

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF LABOR & INDUSTRY

ANNUAL PENNSYLVANIA WORKERS' COMPENSATION CONFERENCE  
Hershey, PA ~ May 16-17, 2016



**BASIC WORKERS' COMPENSATION LAW:  
SUBSTANTIVE ASPECTS OF WORKERS' COMPENSATION**

David B. Torrey, WC Judge, Pittsburgh, PA \*

CONTENTS/OUTLINE OF REMARKS

- I. Theory and History of Workers' Compensation
- II. Employers and Employees Covered
- III. Casualties & Disablements Compensable
  - Injuries and Occupational Diseases
  - Test of "arising in the course of employment and related thereto"
  - Affirmative Defenses
- IV. Basis, Form, Amount & Period of Compensation: Disability Payments
  - TTD, TPD, PD after two years of TTD,
  - and Permanent Injury (commonly known as Specific Loss)
  - Death Benefits; The Average Weekly Wage
- V. Basis, Form, Amount & Period of Compensation: Medical Benefits
- VI. Subrogation of Employers; Subrogation of Health Insurance and S&A Payers
- VII. Compromise Settlement of Cases
- VIII. Critical Litigation Issues
- IX. **Appendix:** Research and Further Reading References

---

\* B.A., 1982, West Virginia University; J.D., 1985, Duquesne University School of Law; Adjunct Professor of Law, University of Pittsburgh School of Law; Creator and Co-author, 6-9 DAVID B. TORREY & ANDREW E. GREENBERG, WEST'S PENNSYLVANIA PRACTICE SERIES, WORKERS' COMPENSATION: LAW AND PRACTICE (3d ed. 2008 & Supp. 2015-16); Immediate Past-President, The National Association of Workers' Compensation Judiciary ([www.NAWCJ.org](http://www.NAWCJ.org)). Contact: 412-209-4322; [dtorrey@pa.gov](mailto:dtorrey@pa.gov).

## I. Theory and History of Workers' Compensation

### A. No-fault liability as the operative principle

\* This means that, no matter whose fault the injury may be, employer or employee, workers' compensation insurance is to provide coverage.

### B. Compensation as the worker's exclusive remedy and the employer's exclusive liability

\* The claimant cannot sue the employer in tort.

\* The claimant must be satisfied with disability benefits and medical treatment coverage.

### C. The four purposes of workers' compensation

1. The humanitarian purpose
2. Cost internalization purpose
3. Promotion of Safety
4. Vocational rehabilitation (not featured in the PA Act)

### D. Origins in German and British social insurance enactments



### E. Original Pennsylvania Act of 1915

**CENTENNIAL WAS LAST YEAR!**

Labor & Industry and Bar Associations Commemorated

See <http://wc100pa.org>

### F. Occupational diseases added in 1937 (aborted); and 1939

### G. Amendments of 1972, 1974 (liberalization)

### H. Contemporary Reforms (generally retractive)

1. 1993 (medical cost containment) (Act 44)
2. 1995 (hearing loss) (Act 1)
3. 1996 (restriction on disability payments; procedural reforms; creation of the compromise settlement (C&R)) (Act 57)
4. 2006 (procedural reforms; creation of mandatory mediation) (Act 147)

## II. Employers and Employees Covered

**Critical Statutes:** Sections 103 and 104

**Leading case:** *Southland Cable v. WCAB (Emmett)*, 598 A.2d 329 (Pa. Commw. 1991) (deceased worker, though nominally retained by cable company as an independent contractor, was employee, as control test was satisfied; also, court considered employee's work tasks vis-à-vis nature of employer's business).

**Recent Development** (2010): Construction Workplace Misclassification Act

A. Definitions

1. Corporate officer exclusion
2. Undocumented Worker rule

B. The control test

\* If the firm alleged to be an employer controlled, or had the right to control, the details of the injured worker's labor, an employer-employee relationship likely exists.

C. Rule surrounding temporary agencies and employee leasing

\* The temp agency or employee leasing firm (PEO) generally maintains immunity, as if it were the actual employer.

**Recent Development** (2012): The law is the "Professional Employer Organization Act." (It has been referred to as "Act 102.") The effective date of the law was January 5, 2013.

