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INSURANCE COVERAGE FOR CONSTRUCTION DEFECTS *KVAERNER METALS V. COMM. UNION*, PA SUPREME COURT

By Thomas V. Gebler, Jr., Esquire[1], Margolis Edelstein, Pittsburgh, PA

In a highly anticipated decision, the Pennsylvania Supreme Court recently provided an important clarification of insurance law in the Commonwealth when it overturned the Superior Court's decision in *Kvaerner Metals v. Commercial Union Ins. Co.* In *Kvaerner*, the Supreme Court held that the Superior Court erred by looking to information not contained in the underlying complaint in resolving an insurance coverage dispute. Also, since the underlying suit alleged only property damage from faulty workmanship, such a claim did not constitute an occurrence under the policies. This decision may effectively preclude coverage pursuant to a comprehensive general liability policy in any claim by a customer against its contractor for allegedly poor workmanship which results in damages.

The *Kvaerner* case arose following claims asserted by Bethlehem Steel against Kvaerner for breach of contract and breach of warranty for defects in a coke oven battery built for Bethlehem by Kvaerner.

Commercial Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA, had each issued insurance policies to Kvaerner under which Kvaerner sought coverage for the Bethlehem Steel claims.[2]

Bethlehem initially filed suit in the Court of Common Pleas of Northampton County, PA against Kvaerner, and its subcontractor, to recover damages for injuries allegedly sustained by Bethlehem's Burns Harbor No. 2 coke oven battery which had been the subject of a design build contract between Kvaerner and Bethlehem Steel.

Kvaerner subsequently filed a declaratory judgment action against its insurers which had denied coverage for the Bethlehem Steel claim. Eventually, National Union, which had issued two very similar commercial general liability ("CGL") insurance policies to Kvaerner during the period of the contract, filed a motion for summary judgment. In its motion, National Union primarily contended that the claims asserted against Kvaerner by Bethlehem Steel were purely contractual claims and, therefore, were not within the coverages provided to Kvaerner by the CGL policies.

The trial court granted summary judgment to National Union, based upon its conclusion that the claims asserted against Kvaerner by Bethlehem Steel were not within the coverages afforded by the CGL policies because there had been no "occurrence," but only a breach

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RESTRICTIVE COVENANTS AND TRADE SECRET PROTECTION: THE BUSINESS OF PROTECTING BUSINESS

By Madeline M. Sherry, Esquire and Holly Sando Rieck, Esquire
Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., Philadelphia, PA

Companies have legitimate concerns and interests in protecting themselves from competition by former employees, and in protecting confidential information by limiting the ability of former employees to take information with them when they leave to work for another company. The extent to which a company can limit an employee's future employment, or preclude or limit that employee from taking confidential knowledge and information to the new employer, is the subject of much litigation in Pennsylvania state and federal courts.

This article examines the basic types of restrictions that are common in the business setting, a review of the enforcement of these restrictions, a comparison of the issues involving different types of industries and a discussion of the considerations pertaining to employment restrictions. Although restrictions may be part of an oral or signed contract or may be imposed by statute, for purposes of this article, they will generally be described as "restrictive covenants."

A restrictive covenant is enforceable where it is found to be:

(1) ancillary to employment or sale of business,

(2) supported by adequate consideration,

(3) reasonably limited in duration of time and geographic scope,

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Write: Pennsylvania Defense Institute
P.O. Box 697
Camp Hill, PA 17001

Phone: 800-734-0737 FAX: 800-734-0732
Email: coled01@padefense.org
Ralph E. Kates, Esq. . . . . .Editor-in-Chief

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of its contractual responsibility. In reaching it conclusion, the trial court substantially relied upon *Redevelopment Authority of Cambria County v. International Ins. Co.*, 454 Pa. Super. 374, 685 A.2d 581 (Pa. Super. 1996) (*en banc*), appeal denied, 548 Pa. 649, 695 A.2d 787 (1997), which held generally that CGL policies do not cover claims by a customer against a contractor for breach of a contract. Because it found no occurrence which would trigger the insuring agreement in the National Union policies, the trial court did not reach the issue of the applicability of certain "business risk/work product" exclusions relied upon by National Union.

In its decision, the Superior Court first rejected the argument that a determination of coverage should only be made by an examination of the allegations of the underlying complaint. The Superior Court found that it could look outside of Bethlehem's complaint in the underlying case because there was "no requirement in the [Policies] that a civil complaint be filed to trigger coverage . . . "

The Superior Court also quoted the Supreme Court's decision in *Mutual Beneficial Ins. Co. v. Haver*, 555 Pa. 534, 725 A.2d 743 (1999) which provides that "to allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies."

On the basis of this authority, the Superior Court apparently relied upon expert reports prepared prior to and during the Bethlehem Steel litigation in reaching its decision. Some of those reports attributed at least a portion of the damage to the battery to heavy rains during the construction which may have washed out brick mortar.

The Superior Court concluded that:

> the damage at issue is not the absence of the grout or the size of the grout spaces but the deformation and deflection of the brick work, tie rods and roof of the battery which occurred after the battery was placed in use. Whether that damage was caused in whole or in part by the torrential rains of October 31st and November 1st, or by some other event during the heatup of the battery, we are not hesitant to conclude that the physical damage to the battery constituted an occurrence for which the policies provide coverage UNLESS otherwise precluded by one of the exclusions set forth in the policy.[3]

The Superior Court recognized that the business risk/work product exclusions typically exclude coverage for "property damage to your product arising out of it or any part of it and included in the products-completed operations hazard." Since "your work" is defined to include work "performed by you or on your behalf," the court noted that these provisions appear to exclude coverage for damage to the Bethlehem coke battery. However, Endorsement 16 to the National Union policies changed the definition of "your work" under the "products-completed operations hazard" clause so as to exclude work performed by a subcontractor. Since the Superior Court concluded that it could not resolve the questions of which part of the work on the battery was performed by subcontractors and which work was defective, it held that the case should be remanded to the trial court for its application of Endorsement 16 to the facts.

In its opinion issued on October 25, 2006, the Supreme Court reversed the order of the Superior Court and held that National Union had no duty to defend or indemnify Kvaerner for the Bethlehem Steel's coke oven battery claims.

The Supreme Court first held that the Superior Court had erred by relying on evidence outside the complaint filed by Bethlehem Steel against Kvaerner, i.e., the litigation and pre-litigation expert reports. The Supreme Court rejected the Superior Court's use of evidence outside the complaint for the following reasons:

> The Superior Court erred in looking beyond the allegations raised in Bethlehem's Complaint to determine whether National Union had a duty to defend Kvaerner and in finding that the Battery's damages may have been the result of an "occurrence." In doing so, it departed from the well-established precedent of this Court requiring that an insurer's duty to defend and indemnify be determined solely from the language of the complaint against the insured. We find no reason to expand upon the well-reasoned and long-standing rule that an insurer's duty to defend is triggered, if at all, by the factual averments contained in the complaint itself.[4]

The Supreme Court next turned to the language of the National Union policies to determine what coverage was provided. The court also found it necessary to review the Bethlehem Steel complaint to determine whether the allegations triggered coverage under the policies.

While recognizing that the underlying suit alleged property damage only to Kvaerner's own work product from its faulty workmanship, the Supreme Court held that the "definition of 'accident' required to establish an 'occurrence' under the [National Union] policies cannot be satisfied by claims based upon faulty workmanship [such as those in the Bethlehem Steel complaint].[5] The court was concerned that to do so would convert the policies into "performance bonds" which the parties obviously did not intend.[6]

It was clear to the Supreme Court that the Bethlehem Steel complaint alleged property damage from poor workmanship only to the work product itself, i.e., the coke oven battery. This conclusion was apparent from the complaint which alleged, *inter alia*, that the battery "did not meet the contract specifications and warranties, or the applicable industry standards for construction, and accordingly was in breach of the contract and its warranties." However, since it held that the complaint's basis in faulty workmanship did not allege an "occurrence," the court did not reach the questions raised either by the potential application of the business risk/work product exclusions or by its own grant of appeal to address the "gist of the action" doctrine regarding whether the essence of a claim lies in an uninsured breach of contract or potentially insured negligence.

The Pennsylvania Supreme Court's decision in *Kvaerner* appears to be in line with the minority rule regarding insurance coverage for construction defects. In a recent article in the Tort Trial & Insurance Practice Law Journal,[7] the authors divided the cases from various jurisdictions across the country which have dealt with the issue of whether there was an occurrence in construction defect claims into three categories:

1. The "majority rule" that coverage is limited to damage to other property, i.e., construction defects satisfy the occurrence definition only if they cause damage to property other than the insured's own work or product;

2. The "foreseeability" rule (a pro-insurer minority rule consistent with the Pa. Supreme Court's specific no-occurrence holding), i.e., there is no coverage even for damage to other property because defective work actively performed by the insured is not an occurrence even where there is damage to other property because any damage to other property is a foreseeable result of faulty workmanship; and

3. The pro-insured minority rule, i.e., all damage is a covered occurrence since the term "accident" is not defined, therefore a broad definition will be applied which typically results in coverage.

A recent opinion from the U.S. Court of Appeals for the First Circuit in *Am. Home Assur. Co. V. AGM Marine Contractors, Inc.* discussed the majority rule but noted that some courts have held faulty workmanship by an insured that results in only damage to its product is not an occurrence, other courts have held that faulty workmanship does not constitute property damage, while yet a third line of reasoning focuses solely on the business risk exclusions.[8] The First Circuit, however, declined to rule based on an interpretation of the "occurrence" term, since there was no defining state law which provided definitive guidance. Rather, the court noted that in "all events, one of the exclusions in this case bars coverage even if we assume *arguendo* that there was an occurrence and property damage within the meaning of the policy." Therefore, the court ruled against coverage in that case based on the application of the various business risk exclusions.

A review of Justice Cappy's unanimous Opinion in *Kvaerner* indicates that Pennsylvania aligns itself with those jurisdictions which hold that claims for faulty workmanship are not covered because the insuring agreement of the policy is not triggered.

Many cases involving construction defect claim have some elements of damages that involve repair or replacement of the insured's own work product as well as repair or replacement of the work of other contractors or subcontractors. In *dicta* in *Kvaerner*, the Supreme Court discussed several such cases from both within and outside Pennsylvania as part of its discussion. One of the cases reviewed was the decision of the Supreme Court of South Carolina, in *L-J, Inc. v. Bituminous Ins. Co.*, 621 S.E.2d 33 (S.C. 2005).

The holding in *L-J, Inc. v. Bituminous* is consistent with *Kvaerner* in that it holds that faulty workmanship does not constitute an occurrence, however, the court in *L-J, Inc.* appears limited to a denial of coverage respecting claims for damages only to the insured's own work product. In its discussion of that opinion, the Pennsylvania Supreme Court noted "[t]he Court stated that a CGL policy may provide coverage where faulty workmanship caused bodily injury or property damage to another property, but not in cases where faulty workmanship damages the work product alone."[9] In light of this apparently limiting language, one may fairly question whether the holding in *Kvaerner is* also limited. If so, a CGL policy will only cover a claim against a contractor for repair or replacement of the work or property of others, but not for those claims which contend that the contractor's shoddy work required the repair or replacement of the contractor's own work product.

However, the holding of *Kvaerner* appears to leave no room for dispute. Note that the Supreme Court follows its discussion of similar cases by clearly announcing its holding - without restricting the application of the case only to damage to the insured's work. In the operative portion of this unanimous opinion, Chief Justice Cappy writes:

> We hold that the definition of "accident" required to establish an "occurrence" under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of "accident" or its common judicial construction in this context. To hold otherwise would be to convert a policy for insurance into a performance bond. We are unwilling to do so, especially since such protections are already readily available for the protection of contractors.[10]

While our Supreme Court discussed several supporting opinions, one of which is limited in a way which may be relevant to the questions presented in this case, its decision is clear and apparently fully dispositive of any and all claims made by a customer against its contractor arising from allegedly poor or shoddy workmanship. That the Supreme Court did not limit its holding to the work product of the insured is made clearer by the concluding paragraph of the opinion. After concluding that "faulty workmanship does not constitute an 'accident' as required to set forth an occurrence under the CGL policies,"[11] the court went on to explain, "[g]iven this conclusion, it is not necessary for us to consider whether the business risk/work product exclusions also preclude coverage here."[12] Since there was no occurrence, the Supreme Court found that the insuring agreement in the policies was not triggered. Further, nowhere in the opinion does the Court indicate any intent to limit its holding regarding coverage for damage to the insured's own work or product.

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END NOTES

[1]Mr. Gebler gratefully acknowledges the assistance of his partners, Elit Felix (Philadelphia) and Miles Kirshner (Pittsburgh) who provided helpful comments, criticisms and suggestions for this article.

[2]Commercial Union and Lexington Insurance Company settled with Kvaerner and were not involved in the appeals.

[3]825 A.2d at 654.

[4]2006 Pa. LEXIS 2064 at 18-19. (Citations omitted).

[5]2006 Pa. LEXIS 2064 at 27.

[6]The court noted that Kvaerner had recovered under both a Builder's Risk Policy, providing coverage for property constructed by it under the contract, and a Professional Liability Policy, covering alleged negligent acts, errors, or omissions by Kvaerner or its subcontractors.

[7]41 Tort Trial & Ins. Prac. L.J. 1079 (2006).

[8]*Am. Home Assur. Co. V. AGM Marine Contractors, Inc.*, No. 05-2310 (1st Cir., November 8, 2006).

[9]2006 Pa. LEXIS 2064 at 15.

[10]2006 Pa. LEXIS 2064 at 16-17.

[11]2006 Pa. LEXIS 2064 at 17.

[12]2006 Pa. LEXIS 2064 at 17.

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(4) and reasonably necessary to protect the employer (without imposing undue hardship on the employee[1]).

Wincup Holdings, Inc. v. Hernandez, 2004 WL 953400, *2 (E.D. Pa. May 3, 2004); *Omicron Sys., Inc. v. Weiner,* 2003 Phila. Ct. Com. Pl. LEXIS 64, *rev'd in part*, 2004 Pa.Super. 389 (Pa. Super. 2004).

I. TYPES OF RESTRICTIONS

A. Non-Competition Clauses

The most common form of restriction is the non-competition agreement, often referred to as a "non-compete" clause. The non-competition clause may take the form of a restriction upon the employee in working in the future for a company that competes with the current company, or working in the future for a customer of the current company.

1. Definitions

It is important that the employer's business is well defined, as well as the employee's title, duties and obligations within the context of that business. While employers would be well-advised to describe the business and the position of their employee in as broad terms as possible to allow for accommodations as the business develops and the employee's role changes within the business, the agreement must contain an understandable and measurable description of the business and the employee's role in the business in order to withstand judicial scrutiny when the agreement is challenged by the former employee or when the employer seeks to restrain the former employee from working for a competitor.

2. Reasonable Geographical and Temporal Restrictions

A non-competition agreement which bars competition in general business "without limitation as to time or area, [is] void on its face as being an unreasonable restraint of trade." *Bilec v. Auburn & Assocs., Inc.,* 403 Pa. Super. 176 (Pa. Super. 1990), *appeal denied*, 528 Pa. 620 (1991)(citation omitted)."'[E]mployment contracts containing general covenants by an employee not to compete after the termination of his employment are prima facie enforceable if they are reasonably limited as to duration of time and geographical extent." *Jacobsen & Co., Inc. v. International Environment Corp.,* 427 Pa. 439 (1967)(quoting *Barb-Lee Mobile Frame Co. v. Hoot*, 416 Pa. 222, 225 (1965).

General covenants are reasonably limited if they are "within such territory and during such time as may be reasonably necessary for the protection of the employer . . . without imposing undue hardship on the employee. . . ." Restatement, Contracts, § 516(f) (1932); *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 628, (1957); *Jacobsen & Co., Inc. v. International Environment Corp.*, 427 Pa. 439 (1967). Pennsylvania courts routinely uphold one to three year covenants not to compete. *National Bus. Servs., Inc. v. Wright*, 2 F.Supp.2d 701, 708 (E.D. Pa. 1988)(citing *Diversey Lever, Inc. v. Hammond,* 1997 U.S. Dist. LEXIS 648 (E.D. Pa. Jan. 24, 1997), and *Worldwide Auditing Servs., Inc. v. Richter*, 402 Pa. Super. 584, 591-592 (1991)); *Bryant Co. v. Sling Testing & Repair*, 471 Pa. 1, 5 (1977); *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 589 (1976).

Where a court finds the geographic or time restrictions unreasonable, it may choose to order the restrictive covenant unenforceable. *Bilec v. Auburn & Assocs., Inc.,* 403 Pa. Super. 176 (Pa. Super. 1990), *appeal denied*, 528 Pa. 620 (1991). Where the employee has been terminated for failing to perform in a matter that promotes the employer's business interests, the business interests in restricting the former employee's future activities are insignificant. This renders the non-compete clause unreasonable as a matter of law. *Insulation Corp. of America v. Bobston*, 446 Pa. Super. 520, 667 A.2d 729 (Pa. Super. 1995); *United One Resources, Inc. v. Hanson*, 2006 Pa. D&C Dec LEXIS 123 (Luz. Co.). In Pennsylvania, modifications by the court to the restrictive covenants, including restrictions on geographic scope and duration, are allowed. See, *Bell Fuel Corp. v. Cattolico*, 375 Pa.Super. 238 (1988), *appeal denied,* 520 Pa. 612 (1989); *Siemens Med. Solutions Health Servs. Corp. v. Carmelengo*, 167 F.Supp.2d 752, 760 (E.D. Pa. 2001).

B. Non-Solicitation Clauses

For many businesses, it is important to limit the former employee from soliciting company customers, or from convincing other company employees to join the employee in the new venture. Each of these business concerns, when appropriately articulated as restrictive covenants, is often upheld. *Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238 (1988), *appeal denied,* 520 Pa. 612 (1989); *Unisys Corp. v. Entex Information Services, Inc.*, 45 Pa. D. &C.4th 405 (Montg. Co. 2000).

With regard to the non-solicitation of customers, since the solicitation would be defined by the identity of the company's customer, inserting provisions regarding geographic scope may not be necessary depending on the business of the company, and could potentially limit an employer's recovery where a customer base is national or global. Restrictions on duration should still be included. *Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238 (1988), *appeal denied,* 520 Pa. 612 (1989); *See also,* Section IV (B), *infra,* re: global markets.

