d 31 (1960) (although the Act yields no intangible damages for a work-related injury that results in a loss of taste and smell, the injured employee is not permitted to pursue civil damages from the employer).²²

The Act is replete with 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 contexts.

For example, Section 306(c) (1-21)²³ of the Act allows the injured employee to recover a scheduled number of “specific loss” weeks of compensation for the work-

²² Recovery limitations can also result from certain 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 “statutes 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' 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.

²³ 77 P.S. §513.

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 such a loss. 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)²⁴ of the Act allows 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 any 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).²⁵

Section 306(c)(8)(iii)²⁶ of the Act allows the injured employee to recover hearing loss benefits calculated in accordance with the binaural formula set forth in the AMA Guides to the Evaluation of Permanent Impairment, **but only for occupational hearing loss that 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)²⁷ of the Act **prohibits** the employee from recovering wage loss or medical benefits where the work injury results from the employee's violation of law or from the employee's intoxication²⁸ or where the employee's injury is self-inflicted.

²⁴ 77 P.S. §513.

²⁵ In Hartwell v. Allied Chemical Corporation, 457 F.2d 1335 (3rd Cir. 1972) the Third Circuit Court of Appeals held that where a work-related disfigurement does not yield a recovery under the Act, the injured employee is not permitted to pursue a civil damages claim against the employer.

²⁶ 77 P.S. § 513.

²⁷ 77 P.S. § 431.

Sections 105.2²⁹ and 306(a)(1)³⁰ of the Act limit the injured employee's wage loss recovery to a compromised amount, e.g. where the injured employee who earns a wage of \$2,884.62 per week³¹ 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 - an 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. denied*, 484 U.S. 1064, 108 S. Ct. 1025, 98 L. Ed.2d 989 (1988)(helicopter manufacturing worker who 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).³²

²⁸ The "intoxication" limitation was added to Section 301(a), 77 P.S. §431, by Act 44 of 1993, 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).

²⁹ 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.

³⁰ 77 P.S. §511(1).

³¹ Yielding an annual wage of \$150,000.00.

³² The inability of the injured employee to establish a compensable "mental-mental" claim under the Act does not convey upon him or her the right 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

These substantive restrictions do not withhold coverage for the particular work-related injury or disease and do not convey upon the injured employee the right to seek damages through the filing of civil tort action.

Quite the contrary - these substantive restrictions are components of the compromise that forms the foundation of the no-fault system. They are necessary in order to maintain the viability of the Act by facilitating apportionment of employer resources to benefit the many.

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

The provision of the Act that plaintiff complains has precluded decedent's workers' compensation claim - Section 301(c)(2)³³ - is a **substantive** limitation³⁴ that has been described as a "disease manifestation time restriction" D.B. Torrey, *Time Limitations in the Pennsylvania Workmen's Compensation and Occupational Disease Acts: Theoretical Doctrine and Current Applications*, 24 DUQ. L.R. 975, 1012 (1986).

The provision 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**

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."

³³ 77 P.S. § 411(2).

³⁴ 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." 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.

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).³⁵

This substantive restriction is one that does not withhold coverage under the Act for work-related diseases, but imposes a limitation 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 (3rd 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, it presumes 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. 288 A.2d 828 (1972), the Commonwealth Court recognized 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**

³⁵ An excellent illustration of the substantive character of Section 301(c)(2) is provided when it 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 language of Section 301(c)(2) and the procedural language of Section 315 would combine to permit the filing of the Fatal Claim Petition nearly nine years following the last date of employment with the target defendant.

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.³⁶

Plaintiff's contention that this method for ascertaining the compensability of a given occupational disease necessarily sanctions the filing of tort claims where the occupational condition does not afford a no-fault award, runs counter to the Legislature's determination to render the Act a complete substitution for the tort system and threatens the compromise that maintains the viability of the no-fault system.

In Weldon v. The Celotex Corporation, supra, the Third Circuit was asked to address the same argument advanced by plaintiff in this case in the context of the Pennsylvania Occupational Disease Act.

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 provision³⁷ did not shield the employer from civil

³⁶See 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).

