PENNSYLVANIA WORKERS' COMPENSATION: 2006-2007 UPDATE

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Andrew E. Greenberg, Esquire[1]

I. Introduction

The Pennsylvania Workers' Compensation Act has been characterized as a humanitarian statute designed to provide expedited wage reimbursement and medical coverage to employees injured in the course of their employment.[2] The basic feature of this administrative scheme is its insistence that employers or their insurers assume responsibility for a vast constellation of work-related ailments, ranging from occupational diseases, such as asbestosis, to repetitive trauma conditions, such as carpal tunnel syndrome, to psychiatric conditions such as post–traumatic stress disorder.

The Act represents a legislative *quid pro quo*, first articulated in the early 1900s, one that affords employers immunity from suit in return for strict employer liability for structured indemnity, medical and specific loss benefits arising out of work-related "injuries."[3]

In keeping with its no fault character, the Act generally will be construed liberally by those tribunals seeking to effectuate its humanitarian purpose.[4]

While it is true that the Pennsylvania Act contemplates legal concepts that are not particularly difficult to comprehend, the administrative regime does present to the practitioner an almost endless array of technical statutory provisions, administrative regulations, forms and intense fact-based case law, all of which require vigilant study and attention to detail.

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[1] Mr. Greenberg is a founding partner of The Chartwell Law Offices, LLP, a litigation/commercial law firm with offices in Philadelphia, Pittsburgh, Harrisburg, Scranton, and Valley Forge. He is the co-author with Judge David B. Torrey of *Pennsylvania Workers' Compensation Law and Practice*, a four-volume treatise published and updated annually by Thomson-West Publishing Company. You can e-mail him at agreenberg@chartwelllaw.com.

[2] See LTV Steel Company, Inc. v. Workers' Compensation Appeal Board (Mozena), 562 Pa. 205, 754 A.2d 666 (2000); Tarpacki v. Workmen's Compensation Appeal Board (Diversified Contracting, Inc.), 164 Pa. Cmwlth. 390, 641 A.2d 639 (1994).

[3] See Kuney v. PMA Insurance Company, 525 Pa. 171, 578 A.2d 1275 (1990).

[4] See Lehigh County v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

Over the past year the dominant issue with respect to Pennsylvania workers' compensation has been legislative activism designed to expedite the litigation process and encourage mediation of disputes between injured employees and their employers or insurers.

At the same time, the courts have continued to issue cases that provide evolving guidance for the workers' compensation bar and for others whose involvement in "work-related" personal injury matters is more peripheral.

This presentation seeks to afford the attendee with legislative and judicial highlights of the practice since September, 2006.

II. Legislative Developments

Certainly, the most notable legislative development in the workers' compensation system came on November 9, 2006 with the enactment of what is now commonly referred to as "Act 147."

The legislation has fostered a number of changes in practice and procedure, including the following: (1) a "resolution hearing" procedure designed to expedite the processing of settlements through "Compromise and Release Agreements"; (2) a increase in the minimum total disability rate for pre-August 31, 1993 injuries; (3) first hearing "Mandatory Trial Schedules" issued by the presiding Workers' Compensation Judge ("WCJ"), designed to expedite the litigation process; (4) Mandatory Mediation sessions in all cases unless such would be "futile"; (5) the allowance of the Workers' Compensation Appeal Board to issue binding appellate rulings through three-member "panels"; and (5) the creation of the "Uninsured Employers Guaranty Fund" affording employees injured while working for uninsured employers access to wage loss and medical benefits under the Act.[5]

The so-called "Mandatory Mediation" requirement of Act 147 – as opposed to the voluntary system that has been in place since 1996 - has prompted much discussion among attorneys, WCJs and the Bureau, all of whom have pondered and debated when mediation is "futile" and how and when to schedule such Mandatory Mediation sessions. The impetus for the expanded use of mediation came not only from the Pennsylvania Trial Lawyers Association - which saw the tool as an effective means for facilitating relatively painless settlements - but also from the Commonwealth of Pennsylvania Chamber of Commerce, which saw Mandatory Mediation as a way for reducing the litigation cost.[6]

While it remains to be seen whether Mandatory Mediation will provide the Pennsylvania business community with the savings that the Chamber of Commerce has

[5] For an excellent summary of Act 147 see the piece prepared by C. Robert Keenan, Esquire in the November, 2006 Pennsylvania Bar Association Workers' Compensation Newsletter, Vol. VII, No. 90. Judge Torrey is the creator and editor of this gold-standard periodical.

[6] See the piece "Mandatory Mediation: Is It Futile" by well-known claimants' counsel, Lawrence Chaban, Esquire of the Allegheny Bar in the February, 2007 in the Pennsylvania Bar Association Workers' Compensation Newsletter, Vol. VII, No. 91.

envisioned, there can be little doubt that it has already changed the way claims are administered.