C. Forfeiture-for-Competition Clauses

In several cases, courts have upheld clauses that called for the forfeiture of various benefits if an employee failed to abide by a non-compete clause. In all these cases, there was no question as to whether the non-compete agreement was ancillary to employment, reasonable in

geographic scope and time, and for the purpose of protecting a legitimate business interest. For cases discussing the forfeiture of deferred compensation, stock options or pension plans, respectively, as a consequence for competition within the agreed to geographic area and or duration, *see, Fraser v. Nationwide Ins. Co., Inc.*, 334 F.Supp.2d 755 (E.D. Pa. 2004); *Capozzi v. Latsha & Capozzi, P.C.*, 2002 Pa. Super. 102 (Pa. Super. 2002), *appeal denied,* 573 Pa. 670 (2003); *Garner v. Girard Trust Bank*, 442 Pa. 166 (1971)). *But see, Hess v. Gebhard & Co.*, 570 Pa. 148 (2002)(where the court was faced with the threshold questions of whether the covenant was enforceable absent an assignment clause, and whether the covenant served to protect a legitimate business interest.); *Bilec v. Auburn & Assocs. Pension Trust*, 588 A.2d 538 (Pa. Super. Ct. 1991)(where the court refused to enforce a pension forfeiture clause standing alone and not tied to non-competition clause or protection of trade secrets/confidential information, stating there was no legitimate business interest to protect.); *Capozzi v. Latsha & Capozzi, P.C.*, 2002 Pa. Super. 102 (Pa. Super. 2002)(although holding that a forfeiture-for-competition clause could apply to stock options, the court found the covenant unenforceable where it was unreasonable and not limited in time or territory).

D. Confidential/Proprietary Information and/or Trade Secrets Clauses

In Pennsylvania, there are restrictions on divulging confidential information or trade secrets by the legal concepts of unfair competition and agency, as well as provisions in the Pennsylvania Uniform Trade Secrets Act, even in the absence of an employment agreement or clause dealing with confidential information or trade secrets. *Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238 (1988), *appeal denied,* 520 Pa. 612 (1989). Nonetheless, employers often include confidential/proprietary information and trade secret clauses in their employment agreements to limit litigation over what the business considers to be confidential/proprietary information or trade secrets. Unlike non-competes, non-solicitation and forfeiture-for-competition clauses, confidential/proprietary information or trade secret clauses are not subject to a reasonableness standard. *Bell Fuel Corp. v. Cattalico*, *supra*. While an employer is entitled to protect its confidential information, "generally the information must be a particular secret of the employer, not a general secret of the trade, and must be of peculiar importance to the conduct of the employer's business." *Id.*

Definitions play a key role in assisting the employer when it comes time to enforce a confidential information or trade secrets provision. An employer should define what processes, customers, manuals, computer records etc… are confidential/proprietary information or "trade secrets" in the agreement itself to save time in litigating this piece by piece when the time comes. Where an employer is concerned that a protectable interest will not meet the statutory definition or factors a court will use to determine if it is a "trade secret" (as described *infra*), the employer may include a provision in the employment agreement in which the parties agree that certain information, materials, and processes constitute the confidential and proprietary information of the employer. This provision is enforceable under basic principles of contract law. *Pittsburgh Logistics Sys., Inc. v. Prof'l Transp. & Logistics, Inc.,* 2002 Pa. Super 227 (Pa. Super. 2002).

As is the case for all restrictive covenants, in considering enforceability, the court will look to whether the trade secret or confidential/proprietary information clause serves to protect a legitimate business interest. *Volunteer Fireman's Ins. Serv., Inc. v. CIGNA Property & Cas. Ins. Agency*, 693 A.2d 1330 (Pa. Super. 1997).

Pennsylvania recently enacted the Uniform Trade Secrets Act which defines a "trade secret" as: information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 12 Pa. C.S. § 5302.

"The crucial indicia for determining whether certain information constitutes a trade secret are substantial secrecy and competitive value to the owner." *O.D. Anderson, Inc. v. Cricks*, 2003 Pa. Super. 13 (Pa. Super. 2003). *See also, N3 Oceanic, Inc. v. Shields*, 2006 U.S. Dist. LEXIS 58563 (E.D. Pa. Aug. 21 2006)(where company failed to prove allegations that its former president and his newly formed business misappropriated trade secrets because none of the items it claimed were trade secrets met the definition of trade secret under 12 Pa.C.S. § 5302; for example, the financial data the company cited was the same data it made public and the pricing was already well known to third party vendors.)

Some factors that a court may consider in determining whether information qualifies as a trade secret include: (1) the extent to which the information is known outside the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *Dibble v. Penn State Geisinger Clinic, Inc.*, 2002 Pa. Super. 156, 806 A.2d 866, 871 (Pa. Super. 2002) (citations omitted).

II. ENFORCEMENT OF RESTRICTIONS

A. General Considerations

Like other jurisdictions, Pennsylvania courts view restrictive covenants as restraints on trade that prevent former employees from earning a living. *Hess v. Gebhard & Co.,* 570 Pa. 148, 157 (2002). Although restrictive covenants are disfavored, Pennsylvania courts will enforce a restrictive covenant if an employer's protectible interests in such matters as confidential information, trade secrets, specialized skills and training and employer-customer relationships outweigh an employee's right to earn a living. *Id.* at 157.

"If the covenant is inserted into the agreement for some other purpose, as for example, eliminating or repressing competition or to keep the employee from competing so that the employer can gain an economic advantage, the covenant will not be enforced." *Id.* As well, a court may modify the restrictive covenant if it is determined to have been

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broader than necessary to protect a legitimate business interest. See, *Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238 (1988), *appeal denied,* 520 Pa. 612 (1989); *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618 (1957); *Bettinger v. Carl Berke Association, Inc*., 455 Pa. 100 (1974).

All covenants are measured by consideration of whether they are reasonably necessary to protect the business interests of the employer. *Hess v. Gebhard & Co.,* 570 Pa. at 163*; Volunteer Fireman's Ins. Serv., Inc. v. Cigna Property and Casualty Ins. Agcy*, 693 A.2d 1330 (Pa. Super. 1997). It is not enough for the employer to say the restrictions are necessary. The inquiry is fact and industry specific as will be addressed in Section IV, *infra*.

B. Signing the Agreement

The outcome of whether the covenant will be enforced may hinge on the manner in which and the time when the covenant was presented to the employee. The covenant must be ancillary to employment or to the sale of a business. In Pennsylvania, if an employer fails to provide the agreement to the prospective employee as part of the hiring process, the employer subjects itself to a high degree of scrutiny by the court which will consider, among other factors, whether the employer offered adequate additional consideration in exchange for the employee's "agreement" to be bound to the restrictions. *See, Wincup Holdings, Inc. v. Hernandez*, 2004 WL 953400, *3 (E.D. Pa. May 3, 2004); *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327 (1974).

Generally the covenant is at risk if it is not signed ancillary to the commencement of the employment relationship. *See, Wincup, supra, Maintenance Specialties, supra, and, Kistler v. O'Brien*, 347 A.2d 311 (1975)(the court concluded that a valid oral contract of employment, without a covenant to compete, existed prior to the written contract of employment, and reversed the trial court's order. Continuation of employment at the time the written contract was signed was not sufficient consideration for the covenant.)

In a few instances, Pennsylvania courts have upheld restrictive covenants that have been signed after the employment relationship commenced. In *National Business Service, Inc. v. Wright*, 2 F.Supp.2d 701, (E.D. Pa. 1998), the court upheld the contract where a covenant was discussed with the employee before the offer of employment was presented, but the covenant was signed ten days after the employee started his job. In those instances where the restrictive covenant is presented after the commencement of employment, the courts will consider whether adequate consideration has been given by the employer in exchange for the employee's decision to agree to the restriction. *See, e.g., M.S. Jacobs & Associates, Inc. v. Duffley*, 452 Pa. 143 (1973)(an agreement to pay commissions); and *Wainright's Travel Service, Inc. v. Schmolk*, 347 Pa. Super. 199(1985)(an agreement for issuance of stock or rights to stock)).

C. Assignability

In this era of mergers and acquisitions, companies change hands and change names on a routine basis. Under Pennsylvania law, restrictive covenants in employment agreements are not assignable to successor employers except as explicitly permitted by the agreement, or unless the employee consented to the assignment. *See, All-Pak, Inc. v. Johnston*, 694 A.2d 347, 351-52 (Pa. Super. 1997).

In order to ensure the enforceability of an employment agreement, an employer should include an assignment clause so that the company's name on the day the employer seeks enforcement of the restrictive covenant will not impede the employer from enforcing the employment agreement. *See, Hess v. Gebhard & Co.,* 570 Pa. 148, 167 (2002) ("we hold that a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant is included in a sale of assets. In reaching this conclusion, we find that personal characteristics of the employment contract permeate the entire transaction. Like the contract for hire, upon which the covenant was given, the employee's restrictive covenant is confined to the employer with whom the agreement was made, absent specific provisions for assignability."); *see also, Savage, Sharkey, Reiser & Szulborski Eye Care Consultants, P.C. v. Tanner*, 848 A.2d 150 (Pa. Super. Ct. 2004). *But see, Seligman & Latz of Pittsburgh v. Vernillo*, 382 Pa. 161, 114 A.2d 672 (1955); *Howe v. Anderson*, 23 D.& C.3d 297 (C.P. Adams 1982) (in both cases, the court held that a restrictive covenant could be enforced against an employee by an employer which changed its form from a partnership to a corporation); *see also, Alabama Binder & Chem. v. Pennsylvania Indus. Chem*., 410 Pa. 214 (1963), (the court permitted an assignment of a restrictive covenant from the predecessor employer to the successor employer but noted the case involved a restrictive covenant made in conjunction with a buy-sell agreement, and cited *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618 (1957), for the principle of law that covenants not to compete which are ancillary to a buy-sell agreement will not be subject to the higher level of scrutiny given those covenants entered into as part of employment contracts).

III. REMEDIES

Remedies for breach of an employment agreement typically include the right to seek injunctive relief, damages and attorneys' fees and costs. *Omicron Sys. v. Weiner*, 2004 PA Super 389 (Pa. Super. Ct. 2004); *Judge Technical Services, Inc. v. Clancy*, 2002 Pa. Super. 391 (Pa. Super. 2002). In citing *Judge Technical Services, Inc. v.* Clancy, *(supra),* the *Omicron* court stated:

> The general rule in this Commonwealth is that the plaintiff bears the burden of proof as to damages. The determination of damages is a factual question to be decided by the fact-finder. The fact-finder must assess the testimony, by weighing the evidence and determining its credibility, and by accepting or rejecting the estimates of the damages given by the witnesses. Although the fact-finder may not render a verdict based on sheer conjecture or guesswork, it may use a measure of speculation in estimating damages. The fact-finder may make a just and reasonable estimate of the damage based on relevant data, and in such circumstances may act on probable, inferential, as well as direct and positive proof.

Id. at *P36.

A. Injunctive Relief

It is common for a restrictive covenant to include a provision where the employee acknowledges that she understands that the employer may seek

injunctive relief. The ability to seek injunctive relief is crucial to the company since the injunction process offers the company a near-immediate decision, at least preliminarily, as to whether the former employee can continue her new employment and new employment activities. Moreover, seeking an injunction gets the immediate attention of the former employee and often helps encourage a negotiated settlement more quickly than an action at law.

Even where an employment agreement includes an arbitration clause, it is common to include a provision allowing an employer to seek preliminary injunctive relief pending arbitration. *Merrill Lynch, Pierce, Fenner & Smith, Inc v. Rodger*, 75 F.Supp.2d 375 (M.D. Pa. 1999). In some jurisdictions, including Pennsylvania, a contractual provision allowing the employer to seek injunctive relief pending arbitration is not required by the courts. *Id*.

B. Liquidated Damages

In addition to an injunction being granted, liquidated damages may be assessed. *See, Omicron Sys. v. Weiner*, 2004 Pa. Super. 389 (Pa. Super. 2004); *Judge Technical Services, Inc. v. Clancy*, 2002 Pa. Super 391 (Pa. Super. 2002). Because damages suffered as a result of breaching a restrictive covenant are usually difficult to quantify or prove with any degree of certainty, where a contract calls for a reasonable sum of damages, a liquidated damages clause may be upheld. *See, Geisinger Clinic v. Dicuccio*, 414 Pa. Super. 85 (1992), *appeal denied,* 536 Pa. 625 (1993), *cert. denied,* 513 U.S. 1112 (1995).

A plaintiff need not seek injunctive relief in order to seek liquidated damages. *See, Geisinger Clinic v. Dicuccio*, 414 Pa. Super. at 108.

An employer should ensure its liquidated damages provision is sufficiently distinguishable from a penalty or forfeiture term to ensure its enforcement. *Stover v. Spielman*, 1 Pa. Super. Ct. 526, 530-531 (1896).

C. Statutory Damages: Pennsylvania Uniform Trade Secrets Act

In accordance with the Pennsylvania Uniform Trade Secrets Act, the company may recover the actual losses caused by misappropriation, and/or unjust enrichment caused by misappropriation and/or punitive damages for willful and malicious misappropriation. Additionally, actual or threatened misappropriation of trade secrets may be enjoined. *See,* 12 Pa. C.S. §5303-5304. Attorneys' fees are available in more limited circumstances. *See,* 12 Pa.C.S. §5305.

D. Other Damages

Among others, damages that have been contracted for and/or sought are attorneys' fees, *Omicron Sys. v. Weiner*, 2004 Pa. Super. 389 (Pa. Super. Ct. 2004), as well as an accounting of profits. *Hayes v. Altman,* 438 Pa. 451, 456 (1970).

Additionally, to the extent actual damages can be assessed and proved, all remedies sought in accord with relevant contract or tort causes of action would also be available to the employer as well.

E. Example Damages Clause

An example of a remedies provision is provided below:

> "EMPLOYEE acknowledges that any breach by him of the obligations set forth in this Agreement, including but not limited to any breach of the obligations and restrictions set forth in Sections ____of this Agreement would substantially and materially impair and irreparably harm the Company's business and goodwill; that such impairment and harm would be difficult to measure; and, therefore, total compensation in solely monetary terms would be inadequate. Consequently, EMPLOYEE agrees that in the event of any breach or any threatened breach by EMPLOYEE of any of the provisions in this Agreement, the Company shall be entitled in addition to monetary damages or other remedies, to equitable relief, including injunctive relief. If EMPLOYEE shall be found to have breached this Agreement, EMPLOYEE shall pay to the Company all costs and expenses incurred by the Company in enforcing the provisions hereof, including attorneys' fees and costs. The remedies granted to the Company in this Section are cumulative and are in addition to remedies otherwise available to the Company at law or in equity. The term Company as used in this Section shall include any person or entity that directly or indirectly, controls, or is controlled by, or is under common control with the Company."

IV. ISSUES RE: SPECIFIC PROFESSIONS AND/OR GLOBAL MARKETS

A. Restrictive Covenants in Specific Professions

Decisions by courts about whether to enforce non-compete style agreements are quite fact specific, and to some extent, industry specific. The financial services and medical professions have utilized non-compete agreements for many years, and therefore, these professions are at the center of much litigation involving the definition, scope and enforceability of such agreements.

Case law regarding the enforcement of restrictive covenants in the medical and financial services fields is an example of judicially detailed consideration of the facts and attempts to understand the unique issues that are significant to various industries.

1. The Medical Field

In the medical field, while the Superior Court upheld a five-year restrictive covenant involving an oncologist/hematologist in *West Penn Specialty MSO v. Nolan*, 1999 Pa. Super. 218 (1995), the Pennsylvania Supreme Court chose not to enforce a two year ban on practice on a county-wide limitation against an orthopedic surgeon in *New Castle Orthopedic Associates v. Burns*, 481 Pa. 460 (1978). As the Supreme Court recognized in *New Castle*, there is a specific public interest at stake in the examination of non-compete agreements among physicians. The court stated:

> Paramount to the respective rights of the parties to the covenant must be its effect upon the consumer who is in need of the service. This is of particular significance where equitable relief is sought and the result of such an order or decree would deprive the community involved of a desperately needed service."
>
> *Id.* at 469.

The court concluded that where patients who sought orthopedic care experienced delays of four weeks to four months to see the only other orthopedic surgeon in the area that was restricted by the covenant, the public interest in adequate medical care was more significant than the orthopedic group's right to obtain injunctive relief against the doctor who had left the practice.

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Restrictive Covenants

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In *West Penn*, the court distinguished *New Castle*, in part based on the fact that there were 96 oncologists practicing in West Penn's five county service area. The trial judge concluded that there was no shortage of oncologists within the ten mile radius and compelled the doctor to "comply with her contractual obligations." In her dissenting opinion, Judge Orie Melvin criticized the injunctive relief and stated that the injunction restricted not only Dr. Nolan in her practice, but also restricted the actions of Dr. Nolan's patients by restricting their rights to seek ancillary treatment and services.

2. The Financial Services Field

The financial services industry provides unique and interesting issues involving restrictive covenant agreements. *Fishkin v. Susquehanna Partners*, 2006 U.S. Dist. LEXIS 34862 (E.D. Pa., May 31, 2006) is illustrative of the complex factual and procedural twists these cases present. Three former employees of Susquehanna filed a declaratory judgment in state court seeking an order that the post-employment restrictive covenants in their employment agreements were unenforceable. Susquehanna formed a new partnership with NT Prop Trading LLC after the plaintiffs left Susquehanna. The case was removed to federal court. Prior to the removal, Susquehanna filed counterclaims against two of the three plaintiffs and then moved for a preliminary injunction against all three plaintiffs. A preliminary injunction hearing was conducted. Transcripts and exhibits from the hearing and the memorandum and order granting Susquehanna's preliminary injunction were placed under seal. Subsequent activity included dismissal of the plaintiff employees' appeal, transfer of the case from Judge James McGirr Kelly to Judge Mary McLaughlin, the filing of an amended complaint by plaintiffs, and the filing of a motion to dismiss with respect to one of the plaintiffs which was granted in favor of only one of the corporate defendants. In her opinion, Judge Mary McLaughlin considered separate motions for summary judgment filed by Susquehanna and by NT Prop. The court granted SIG's motion for summary judgment but denied NT's motion for summary judgment. The court considered such diverse issues as the misappropriation of trade secrets, tortuous interference claims, the scope and enforcement of a "Non-Association Clause," the role of parol evidence related to statements that were allegedly made by a recruiter prior to the execution of the employment agreements, and the general question of enforcement of restrictive covenants under Pennsylvania law.

With respect to specific issues involving this industry, Judge McLaughlin supported Judge Kelly's determination that plaintiff Fishkin had taken full advantage of Susquehanna's capital, technology and trial and error process to learn how to use the trading strategy. Judge McLaughlin stated that once the company "invests in providing an employee with these opportunities, it is entitled to a buffer period before that employee can use that knowledge to compete with it**."** *Id.* at *31.

In supporting Judge Kelly's determination that there was ample evidence that traders developed goodwill with brokers and learned about the trading habits of other traders and that this goodwill and knowledge was valuable to the plaintiffs, Judge McLauglin noted that broker goodwill, like customer goodwill is a legitimate business interest of the company.

B. Global Markets

There are special issues that relate to a company's needs and interests in enforcing restrictions in a global economy. For those companies that compete in the national and international arena, what is the limit to the protections they seek? While there are more questions than answers, there has been some guidance from courts related to companies that seek to enforce restrictions in a broad territory.