D. Statutory inclusion and exclusion of certain classes of workers

\* Some workers, such as insurance and real estate agents, are excluded by statute

E. Injuries occurring outside of Pennsylvania ("Extraterritoriality")

\* Generally, a worker's insurance "follows" him or her when he or she leaves a fixed site workplace to perform a work-related task out of state; three other situations will also lead to Pennsylvania coverage when the injury occurs outside of the state.

F. Inclusion of volunteer firefighters

\* Volunteer firefighters, and other volunteer emergency personnel, are covered at Section 601 of the Act. They are considered employees of the sponsoring municipality. Disability benefits are payable, at a statutorily created rate, even if the volunteer is otherwise unemployed or retired.

III. **Casualties & Disablements Compensable**

**Critical Statute:** Section 301(c)(1) [and others]

***Injuries and occupational diseases compensable***

A. Compensable event under the Pennsylvania: "injury"

B. 15 years of liberal interpretation (1972-1987): injury is any harmful or hurtful effect on the body.

C. "Injury" as including occupational diseases; the presumption of causation  
**Critical Statutes:** Section 301(c)(2), Section 108, section 301(e)

D. The catch-all provision: Section 108(n) of the Act

E. **Recent Development:** Sections 108(r) and 301(f) (a/k/a Act 46 of 2011)  
“Firefighter’s Cancer Presumption”

F. **Leading cases:** *Pawlosky v. WCAB (Latrobe Brewing Co.)*, 525 A.2d 1204 (Pa. 1987) (claimant, who suffered aggravation of preexisting asthma due to chemical exposure at work, did not show that his disease had substantially greater incidence in his occupation than in the general population; still, claim was compensable as his ailment could be conceived of as an “injury”); *City of New Castle v. WCAB (Sallie)*, 546 A.2d 132 (Pa. Commw. 1988) (deceased employee, who incurred rare bacterial disease from co-worker’s innocent good-bye kiss, suffered injury arising in the course of his employment: widow was thus entitled to benefits); *Tooev v. AK Steel*, 81 A.3d 851 (Pa. 2013) (if claimant or widow barred from compensation by 300-week period, he or she may then sue employer in tort).

G. Compensability of Mental Stress Cases

**Leading Cases:** *Martin v. Ketchum*, 568 A.2d 159 (Pa. 1990) (claimant, to recover in mental stress causing mental disability case, must show abnormal working conditions); *Payes v. WCAB (Pa. State Police)*, 79 A.3d 543 (Pa. 2013) (because mental stress injury cases “are highly fact-sensitive, a reviewing court must give deference to the fact finding functions of the WCJ and limit review to determining whether the WCJ’s findings of fact are supported by the evidence.”).

H. Compensability of Hepatitis C

**Critical Statute:** Section 108(m.1)

Hepatitis C is recognized as an occupational disease. If a worker on the list (e.g., healthcare providers, emergency service providers), develops the disease, the law will in most cases presume work causation.

I. “Compensable Consequences”

Workers’ compensation insurance provides coverage not only for the immediate consequences of the injury: “injuries unrelated to a claimant's job are compensable if they are the ‘proximate, natural, and probable result’ of prior work-related injuries.”

**Test of arising in the course of employment and related thereto**

A. **Leading case:** *Krawchuk v. WCAB (PECO)*, 439 A.2d 627 (Pa. 1983) (stress heart attack was compensable, even though it occurred off the premises and after work: persuasive expert medical opinion was that claimant’s heart attack had its origin in stressful workplace).

“Arising” as connoting origin of injury

B. “Course of employment”

C. “Related thereto” as requiring proof of medical causation in non-occupational disease cases; Test in Pennsylvania, in non-obvious cases, is reasonable medical certainty

D. Course of employment and gray areas.

Rule of thumb: are the ambiguous circumstances an “incident” of the employment – or, in contrast, an “abandonment” of the same?