With a greater number of settlements flowing from the new Mediation apparatus, the life expectancy of a standard workers' compensation claim will surely be reduced. How that development will impact third-party civil litigation remains to be seen. For example, one wonders whether a workers' compensation insurer, having expeditiously settled a claim by Compromise and Release, without accepting liability under the Act, will be deemed to have waived its potential subrogation rights under Section 319. And, one wonders whether expedited resolutions will impact third-party defense counsel as they seek to discover and analyze the alleged underlying work incident/injury.

Another less notable legislative development occurred in the last year with the enactment of "Act 109."

That provision requires claimants to provide child support collection information to WCJs in certain cases.[7]

The Bureau of Workers' Compensation has summarized the new law as follows:

> "Act 109, which amends Title 23 and states, in part, that with respect to any monetary award (defined as a lump sum payment in excess of $5,000) arising under the Workers' Compensation Act, no order providing for a payment shall be entered by the workers' compensation judge unless the prevailing claimant provides the judge with written documentation of arrears from the Pennsylvania Child Support Enforcement System Web site, or, if no arrears exist, written documentation from the Web site indicating no arrears. The judge shall order payment of the lien for overdue support to the department's state disbursement unit from the net proceeds due the claimant. Act 109 took effect on Sept. 5, 2006."[8]

The urge to tinker with the Act by individual lawmakers is apparently irresistible as evidenced by the almost endless flow of legislative proposals that have been made in Harrisburg over the past year: (1) *House Bill 1905*, introduced by Representative DiGirolamo (R-Bucks), would add coverage to volunteers and other individuals employed by FEMA or as "first responders" in an emergency; (2) *House Bill 2423*, introduced by Representative Ross (R-Chester), would add coverage to "volunteer members of an emergency management team" and would specifically include travel time; (3) *Senate Bill 849*, introduced by Senator Orie (R-Allegheny), would include coverage of volunteers "in a disaster relief function" within Pennsylvania's boundaries, and would designate them as employees of the Commonwealth; (4) House Bill 2889, introduced by Representative Lederer (D-Philadelphia), would refine the definition of average weekly wage under Section 309 of the Act in a way "most favorable to the

[7] See 23 Pa. C.S. §4308.1.

[8] See Bureau of Workers' Compensation *News & Notes* (Fall 2006).

employee.";[9] (5) *House Bill 218*, sponsored by Representative Cohen (D-Philadelphia), is a sweeping effort to allow an employee a cause of action against an employer where an employee "has suffered an injury which results from the employer's reckless, willful, or wanton disregard for the safety of the" employee. Under this legislation, an employee's cause of action would not be subject to a number of traditional defenses "unless it can be established that the injury was caused by such employe's (sic) intoxication or by his reckless indifference to danger."; (6) H*ouse Bill 292*, sponsored by Representative DiGirolamo (R-Bucks), is similar to his House Bill 1905 in the last session. House Bill 292 would add specified emergency workers and first responders to the volunteers covered by Section 601 of the Act; (7) *House Bill 465*, sponsored by Representative Dally (R-Monroe), is the same as last session's House Bill 353 after that former bill was amended. House Bill 465 would add Sheriffs' personnel and some specified state law enforcement officers to the protected class under the hepatitis provisions of Section 108(m.1) of the Act; (8) *House Bill 514*, sponsored by Representative Hickernell (R-Lancaster), is the same as last session's House Bill 961, and would compel treatment with a panel physician for the first 180 days of treatment (increasing the current coverage period of 90 days); (9) *House Bill 565*, sponsored by Representative Michael O'Brien (D-Philadelphia), would add the following sentence to Section 416 of the Act: "In an action for denial, termination, or suspension of compensation, the employer has the burden of proving that the employe is not entitled to compensation"; (10) *House Bill 643*, sponsored by Representation Walko (D-Allegheny), does not deal specifically with workers' compensation but addresses prescription drugs, which would have impact upon workers' compensation medical costs; (11) *House Bill 763*, sponsored by Representative Goodman (D-Schuykill), which is the same as last session's House Bill 171, would add probation, parole, environmental, and Sheriffs' personnel to the protected class under the hepatitis provisions of Section 108(m.1) of the Act; (12) *House Bill 786*, sponsored by Representative Hutchinson (R-Venango), would add Department of Conservation and Natural Resources law enforcement officers to the list of personnel covered by the Heart and Lung Act. This bill has received Committee discussion and hearings in May; (13) *House Bill 791*, sponsored by Representative Denlinger (R-Lancaster), is sweeping legislation providing rights and processes for "subscribers" (that is, employers) covered by the State Workers' Insurance Fund; (14) *House Bill 1025*, sponsored by Representative Casorio (D-Westmoreland), would add a variety of officers (involved in fish, game, conversation, and others) to the protected class under Section 108(m.1) of the Act, dealing with hepatitis C[10].