Although disfavored, courts will enforce nationwide covenants not to compete where the employer's business is nationwide or "not limited by state boundaries." *National Bus. Servs., Inc. v. Wright*, 2 F.Supp.2d 701 (E.D. Pa. 1998); *Graphic Mgmt. Assocs., Inc. v. Hatt,* 1998 WL 159035, at *14; *Volunteer Firemen's Ins. Servs., Inc. v. CIGNA Property & Cas. Ins. Agency*, 693 A.2d 1330 (Pa. Super. 1997).

Likewise, businesses that market their products or services on the internet are similarly situated to have a court uphold a global non-compete. *National Bus. Servs., Inc. v. Wright*, 2 F.Supp.2d 701 (E.D. Pa. 1998) ("transactions involving the Internet, unlike traditional 'sales territory' cases are not limited by state boundaries.")

More recently, in an unpublished opinion, *Arch Personal Care Products, L.P. v. Malmstrom*, 2003 U.S. App. LEXIS 26274 (3d Cir. 2003), the court affirmed the lower court's order granting a preliminary injunction to enforce a three-year non-compete agreement against Malmstrom, the former president and a principal shareholder in Brooks Industries. Malmstrom sold nearly all of the assets of his company, Brooks Industries, a company that manufactured cosmetic ingredients which were sold to manufacturers of finished cosmetic and personal care products, to Arch Personal Care Products in an asset-purchase agreement. This agreement also included a consulting agreement between Arch and Malmstrom which included a non-compete clause that provided that the "Consultant shall not, for the term of this Agreement and three (3) years immediately following the termination hereof, within the United States, engage in activities or businesses, or establish any new businesses, that are substantially in competition with the Business ("Competitive Activities"), including:…" *Id.* at **3. The non-compete agreement then set out a list of activities that it defined as "Competitive Activities."

In upholding the district court's grant of injunctive relief, the appellate court was not swayed by the geographic limitations the language would impose, namely that Malmstrom would be restricted from competitive activities on an international as well as national basis and stated:

> Although the district court's order includes international businesses in addition to U.S.-based businesses with which Malmstrom is prohibited from competing, the order mirrors the language of the original agreement not to compete by restricting Malmstrom from doing business with these companies while he is "within the United States".
>
> *Id.* at **14.

In making its determination, the court agreed with the district court's factual consideration that the restrictive agreement was part of an asset-purchase agreement between two business people

with equal bargaining power and for which Malmstrom received ample consideration both in terms of the purchase price as well as the payment for his consulting services. *Id*. at **13, and **2-3.

V. CONCLUSION

A company will succeed in enforcing restrictive covenants if the covenants are well drafted, reasonable and if the limitations make sense in the business world, as well as to a court. The company must be prepared to explain the legitimate business interest it seeks to protect. Likewise, a company's risk in hiring an employee contractually bound to another company is also assessed in terms of the written agreement. The weaker the employment agreement, the easier it is for the hiring company to consider and evaluate the risk of a potential lawsuit in hiring away a key employee from a competitor. Should the restrictive covenants contained within the agreement not serve any legitimate business interest, be far-reaching or overbroad in their geographic and time limitations, or if the agreements were not executed ancillary to an employment decision with adequate consideration, a company may be giving away the key to hiring away its key employees.

END NOTE

[1]Pennsylvania cases formally add the consideration of whether protecting the employer's legitimate business interest imposes undue hardship on the employee to their recitation of the elements required to enforce restrictive covenants. This consideration, whether specifically enunciated or not, is made by both state and federal courts.

MEDICAL MALPRACTICE UPDATE

By Howard Levinson, Esquire,Rosen, Jenkins & Greenwald, Wilkes-Barre, PA

U.S. Supreme Court Holds That State's Medicaid Department Entitled To A Lien Only On Settlement Proceeds With Respect To Medical Expenses

In *Arkansas Dept. of Health and Human Services v. Ahlborn*, 126 S. Ct. 1752 (2006), the Court held that a State's medicaid department will be limited to reimbursement from only that portion of a judgment or settlement that represents payment for medical expenses. States are now prohibited from being reimbursed for medicaid costs from settlement proceeds that were intended to cover items other than medical expenses such as pain and suffering and wage loss. The federal anti-lien statute prevents States from attaching or encumbering the non-medical portion of the settlement or judgment. The court held that "the risk that parties to a tort suit will allocate away the State's interest can be avoided by either obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id*. at 1765.

Certificate Of Merit Required For Professional Negligence Cause Of Action In Case Of Injuries From Patient's Fall

In *Budner v. Allegheny General Hospital*, 74 Pa. D. & C. 4th 557 (Court of Common Pleas of Allegheny County, 3/9/05), the court addressed whether a certificate of merit was required in the context of a patient's falling from a chair while under the care of a physical therapist.

In 2001, Amy Budner fell during a session of physical therapy treatment at a facility owned by defendant. Under the care of a physical therapist, Mrs. Budner sat in a high swivel chair for the purpose of a whirlpool bath treatment. When Mrs. Budner attempted to get down from the chair, she fell. As a result of the fall, Mrs. Budner suffered injuries to her neck, back, ribs, coccyx, and right shoulder. To seek recovery for alleged injuries, Mrs. Budner filed a cause of action for negligence against Allegheny General Hospital and the physical therapist.

Plaintiffs, Mr. and Mrs. Budner, brought the case as a premises liability claim against defendants. Plaintiffs attempted to demonstrate that Allegheny General Hospital was liable for knowingly placing Mrs. Budner in the swivel chair, an object that Plaintiffs called a "dangerous condition of the land." The court rejected the premises liability claim as an insufficient cause of action, citing the three-part test in the Restatement (Second) of Torts. The court held that the physical therapist's professional negligence, not the chair, was the alleged cause of Mrs. Budner's injury. Because plaintiffs failed to file a timely certificate of merit, they could not file a professional negligence claim pursuant to Pa.R.C.P. 1042.2. The court granted summary judgment in favor of the defendants.

Court Denied Motions To Preclude Testimony Of Nurse Presented As A Fact Witness

In *Burega v. Centre Community Hospital Inc*., 73 Pa. D. & C.4th 235, (Court of Common Pleas of Pennsylvania, Centre County, 8/24/05), the court denied motions in limine brought by defendants Centre Community Hospital Inc. and J.R. Paine M.D. to preclude testimony of Mary Harter (Auman) R.N.

In the amended complaint, plaintiff alleged that J.R. Paine M.D. was negligent in caring and treating for minor plaintiff during an emergency visit in 1997. Plaintiff asserted that Dr. Paine failed to diagnose minor plaintiff's Group B strep meningitis and sepsis.

During the process of discovery, the deposition of Mary Harter (Auman) R.N. was taken. Nurse Harter was the emergency room nurse who assessed minor plaintiff during the 1997 emergency room visit. Nurse Harter was asked to give her opinions of minor plaintiff's condition while in the emergency room. In response to the deposition of nurse Harter, both defendants (Centre Community Hospital Inc. and Dr. Paine) filed motions in limine to preclude nurse Harter's testimony.

Defendants argued that nurse Harter should be precluded from making medical diagnoses or prescribing treatments, as indicated in Pennsylvania Nursing Law, 63 P.S. § 212(1), which reads:

> **(1)** The **"Practice of Professional Nursing"** means diagnosing and treating human responses to actual or potential health problems through such services as casefinding, health teaching, health counseling, and provision of care supportive to or

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> restorative of life and well-being, and executing medical regimens as prescribed by a licensed physician or dentist. *The foregoing shall not be deemed to include acts of medical diagnosis or prescription of medical therapeutic or corrective measures, except as performed by a certified registered nurse practitioner acting in accordance with rules and regulations promulgated by the Board*. (emphasis added)

Plaintiff countered defendant's objection to nurse Harter's testimony, stating that nurse Harter would testify as a fact witness, not as a medical expert. As a factual witness, nurse Harter would confine her testimony to observations of plaintiff minor's chart, staying in line with the language of Pennsylvania Nursing Law, 63 P.S. § 212(1). The court held that:

> "Nurse Harter's testimony may be presented by plaintiff. However, such testimony must be restricted to that which she is qualified to testify, including but not limited to descriptions of what she observed, what she did, and notations she made in plaintiff minor's chart."

Further, the court held that Nurse Harter "may not offer opinions as to either the medical diagnosis of plaintiff minor's condition or to the medical causes of that condition." The court also ordered that, "to further avoid confusion, the jury will be informed at time of trial, and prior to deliberations, that testimony of a nurse is not expert medical testimony."

Various Evidentiary Issues In Malpractice Claim

In *Burton v. Chatwani*, 2006 W.L. 1768388 (Court of Com. Pl. 5/30/06), the court addressed multiple evidentiary issues in the context of a medical malpractice action. Plaintiff's complaint alleged that her left ureter was injured when she was operated on for a hysterectomy, and as a result thereof, a fistula developed, resulting in the leakage of urine into her vagina.

a. Qualification Of Expert Under MCARE

Plaintiff argued that the trial court erred in permitting Dr. Hersch, a urologist, to testify as a witness because he was not an obstetrician/gynecologist and was, therefore, not qualified to testify as to the standard of care involved in hysterectomy surgery. The court found no merit to this contention. The record reflected that Dr. Hersch did not testify about the standard of care of an obstetrician/gynecologist, but rather about the standard of care involved in avoiding uretal injury during abdominal surgery and about a diagnostic test used to determine whether a ureter was damaged during surgery, subjects which were within his area of expertise. While the court noted that the MCARE Act plainly prefers, and in some cases may require, that expert testimony in professional malpractice cases come from witnesses with expertise in the defendant's particular subspeciality, the Act does not require that testimony in all cases be so restricted. 40 P.S. §1303.512(c).

b. Reasonable Medical Certainty Not Required of Defense Expert

Plaintiff also objected to the testimony of Dr. Hersch because his opinions were not stated to a reasonable degree of medical certainty. On this issue the court held as follows:

> "While experts called by plaintiffs in medical malpractice actions surely indicate that their opinions are rendered to a degree of medical certainty, there appears to be no such requirement with respect to experts called by the defense."

c. Cross Examination Of Defense Expert About Malpractice Suits Filed Against Expert

Plaintiff complained that the court erred when it prohibited plaintiff's counsel from cross examining a defense expert about medical malpractice lawsuits filed against her. On this point the court held as follows:

> "Had the plaintiff's counsel been more specific in her questioning and lay the foundation as set forth that, in fact, the doctor had been sued for malpractice and when and where that occurred, the defense's objection most likely would not have been sustained, especially given that evidence showing that the doctor had been recently sued for malpractice would be admissible to prove bias."

d. Judge Berating Of Trial Counsel

Plaintiff also argued a new trial should be granted because the court improperly berated counsel before the jury thereby prejudicing the jury against plaintiff and her attorney. The law provides that a litigant has the right to a fair trial before an impartial jury uninfluenced by a trial court's having showed favoritism or ill will toward either party. The record reflected that the court admonished plaintiff's counsel only after she insisted upon asking improper questions after objections to them had been sustained. In so doing, the court did not stigmatize counsel or make comments that would cause the jury to dislike the plaintiff or her attorney. The fact that the complained of comments did not prejudice the plaintiff renders the argument without merit.

e. Right To Make A Record

Finally, plaintiff claimed that the court erred when it refused to allow plaintiff's counsel to make a record or offer of proof. The court did not preclude plaintiff ever from making an offer of proof or for making record. It merely did not permit her to do so at a certain point during the trial. Once the witness finished testifying, counsel should have placed whatever she wished on the record.

Voir Dire Allowed Regarding Prospective Jurors' Attitude Towards Tort Reform

In *Capoferri v. Children's Hospital of Philadelphia*, 893 A.2d 133 (Pa. Super. 2006), the court held that parties in a medical malpractice action were entitled to question prospective jurors on *voir dire* regarding the attitudes toward tort reform. This medical malpractice trial resulted in a verdict for the defense. On appeal plaintiffs argued that they were precluded from questioning prospective jurors during *voir dire* about the alleged media coverage of "the alleged medical malpractice crisis in and the alleged flight of physicians from Philadelphia."

The court noted that the sole purpose of *voir dire* is to secure a fair, competent and impartial jury. To achieve this purpose, general questions should be permitted so that it can be determined whether any of the veniremen would have a direct or even a contingent interest in the outcome of the litigation or the parties involved. The scope and extent of *voir dire* examination is within the sound discretion of the trial court and the trial court's ruling thereon will not be disturbed absent a clear abuse of that discretion.

In its ruling the court noted that Rule 220.1(a)(16) directs that *voir dire* shall include the opportunity to obtain "[s]uch other pertinent information as may be appropriate to the particular case to achieve a competent, fair, and impartial jury." The court concluded that with the amount of publicity occurring at the time the case was ready for trial, the parties should have been allowed to question prospective jurors about their attitudes regarding medical malpractice and tort reform in order to determine whether each individual juror could serve in a fair and impartial manner. Common sense, as noted by the court "…dictates that the type of media coverage that accompanied the debate over tort reform created a climate from which the average person could conclude that he or she would be economically impacted and/or be deprived of accessible health care services. Because there was no question that there was pervasive media coverage on the issue of medical malpractice prior to trial in the instant case, we conclude that counsel for both sides should have been permitted to question the prospective jurors regarding the subject and attempt to glean whether there was any impact on any individual juror's ability to decide the case fairly and impartially." 893 A.2d at 142.

The Superior Court did not require that the trial court specifically allow the questions proposed by plaintiffs, but did hold that the questions proposed by plaintiffs were acceptable. Had any of the jurors responded positively to these initial questions, either party should have been entitled to have more specific questions put to the jurors designed to probe those jurors' attitudes regarding, and possible bias resulting from, the tort-reform information. Voir dire questions submitted by the plaintiff included:

Have you seen or heard advertisements that criticize persons who use the judicial system as a method of recovering money for personal injuries or damages caused by another person? If so, what have you seen or heard?

Does anything concern you about personal injury lawsuits generally or medical malpractice cases in particular in which an injured person seeks money damages? If so, what is your concern? Please explain.

Do any of you have any prejudice against a person who files a lawsuit seeking money damages for personal injuries based upon anything you or anyone in your family or household has seen or heard, or based upon any personal feelings or thoughts you may have?

Do any of you have any preconceived prejudice against individuals who file a lawsuit claiming injuries as a result of the medical malpractice of hospitals and/or physicians, because of recent publicity, advertising or newspaper stories that you have read or heard regarding the "so-called" medical malpractice crisis in the Philadelphia community? If so, please explain.

Guaranty Association Is Liable For The Lesser Of The Insolvent Insurer's Policy Limit Or The Statutory Maximum Of $300,000

In *Chajkowsky v. Pennsylvania Property and Casualty Insurance Guaranty Association*, 895 A.2d 528 (Pa. 2006), the Supreme Court, by per curiam order, affirmed the decision of the Commonwealth Court which held that the Guaranty Association's liability was limited to the lesser of the amount set forth in the insolvent insurer's policy or the statutory maximum of $300,000, and that the Guaranty Association had no responsibility for delay damages and post-judgment interest. Thus, the Commonwealth Court held that the Guaranty Association's liability in this case was $200,000, the amount of the insolvent insurer's policy limit.

The underlying medical malpractice claim resulted in a verdict for the plaintiff of approximately $3.5 million. The Association paid plaintiff $200,000 which represented the defendant doctor's policy limits with PIC, but was $100,000 less than the Guaranty Association's $300,000 cap. In a concurring statement, Justice Baer noted that in *Hall v. Brown*, 526 A.2d 413 (Pa. Super. 1987) the court held that an insurance carrier that has paid the limits of the policy will not be liable for delay damages except when acting in bad faith. The Justice noted that the propriety of *Hall* in the context of claims against the Guaranty Association has not been addressed and further noted that there was no claim in the instant case that the Guaranty Association acted in bad faith. The Justice affirmed because the parties did not ask the court to review the matter pursuant to *Hall* which, in his opinion, was necessary before a determination could be made on the Guaranty Association's liability for delay damages.

Under MCARE And The Pennsylvania Rules Of Civil Procedure, A Medical Professional Liability Claim May Be Brought Against A Health Care Provider Only In The County In Which The Cause Of Action Arose

In *Clark, et. al. v. Lankenau Hospital*, et. al., No. 03839, 2006 WL 1768062 (Pa.Com.Pl. June 8, 2006), the plaintiff brought a medical malpractice claim in Philadelphia county against a number of health care providers who had treated him. Following a verdict for the defendants, Clark appealed. The Superior court affirmed the judgment as to the Philadelphia defendants, but remanded the case for trial as to the Montgomery county defendants. On remand, the remaining defendants moved for a change of venue from Philadelphia to Montgomery county. The court granted the motion to transfer and Plaintiff appealed.

The Superior Court affirmed on the ground that none of the remaining malpractice defendants had Philadelphia jurisdictional ties. Except as provided in subsection (c) (relating to actions to enforce joint and several liability against two or more defendants), Pa.R.C.P. 1006(a)(1) provides that a medical professional liability action may only be brought against a health care provider in a county in which the cause of action arose. This rule was adopted in accordance with section 514(a) of the MCARE Act, 42 Pa. C.S. §5101.1(a). Because the remaining defendants had no jurisdictional ties to Philadelphia, but all provided care in Montgomery county, the case was properly transferred to that county.

Availability In A Civil Case Of Discovery Of Financial Records Of A Non-Party Expert Medical Witness To Facilitate An Inquiry Into Potential Bias

In *Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006), the Supreme Court addressed the scope of discovery with respect to a "professional expert". The underlying claim concerned a car accident. The defendant engaged a Dr. Eagle to perform an IME. Dr. Eagle was known as having extensive participation in defense medical exams. Plaintiff

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sought discovery relating to these activities to show potential favoritism toward the defense, or, more generally, the insurance industry. The trial court ordered the production of copies of Federal Form 1099 tax records associated with Dr. Eagle's performance of services as an independent contractor for calendar years 1999, 2000 and 2001 in undertaking "defense-related reports, examinations and depositions". Defendant appealed the order, and while the appeal was interlocutory, the case proceeded as of right through the appellate courts under the collateral order doctrine.

Plaintiff sought the information claiming that it was essential to a defense tactic of cultivating and employing "professional witnesses", as well as the evasiveness of such witnesses in responding to legitimate inquiries concerning the extent of their financial entanglements with defense firm and/or the insurance industry. Plaintiff had presented evidence to the trial judge that Dr. Eagle was involved for at least thirteen years in conducting examinations for defense attorneys, rehabilitation firms, and insurance companies. Plaintiff also presented evidence that Dr. Eagle acknowledged in the past that payment for defense medical examinations represented a "big ticket item" in terms of his income, and that the doctor had been vague and inconsistent in his responses to questions concerning the raw number of his litigation-related ventures in any given year.