³⁷ Since the occupational exposures occurred between 1952 and 1955, the statute applicable to the claim was the Pennsylvania Occupational Disease Act.

liability because the disease manifestation time restriction set forth in Section 301(c) of the Occupational Disease Act³⁸ precluded a recovery of benefits.

The Third Circuit rejected plaintiff's argument, explaining that the restriction 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 prosecution of the civil action. 695 F.2d at ____.

The distinction between a work injury that falls "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.

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" does not fall within the ambit of 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 explained that:

"[A] defamation action seeks damages for the harm caused to one's **reputation**.³⁹ . . . The essence of the [defamation] action therefore, is not to

³⁸ 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."

compensate one for an 'injury' as contemplated by the Worker's 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 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 affords coverage for the effects of the former, but not the latter.

Indeed, plaintiff's civil action misapprehends that in stark contrast to the defamation injury addressed by Judge Wieand in Hammerstein the occupational injury alleged in this case - cancer resulting from exposures to halogenated hydrocarbons - falls within the ambit of the Act,⁴⁰ even though the Act may not necessarily yield a recovery of benefits.

That is why plaintiff's reliance upon 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.

³⁹ Judge Wieand quoted this Honorable Court's explanation 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."

⁴⁰ Poisoning by exposures to halogenated hydrocarbons is an enumerated "occupational disease" under Section 108(c) of the Act.

In Greer and Boniecke, the Supreme Court 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.⁴¹

The Court's observation in those cases is not surprising since the Occupational Disease Act did not presume to represent a complete substitution for the common law tort system.

Just the opposite is true with respect to the Injury Act at issue in this case – the Injury Act is presumed to represent a complete substitution for the common law tort system.

Moreover, as opposed to the situation in both Greer and Boniecke, decedent's alleged condition in this case – cancer resulting from exposures to halogenated hydrocarbons – is specifically enumerated as a covered disease under Section 108(c) of the Act, and is therefore cognizable⁴² only under the no-fault administrative scheme.

Plaintiff's assertion that the disease manifestation time restriction that ascertains the compensability of the covered condition alleged, is somehow analogous to the facts presented in Boniecke and Greer, to paraphrase the Third Circuit in Weldon, "mistakes a temporal limitation on recovery [under the Act] for a lack of coverage [under the Act]."

It is inescapable that the rulings in Poyser v. Newman & Company, Inc., *supra*, Barber v. Pittsburgh Corning Corporation, *supra*, Kline v. Arden H. Verner Company,

⁴¹ The ruling in Pollard is an anomalous one that has limited precedential value since it was issued by an evenly divided court. See PENNSYLVANIA WORKERS' COMPENSATION LAW AND PRACTICE § 1:24 (Thomson-West, 2nd ed., 2002). Moreover, the instruction in Pollard that the employee's challenged tort action should be stayed pending an adjudication of the alleged occupational disease under the Act would seem inapposite to the facts in this case since plaintiff has conceded that a compensation claim in this case would clearly fail under Section 301(c)(2).

⁴² Cognizable in the sense that the disease is "capable of being tried or examined before a designated tribunal." See BLACK'S LAW DICTIONARY, 5th ed. (1979).

supra, Blouse v. Superior Mold Builders, Inc., and Weldon v. The Celotex Corporation, supra, are unassailable and controlling of the outcome in this case – plaintiff’s remedies are limited to those afforded by the Pennsylvania Workers’ Compensation Act.

The instant civil action therefore 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,”⁴³ 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,⁴⁴ “Act 57 of 1996”⁴⁵ which provided employers with indemnity offsets, introduced Compromise and Release settlements, Impairment Ratings and an innovative vocational earning power apparatus; and “Act 147 of 2006” which established expedited trial scheduling and Mandatory Mediation.

In none of these instances did the Pennsylvania Legislature adopt exceptions to the exclusive remedy provision.⁴⁶

⁴³ 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).

⁴⁴ 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.

⁴⁵ 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).

