BASIC WORKERS’ COMPENSATION LAW (PART I)
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

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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
   (RECENT CENTENNIAL!)

Labor & Industry and Bar Associations Commemorated
See [http://wc100pa.org](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 Workers rule (covered as employees; disability limited)

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 “adverse or hurtful change”
relative to 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”) (30th Anniversary noted by Justin Beck, Esq., PBA WC Newsletter No. 129, March 2017), [www.davetorrey.info](http://www.davetorrey.info); *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); *Tooey 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 compensable, even though occurring off 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
   * Development: Telecommuting (coverage applies: see www.davetorrey.info)

**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) (law stricken)
   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


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 2018 is $1,025.00. The chart that appears below demonstrates the consequent benefit rates.

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<th>Maximum: $1,025.00</th>
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<tr>
<td><strong>01/01/18</strong></td>
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<tr>
<td>$1,537.50</td>
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<td><strong>66 2/3%</strong></td>
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<td><strong>or 90%</strong></td>
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<td><strong>Less</strong></td>
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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 2013 to 2018. 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 2018 is $1,025.00. 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 $1,537.50 and $768.76.

The third block reflects a weekly compensation rate of $512.50 if the employee's average weekly wage is between $768.75 and $569.44.

The last block is 90 percent of the employee's average weekly wage if his/her average weekly wage is $569.43 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
1a: Role of the Nurse Case Manager – not subject to regulation in Pennsylvania:

2. Medical Fee Schedule: 113% of Medicare for treatment expenses
3. Pharmaceutical controls: 110% of wholesale
4. Utilization review (the process of the employer/carrier challenging the reasonableness and necessity of treatment)
5. Fee Review (the process of healthcare providers challenging the amount and timeliness of payments by employers/carriers)

C. Employee’s refusal of reasonable medical services (may result in forfeiture of benefits during period of refusal)
VI. **Subrogation**

**Critical statute**: Section 319


(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:

The Pennsylvania Workers’ Compensation Act (non-annotated)
Title 77, Pennsylvania Statutes:

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: https://lion.pa.gov/comp/bwc/SitePages/Home.aspx;
https://lion.pa.gov/comp/wcoa/SitePages/Home.aspx;

B. Books


PENNSYLVANIA WORKERS’ COMPENSATION: PRACTICE & PROCEDURE (1 Volume: Pennsylvania Bar Institute, 2018 edition) (www.pbi.org). This “A to Z” manual is often called the “Yellow Bible.”

C. Newsletter


D. General Interest


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; http://www.livingabled.com/).

L. Kertay, Ph.D., M. Eskay-Auerbach, M.D., & M. Hyman, M.D., eds., AMA GUIDES TO NAVIGATING DISABILITY BENEFIT SYSTEMS: ESSENTIALS FOR THE HEALTHCARE PROFESSIONAL (American Medical Association 2016).