As a threshold matter, the court agreed with the trial court that Rule 4003.5 should be read to restrict the scope of all discovery from non-party witnesses retained as experts in trial preparation. The court held that the better practice is to channel inquiries into collateral information through the Rule's "cause shown" criterion. Pa. R.C.P. 4003.5(a)(2).

The court agreed with the general proposition that a pattern of compensation in past cases raises the inference of the possibility that the witness has slanted his testimony in these cases so he could be hired to testify in future cases. The Supreme Court held as follows:

> Therefore, we believe that the appropriate, threshold showing to establish cause for supplemental discovery related to potential favoritism of a non-party expert witness retained for trial preparation is of reasonable grounds to believe that the witness may have entered the professional witness category. In other words, the proponent of the discovery should demonstrate a significant pattern of compensation that would support a reasonable inference that the witness might color, shade, or slant his testimony in light of the substantial financial incentives.

Thus, the court held that the boundaries of discovery, weighing the respective interests of the parties, was as follows:

> In keeping with the idea that the discovery along these lines should be of the least burdensome and intrusive kind possible, we believe that the appropriate entry point, upon the showing of cause, is a deposition by written interrogatories under Rule of Civil Procedure 4004. Through this vehicle, and subject to the trial court's exercise of its sound discretion, the proponent of the discovery may be permitted to inquire as to the following: the approximate amount of compensation received and expected in the pending case; the character of the witnesses' litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; the number of examinations, investigations, or inquiries performed in a given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same period; the approximate portion of the witness's overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up to the past three years, garnered from the performance of such services. While we recognize that some jurisdictions have limited this form of discovery to exclude the income category, *see, e.g., Syken*, 644 So.2d at 546, we believe that this limited aspect of income information is within the fair scope of relevance on the question of potential favoritism. *Accord Wrobeski*, 727 A.2d at 938 ("If there is a reasonable basis for a conclusion that the witness may be a 'professional witness,' the party may inquire…into the amount of income earned in the recent past from services as an expert witness[.]").

The court noted that the witness will certainly incur expenses connected with the deposition and the trial court has discretion to allocate costs appropriately. Pa. R.C.P. 4003.5(a)(2).

The court further held that after an assessment of the interrogatory responses, the trial court, upon appropriate motion, may determine that there is cause to support further supplemental discovery, including production of tax records.

Finally, the court held that there are procedures supporting adequate trial preparation on the issue of potential bias of non-party witnesses less burdensome than the production of financial records, and thus, the orders of the Superior Court and the Common Pleas Court were vacated without prejudice.

Facts Relating To R.N.'S Investigation Into The Causes Of Patient's Infection Are Discoverable

In *Forrest v. St. Luke's Hospital*, 73 Pa. D. & C. 4th 353 (Court of Common Pleas of Lehigh County, 6/13/05), the court reviewed protection from discovery issues pertaining to the Peer Review Protection Act and the Medical Care Availability and Reduction of Error Act (MCARE Act).

Plaintiffs Kevin Forrest and Michael Trigiani developed sternal wound infections following heart surgery performed at defendant St. Luke's Hospital, Bethlehem Campus on October 28, 2003 and October 27, 2003, respectively. The unusual circumstance of the infections was that the infection diagnosed in both Forrest and Trigiani arose out of the "same virulent strain of bacteria."

Since the two infections occurred unusually close together, Steven Schweon R.N., St. Luke's Hospital's Coordinator of Infection Control and Prevention, initiated an investigation into the possible causes of the infection. Schweon was particularly concerned that the operating room could be the source of bacteria that caused the infections in Forrest and Trigiani. During his deposition, Schweon was asked about his investigation of the infection. Defendant's counsel objected to the questions and told Schweon not to respond, citing the confidentiality protection provided by the Pennsylvania Peer Review Protection Act, 63 P.S. § 425.1-425.4 and the

MCARE Act, 40 P.S. § 1303.311 (specifically relevant to provisions about investigations performed by the hospital's Patient Safety Committee).

Defendant cited section 311 of the MCARE Act as grounds for objection to the interrogation of Schweon. Section 311 of the MCARE Act protects from discovery only "documents, materials, or information prepared or created pursuant to the responsibilities of the Patient Safety Committee or governing board of a medical facility…" 40 P.S. § 1303.311(c). Schweon did not testify that he initiated his investigation per instructions by a Patient Safety Committee. Further, there was no mention of a Patient Safety Committee in Defendant's policies and procedures. Because Schweon's investigation was not conducted on behalf of a Patient Safety Committee, the court concluded that section 311 of the MCARE Act did not apply, and defendant's objections based on section 311 were overruled.

In addition, defendant cited the Peer Review Protection Act as grounds for objecting to the disclosure of information related to Schweon's investigation and findings. 63 P.S. §425.4 In order for information about an investigation to be protected from discovery, discussions about the information must be conducted at a peer review meeting. Information about Schweon's investigation was not brought before a committee. Further, Schweon's conclusions were generated by his personal investigation, not by the work of a peer review committee. Because Schweon, not the committee as a whole, was the original source of the investigative report, confidentiality protection could not be afforded to Schweon's findings under the Peer Review Protection Act. *See: Tirado v. Lehigh Valley Hospital*, 49 Pa. D. & C.4th 110 (Lehigh County, 2000).

The court order allowed plaintiff to redepose Schweon for the purpose of resuming questioning related to the investigation of possible causes of the infections at issue in this suit.

The Venue Rules On Medical Malpractice Do Not Apply Where A Doctor Is Joined As An Additional Defendant And Plaintiff's Underlying Claim Is Not Based On Medical Malpractice

In *Forrester v. Salkind*, 901 A.2d 548 (Pa. Super. 2006), the court addressed whether the trial court abused its discretion when it transferred the case from Philadelphia to Montgomery County pursuant to Pa. R.C.P. 1006(a.1). Plaintiff, Kenneth Foster, was involved in a car accident in Philadelphia with defendant, Michael Hanson. Suit was brought in Philadelphia County. Subsequently, Hanson joined as an additional defendant Dr. Salkind, plaintiff's treating physician due to his alleged negligent treatment of plaintiff. Dr. Salkind moved to have the venue transferred to Montgomery County. The trial court sustained Dr. Salkind's objection to venue. Plaintiff appealed.

On the issue of appealability, the court noted that an order transferring venue in a civil action is interlocutory in nature, although, by statute, such an order is appealable as a right.

The court then addressed whether the general rules of venue apply or the venue rules set forth in MCARE. The threshold issue was whether the case involved a medical malpractice claim. Pursuant to 42 Pa. C.S.A. §5101.1(c) a "medical professional liability claim" is defined as follows:

> Any claim seeking the recovery of damages or loss from a health care provider arising out of any tort or breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided.

Because the joinder complaint against Dr. Salkind did not assert a claim seeking recovery of damages or loss from the doctor, the joinder complaint was not a "medical professional liability claim", as defined by statute. Accordingly, the venue rules applicable to malpractice actions did not apply, and thus it was an abuse of discretion for the trial court to transfer the case to Montgomery county.

An Expert Who Submits Various Reports To A Party And Then Refuses To Testify For That Party Resulting In The Claim Being Dismissed, May Be Liable, Based On Breach Of Contract, To The Party On Whose Behalf The Report Was Submitted

In *Rambo v. Greene*, 2006 W.L. 2423433 (Pa. Super. 2006), the common pleas court dismissed a complaint against an expert who had provided several reports to the plaintiff in a medical malpractice case. The plaintiff filed a medical malpractice lawsuit and secured two expert reports from a Dr. Greene. Dr. Greene refused to testify at the medical malpractice trial. He was served with a subpoena, yet he remained absent. As a result, Rambo's case against the defendant doctor did not proceed and a non-suit was entered. Subsequently, Rambo brought a breach of contract action against Dr. Greene. The trial court dismissed the complaint following preliminary objections based on lack of specificity.

The Superior Court reversed. The Superior Court noted that there was no written agreement between the parties where Greene affirmatively stated that he would testify as an expert at Rambo's trial. However, the court held that under contract law, the objective manifestations of the parties is the governing factor regardless of subjective beliefs and reservations. Even if the expert truly believed a contract did not exist, if his manifested intent reasonably suggested the contrary, a jury could find that there was a contract.

The defendant argued, based on *Panitz v. Behrend*, 632 A.2d 562 (Pa. Super. 1993), that a party may not contract with an expert witness in order to compel the witness to give only favorable testimony on the threat of civil liability. The court held that it was premature to address this issue as there was no allegation that Greene contracted with the plaintiff to only give favorable testimony or to testify to anything other than the truth.

An Exception To The *Res Ipsa Loquitur* Exception: Expert Testimony Required In Medical Malpractice Action Where Issues Are Beyond 'Ordinary' Knowledge

In *Solis v. St. Luke's Hospital*, 75 Pa. D. & C. 4th 198 (Court of Common Pleas of Lehigh county, 5/27/05), the court held that the *res ipsa loquitur* exception to the requirement that expert testimony must accompany a medical malpractice action was inapplicable in light of the technical nature of the surgery undergone by plaintiff's decedent.

Plaintiff brought suit against defendant on behalf of decedent who suffered two enterotomic tears (tears resulting from an enterotomy, a procedure in which a surgical incision is made into the intestine) following laparoscopic surgery on his abdomen. Plaintiff asserted that defendant was negligent in performing

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the surgery and providing post-operative care. Defendant's negligence allegedly caused the onset of peritonitis, system sepsis, and respiratory failure, causing decedent's death.

Plaintiff had no expert report and asserted that an expert report was unnecessary because the *res ipsa loquitur* exception to the expert testimony requirement was applicable.

The court held that the *res ipsa loquitar* exception, which applies only where "the matter under investigation is so simple, and the lack or want of care so obvious as to be within the range of ordinary experience of even non-professional persons," did not apply to the plaintiff's suit. *Toogood*, 573 Pa. at 255, 824 A.2d at 1145. The court explained that laparoscopic surgery and treatment of enterotomic tears involve specialized knowledge, "matters beyond the knowledge of ordinary laypersons." The court required plaintiff to submit an expert report. Because plaintiff failed to produce an expert report before the deadline had expired, the court granted defendant's motion for summary judgment.

Sanctions Denied Based On Defense Counsel's Opening Remarks Causing A Mistrial In Malpractice Case

In *Stahl v. Redcay*, 897 A.2d 478 (Pa. Super. 2006), the parents brought a medical malpractice action against a doctor arising out of the birth of a baby. The Court of Common Pleas of Union County granted a mistrial after the doctor's counsel, during his opening statement, stated that defense had a host of experts to support the proposition that smoking caused microcephaly when, in fact, the only witness that doctor's counsel could cite for this proposition was a nurse whose testimony had been ruled inadmissible. After granting a mistrial, the parents' attorney moved for sanctions in the form of a contempt petition seeking costs and attorney fees from doctor's counsel for causing the mistrial. The trial court imposed sanctions and ordered defense counsel to pay $52,088.02 to plaintiffs' counsel.

The Superior Court held that the trial court's contempt/sanctions order was civil in nature and, thus, immediately appealable. Further, the court held that absent a definite, clear, and specific prior order of record prohibiting the use at trial of evidence of mother's smoking during pregnancy as a cause of baby's microcephaly, the doctor's counsel should not have been found in civil contempt. The court noted, however, that a finding of criminal contempt or civil contempt is immediately appealable. In this case, the court held that the sanction order was for civil contempt. If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of some private party, proceedings to enforce compliance with the decree of the court are civil in nature. The court noted, however, that under prevailing Pennsylvania law, a civil contempt ruling with sanctions involving discovery orders remains interlocutory and not immediately appealable.

The court found that although defense counsel strategy in misstating the evidence should not be condoned, the court was "constrained to reverse".

Bathing An Elderly Incapacitated Patient At A Nursing Home May Give Rise To A Professional Liability Claim And Therefore Coverage Is Provided Pursuant To The CAT Fund

In *Strine v. Commonwealth of Pennsylvania, Medical Care Availability and Reduction of Error Fund*, 894 A.2d 733 (Pa. 2006), a nursing home brought an action against the CAT Fund alleging that the Fund breached its statutory duty in refusing to indemnify it for a payment the nursing home made to settle a wrongful death suit against it. This malpractice claim arose out of the death of a 75 year old patient at the Chester Care Center. A certified nursing assistant administered a bath to the patient as therapy to relieve her bed sores, which resulted in the patient suffering sever burns because the bath water was too hot, which burns caused the patient's death. A wrongful death action was brought and the parties settled before trial for $1.5 million, of which PPCIGA paid $200,000 and Chester Care paid the $1.3 million balance. Thereafter, Chester Care sought partial indemnification from the Fund, pursuant to its statutory excess coverage in the amount of $1 million. The Fund claimed that it was not liable because the bath given to the plaintiff did not constitute a medical service supporting a claim for "professional liability" under the Health Care Services Malpractice Act. The Fund maintained that the bath was merely part of the patient's "routine care" and would not have been covered by medical malpractice liability insurance, which in turn relieved the Fund of any statutory duty to furnish indemnification.

By statute, the Fund's liability arises for losses occasioned by claims of "professional liability". The court held that the patient was physically and mentally incapacitated such that bathing required a certain degree of specialized training. 40 P.S. §1301.102, 103, 701(d). The statute regulating the Fund makes it evident that "professional liability" applies to liability "resulting from the furnishing of medical services which were or should have been provided.". 40 P.S. §1301.103 (superseded).

In holding the Fund liable, the court noted that a nurse's aid is required by law to complete certain training and that the nurse in question underwent six weeks of formal classroom training, including instruction on bathing and patient care. Further, the regulations under 28 Pa. Code §201.3 define "skilled or intermediate nursing care" as including daily inpatient services provided pursuant to a physician's direction.

The court rejected the Fund's suggestion that coverage is precluded on the basis that an equipment failure was to blame for the occurrence. Even accepting that the water's excessive heat was occasioned by a faulty valve, the court held that it was evident that the inattentiveness of the nurse's aid in administering the bath was also a substantial contributing factor in causing the death.

Court Affirmed Civil Penalty Issued Against Plaintiff Doctor For Failure To Comply With Reporting Requirements Of MCARE

In *Taterka v. Bureau of Professional and Occupational Affairs, State Board of Medicine*, 882 A.2d 1040, (Pa. Commonwealth 2005), the court affirmed an order of the State Board of Medicine. The Board's order upheld the conclusions of a Hearing Examiner to assess a penalty of $1,000.00 against plaintiff Dr. James A. Taterka, M.D. for violating Section 903 of the Medical

Care Availability and Reduction of Error Act (MCARE), 40 P.S. § 1303.903.

Dr. Taterka had been previously named as a defendant in a civil medical professional liability action brought before the Court of Common Pleas of Philadelphia county. Upon notice that Dr. Taterka had been named as a defendant, the Board notified Dr. Taterka by letter that he had not fulfilled the reporting requirements of Section 903 of MCARE, which reads:

> "A physician shall report to the State Board of Medicine … within 60 days of the occurrence of any of the following:
>
> (1) Notice of complaint in a medical professional liability action that is filed against the physician. The physician shall provide the docket number of the case, where the case is filed and a description of the allegations in the complaint."

40 P.S. § 1303.903.

Even after notification by the Board, Dr. Taterka still did not comply with the reporting requirements of Section 903. As the basis for its initiation of disciplinary action against Dr. Taterka, the Board cited Section 908 of MCARE, which reads:

> "Licensure board-imposed civil penalty. In addition to any other civil remedy or criminal penalty provided for in this act … the State Board of Medicine … by a vote of the majority of the maximum number of the authorized membership of each board as provided by law or by a vote of the majority of the duly qualified and confirmed membership or a minimum of five members, whichever is greater, may levy a civil penalty of up to $10,000 on any current licensee who violates any provision of this act …" 40 P.S. § 1303.908.

Although Dr. Taterka's attorney speculated that the Board may have misplaced the forwarded complaint, the attorney assumed responsibility for Dr. Taterka's failure to file the complaint in accordance with Section 903's reporting requirements.

Plaintiff argued that the civil penalty issued against him was inappropriate since the Board had received a copy of the complaint from another party at the time that the Board penalized plaintiff for violating Section 903. Plaintiff asserted that the policy of Section 903 was enacted to maintain records of complaints filed against physicians. Since a copy of the complaint had already been received by the Board, plaintiff argued that the Board's sanctioning of him was improper. The court rejected plaintiff's interpretation of Section 903. The court noted that Section 903 "expressly mandates that a licensed physician *shall* report any complaint in a medical liability action taken against the physician." The word 'shall,' the court concluded, clearly indicated that the intent of the statute was to require a licensed physician to report any complaint brought against him.

In holding that plaintiff could not relinquish the reporting requirements of Section 903 of MCARE to his attorney, the court noted that delegating the reporting duty to a second party, an attorney in this case, did not immunize Plaintiff from professional responsibility.

Court Reviewed Discovery Issues Under Peer Review Protection Act And MCARE Act

In *Treible v. Lehigh Valley Hospital Inc*., 75 Pa. D. & C.4th 22 (Court of Common Pleas of Lehigh County, 8/12/05), defendant Lehigh Valley Hospital (LVH) objected to plaintiff Rhonda Treible's request for the production of documents. Defendant asserted that the documents were protected from disclosure under the Peer Review Protection Act, 63 P.S. § 425.1-425.4, and the Medical Care Availability and Reduction of Error Act, 40 P.S. § 1303.101-1303.910.

The disputed matter before the court concerned defendant's refusal to produce selected pages from four separate reports asserting that they were protected from discovery. The second page of each of the four reports was entitled "Quality Assurance Review Form" (QAR form). The QAR form included a description of the incident, the follow-up steps taken after the incident, and a report by the appropriate departmental director indicating the conclusions drawn as a result of the incident and follow-up.

a. Peer Review Act

The court held that the defendant must carry the burden to demonstrate that the QAR forms were generated and utilized by a peer review committee. There was no such evidence presented.

b. MCARE Act

The MCARE Act extends a confidentiality privilege to "documents, materials or information. . .which arise out of matters reviewed by the patient safety committee pursuant to section 310(b) or the governing board of a medical facility. . ." 40 P.S. § 1303.311(a). The court reasoned that since no evidence had been presented to demonstrate that the QAR forms were reviewed by a patient safety committee or by the hospital's governing board, the defendant could not claim protection from discovery under the MCARE Act.

c. Significance Of Witness Reviewing Confidential Reports In Preparation For Deposition

The court had an additional circumstance to consider in deciding the present case. Nurse Renee E. Gombert, a witness produced by defendant LVH, consulted the QAR forms prior to testifying at her deposition. The court held that it was "patently unfair" to shield the QAR forms from discovery by the plaintiff since Gombert had been permitted to use the forms in preparation for her deposition. The court concluded that, "in the interest of justice," the plaintiff must have the same opportunity as Gombert to review the QAR forms.