⁴⁶ In December, 2001 the Legislature amended Section 108 of the Act to specifically provide that “hepatitis C” is by definition an “occupational disease” for healthcare workers and other public service professionals such as firefighters and police officers. Section 1 of the Act of December 20,

Had it done so, the Legislature would have thwarted the essential goal of each remedial effort by subjecting employers to increased costs for Pennsylvania work injuries – the very same costs that prompted the Legislature to adopt the workers’ compensation law in 1915.

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.⁴⁷

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

Every policy is directly impacted by the “Experience Modification Factor” – a sophisticated mathematical calculation that is generated by the Commonwealth of

2001, P.L. 967. See City of Philadelphia v. Workers’ Compensation Appeal Board (Sites), 889 A.2d 129 (Pa. Cmwlth. 2005).

⁴⁷ 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 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.

Pennsylvania Rating Bureau – a non-profit organization created in 1915 pursuant to the Pennsylvania Insurance Law, for a series of industry classifications.⁴⁸

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 – but 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.⁴⁹

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 puncture employer immunity in the manner urged 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.

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 suggested 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] time requirement, it seems to be another example of legislative line-drawing intended to afford employers and insurers reasonable time

⁴⁸ See Pennsylvania Compensation Rating Bureau Website at www.dcrb.com.

⁴⁹ See Pennsylvania Compensation Rating Bureau, PA Experience Rating Seminar Booklet (June 2007).

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.

- B. SINCE THERE HAS BEEN NO ALLEGATION THAT ROHM AND HAAS ACTIVELY AND FRAUDULENTLY MISREPRESENTED WORKPLACE INFORMATION TO ITS FORMER EMPLOYEE OR THAT ANY SUPPOSED FRAUDULENT MISREPRESENTATION CAUSED AN AGGRAVATION OF A THEN-EXISTING OCCUPATIONAL DISEASE, ROHM AND HASS MAY NOT BE STRIPPED OF ITS IMMUNITY FROM CIVIL SUIT UNDER THE NARROW AND ISOLATED HOLDING IN MARTIN V. LANCASTER BATTERY.

Plaintiff maintains that the Pennsylvania Supreme Court holding in Martin v. Lancaster Battery Company, Inc., 530 Pa. 11, 606 A.2d 444 (1992) authorizes the “fraud” count set forth in the Second Amended Complaint at issue in this case.

The Martin case involved an employee of an automotive/truck wet storage battery manufacturer. The employer’s manufacturing process necessarily exposed claimant to high levels of lead dust and fumes, requiring that claimant and his co-employees be tested regularly for lead absorption. For more than three years the employer withheld from claimant his blood test results and actually altered claimant’s blood test results before disclosing the results to him.

The employee was diagnosed with chronic lead toxicity, lead neuropathy, hypertension, gout, and renal insufficiency. The intentional delay in notifying the employee of the actual levels of lead in his blood by his employer prompted an aggravation of his work-related condition.

The trial court granted the employer’s preliminary objection, dismissing the civil action.

On appeal, this Honorable Court reversed the trial court, ruling that the employer’s act of tampering with his blood test results and concealing his injury from him entitled the employee to proceed with a fraudulent misrepresentation civil action.

On appeal, the Supreme Court affirmed. In so doing, the Court agreed that under the particular facts of the case an employee may bring civil suit against an employer where the employer fraudulently misrepresents information to the employee that prevents the employee from seeking treatment for an existing work-related disease.

In addressing the plaintiff's effort to apply the holding in Martin to the facts in this case, the trial court below has asserted "that our Supreme Court's finding in Martin was not limited to the aggravation of a known pre-existing illness, but instead based its finding on the fact that the employer fraudulently concealed information that led to an employee's injury." See Appendix "C" at p. 5)(emphasis in original).

It is respectfully submitted that the trial court's interpretation of Martin is not correct.

Indeed, the Supreme Court carefully limited its ruling to that instance where the **existing** occupational disease is **aggravated** by the active fraudulent actions of the employer, thereby delaying its treatment: "[t]here is a difference between employers who tolerate workplace conditions that will results in a certain number of injuries or illnesses and those who **actively mislead employees already suffering as the victims of workplace hazards**, thereby precluding such employee from limiting their contact with the hazard and from receiving prompt medical attention and care."(emphasis supplied).