1. Role of the premises

2. Social events

3. Injuries occurring during travel: Routine commuting is not course of employment:

\* Exception: Traveling employees

\* Exception: Contract includes travel

\* Exception: Special Mission

\* Exception: Special Circumstances

\* ***Recent Development:*** Telecommuting

### ***Affirmative defenses***

***Note: Burden of proof is always on employer***

A. Not a defense: Horseplay

B. Defense: Violation of Law

\* e.g., Driving While Intoxicated is a violation of the Motor Vehicle Code

C. Defense: Intoxication

D. Defense: “Reasons personal”

\* e.g., An injury or death suffered by a worker when an angry neighbor enters the workplace and assaults the worker

E. Defense: Violation of positive orders

\* In Pennsylvania, the test is limited. A knowing violation of a safety statute, for example, is *not* a defense. Instead: “injuries resulting from those acts which are in direct hostility to, and in defiance of, positive orders of the employer concerning instrumentalities, places, or things about or on which the employee has no duty to perform, and which the employee has no duty to perform, and with which his employment does not connect him, are not compensable.” ***Pennsylvania does not otherwise maintain a misconduct or willful misconduct defense.***

F. Defense: Intentional self-infliction

IV. **Basis, Form, Amount & Period of Compensation**

**Critical Statutes:** Section 306(a); Section 306(b); Section 306(c)

A. [Temporary] Total Disability (for the duration)

B. [Temporary] Partial Disability (maximum 500 weeks)

**Leading case:** *Kachinski v. WCAB (Vepco Constr. Co.)*, 532 A.2d 374 (Pa. 1987) (unless claimant is *fully recovered*, employer must offer light work, or prove its availability through job placement, before TTD may be reduced to TPD).

1. Pre-Act 57: Actual job availability

2. Post-Act 57: Earning power assessment via expert *or* job availability

C. Partial Disability after two years of TTD (maximum 500 weeks)

1. Effective, based on *AMA Guides* rating when below 50% whole body impairment, after receipt of 104 weeks of TTD

2. Petitions after impairment rating

\* Employer may seek reduction of payment levels after a lower-than-50% impairment rating by offering work, proving restored earning power via expert testimony, or by proving full recovery

3. Controversy: Which edition of *AMA Guides* do we use? *Protz* case.

D. Disability from Permanent Injuries (scheduled losses or “specific loss”)

E. Death Benefits: Section 307

F. The Average Weekly Wage: Section 309

G. Bureau’s Quick-Reference Benefit Chart:

The Statewide Average Weekly Wage (which is also the maximum compensation payable) for 2016 is \$ 978.00. The chart that appears below demonstrates the consequent benefit rates.

**2016**

Maximum: \$978.00 <b>01/01/16</b>
\$1,467.00 ↕ 66 2/3% \$733.51
\$733.50 ↕ \$489.00 \$543.33
\$543.32 or ↕ 90% Less

The Bureau, on its website, has included the following introduction and example with regard to how to read this chart:

“Under the Workers’ Compensation Act, injured workers are entitled to indemnity (wage-loss) benefits equal to two-thirds of their weekly wage for a work-related injury. However, there are minimum and maximum adjustments provided in the Act, and the benefit rate is set using the annual maximum in place at the time of injury. The maximum is based on the Department of Labor and Industry’s calculation of the statewide average weekly wage.

The following schedules provide the weekly rates from calendar year 2011 to 2016. When referring to the schedules, read down the column for the calendar year during which the injury occurred.

For example, the maximum weekly compensation rate for calendar year 2016 is \$978.00. The second block represents the weekly compensation rate to be 66 2/3 percent of the employee’s average weekly wage if the average weekly wage falls between \$1,467.00 and \$733.51.

The third block reflects a weekly compensation rate of \$489.00 if the employee’s average weekly wage is between \$733.50 and \$543.33.

The last block is 90 percent of the employee’s average weekly wage if his/her average weekly wage is \$543.32 or less.”

**NOTE: Past due payments are subject to simple interest only.**

V. **Basis, Form, Amount & Period of Compensation: Medical Benefits**

**Critical statutes:** Section 306(f.1), Section 306(f.2)

A. Employer responsible for reasonable and necessary medical care, “as and when needed”

B. Cost-Containment

1. Employer control (lack of employee choice) for 90 days
2. Medical Fee Schedule: 113% of Medicare for treatment expenses
3. Pharmaceutical controls: 110% of wholesale
4. Utilization review
5. Fee Review

C. Employee’s refusal of medical services

VI. **Subrogation**

**Critical statute:** Section 319

**Leading case:** *Heckendorn v. Consolidated Rail Corp.*, 465 A.2d 609 (Pa. 1983) (employer cannot be joined in third-party action, even if negligent).