PPCIGA Is Liable On A Per Policy Not Per Claim Basis

In *Valley Medical Facilities, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Association,* 902 A.2d 547 (Pa. Super. 2006), the court addressed whether the PPCIGA ("Association") statutory limit of $300,000 per claimant should be applied per insured and per policy. The underlying malpractice claim concerned the care surrounding the birth of a minor plaintiff. It was alleged that The Medical Center ("TMC") and Dr. Crozier ("Crozier") were negligent and brought about harm to the minor plaintiff. There was a verdict of approximately $4,800,000 with 90% of the casual negligence to TMC and 10% to Dr. Crozier.

PHICO provided TMC with a $300,000 primary coverage policy limit and an excess coverage policy limit of $5,000,000, and provided Dr. Crozier with a $200,000 primary coverage limit. The Association argued that its limit per

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the language of the statute was per claim and since there was only one claim that its limit was $300,000.

Further, the Association argued that Crozier and TMC were "insurers" rather than "claimants" within the meaning of the statute. It was not disputed that the plaintiff in the medical malpractice action had a covered claim. TMC and Dr. Crozier made payments for the amounts they believe the Association should have paid and took an assignment on any rights against the Association. While there is some law to suggest that only a plaintiff in a medical malpractice action is a claimant, the court found that this was not persuasive and inconsistent with the liberal intention of the statute. Accordingly, the court held that TMC and Dr. Crozier were claimants, and further that the statutory limit is applied per policy and not per claimant.

Rejection Of Remittitur, Appealability, And Breach Of Contract

In *Vogelsberger v. Magee-Womens Hospital of UPMC, et al.,* 903 A.2d 540 (Pa. Super. 2006), the Superior Court addressed several issues under the MCARE Act relating to remittitur, and also addressed the circumstances under which a breach of contract action lies against a doctor in a medical malpractice context.

Plaintiff, Michelle Vogelsberger, appealed from the trial court's order granting remittitur in the amount the jury awarded in non-economic damages against the defendants. Thus, the trial court ordered reduction in non-economic damages from $600,000 to $200,000, with the proviso that if the reduction were rejected a new trial would be granted. In addition, plaintiff contended that the trial court erred by dismissing the breach of contract claim against Dr. Gentile on summary judgment. PaTLA and the Pennsylvania Medical Society filed briefs on the remittitur issue.

a. Appealability Of Remittitur Order Where Plaintiff Rejects The Remittitur

Following the verdict, defendants filed a motion for a new trial on the issues of damages. Plaintiff rejected the remittitur, and, thereafter, filed a timely notice of appeal. Defendants moved to quash the appeal pursuant to Pa. R.C.P. 1042.72, arguing that plaintiff must first proceed to a new trial on non-economic damages before the case is ripe for appeal. Plaintiff, on the other hand, argued that nothing in Pa. R.C.P. 1042.72 prevented her from taking an interlocutory appeal as of right pursuant to Pa. R.C.P. 311(6) from the grant of a new trial. Because the plaintiff rejected the remittitur, the effect of which was to grant a new trial, the Superior Court held that the appeal was proper and denied the motion to quash.

b. Remittitur Standard

One of the significant issues in the case was the standard to be applied by a court in determining whether remittitur is appropriate.

Prior to the passage of the MCARE Act and promulgation by the Supreme Court of Rule 1042.72, the following standard applied to remittitur in medical malpractice cases:

> The court is not warranted in setting aside, reducing, or modifying verdicts for personal injuries unless unfairness, mistake, partiality, prejudice, or corruption is shown, or the damages appear to be grossly exorbitant. The verdict must be clearly and immoderately excessive to justify the granting of a new verdict. The amount must not only be greater than that which the court would have awarded, but so excessive as to offend the conscience and judgment of the Court. *Goldberg ex rel. Goldberg v. Isdaner*, 780 A.2d 654, 662, (Pa. Super. 2001) (citation omitted).

903 A.2d at 552.

However, pursuant to Rule 1042.72, remittitur is appropriate as follows:

> (a) In a medical professional liability action in which the trier of fact has made separate findings specifying the amount of noneconomic loss, any defendant may include in a motion for post-trial relief under Rule 227.1 the ground that the damage award for noneconomic loss is excessive.
>
> Note: A damage award for noneconomic loss does not include amounts awarded for medical and other related expenses, loss of earnings or earning capacity, or punitive damages.
>
> (b) A damage award is excessive if it deviates substantially from what could be reasonable compensation. In deciding whether the award deviates substantially from what could be considered reasonable compensation, the court shall consider (1) the evidence supporting the plaintiff's claim; (2) factors that should have been taken into account in making the award; and (3) whether the damage award, when assessed against the evidentiary record, strongly suggests that the trier of fact was influenced by passion or prejudice.
>
> Note: The defendant has the burden of convincing the court that the award deviates substantially from what could be reasonable compensation. The factors that the trier of fact should take into account are those set forth in the jury instructions described in Rule 223.3.

In determining whether or not the MCARE Act modified the Rule in *Goldberg*, the court held as follows:

> The "deviates substantially from what could be reasonable compensation" standard differs from the traditional remittitur standard enunciated in *Goldberg* whereby "[t]he verdict must be clearly and immoderately excessive" and "[t]he amount must not only be greater than that which the court would have awarded, but so excessive as to offend the conscience and judgment of the court" in order to warrant a remittitur. *Goldber*g, 780 A.2d at 662. The "deviates substantially" standard appears to provide more flexibility in the court's discretion to grant remittitur for noneconomic damages in medical malpractice cases than does the traditional "grossly exorbitant" or "shocks the conscience of the court" standard. However, the "deviates substantially from what could be reasonable compensation" standard appears to remain congruent with the traditional common law precept that "remittitur should fix the highest amount any jury could properly award, giving due weight to all the evidence offered.". [citation omitted]

903 A.2d at 554.

c. Breach Of Contract Claim

Plaintiff claimed that she was advised by the doctor that he was going to perform a TAH/BSO, a total abdominal hysterectomy (removal of the uterus), and bilateral salpingo-oophorectomy

(removal of both ovaries and fallopian tubes). The doctor performed the TAH, but did not perform the BSO. Plaintiff signed an informed consent for a TAH/BSO and the preoperative note reflects that this was the surgery to be performed. The doctor testified that he was going to perform a TAH, and a BSO only if the circumstances warranted. Plaintiff, several years later, elected to have her ovaries removed and the surgeon who performed this procedure noted that the ovaries and tubes were adhered to the anterior pelvis by adhesions and covered by two different loops of bowel, which caused pain, and which may have been avoided had the defendant performed the BSO. Id at 547.

The court held that where the parties have agreed upon the performance expected by the plaintiff and promised by the defendant in terms that commit the defendant to that performance without reference to and irrespective of any general standard of care, the defendant may be liable on the contract whether or not he or she was negligent. The defendant doctor argued that Section 1303.105 of the MCARE Act precluded liability based on breach of contract. This section provides that, "In the absence of a special contract in writing, a health care provider is neither a warrantor nor guarantor of a cure." The court rejected this argument. Plaintiff was not seeking a cure for a disease. Rather plaintiff sought a specific prophylactic procedure in the absence of any disease to provide her assurance that she would not develop the disease in the first place. There was enough evidence as to whether or not there existed an enforceable contract to perform a prophylactic BSO and it was an abuse of discretion for the trial court to dismiss this claim.

PRIVACY IN THE 21ST CENTURY WORKPLACE

By Jill Fisher, Esquire, Zarwin, Baum, DeVito, Kaplan, Schaer & Todd, P.C., Philadelphia, PA

I. Introduction

To monitor or not to monitor – that definitely is a question for the 21st century. New technologies make it attractive and affordable for employers to monitor all aspects of their employees' jobs. However, as more and more employees are being monitored in the workplace, the number of lawsuits being filed for invasion of privacy is on the rise.

Privacy rights of individual employees stem from several sources, including the United States Constitution, federal and state statutes and state common law. This article will discuss employee privacy rights at the pre-employment stage, during employment and after the employment relationship has ended. This article is not intended to be a treatise on each topic. Rather, it is intended to alert the reader to certain potential legal issues concerning privacy rights of employees.

II. Privacy Rights At The Pre-Employment Stage

Many employers want to screen job applicants before a final offer of employment is made. It is essential that individuals involved in the hiring process be aware of job applicants' privacy rights under federal and state laws.

A. Job References

Increased litigation has caused former employers to be cautious when giving references to prospective employers. When responding to requests for references, many employers follow "the less said, the better" rule. The more information provided by the person giving the reference, the greater the risk of a defamation or other tort action being filed.

Defamation cases, which involve the publication of false facts concerning the plaintiff, often arise when a prospective employer contacts a current or prior employer to confirm an applicant's ability and/or trustworthiness. The problem surfaces when the current or former employer informs the prospective employer of misconduct or performance evaluations which may result in the applicant being rejected. If the misconduct did not occur, or took place outside of work, or if the performance evaluation is false, the current or former employer may be subject to a defamation action.

Prospective employers can protect themselves by obtaining an applicant's consent, in writing (on the employment application or by separate authorization), to have the applicant's current or former employer contacted. If the consent is given, prospective employers should confine their questions to areas that are job-related and should not ask questions in areas made otherwise impermissible by discrimination statutes, such as the Americans With Disabilities Act and the Pennsylvania Human Relations Act. Employers should make the acquired information available only to those individuals who participate in the hiring or selection process.

B. Pre-Employment Inquiries Under The Americans With Disabilities Act

1. Questions Regarding An Applicant's Medical Condition

The Americans With Disabilities Act ("ADA"), 42 U.S.C. §121101 *et seq.*, prohibits prospective employers from asking any questions that may elicit a response from an applicant which reveals a disability, or the nature or severity of a disability. Obviously, the employer cannot ask whether an applicant has a disability or whether s/he can perform major life activities, such as seeing, hearing or walking. An employer cannot ask at the pre-offer stage about an applicant's worker's compensation history.

Not all impairments are disabilities under the ADA. Therefore, an employer may ask questions about an applicant's impairments if the question is not likely to elicit information about whether the applicant has a disability. For example, an employer may ask an applicant with a broken arm how s/he broke the arm, but may not ask such questions as "Will the arm heal normally?" or "Do you have a history of broken bones?" These types of questions are almost always disability-related.

A prospective employer may ask questions about an applicant's ability to perform specific job-related functions, so long as the question is not phrased in

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terms of disability. An employer may ask an applicant to describe or demonstrate how s/he would perform the job and whether s/he will need a reasonable accommodation to do so.

2. Pre-Offer Medical Examinations

Under the ADA, an employer may require a medical examination only if it is job-related and consistent with business necessity and only after a job offer has been extended to the applicant. The offer of employment may be conditioned on the results of the examination so long as: (1) all applicants in a particular job category are subjected to a physical examination; (2) the information is maintained in a separate medical file and is treated as confidential; and (3) the results of the exam are not used to screen out an individual or class of individuals with disabilities. If the physical examination reveals a disability, especially if it is not job-related, the employer must be careful not to engage in any action that results in discrimination against that individual because of the disability.

Under the ADA, drug testing is not a medical examination and, therefore, is permissible at the pre-offer stage. However, the employer must avoid exposing itself to a cause of action for defamation by communicating the results of an inaccurate drug test to third parties. Alcohol testing, unlike drug testing, is considered a medical examination under the ADA.

3. Genetic Testing

Today, many employers are taking advantage of new, affordable technology that makes it possible to test applicants to determine whether they have certain genetic characteristics or deficiencies. The ADA does not protect applicants from requirements or requests to provide genetic information to an employer after a conditional offer of employment is made. It does, however, protect individuals with symptomatic genetic disabilities the same as individuals with other disabilities. According to the Equal Employment Opportunity Commission ("EEOC"), employers who discriminate on the basis of genetic predisposition regard an individual as having an impairment covered by the ADA.

While employers certainly have an interest in hiring and retaining healthy, productive employees, federal and state legislators seem to disfavor such testing in the workplace. In February, 2005, the federal Genetic Information Nondiscrimination Act (S.306, H.R. 1227) was introduced and passed in the Senate. If enacted, this law will prohibit discrimination on the basis of genetic information with respect to insurance and employment. It would stop employers from requiring applicants to submit to genetic testing, maintain strict use and disclosure requirements of genetic testing information, and impose penalties against employers who violate these provisions.

A number of states, including Delaware and New Jersey, have passed genetic information non-discrimination statutes. New Jersey's statute, the Genetic Privacy Act, N.J. 10:5-43 *et seq.*, prohibits obtaining or retaining genetic information without obtaining the informed consent of the individual to be tested. In addition, under the New Jersey statute, a DNA sample obtained from an individual for employment purposes must be destroyed after the purpose for which the sample was obtained is accomplished.

4. Personality Testing

Generally, employers use personality tests to help them determine certain traits and/or deficiencies of job applicants. Personality tests help employers make better judgments about a job applicant's honesty, potential for violence, substance abuse or sexual harassment, and whether an applicant is suitable for a particular position.

Employers should be aware that certain types of personality tests, or the manner in which certain tests are administered, might violate the ADA. The EEOC has issued guidelines as to what types of personality tests may constitute a medical examination under the ADA. For example, a test which reflects whether an applicant has characteristics that lead to identifying excessive anxiety, depression, or certain compulsive disorders listed in the DSM is a medical examination, even if the employer intends to use the test only to determine certain tastes or preferences of the applicant. On the other hand, a personality test designed and used to reflect only whether an applicant is likely to lie is not a medical examination.

In *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005), the court addressed whether an employer violated the ADA when it required prospective managers to take a series of management profile tests which included a personality test – the Minnesota Multiphasic Personality Inventory Test ("MMPI"). The MMPI can measure personality traits, but it also measures traits such as depression, hypochondria, hysteria, paranoia and mania. Although none of the prospective managers scored well enough on the overall management profile to be promoted, they sued their employer on the grounds that the company's use of the MMPI violated the ADA's prohibition against using "medical tests" that tend to screen out people with disabilities. The court held that Rent-A-Center's use of the MMPI violated the ADA because it was designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of an individual with a mental disability.

In addition to being challenged as impermissible medical exams under the ADA, personality tests may violate other anti-discrimination statutes, for example, Title VII, if the tests tend to screen out a protected category of applicants, such as African Americans. Excessively intrusive personality tests also have led to common law invasion of privacy claims. Therefore, employers who use personality tests to screen applicants should carefully review the tests before administering them.

C. Pre-Employment Inquiries Under other Statutes

1. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964, as amended in 1991, 29 U.S.C. §2000e *et seq.,* prohibits employers from making adverse employment decisions on the basis of certain protected categories such as sex, race, national origin, religion or age. To protect themselves from the risk of liability, employers should not ask any question on an application or during an interview that is not job-related. If a question cannot be defended as job-related, it should not be asked. Questions should focus on an applicant's skills, abilities and knowledge, and whether the applicant is a suitable candidate for the job sought.

Certain inquiries may be viewed as discriminatory even if they are facially

neutral. For example, questions concerning what languages an applicant is fluent in might tend to screen out qualified minority applicants. If a job requires an applicant to be fluent in a particular language, the employer should simply ask whether the applicant can speak that language, not how or where the applicant learned it, or what country the applicant or the applicant's parents are from.

2. The Pennsylvania Human Relations Act

The Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C.S.A. § 951 *et seq.,* forbids employers from eliciting information, or keeping a record, or using an application form containing questions concerning the race, color, religious creed, ancestry, age, sex, national origin or disability of any applicant for employment. Under the PHRA, it is also unlawful to make inquiries about an applicant's birthplace, original name if legally changed, names of relatives outside of the United States, etc. These types of questions may give rise to the inference of discrimination against a particular group or classification of people.

3. Fair Credit Reporting Act

Pursuant to the federal Fair Credit Reporting Act ("FCRA"), 15 U. S.C. § 1681, *et seq.,* before procuring a consumer or credit report, an employer must give notice to and obtain preliminary authorization from the person who is the subject of the report. The FCRA requires the employer to (1) provide that person with a "clear and conspicuous disclosure... in a document that consists solely of the disclosure" that such report may be obtained for employment purposes; and (2) obtain the person's written authorization to procure the report.

If an employer takes any adverse action against someone based in whole or in part on a credit report (such as refusing to hire or retain the person as an employee), the employer must provide the individual with a copy of the report as well as a written description of his or her rights under the FCRA. To satisfy this requirement, the employer can mail a copy of any credit report obtained along with a notice of rights under the FCRA to every person for which the employer procures a report. The report and notice should be mailed as soon as the report is received to protect the employer should the employer later take some adverse action against the person based in whole or in part in the report.

Caveat for employers: If an employer decides to use consumer credit reports, it must follow the specific requirements of the FCRA. Employers should also be aware that potential and current employees might challenge the use of such reports as discriminatory if their use has an adverse impact on a protected group.

4. Pennsylvania Criminal History Record Information Act

Pursuant to the Pennsylvania Criminal History Record Information Act, 18 Pa. C.S.A. §9125(2), whenever an employer is in receipt of information concerning an applicant's criminal history record, it may use that information only to the extent that any prior felony or misdemeanor conviction relates to the applicant's suitability for employment in the position for which s/he has applied. Under this Act, the employer must notify an applicant in writing if s/he is denied employment based on whole or in part on previous convictions.

The employee selection guidelines issued by the Pennsylvania Human Relations Commission state that an employer should not elicit information from an applicant regarding convictions for misdemeanors. This guideline seems to conflict with the Act, which permits inquiries about misdemeanor convictions.

The EEOC also takes the position that conviction records may be relevant in determining an applicant's suitability for a particular job. As for arrest records, the EEOC concedes that those records may reflect unsuitability for a certain position. However, even in instances where the conduct leading to an arrest relates to the job at issue, the employer must make an additional inquiry and should: (1) examine the surrounding circumstances; (2) give the applicant/employee a chance to explain; and (3) make follow-up inquiries to evaluate his or her credibility if the person denies engaging in the conduct.

III. Privacy Rights During Employment

A. Search and Seizure

1. The U.S. Constitution

The Fourth and Fourteenth Amendments to the United States Constitution protect private individuals from unreasonable searches and seizures by government agencies or officials. The constitutional protections extend to, among other things, drug testing.

2. Searches of an Employee's Person

In the private employment setting, searches of an employee's person, i.e. clothing or objects within the employee's immediate control, are generally permissible if: (1) the employer has a search policy that has been communicated to the employee; (2) the employer has justification ("probable cause") for conducting the search; and (3) the search is reasonable (nonviolent and private). To minimize the risk of potential defamation actions, employers should include in their written policy a statement to the effect that a request to search an employee does not necessarily imply accusation of theft or other wrongdoing.

Employers should instruct all supervisors and /or security guards not to touch the employee during the search and not to force a search on an employee if the employee does not cooperate. No matter how slight, an intentional touching may give rise to a civil action for assault and battery. Instead, the employer may discipline or discharge the employee for insubordination for the employee's refusal to allow the search. [Caveat: Employers must be cognizant of unionized employees' rights under Collective Bargaining Agreements.]