Although the Supreme Court has never revisited its ruling in Martin, this Honorable Court has recognized on a number of occasions that the Martin decision is an extremely narrow one that sanctions the filing of a civil action **only** where the employee alleges an **active fraudulent misrepresentation** by the employer that results in delay, causing an **aggravation of an already-existing work-related condition**. See Fry v. Atlantic States Insurance Company, 700 A.2d 974 (Pa. Super. 1997) ("the mishandling of an

otherwise valid claim of work-related injury which results in adverse medical repercussions” while reflective of “a uniquely deplorable callousness on the part of insurers or employers” is substantively different from the conduct contemplated by the Supreme Court in Martin therefore affording the injured worker with whatever remedy is available under the Act) *citing* Hammerstein v. Lindsey, 440 Pa. Super. 350, 359 n.5, 699 A.2d 597, 602 n.5 (1995) (“the holding of Martin is limited to situations where the employer has engaged in fraudulent misrepresentation” prompting an **aggravation** of existing work injuries); Grant v. GAF Corp., 415 Pa. Super. 137, 155, 608 A.2d 1047, 1056 (1992) (“where an employee alleges fraudulent misconduct on the part of an employer which causes **aggravation** of a work-related injury, the employee is not barred from pursuing a common law claim against the employer”); Santiago v. Pennsylvania National Mutual Casualty Insurance Company, 418 Pa. Super. 178, 190, 613 A.2d 1238, 1241 (1992) (“the holding in Martin applies only where the employer has ‘concealed, altered or intentionally misrepresented information related to the work-related injury which results in [its] **aggravation**’”); Snyder v. Specialty Glass Products, Inc., 441 Pa. Super. 613, 658 A.2d 366 (1995)(“in the present appeal, [plaintiff] sought relief for his work-related injury; he was not seeking damages for the **aggravation** of that injury. Therefore, we find that the limited exception to the principles enunciated in Poyser, recognized by our Supreme Court in Martin, do not apply to this case.”); Wendler, Administratrix of the Estate of William R. Bower, III, deceased, v. Design Decorators, Inc., 768 A.2d 1172 (Pa. Super. 2001) (civil action filed by decedent’s mother following decedent’s work-related death caused by co-employee’s failure to properly operate a lift truck that decedent occupied while in the course of his employment duties, dismissed since, under Martin, plaintiff sought recovery

in connection with her son's work-related death but did not seek relief for an **aggravation** of the work injury).

Again, as this Honorable Court has recognized, the fraudulent misrepresentation cause of action contemplated by the Supreme Court in Martin is available **only where there is fraud and delay on the part of the employer leading to the exacerbation or aggravation of an already-existing work-related disease.**

The foregoing has simply not been presented in this case.

Indeed, there is no allegation that Rohm and Haas was obligated by regulators to conduct medical blood testing on decedent or that while working for Rohm and Haas decedent was suffering from an occupational disease or that Rohm and Haas altered medical testing performed on decedent or that Rohm and Haas actively misled decedent while she worked for the company or that Rohm and Haas engaged in any form of delay that resulted in an aggravation of an already-existing occupational disease.

Rather, the allegations contained in plaintiff's Complaint are analogous to the "failure to warn" allegations contained in the civil complaints dismissed by the Supreme Court in Poyser and Barber and by this Honorable Court in Blouse.⁵⁰

Since plaintiff's Complaint fails to articulate factual allegations that fall within the narrow confines of Martin, his "fraud" cause of action should be dismissed.

⁵⁰ See discussion on pages 25-26 supra.

IX. CONCLUSION

For the reasons set forth above, Amicus Curiae, The Pennsylvania Insurance Federation, Inc. respectfully urges this Honorable Court to reverse the November 20, 2007 Order of Judge Paul P. Panepinto, overruling the Preliminary Objections of appellant, Rohm and Haas.

All the foregoing is respectfully submitted.

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CERTIFICATE OF SERVICE

I, Andrew E. Greenberg, Esquire, do hereby certify that I have serviced a true and correct copy of the within Brief for Amicus Curiae, The Pennsylvania Insurance Federation, Inc. via United States First Class Mail, postage pre-paid upon the following:

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