A. Subrogation of Employers

1. Subrogation right broadly enforced, but not an assignment
  2. Subrogation applies to all damages
    - \* Exception: bona fide damages ascribable to loss of consortium
  3. Employer may be joined if an express contract of indemnity exists
- Note:** an employer may secure a subrogation waiver in Pennsylvania

B. Subrogation of Health Insurance and S&A Payers

VII. **Compromise Settlements (first authorized in 1996)**

**Critical Statute:** Section 449

- A. All benefits may be released
- B. All “claims” may be settled: original *and* accepted; issue of blanket releases
- C. Approval by WCJ is required; a hearing is required in every case
- D. Criterion of approval: whether the claimant understands the full legal significance of the settlement
- E. Exciting academic article:  
*Torrey, Compromise Settlements Under State Workers’ Compensation: Law, Policy, Practice, and Ten Years of the Pennsylvania Experience*,  
16 WIDENER LAW JOURNAL 199 (2007)

VIII. **Critical Aspects of Litigation**

A. Adjudicatory Structure

1. Workers’ Compensation Judge (final fact-finder) (contrast: Maryland, Ohio)
2. Workers’ Compensation Appeal Board (substantial evidence and legal error review)
3. Commonwealth Court/Pennsylvania Supreme Court (same)

- B. Claimant Petitions: Claim, Reinstatement, Review, and Penalty
- C. Employer Petitions: Termination, Suspension, Modification, Review
- D. Utilization Review
- E. Fee Review
- F. Mediation of Cases

## IX. Appendix: Research References

### A. *Law*

The Pennsylvania Workers' Compensation Act (non-annotated), with regulations:  
Hardcopy (revised January 2016) or:  
<http://www.portal.state.pa.us/portal/server.pt?open=514&objID=553004&mode=2>.

The Pennsylvania Workers' Compensation Act (non-annotated)  
Title 77, Pennsylvania Statutes:  
<http://government.westlaw.com/linkedslice/default.asp?SP=pac-1000>

The Pennsylvania Workers' Compensation Act (annotated):  
Title 77, Pennsylvania Statutes Annotated (3 volumes)

The new precedents from Commonwealth and Supreme Courts, updated daily:  
<http://www.pacourts.us/>.

*In general:* The Bureau of Workers' Compensation and Office of Workers' Compensation Adjudication (WCOA) websites:  
[http://www.portal.state.pa.us/portal/server.pt/community/workers'\\_compensation/10386](http://www.portal.state.pa.us/portal/server.pt/community/workers'_compensation/10386).

### B. *Books*

D. Torrey & A. Greenberg, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE (4 Volumes: Thomson-West 3rd ed. 2008 & Supp. 2015-16). (Also on Westlaw)

D. Torrey, THE CENTENNIAL OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT: A NARRATIVE AND PICTORIAL CELEBRATION (PBA 2015)

PENNSYLVANIA WORKERS' COMPENSATION: PRACTICE & PROCEDURE (1 Volume: Pennsylvania Bar Institute, 2016 edition) ([www.pbi.org](http://www.pbi.org))

### C. *Newsletter*

Pennsylvania Bar Association Workers' Compensation Law Section *Newsletter* (Quarterly). Written and edited by WCJ Torrey (since 1988) ([www.pabar.org](http://www.pabar.org))

### D. *General Interest*

P. Fishback & S. Kantor, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000).

M. McGavin, BLUEPRINT FOR WORKERS COMP COST CONTAINMENT (IRMI 2001)  
([www.IRMI.com](http://www.IRMI.com)).

J. Witt, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004).

K. Roberts, J. Burton, M. Bodah, editors, WORKPLACE INJURIES AND DISEASE: PREVENTION AND COMPENSATION (Upjohn Institute 2005).

Kenneth S. Abraham, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (Harvard University Press 2008).

Richard A. Victor & Linda L. Carrubba, eds., WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (WCRI 2010).

Donald D. DeCarlo & Roger Thompson, WORKERS' COMPENSATION: THE FIRST ONE HUNDRED YEARS (Am. Society of Workers Comp. Professionals 2012).

Christopher R. Brigham, M.D., LIVING ABLED AND HEALTHY: YOUR GUIDE TO INJURY & ILLNESS RECOVERY (Healthy Living Publishing 2014) (price includes web-based access to reader-only material, including forms and agreements; [www.livingabled.com/book](http://www.livingabled.com/book)).