A polygraph or lie detector test also may be considered a "body search." Lie detector tests are heavily regulated by federal and state laws. The federal Employee Polygraph Protection Act ("EPPA"), 29 U. S.C. §2001 *et seq.,* prohibits most private employers from requesting or requiring applicants or employees to take lie detector tests. There is an exception for employees or prospective employees of security firms or pharmaceutical manufacturers or certain employees suspected of misappropriation or embezzlement. Pennsyl-vania's Lie Detector Test statute, 18 Pa. C. S. A. §7321, permits polygraph testing only with consent of the employee. In addition, taking a lie detector test cannot be made a term or condition of employment or continued employment. The Pennsylvania law does not apply to the law enforcement field or to those who dispense or have access to narcotics or dangerous drugs.

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3. Searches of an Employee's Personal Items

Employers may have justification for searching such items as an employee's desk, locker, lunch box, pocketbook, briefcase, or areas outside the workplace. The critical issue is balancing the employee's reasonable expectation of privacy against the employer's reasonable right to know. Searches should be narrowly defined and reasonable under the circumstances. If it is the employer's stated policy to do random searches, they should be done in a non-discriminatory manner so as to avoid the inference that the searches are designed to out single individuals in a particular protected category.

B. Personal Employee Information

1. Private Health Information

The increase in identity theft has led to the enactment of certain laws designed to protect private personal information. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is one of these laws. Although HIPAA rules apply to "healthcare providers," some private employers may fall within the statutory definition of a healthcare provider. However, whether considered a healthcare provider or not, because of the ADA and other laws, all employers should protect the privacy of their employees' medical/health information by keeping such information as confidential as possible under the circumstances, and by sharing such information only with those with a need to know. Employers are urged to keep employees' medical information in separate files, apart from the personnel files, under lock and key.

2. Disposal of Consumer Credit Reports and Information

The federal "disposal rule," issued by the Federal Trade Commission (charged with implementing the Fair and Accurate Credit Transaction Act of 2003), went into effect on June 1, 2005. The disposal rule requires businesses to take appropriate measures to dispose of sensitive information derived from consumer credit reports. It applies to all businesses, no matter the number of employees.

In compliance with the disposal rule, employers must store all hard copies of consumer credit reports and information obtained from third party reporting agencies under lock and key, with access only by authorized individuals. Credit report information contained in computer files must also be kept secure (allowing access only by authorized individuals with a required password). In addition, any employees authorized to access consumer credit information should be directed to maintain the confidentiality of this information.

Employers also should establish a system for routine destruction of credit reports and should choose an appropriate and effective means of destroying such information. Except for designated personnel, no other employee authorized to access consumer credit reports should dispose of or discard any such information in any manner or by any means.

3. Social Security Numbers

A growing number of states, including Pennsylvania, have enacted laws to protect individuals' social security numbers (SSN) from identity theft and improper use. On June 29, 2006, Governor Rendell signed into law Senate Bill No. 601, which became effective 180 days from the date of the enactment.

The new law, as it applies to businesses, prohibits certain activities involving SSNs, including publicly posting an employee's social security number in any manner or printing an individual's social security number on any materials that are mailed to the individual, except where required by law (such as a W-2 form). In that case, at no time should the SSN be visible on the envelope or from the outside of the mailer. Violations of this law will be punishable by fines of $50 up to $500 for first offenses and up to $5,000 for subsequent offenses.

C. Wiretapping and Video Surveillance

Millions of Americans are electronically monitored in the work place. Surveillance at work occurs not only to detect and/or deter misconduct, but also to track and evaluate an employee's work performance. Employers must be aware of specific statutes that address the legality of electronic surveillance.

1. Electronic Communications Privacy Act/Stored Communications Act

The Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C.A. §2510 *et seq.,* which protects electronic communications while in transit, was enacted to update the existing federal wiretapping laws. Briefly, the ECPA prohibits: (1) the interceptions of any wire, audio, or electronic communication; (2) the disclosure of information obtained by interception; and (3) the use of the information. However, it is not unlawful to intercept or access an electronic communication made through an electronic communication system that is configured so that the communication is readily accessible to the general public. 18 U.S.C.A. §2511 (2) (g).

Although employers are exempt from the ECPA's prohibition against phone and data line taps under the Business Extension Exception, §2510(5)(a), the ECPA does limit an employer's right to listen in on an employee's telephone calls. Personal telephone calls may not be intercepted in the ordinary course of business except to the extent necessary to guard against unauthorized use of the telephone or to determine if a call is personal or not. Once the employer determines that a call is personal, the employer can no longer listen, even if the employer has a policy against personal calls. Violations of the ECPA can subject employers to actual and punitive damages and to criminal charges.

The Stored Communications Act ("SCA"), 18 U.S.C.A. §2701 *et seq*., included as Title II of the ECPA, protects messages stored on computers. The SCA's protections apply to two categories of communications. The first category is any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission of the communication, such as when a message sits in an email user's mailbox after transmission, but before the user has retrieved the message from the email server. The second category is any storage of such communication by an electronic communications service for the purpose of backup protection of the electronic communication. Title III of the Act prohibits the use of pen register and/or trap devices to record dialing, routing, addressing, and signaling information used in the process of transmitting wire or electronic communications.

2. Pennsylvania Wiretapping and Electronic Surveillance Control Act

In contrast to federal wiretapping laws, under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C. S. A. §5701 *et seq.,* all parties to a telephone conversation must give prior consent before it can be tape-recorded lawfully. 18 Pa. C.S.A. §5704 (4). For example, before customer solicitation calls can be monitored, at least the implied consent of the customers should be obtained. In the workplace, employers should avoid surreptitiously sound recording their employees' telephone conversations because that may subject the employer to federal and state wiretapping laws.

3. Video Surveillance

Many employers view video surveillance as an effective means of deterring employee misconduct as well as limiting their exposure to worker's compensation claims. While there are no laws in Pennsylvania against video surveillance in the workplace, employers should definitely avoid cameras in private areas such as locker rooms and bathrooms. It is certainly reasonable for employees to have an expectation of privacy in those areas. However, employees should have no reasonable expectation of privacy in open work areas, so long as the viewer's presence is lawful, and the purpose of the surveillance is for a legitimate business reason. By way of example, an employee's co-worker may be on the work premises lawfully, but the placement by the co-worker of a hidden camera under the employee's desk for the purpose of posting the pictures on a pornographic web site would expose the employer to an invasion of privacy action.

To increase an employer's chances of successfully defeating an employee's claim that s/he had a reasonable expectation of privacy, the employer should advise employees of its stated intention and/or right to use video cameras in open work areas and identify those areas where the cameras will be placed.

D. Monitoring of Electronic Equipment in the Workplace

1. E-Mail and Internet

Today, billions of e-mails, Internet messages, and text messages are sent through U.S.-based computer networks, telephone systems and other electronic equipment. Many of these messages are sent by employees at work, during work hours. As these types of communications increase, so do the legal issues associated with their use. In particular, employees who send e-mail messages, text messages and/or access Internet chat rooms expose employers to liability for defamation. Because sexually explicit materials are easily available from the Internet and just as easily transmitted via e-mail, camera phone, blackberry, or other electronic equipment, employers may be subject to employee claims of hostile work environment for sexual harassment. Although employers need to be aware of what their employees are saying and doing at work, they must balance this need against any reasonable privacy expectations their employees may have with regard to the use of electronic equipment in the office.

Employers can protect themselves from civil claims arising from inappropriate e-mails, etc. by developing and implementing an effective policy. The policy should, at the very least, advise employees that: (1) the e-mail, Internet or other electronic systems may be used for business purposes only; (2) they are not private; and (3) the employer has the right to view the contents of all messages and communicate them to others. (Certain commercial software programs track the Websites visited by each employee and the amount of time spent at each.) If monitoring is to take place, the employer should advise employees of its stated intention and/or right to do so and, when possible, have the employees sign an acknowledgment of their receipt and understanding of the policy. Having a clearly defined policy should increase the employer's chances of successfully defeating an employee's claim that s/he had a reasonable expectation of privacy.

2. Voice Mail

The same privacy concerns arise with employer monitoring of voice-mail messages as with Internet monitoring. In *Huffcut vs. McDonalds Corporation* a 1996 case brought in the Southern District of New York, the plaintiff sued his employer for "eavesdropping" on voice-mail messages that he left for his lover at work. When the employer became aware of the messages, the employer played them for the plaintiff's wife. Plaintiff claimed in his lawsuit that his privacy rights were violated because he had been informed that he alone knew the code to retrieve messages from his voice mailbox. He argued that he reasonably assumed that his messages would be private and confidential. Although no decision was made by the court in this case because there was an undisclosed out-of-court settlement, this case illustrates the need for a clearly defined policy regarding voice mail.

3. Blogging

Employee blogging – whether anonymously on the employee's personal PC at home or on the employer's computer at work – gives rise to a number of privacy concerns. When it comes to their employers, employees simply do not have unfettered freedom to say what they want on a blog and avoid possible discipline or termination.

Increasingly, employers are including blogging policies in their employee handbooks. An effective blogging policy should include, at the least, the following statements: (1) that employees are personally responsible for their posts; (2) that what they write will be public for a long time, therefore, they must respect the company's affiliates, employees, clients, and competitors; (3) that they should not use ethnic slurs, personal insults, obscenities, or other language that may be considered objectionable or inflammatory; (4) that when they blog about the company, or company-related matters, they must make it clear to readers that the views expressed are theirs alone and that they do not reflect the views of the company; (5) that they should respect copyright, trademark, fair use, financial disclosure and privacy laws; (6) that they should not provide confidential or proprietary company information or confidential information of other employees; and (7) that they should not link their website/weblog to the company website without prior written permission from the owner of the company.

Employees would be wise to refer to company policies before posting their innermost thoughts on a blog. Employees also should understand that the words they blog one day may be accessed at any time in the future by anyone, including their employer and government officials.

IV. PRIVACY RIGHTS POST-TERMINATION

The United States Supreme Court carved out a basis to file a lawsuit under Title VII for post-termination retaliation

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in the form of a negative employment reference. In *Robinson v. Shell Oil Co.,* 19 U.S.337 (1997), a former employee filed a charge with the EEOC alleging that his termination was based on race. After the charge was filed, his former employer gave him a negative evaluation in retaliation for his having filed the EEOC charge. The Court held that former employees, like current employees, can file suit under Title VII.

In light of the above, the best practice for an employer who is asked for a reference may be to say nothing qualitative about the former employee, and to provide only basic information, such as dates of employment, salary and position. However, if the employer is aware that a former employee has dangerous tendencies and says nothing, the employer may be exposing itself to other types of claims, such as fraud or negligent misrepresentation.

While some states have enacted job reference immunity laws that protect employers from civil liability in defamation actions brought by employees in connection with information disseminated to those requesting job references, Pennsylvania is not among them. Therefore, it is clear that employers must act with prudence when providing information in any context related to references. Employers can protect themselves to some degree by keeping accurate records, conducting honest exit interviews and putting waivers on their employment applications or using a separate written waiver at the time of the interview.

V. CONCLUSION

Employees increasingly are relying upon state tort laws such as invasion of privacy in conjunction with workplace discrimination and wrongful termination claims. Because privacy is largely a function of one's reasonable expectations, employers should develop, communicate and implement clearly defined employment policies. A comprehensive and clearly written handbook will provide adequate notice to employees of the employer's policies, and in the process help to fashion reasonable expectations of privacy for that workplace.

PENNSYLVANIA EMPLOYMENT LAW UPDATE

By Stephanie K. Rawitt, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA

Defendant Meets Numerosity Requirement Of Title VII Because Defendant And Subsidiary Are Operationally Entwined.

Thorpe v. The Reading Hospital, No. 06-00828, 2006 U.S. Dist. LEXIS 80206 (E.D.Pa. November 1, 2006,)

The defendant hospital sought summary judgment in Title VII case, arguing that the case was one of "mistaken identity" because it had no employees and the actual employer was a wholly owned subsidiary who contracted with a parking service to provide valet parking for the hospital. If the defendant's argument prevailed, the defendant would then be deemed to have no employees, and, thus, the plaintiff could not proceed with a Title VII claim as the numerosity requirement would not have been met (Title VII only applies to employers who employ more than fifteen people).

The Third Circuit permits two "nominally distinct entities" to be consolidated and considered as one under certain circumstances. One of those circumstances, operational entanglement, is found where the "operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another. To determine whether two entities are operationally entwined and should be consolidated into one entity, courts must consider the following operational factors: (1) the degree of unity between the entities with respect to ownership, management (both directors and officers) and business functions (e.g. hiring and personnel matters); (2) whether they present themselves as a single company such that third parties dealt with them as one unit; (3) whether a parent company covers the salaries, expenses or losses of its subsidiary; and (4) whether one entity does business exclusively with the other.

In this matter, the court determined that the operational entanglement exception was applicable, denied the defendant's motion and permitted the case to proceed to trial.

No Individual Liability For Damages Under The ADA

*O'Neil v. Diocese of Erie***,** No. 06-65E, 2006 U.S. Dist. LEXIS (W.D. Pa. October 23, 2006).

The court denied the plaintiff's motion to request permissive joinder of several individual defendants in her ADA complaint against her former employer, the Diocese of Erie. The court ruled that there is no individual liability under the ADA. In reaching its decision, the Western District Court relied upon the Third Circuit's decision in *Koslow v. Pennsylvania***,** 302 F.3d 161 (3d Cir. 2002). Additionally, the court noted that there is no individual liability under Title VII and that, since "employer" is defined the same in the ADA and Title VII, it follows that there should be no individual liability under the ADA.

It is important to note that the United States Supreme Court has not addressed the issue of individual liability under the ADA at this point. But given recent decisions in which the ADA and ADEA have been compared to Title VII, it is likely that the Supreme Court would agree with the Western District's decision in *O'Neil*.

Intake Questionnaires, Or Other Communication To EEOC, Do Not Constitute Formal Filing Where EEOC Requests Additional Information To Complete Formal Charge

*Hollender v. Mutual Industrial North, Inc.***,** No. 05-5956, 2006 U.S. Dist. LEXIS 76768 (E.D. Pa. October 20, 2006).

The defendant's Motion for Summary Judgment was granted on the basis of the fact that the plaintiff failed to exhaust his administrative remedies with reference to his ADEA claim. The defendant argued that the plaintiff failed to properly comply with the ADEA's requirement that claimants file a written charge with the EEOC alleging unlawful discrimination at least 60 days before commencing a civil action for age

discrimination. The plaintiff, on the other hand, claimed that he did file a proper charge with the EEOC along with sworn statements detailing the incident.

The EEOC, however, sent the plaintiff's attorney a letter indicating that it would not file a formal charge until the plaintiff completed and returned questionnaires concerning his claim. These questionnaires were never returned. The court determined that the result of the failure to provide the requested additional information was that no charge was ever filed and there was no administrative process.

It is important to note that the court's decision in this matter considered the fact that the plaintiff in this case was represented by counsel at the EEOC stage. The court noted that it is sensitive to the fact that parties seeking redress under the ADEA are often unrepresented during the administrative process and that in such cases the claimant's pro se status must be taken into consideration.

Notice Of Class Claims

Duffy v. Sodexho, Inc., No. 05-5428 (2006 U.S. Dist. LEXIS 76769 (E.D. Pa. October 20, 2006).

The court denied the plaintiffs' motion for provisional class certification because of the absence of class-based allegations in the formal charges filed with the EEOC. In so holding, the court noted that plaintiffs who have not filed charges with the EEOC can opt into an ADEA class action suit only if the original complainant's EEOC charge gave the employer notice of the class-based age discrimination claim(s). See also, *Lockhart v. Westinghouse Credit Corp.*, 879 F. 2d 43 (3d Cir. 1989), citing *Lusardi v. Lechner*, 855 F.2d 1062 (3e Cir. 1988).

Wal-Mart Ordered to Pay At Least $79 Million to Class

Hummel v. Wal-Mart, Inc. (unpublished decision), Philadelphia Court of Common Pleas.

On Friday October 13, 2006, a Philadelphia jury awarded $78.5 million to a class of some 186,000 current and former employees of Pennsylvania Wal-Marts who were not properly paid for missed rest breaks and off-the-clock work. The award roughly reflects the total amount asked for by the class.

The jury's award in *Hummel v. Wal-Mart Stores, Inc.* came a day after its members determined that the retail giant had failed to pay its post-1998 Pennsylvania workers for time worked off-the-clock and for missed rest breaks, but not for meal breaks class representatives said they routinely missed as well. In so doing, Wal-Mart was determined to have violated the Pennsylvania Wage Payment and Collection Law.

A punitive damages claim was not made in this case. Thus, the total monies awarded by the jury represent the class' lost wages only (compensatory damages). However, Philadelphia Common Pleas Judge Mark I. Bernstein, who presided over the month-long trial, will decide, without the jury's input, how much Wal-Mart's Pennsylvania employees are owed under a statutorily designated liquidated damages scheme given that it was determined that Wal-Mart did not have a good faith contest or dispute when they failed to compensate the class members for time worked off the clock and for missed rest breaks. Under the statute, Judge Bernstein is permitted to award the greater of two possible amounts to each qualified plaintiff: $500 or 25 percent of the total amount of wages due. It is possible that the class could be awarded up to an additional $62 million.

Instrumentality Of The Commonwealth Of Pennsylvania Immune From A Suit For Damages Under The ADA

Burch v. Pennsylvania Department of Public Welfare, No. 06-1429, 2006 U.S. App. LEXIS 24803 (October 3, 2006).

In her complaint, the employee argued that the employer, the Pennsylvania Department of Public Welfare, discriminated and retaliated against her due to her alleged disabilities. The district court dismissed the complaint for lack of subject-matter jurisdiction based on Pennsylvania's sovereign immunity under the Eleventh Amendment. The employee appealed.

The Third Circuit agreed with the district court's ruling that the threshold issue in the matter was whether the employee could recover under Title I of the ADA for her discrimination and retaliation claim against the employer in federal court. The court held that she could not. The employer, as an instrumentality of the Commonwealth of Pennsylvania, was entitled to immunity under the Eleventh Amendment from a suit for damages brought pursuant to the ADA, and such immunity functioned as an absolute bar to the employee's ADA claim.

The Supreme Court Widens Employee Protection From Retaliation

Burlington Northern v. White, 2006 U.S. LEXIS 4895 (U.S. 2006).

The U.S. Supreme Court's June 22, 2006, ruling in *Burlington Northern v. White* redefined the anti-retaliation provision under Title VII. Employers now must be careful to avoid any action – in or out of the workplace – that may be considered retaliatory by a "reasonable employee or job applicant."

In *Burlington*, the plaintiff, White, filed a sexual harassment claim with the EEOC. After she filed her complaint, Burlington removed White from her duties as a fork-lift operator and reassigned her to another position. White filed a second complaint with the EEOC, alleging gender discrimination and retaliation. Burlington suspended her for 37 days without pay for insubordination, but later determined that no insubordination had taken place and reinstated White with full back-pay.

A federal court determined that the suspension and job reassignment was unlawful retaliation under Title VII. In its decision affirming the lower court, the Supreme Court expanded the scope of the anti-retaliation provision by not confining it to actions that are related to employment or that occur in the workplace.

To be actionable, the Court said, the retaliation must cause harm that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." The Court noted that a change in position may not be actionable for some, but may be to others, for example, a mother with school-aged children. Similarly, the Court noted that, while failing to ask an employee to join a supervisor for lunch may not rise to retaliation under some circumstances, it might if the supervisor were excluding the employee from lunches that would lead to professional advancement.

The ruling may result in an increase in retaliation claims filed by employees after making or supporting a discrimination claim. The Supreme Court, however, acknowledged that the adversity experienced must be material and that it is important to distinguish significant from trivial harms. Employers should train supervisors and managers to comply with the company's anti-harassment, anti-retaliation and equal opportunity

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policies, and they should act quickly to investigate allegations of discrimination and/or retaliation while protecting (to the extent possible) the confidentiality of the employees bringing such complaints.

Disabled Employee Does Not Have To Request A Specific Accommodation To Trigger Employer's Obligation To Explore What Accommodations Are Possible

Armstrong v. Burdette Tomlin Memorial Hosp., 438 F.3d 240 (3d Cir. 2006).

In *Armstrong,* the Third Circuit sent a disability discrimination claim back to be retried because the jury instructions erroneously required the plaintiff to prove he had requested a specific reasonable accommodation. Specifically, the court held that the plaintiff need only show that he requested "an" accommodation, at which point his employer was required to make a good faith effort to assist him in identifying appropriate accommodations.

The *Armstrong* case demonstrates that employers should be proactive with employees who indicate they are unable to perform one or more functions of their jobs because of a disability. At that point, the employer should start an interactive process with the employee to determine whether a reasonable accommodation exists that will permit the employee to continue to work. Even if an employee requests an "unreasonable" accommodation, the employer must continue to explore whether any other accommodation is reasonably possible. Consideration should also be given to documenting the accommodations that are offered, including any alternative positions available, to avoid misunderstandings or later disputes.

Title VII's Retaliation Provision Does Not Protect Employees Who File Facially Invalid Charges

Slagle v. County of Clarion, 435 F.3d 262 (3d Cir. 2006).

In a case of first impression, the Third Circuit has joined the Fourth and Ninth Circuits in holding that filing a facially invalid discrimination charge is not a protected activity under Title VII. In May 2001, the Clarion county jail suspended corrections officer Timothy Slagle for failing to cooperate with an investigation and threatening to go outside his chain of command. Slagle was suspended again in July 2001 for sexual harassment. In September 2001, Slagle filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that he had been discriminated against "because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." The EEOC dismissed the charge for failure to state a Title VII claim.

In January 2002, Slagle was discharged for gross insubordination and for allegedly lying about an absence.

Slagle then filed a second EEOC charge alleging retaliatory termination. Subsequently, his discharge was changed to a one–month suspension. Slagle, however, did not return to work and filed a third charge alleging sex discrimination. The EEOC dismissed the second and third charges for lack of evidence of any violation of the statute. Slagle then filed a lawsuit, alleging that he had been harassed, disciplined and discharged in retaliation for the filing of his first EEOC charge. The district court dismissed the complaint, concluding that Slagle had made only a general complaint of unfair treatment and not a claim of illegal discrimination that would be protected activity under Title VII. On appeal, Slagle argued that the District Court had applied the wrong standard in relying upon *Barber v. CSX Distribution Services*, 68 F.3d 694 (3d Cir. 1995), where the plaintiff had made only an internal complaint to human resources. *Barber* was decided under the "opposition clause" of the Age Discrimination in Employment Act (Title VII contains an identical clause), which prohibits retaliation against employees who "oppose" any practice that violates the Act. Slagle invoked Title VII's "participation clause," which protects an employee who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

The Third Circuit agreed that the standard is different for a case under the participation clause, which provides more expansive protection. Nevertheless, the court reasoned, protection for bringing any charge, regardless of content, would render the statutory language "under this subchapter" meaningless. Thus, the court held, to constitute protected activity, a charge must allege discrimination on the basis of one or more grounds prohibited by Title VII. If the charge does not make such an allegation, the court explained, it is invalid on its face and is not covered by the retaliation provisions of Title VII.

Reverse Race Discrimination Claim Fails – No Evidence That Employer's Reasons For Promoting Others Were Pretextual

Haley v. City of Plainfield, 169 Fed. Appx. 670 (3d Cir. 2006).

In *Haley v. City of Plainfield*, the Third Circuit affirmed a district court decision granting summary judgment to the City of Plainfield on a reverse race discrimination claim. The plaintiff, Dennis Haley, a Caucasian police sergeant, sued Plainfield, alleging that African-American officers were promoted over him, even though he was more qualified. In 1999, Haley passed a promotional examination, which resulted in his placement on an eligibility list for future promotion. In 2002, five Caucasians and three African-Americans were promoted. Two of the promoted employees were sergeants – one Caucasian and one African-American. While the two sergeants scored slightly lower than Haley on the promotional examination, both had received fewer reprimands and had more impressive educational and job-related experience. Haley had received a total of eight reprimands during his tenure for violating various department policies.

The Third Circuit assumed, without deciding, that Haley would be able to establish a *prima facie* case of reverse race discrimination. The court noted, though, that the employer had offered legitimate non-discriminatory reasons for the decision not to promote Haley, namely, that the persons selected for promotion had better experience and fewer disciplinary problems than Haley and that Haley had displayed difficulty dealing with the African-American community. Accordingly, the burden was placed on Haley to provide sufficient evidence for a reasonable jury to conclude that the employer's reasons were a pretext for reverse discrimination. Haley argued that he had more commendations than the employees who were promoted, but the court concluded that this was not enough to cast doubt on the employer's decision because the employer could consider that this factor was outweighed by Haley's disciplinary record. Thus, the court concluded there was no genuine

issue of fact regarding the non-discriminatory motivation of the employer.

The "Ministerial Exception" To Title VII Does Not Prohibit A Minister From Complaining Of Sexual Harassment Or Sex Discrimination

Petruska v. Gannon University, 2006 U.S. App. LEXIS 13135 (3d Cir. 2006).

In this case, Judge Becker held that the "ministerial exception" to Title VII applies only when the alleged discrimination somehow relates to "religious belief, religious doctrine, or the internal regulations of a church" but does not prohibit a minister from complaining of sexual harassment or sex discrimination. According to Judge Becker, "[e]mployment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects." Judge Becker further stated that, "in adjudicating suits that do not involve religious rationales for employment action, courts need not consider questions of religious belief, religious doctrine, or internal church regulation, a process that would violate the Establishment Clause by entangling courts in religious affairs."

Signing A Pro-Choice Advertisement Is Not Protected Activity Under Title VII's Opposition Clause

Curay-Cramer v. The Ursuline Academy of Wilmington, 2006 U.S. App. LEXIS 13956 (3d Cir. 2006).

Michele Curay-Cramer, a teacher at the Ursuline Academy, a private, Catholic school, was fired after she signed her name to a pro-choice advertisement in the local newspaper. Curay-Cramer asserts both that signing the advertisement was conduct protected by Title VII and that she was fired for conduct less egregious under Catholic doctrine than conduct of male employees who were treated less harshly. The district court granted the defendants' motions to dismiss after concluding that applying Title VII and the PDA would raise serious constitutional questions and that Congress did not manifest a clear legislative intent that Title VII be applied in a case like Curay-Cramer's. On appeal, the Third Circuit affirmed the district court's holding but did not adopt all of the district court's reasoning. Specifically, the Third Circuit concluded that Curay-Cramer had failed to state a claim upon which relief can be granted because signing the pro-choice advertisement was not protected conduct under Title VII's opposition clause. Furthermore, the court found that Congress has not clearly expressed an affirmative intention to apply Title VII to a claim against a religious employer in this context.

It Is Not Enough For An Employee To Show That His/Her Employer's Decision Was Wrong Or Mistaken When Demonstrating That His/Her Employer's Reasons For Taking Alleged Adverse Employment Actions Were A Pretext For Discrimination.

Igwe v. E.I. DuPont De Nemours & Co., 2006 U.S. App. LEXIS 11801 (3d Cir. 2006).

Igwe claimed that DuPont discriminated against him when they did not promote him, transfer him, and pay him merit increases or bonuses from 1998 through the end of his employment in October 2002. Igwe also asserted that DuPont retaliated against him by terminating his position as Senior Research Engineer and by demoting him to Senior Information Scientist in 1998. Finally, Igwe alleged common law defamation. The district court determined that the employee failed to establish that he had been subjected to an adverse employment action, noting that he failed to allege specific facts showing a change in compensation, core job duties, or benefits resulting from the employer's failure to promote or transfer him or to give him a raise or bonus. The appellate court first affirmed the district court's grant of summary judgment as to the employee's Thirteenth Amendment claim substantially for the reasons set forth by the district court. Next, because the employer proffered legitimate reasons for its alleged failure to promote, transfer, or award merit raises and bonuses, the employee was required to show that the employer's reasons for taking the alleged adverse employment actions were a pretext for discrimination**.** It was not enough for the employee to show that the employer's decision was wrong or mistaken. The employee relied on numerous documents memorializing management's decisions with respect to the employee's poor work performance. However, without some other evidence calling into question the veracity of the employer's evaluation, the documents did not amount to a showing of pretext.

WORKERS' COMPENSATION UPDATE

By Paul V. Tatlow, Esquire and Frank X. Wickersham, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin, King of Prussia, PA

Subrogation Lien Of The Carrier Was Limited To Claimant's Third-Party Recovery, And The Trial Court Did Not Err In Determining That The Large Portion Of The Settlement Was Properly Allocated To The Wife's Loss Of Consortium Claim

John and Mary Lee Urmann v. Rockwood Casualty Insurance Co. v. Spilka Wood Products, 1512 WDA 2004; Filed July 31, 2006; By Judge McCaffery.

The claimant was severely injured in a work-related auto accident on January 27, 1995, for which he received workers' compensation benefits. The claimant and his wife later filed a third-party case against the other driver, which settled for $300,000, of which $50,000 was paid to the claimant for his physical and mental injuries. The balance of $250,000 was paid to his wife for her loss of consortium. An evidentiary hearing took place before the trial court in which the workers' compensation carrier participated. The judge approved the settlement agreement, finding that the unusual facts warranted having the spouse of the injured party receive the lion's share of the recovery.

On appeal, the compensation carrier was unsuccessful in asserting that the apportionment improperly took away its absolute right of subrogation since it had no claim against the consortium portion of the claim. The Superior Court found that the record established that, while the claimant had largely recovered from his physical injuries, he had suffered brain

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injuries that required his wife to become more of a mother than a wife and to deal with those issues on a daily basis. The court, therefore, concluded that the trial court did not err and that the apportionment was based on the good faith attempt to apportion the claim based on the facts and was not motivated to eliminate or reduce the subrogation lien of the carrier.

The Five-Year Statue Of Limitations Contained In The Act Applies To Criminal Prosecutions Brought Under The Act Rather Than The More General Two-Year Statute Of Limitations

Commonwealth of Pennsylvania v. Corban Corp., d/b/a Encor Coatings, Inc., 2934 EDA 2005; Filed October 4, 2006; By Judge Gantman

This case involved a criminal complaint filed against an employer on September 21, 2004, by the Lehigh County Insurance Fraud Task Force for failing to maintain workers' compensation insurance for seven separate time periods. The employer filed a motion objecting to the timeliness of the complaint on the basis that the two-year statute of limitations had expired. The trial court dismissed the charges, and on appeal the Commonwealth argued that the trial court had erred in doing so since the criminal charges should have been subject to the five-year statute of limitations contained in §1039.12 of the Act. The Superior Court agreed with the Commonwealth that the five-year statute of limitations contained in the Act should apply to all criminal prosecutions under the Act, including those for failing to maintain insurance. The court reasoned that the two-year criminal law statute of limitations would impair the Commonwealth's ability to prosecute offenses arising under the Act, since an injured employee has three years from the date of the injury in which to file a claim, and it is often not until that time that any transgressions by the employer become known by the Commonwealth.

A Claim For Specific Loss Benefits Is Time Barred Where Claimant Fails To File A Review Petition Within Three Years Of The Payment Of A Commutation Award

Raymond Seekford v. W.C.A.B. (R.P.M. Erectors), 393 C.D. 2006; Filed October 11, 2006; By Judge Leavitt

The claimant was employed as an iron worker and sustained a work injury on July 27, 1994, when he slipped and fell while carrying a 200 pound steel panel. The claimant began receiving compensation pursuant to issuance of a notice of compensation payable and underwent back surgery on December 29, 1994. Shortly after that surgery, the claimant experienced both weakness and loss of control of his right arm. He later agreed to a commutation of his benefits for the amount of $131,250, which was approved by the Board and for which the claimant received payment on July 15, 1996.

On May 16, 2002, the claimant filed a claim petition alleging the loss of use of his right arm as a result of complications from the surgery. The WCJ granted the claim and awarded the claimant 410 weeks of compensation for the specific loss. On appeal, the judge's award was reversed, and the Commonwealth Court noted that the claim petition was properly treated as a review petition under §413 (a) of the Act. Such a petition to modify the notice of compensation payable must be filed within three years of the last date of the most recent payment of compensation. The court reasoned that, since the claimant received his final payment of compensation on July 15, 1996, the statute of limitations expired three years later; however, the claimant did not file his review petition until May 16, 2002. Accordingly, the review petition was time barred by the §413(a) time limitation.

Commonwealth Court Holds That Claimant Has Access To Both Workers' Compensation Benefits And Long Shore And Harbor Workers' Compensation Act Benefits, Based On The Physicality Of The Area Where The Injury Was Sustained

Daniel McElheney v. W.C.A.B. (Kvaerner Philadelphia Shipyard), 806 C.D. 2006; Filed September 27, 2006; By Judge Pellegrini

The claimant was working on a ship, which was in a dry dock that was dug into the land, at the time he was injured. A claim petition was filed, and the employer argued that the claimant's exclusive remedy was under the Long Shore and Harbor's Workers' Compensation Act (LHWCA). The WCJ agreed and dismissed the claim petition. The Commonwealth Court reversed, however, and held that, because the claimant was injured in a "graven" dry dock (a dry dock dug into the land) while the ship was not afloat, he was on land in a physical sense at the time of the injury and, thus, had access to both LHWCA and Pennsylvania workers' compensation benefits.

Appeal Board Erred In Reversing Decision Of WCJ Amending A Notice Of Compensation Payable To Include Depression And Anxiety Where The Judge's Decision Was Supported By Substantial Evidence

Wayne Huddy v. W.C.A.B. (U.S. Air), 1031 C.D. 2005; Filed August 1, 2006; By Judge Friedman

In this case, the claimant received workers' compensation benefits for a cervical strain and then filed a petition to amend the notice of compensation payable to include depression and anxiety. The WCJ granted the petition and accepted the claimant's psychiatrist's opinion that the claimant's work injuries contributed to his mental condition. However, the judge also accepted the employer's expert's opinion that developments in the claimant's life outside of work were substantial contributing factors to his mental condition. On appeal, the Appeal Board reversed the judge's decision.

The Commonwealth Court, however, reinstated the judge's decision, holding that there was substantial evidence to support it, despite the fact that the judge accepted the opinions of the claimant's and the employer's psychiatric experts. The Commonwealth Court also held that the judge's assessment of liability against the employer of 50 percent of claimant's psychiatric treatment was not in accordance with the Act and, therefore, the employer was held to be 100 percent liable for claimant's psychiatric treatment.

An Employer Is Not Barred From Seeking To Terminate Claimant's Workers' Compensation Benefits Where Claimant Had An Impairment Rating Evaluation Of Six Percent

Joseph Schachter v. W.C.A.B. (SPS Technologies), 320 C.D. 2006; Filed October 12, 2006; By Judge Leavitt

In this case, the claimant had an impairment rating evaluation (IRE), the results of which were six percent impairment of the total person. Thereafter, the employer filed a petition to terminate the claimant's workers' compensation benefits, based on an opinion of full recovery. The WCJ dismissed the termination petition and also found that the employer's contest was unreasonable, based on the IRE results.

The judge awarded the claimant counsel fees. On appeal, the Appeal Board reversed the judge's award of attorneys fees for unreasonable contest.

The Commonwealth Court rejected the claimant's argument that counsel fees were payable for unreasonable contest based on an IRE that established a six percent permanent impairment. The court concluded that the impairment rating was not *res judicata* and there was no evidence of record that the claimant's injury constituted an irreversible condition. The court also found that the claimant's argument was at odds with the IRE remedies, which are in addition to, not a replacement of, the remedies available to an employer who believes that an employee's loss of wages is not the result of a work-related injury. The court further held that unreasonable contest attorneys fees were not payable since the employer offered into evidence the testimony of a medical expert, who opined that the claimant had fully recovered from his injury.

Commonwealth Court Declines To Decide The Important Issue Since Claimant Failed To Preserve The Issue Of Whether WCJ May Terminate Compensation When Seven Months Earlier Claimant Was Found To Have Whole Person Physical Impairment Rating Of 26% Based On IRE Examination Under Section 306 (A)(2).

Lawrence McGaffin v. W.C.A.B. (Manatron, Inc.), 2168 C.D. 2005; Filed July 19, 2006; By Judge Cohn Jubelirer.

This case involved an important issue of first impression as to whether an employer may obtain a termination of compensation where it had previously had the claimant undergo an impairment rating evaluation, which was still in effect.

The claimant was employed as a field data collector and on February 8, 1999, had a slip and fall injury, sustaining injuries to his neck, upper back, low back and left shoulder. The employer accepted the claim and began paying the claimant compensation for temporary total disability. On August 7, 2001, the employer requested and the claimant submitted to an IRE, which resulted in an impairment rating of 26% of the whole person. Later, on May 31, 2002, the employer filed a termination petition seeking to stop compensation as of March 12, 2002. Both parties presented medical evidence before the WCJ, and a decision was issued in the employer's favor finding that they had met the burden of proving that the claimant was fully recovered from the work injury. During that litigation, the employer actually offered the IRE report into evidence, not as a medical opinion, but merely as a Bureau document that contained background history. The judge's decision made no reference to the IRE report.

The claimant appealed to the Appeal Board, but in the notice of appeal made no mention of the IRE determination. The Board affirmed the Judge's decision but did not discuss the effect of the IRE. On appeal to the Commonwealth Court, the claimant argued that the IRE determination established that the claimant had a permanent impairment caused by his work place injuries and that the lower courts had erred by failing to grant the impairment rating preclusive effect as to the permanent nature of the claimant's injuries. The Commonwealth Court held that the claimant had failed to preserve this issue for appellate review since the appeal papers filed with the Board did not include the issue of what impact the IRE determination had on the employer's Termination Petition. The dissenting opinion would have found that the issue was not waived and addressed it on its merits.

Commonwealth Court Holds That Security Fund Could Not Be Assessed A Penalty For Violating The Act Nor Could Employer Whose Liability Had Been Assumed By Security Fund.

Constructo Temps, Inc. and Worker' Compensation Security Fund v. W.C.A.B. (Tennant), 1562 C.D. 2005; Filed September 8, 2006; By Judge Cohn Jubelirer.

The issue presented was whether the Security Fund, which takes over claims from insurance carriers that have gone into liquidation, and the employer itself could be subject to penalties for violating the Act.

The claimant had sustained a work-related injury to his right knee on March 6, 2000, and began receiving compensation pursuant to a notice of compensation payable. Litigation later ensued that involved a termination petition, a penalty petition alleging unpaid medical expenses, and a review petition filed on behalf of the claimant alleging a refusal to pay for necessary and reasonable medicals. The WCJ's decision denied the termination petition but granted the other two petitions and found in relevant part that the employer and insurance carrier were assessed a 20% penalty for failing to pay the medical bills in a timely fashion. The employer had originally had workers' compensation insurance coverage with a carrier, which had gone into liquidation, and the claim had been taken over by the Security Fund. On appeal, the Board affirmed the judge's decision.

The Commonwealth Court noted that Section 435 of the Act authorizes the imposition of penalties on insurers and employers for failing to comply with its provisions. The court noted that Section 401 of the Act, which contains the definition of "insurer," does not include the Security Fund and, therefore, the Legislature did not intend to include them within that provision. The court concluded, based on its prior decisions, that the imposition of penalties against the Security Fund was improper.

The court then addressed the issue of whether an employer who is fully insured in its liability could be assessed a penalty for non-payment or untimely payments resulting solely from conduct of the Security Fund. The court concluded that it could not and reasoned that nothing in the facts showed that any delay on the part of the Security Fund in paying the claimant was attributable to the employer. The imposition of penalties on the employer in this situation would amount to an attempt to penalize into compliance an already compliant employer and, thus, would not serve the intended purpose of inducing non-compliant employers into compliance with the Act and penalizing wrongful conduct. The court, therefore, concluded that the employer could not be vicariously liable for the payment of penalties due to the conduct of the Security Fund in handling and processing the claim.

WCJ Abuses Discretion In Not Awarding Disfigurement Benefits To Claimant Who Lost Three Front Teeth In Work-Related Injury.

Phyllis Agnello v. W.C.A.B. (Owens-Illinois), 629 C.D. 2006; Filed September 14, 2006; By Judge Pellegrini.

The issue was whether a claimant, who had lost three front lower teeth in a work-related injury, had suffered serious and permanent disfigurement of the head, neck or face, as defined in §306 (6) (c) (22) of the Act, that produced an unsightly appearance and was not usually incident to the employment.

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The claimant filed a claim petition seeking an award for permanent disfigurement related to the loss of three lower front teeth, and the employer filed an answer denying any disfigurement. The claimant had her remaining lower teeth removed for non-work-related reasons and replaced with a full denture. At the hearing before the WCJ, the claimant removed her denture and was asked by the Judge to open and close her mouth as if she was smiling. The judge ultimately denied the claimant's petition based on his observations of her because he was unable to find that she had a serious and permanent disfigurement. His decision stated that he was unable to see any difference with or without the lower teeth since he was unable to see them above the lower lip. On appeal by the claimant, the Appeal Board affirmed without viewing the claimant.

The Commonwealth Court held that the judge had abused his discretion when he found that the claimant did not suffer from any disfigurement. The court emphasized that, when reviewing disfigurement cases involving teeth, the judge needs to evaluate the claimant without his or her prosthesis. The court reasoned that only then can the judge get a true idea of the damage that has been done and the unsightly appearance that the claimant must face on a daily basis when not wearing the prosthesis. Since the claimant in this case had no teeth when she removed the denture, the court reasoned that she had proved her disfigurement was serious and permanent and had resulted in an unsightly appearance, entitling her to a compensation award. The case was remanded to the judge to make an appropriate award to the claimant.

The dissenting opinion found that the majority was being empathetic to the claimant and had completely disregarded the factual findings of the judge.

Under The Act, Claimant Can Have A Healthcare Provider Participate In An Independent Medical Examination. However, Healthcare Provider's Participation Is Limited To Attendance And Observation.

Knechtel v. W.C.A.B. (Marriott Corporation), 140 C.D. 2006; Filed August 24, 2006; By Judge Ledbetter.

In this case, the claimant received benefits for a work-related knee injury. Later, the notice of compensation payable (NCP) was amended to add depression to the description of the claimant's work injury. The employer requested the claimant submit to an examination by a psychiatrist, and they were later forced to file a petition to compel the claimant to submit to a psychiatric evaluation. The WCJ granted the petition, and in his decision said that the claimant's request to have a healthcare provider participate in the examination was granted. However, the judge rejected the claimant's assertions that "participate" meant that the healthcare provider was allowed to tape-record the evaluation, question the evaluator, make comments or otherwise assist the claimant during the procedure. The judge specifically ordered the healthcare provider to be permitted to take notes and request brief recesses during the course of the evaluation to confer with the claimant. The claimant appealed to the Appeal Board, arguing that the judge erred by restricting her rights under §314 (b) of the Act. The Board, however, as well as the Commonwealth Court, affirmed the judge's decision.

The Commonwealth Court noted that neither the Act nor the Bureau regulations define the term "participate." Interestingly, the Commonwealth Court reviewed the *Webster's Dictionary* definition of the term and noted that it provided very little assistance in determining what the Legislature intended in enacting §314 (b) of the Act. The court concluded, however, that the opportunity for a healthcare provider to attend and observe an independent medical examination constitutes a significant degree of participation, and the court did not believe that the Legislature intended that a claimant's healthcare provider participate to such an extent that the examination becomes disrupted by questioning in disagreement of an adversarial nature regarding the examiner's methods and procedures.

When Payment Is Made By Check, The Date Of Last Payment For Purposes Of Determining Statute Of Limitations Period For Reinstatement Petition Is The Date The Check Is Received.

Gloria Romaine v. W.C.A.B. (Bryn Mawr Chateau Nursing Home), 62 EAP 2004; Filed June 22, 2006; By Madame Justice Newman.

In this case, the claimant began receiving workers' compensation benefits for a work-related injury that occurred in July 1990. The claimant was later found fully recovered by a judge's decision from December 1994, and the claimant's benefits were terminated effective August, 1991. In December 1997, the claimant filed a petition for reinstatement of benefits, alleging that she experienced a worsening of her ongoing back problems. The WCJ dismissed claimant's petition to reinstate, finding that it was not timely since it was not filed within three years of the most recent payment of compensation. According to the judge's decision, the claimant's most recent payment of compensation was a check from the employer dated December 14, 1994. The Commonwealth Court affirmed the judge's decision, and the claimant appealed.

The Supreme Court affirmed the Commonwealth Court. They found that the claimant failed to present sufficient evidence to establish that her reinstatement petition was timely filed within the statute of limitations. The court noted that, although timing of the last payment was crucial to defining the limitations period, the claimant produced no testimony as to the actual date upon which she received the check. She failed to do this even in light of the employer's raising the statute of limitations defense.

When Claimant Is Disabled From Performing Concurrent Job With The Union, The Wages Claimant Earned From His Concurrent Position Must Be Included In The Average Weekly Wage Calculation, And Claimant's Petition To Review Will Be Granted.

Akers National Roll Company v. W.C.A.B. (Whaley), 2344 C.P. 2005; Filed June 27, 2006; By Senior Judge Flaherty.

In this case, the claimant sustained a work-related injury and began receiving workers' compensation benefits. Later, he filed a petition to review, alleging that his average weekly wage was incorrectly calculated. According to the claimant, at the time of his injury, he also worked as a griever with his union and was entitled to an increase in his average weekly wage and his compensation rate. After the claimant's work-related injury, he continued to do union work out of his home, but he did not receive payment for his services because the union only paid him when he lost time from work. Because the claimant was no longer losing time from work inasmuch as due to his work-related injury he was receiving workers' compensation, he in fact did not lose any time

from work and, therefore, did not receive reimbursement from the union. The claimant was also unable to perform his job with the union since October 2003, when he was told that, according to policy, he could no longer perform his grievance duties because he was not physically working on the employer's premises. The WCJ granted the claimant's petition, and the Appeal Board affirmed.

The Commonwealth Court affirmed the judge's decision and rejected the employer's argument that the claimant's work-related injury did not disable him from his concurrent job with the union as a griever. According to the court, because the claimant's concurrent job with the union required him to work on the employer's premises, inclusion of concurrent employment reflects the claimant's economic reality, and benefits must be calculated to include those earnings.

With Respect To A Petition To Review For Facial Disfigurement Directly Arising From An Injury In The Original NCP, Section 413 (a) Of The Act Applies, As Opposed To Section 315.

Penn Beverage Distributing Company v. W.C.A.B. (Rebich); 1698 C.D. 2004; Filed June 27, 2006; By Judge Cohn-Jubelirer.

In this case, the claimant received workers' compensation benefits for a 1985 work injury. Later, the claimant underwent cervical surgery in 1993. The surgeries left the claimant with scarring on his head and neck. In December 1999, the claimant filed a claim petition for facial disfigurement. The WCJ dismissed the petition, finding that it was time-barred under §315 of the Act. However, the Appeal Board reversed, in part, concluding that the statute of limitations in §413 (a) of the Act applied.

On appeal to the Commonwealth Court, the employer argued that the claim petition for disfigurement was time-barred by §315 and/or §413 (a) of the Act. The court held that, as the claimant's scars arose as a direct result of the injuries underlying his original NCP, the statute of limitations found in §413 (a) of the Act applies, and since the claim petition was filed while the claimant was still receiving benefits for the underlying injury, his claim petition was timely.

The Claimant, Not Employer, Has The Burden Of Establishing The Work-Relatedness Of His Subsequent Condition Where No Obvious Relationship Exists Between The Work Injury Described On The Notice Of Compensation Payable And A Subsequently Alleged Physical Condition.

City of Philadelphia vs. W.C.A.B. (Fluek), 1250 C.D. 2005; Filed April 6, 2006; By Senior Judge McCloskey.

The claimant was employed with the employer as a pumping station engineer. On November 10, 1996, the claimant was involved in a work-related accident when he slipped on a curb. The injury was acknowledged by way of a notice of compensation payable as a knee injury. Later, the employer filed a petition for termination and modification, and the claimant filed a review petition seeking to amend the notice of compensation payable to include a back injury. The WCJ found in favor of the employer and granted the termination petition and denied the claimant's review petition by stating that the credible medical testimony did not support a relationship between the back problems and the original knee injury.

On appeal, the Appeal Board vacated the WCJ's order and remanded the matter with instructions that the burden should be on the employer in a termination petition to prove a lack of causal connection between the alleged new injury and the prior work injury. The WCJ, in a second decision, found in favor of the claimant and was affirmed by the Appeal Board.

The Commonwealth Court on the employer's appeal stated that the Board had misapplied the law in putting the burden of proof on the employer. Relying on the *Commercial Credit* case, the court stated that where there is no obvious relationship between the injury described in the notice of compensation payable and a subsequently claimed physical condition, the claimant must bear the burden of establishing the work-relatedness of such a condition before the employer will have any burden of disproving any continuing disability related to that subsequent condition. Here, the court noted that the claimant's injury to the knee and the alleged back injury were not so obviously connected, and did not involve the same body part or system, that the burden should rest on the employer to disprove that any continuing disability from the back was not related to the work injury. Rather, the claimant was required to initially establish that the subsequently alleged condition was work-related, and he had not done so. The WCJ's original decision granting the termination was reinstated.

Employer Remains Obligated To Pay For Necessary And Reasonable Medicals Incurred For A Work Injury Even After Employer's Liability For The Payment Of 500 Weeks Of Partial Disability Benefits Has Ceased

Keystone Coal Mining Corp. v. W.C.A.B. (Fink), 1487 C.D. 2005; Filed April 13, 2006; By Judge Smith-Ribner.

The narrow issue here was whether an employer remains responsible for medical benefits after its liability for payment of partial disability benefits has been exhausted. The claimant sustained an injury on January 8, 1997, in the nature of a herniated disc in the lumbar spine. Later, the parties entered into a supplemental agreement documenting the claimant's earning capacity and providing for partial disability benefits, which were paid for the maximum of 500 weeks and which then expired on September 28, 1998. Just prior to the expiration of the partial disability benefits, the claimant filed a petition to review compensation alleging total disability, but this petition was denied.

Years later, in July 2004, the claimant filed a petition to review medical treatment, alleging that the employer refused to pay for necessary and reasonable medicals incurred for the work injury. The WCJ granted the petition and was affirmed by the Appeal Board.

The employer argued on appeal that liability for compensation under §301 (a) of the Act is generally interpreted to mean the payment of both wage loss and medical benefits and that the expiration of the 500-week period under §306 (b) (1) extinguishes not only partial disability benefits but also medical benefits. The Commonwealth Court rejected the employer's argument and noted that it was supported neither by case law nor statutory authority. The court concluded that the employer remained liable for medical expenses incurred for the work injury since §306 (f.1) of the Act placed no time limit on the employer's liability for medical benefits and also because no order had been entered granting a petition by the employer for termination of compensation nor had any order been entered granting a petition filed by the employer to end its liability for medical expenses.

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Employer Is Not Obligated To Pay For Vocational Services Provided To Claimant As They Are Not Reimbursable As Services Rendered By A Healthcare Provider

Wayne Taylor v. W.C.A.B. (Bethlehem Area School District), 1651 C.D. 2005: Filed; May 2, 2006; By Judge Cohn Jubelirer.

The claimant filed a review petition seeking reimbursement from the employer for vocational expenses that he had incurred. This reimbursement was sought pursuant to §306 (f.1) (1) of the Act, which is the medical payment provision.

The claimant had sustained a work injury on August 14, 1996, in the nature of a cervical epidural hematoma that subsequently resulted in partial paralysis with bowel and bladder dysfunction. It was undisputed that the claimant had near constant dependence upon a wheelchair for mobility and that he had an acknowledged chronic adjustment disorder with mixed features of depression and anxiety. The employer had unsuccessfully attempted to return the claimant to modified work. The claimant retained his own vocational consultant, who reviewed the employer's job offer and advised the claimant about potential issues that could arise in returning to work. The claimant's treating physician also testified that he had written a prescription for a vocational expert to assist the claimant.

The WCJ denied the review petition and was affirmed on appeal by the Appeal Board. The only issue before the Commonwealth Court was whether the expenses incurred for the vocational services were reimbursable under the Act. The claimant argued that they were since his treating physician, as a licensed medical professional, had written a prescription authorizing the services and because the policy goals of the Act provided reasonable grounds for reimbursing services incidental to medical treatment.

The court rejected both of those arguments and emphasized that the vocational consultant was not a licensed medical practitioner in Pennsylvania. Section 109 of the Act specifically provides that a "healthcare provider" must be licensed to provide healthcare services. The vocational consultant did not fall within that category, and his services were, therefore, not reimbursable as being rendered by a healthcare provider under the Act. Furthermore, the court noted that the mere fact that the treating physician had written a prescription for vocational services did not in and of itself bring those services within the definition of a medical service. Finally, the court noted the policy reason that the claimant need not even incur any expenses for vocational rehabilitation since such services are available free through the Office of Vocational Rehabilitation.

Appeal Board Properly Reversed WCJ's Grant Of A Penalty Petition Because The Employer, Who Had Failed To Pay A Compensation Award While It Had A Supersedeas Petition Pending, Was Not Subject To A Penalty Assessment Under The Act

Patric Gibson c/o Kathy Gibson v. W.C.A.B. (Armco Stainless and Alloy Products), 1485 C.D. 2005; Filed April 6, 2006; By President Judge Colins

In this case, the WCJ granted a fatal claim petition, which the employer appealed. The Appeal Board reversed the decision. However, the Commonwealth Court later reversed the Board and reinstated the WCJ's award. The employer filed a petition for allowance of appeal with the Supreme Court and an application for stay. The Supreme Court denied the employer's application, and the claimant filed a penalty petition, alleging the employer had violated the Act by failing to pay benefits as directed by the WCJ after the Supreme Court denied the employer's request for supersedeas.

Before the WCJ's decision on the penalty petition was issued, the Supreme Court granted the employer's application for supersedeas. Two months later, the WCJ granted the penalty petition. The WCJ ordered the employer to pay the claimant all benefits due, along with a 20% penalty, and noted that the employer could seek relief from the Supersedeas Fund. The employer appealed, and the Board reversed the WCJ's decision.

The Commonwealth Court affirmed the decision of the Board, and dismissed the claimant's appeal. Citing the case of *Snizaski v. W.C.A.B. (Rox Coal Company)*, __ PA __, 891 A.2d 1267, No. 36 WAP 2004, filed February 22, 2006, the Supreme Court held that the assessment of penalties against an employer should not be dependent upon the grant or denial of the employer's supersedeas request but, rather, should be linked to some discernable and avoidable wrongful conduct. Where the only delay in payment is that which is specifically contemplated in the regulations to permit the orderly determination of a timely supersedeas request, a penalty is not appropriate.

Employer Fails To Meet Its Burden Of Proof With Respect To A Utilization Review Petition Where It Fails To Offer Evidence Specific To The Procedure Under Review And The Date That The Procedure Was Performed

Brookside Family Practice v. W.C.A.B. (Heacock), 1943 C.D. 2005; Filed April 19, 2006; By Judge Friedman.

In this case, a provider implanted a spinal cord stimulator in the spine of the claimant, who was receiving benefits. The employer filed a utilization review (UR) request regarding the reasonableness and necessity of this procedure. The provider who performed the review issued a determination, concluding that the spinal cord stimulator replacement procedure was reasonable and necessary. The employer challenged the determination by filing a petition to review the utilization review determination. In support of that petition, the employer relied on evidence from past litigation concerning prior unsuccessful spinal cord stimulator trials, as well as an opinion from a medical expert that any further intervention would not be considered reasonable or medically necessary. The WCJ granted the employer's petition; however, the Appeal Board reversed, concluding that the employer failed to offer any evidence specific to the procedure under review.

The Commonwealth Court agreed with the Board and held that the evidence presented by the employer was not related to the reasonableness and necessity of the November 10, 2003, procedure under review. The court held that medical evidence of reasonableness and necessity should address the specific treatment under review in the UR petition proceeding and the WCJ should not infer a lack of reasonableness and necessity for the present treatment based solely on less than satisfactory results from a prior procedure.

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