In addition, (15) *House Bill 1272*, sponsored by Representative Kessler (D-Berks), would add emergency volunteers to Section 601 and would specifically include travel to and from the volunteer's home or place of business; (16) *House Bill 1393*, sponsored by Representative Belfanti (D-Northumberland) would provide an annual cost of living adjustment for all wage loss benefits and (17) *Senate Bill 263*, sponsored by Senator Gordner (R-Columbia) last session's

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[9] C. Robert Keenan, Esquire, Pennsylvania Bar Association Workers' Compensation Newsletter, November, 2006, Vol. VII, No. 90.

[10] In his summary set forth in Pennsylvania Bar Association Workers' Compensation Newsletter, June, 2007 Vol. VII, No. 92, Judge Torrey reports that "[a]ll of the above bills are before the Committee on Labor Relations except for House Bill 786, which is before the Committee on Environmental Resources and Energy, and House Bill 643, which is before the Committee on Health and Human Services. Only House Bills 292 and 786 have shown any signs of interest among legislators."

Senate Bill 733, which passed the Senate but expired in the House, would provide a slight increase in the maximum monthly rate of benefits for those receiving coverage for specified occupational diseases under the Occupational Disease Act. This bill passed the Senate on March 21, 2007 and is now before the House Committee on Labor Relations, but apparently will not make it to the House floor anytime soon; (18) *Senate Bill 282*, sponsored by Senator Costa (D-Allegheny), deals with firefighters in Second Class Cities i.e. Pittsburgh. The proposal refers to the Workers' Compensation Act and implies that a surviving firefighter's spouse may remarry and still collect benefits; (19) *Senate Bill 348*, sponsored by Senator Boscola (D-Northampton), which is the same as last session's Senate Bill 160 refines the definition of cancer, adds firefighters under new Sections 108(r) and 301(c)(3) of the Act, and shifts the burden to the municipality-employer to prove that the firefighter's occupation was *not* a "major contributing cause" of the disease; (20) *Senate Bill 557*, sponsored by Senator Kasunic (D-Fayette), which is the same as last session's Senate Bill 616 would provide a cost of living adjustment for wage loss benefits; (21) *Senate Bill 559,* also sponsored by Senator Kasunic, would add corrections officers to the personnel covered under the Heart and Lung Act; (22) *Senate Bill 599*, sponsored by Senator Orie (R-Allegheny), which is the same as last session's Senate Bill 849, would add certain disaster response volunteers to the volunteers covered under Section 601 of the Act; (23) *Senate Bill 602* sponsored by Senator Orie (R-Allegheny), addresses prescription drugs and pharmacy services which could impact workers' compensation medical costs; and (24) *Senate Bill 666*, sponsored by Senator Gordner (R-Columbia), aims at independent contractor issues along the lines of last session's House Bill 1215 and Senate Bill 643.

Judge Torrey reports that "[a]ll bills in the Senate are before the Labor and Industry Committee except for Senate Bills 282 (Finance Committee) and 602 (Public Health and Welfare Committee)."[11]

As individual legislators seek to promote the wishes of their particular constituents, there is no reason to believe that the flow of proposed amendments to the Act will not continue in the months ahead.

From a regulatory standpoint, the Bureau of Workers' Compensation has recently issued a series of revised Regulations that will impact administrative and litigation procedure.

Finally, the Bureau has recently introduced a new form that will alter to some degree the manner in which new claims will be administered. The new "Medical Only Temporary Notice of Compensation Payable" provides claims personnel with yet another device for administering minor work injuries. The addition of another "Temporary" claims form – the "Notice of Temporary Compensation Payable" form is still in its infancy – will further complicate the administrative process, one which claimants' counsel and the courts are likely to scrutinize as the use of such new documents matures[12].

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[11] See Pennsylvania Bar Association Workers' Compensation Newsletter, June, 2007 Vol. VII, No. 92.

[12] That process is beginning to occur. In Jordan v. Workers' Compensation Appeal Board (Philadelphia Newspapers, Inc.)(Pa. Cmwlth. 2007) the Commonwealth Court affirmed the imposition of penalties for what it viewed as the inappropriate use of a Notice of Temporary Compensation Payable in the context of an undisputed wage-loss producing work injury. In its last pronouncement on the issue, the Commonwealth Court has most recently ruled in Armstrong v. Workers' Compensation Appeal Board (Haines & Kibblehouse, Inc.), (Pa. Cmwlth. 2007) that the use of the Temporary form as a method for administering a compensable work injury is permissible.

III. Subrogation

Perhaps nothing causes more frustration to civil personal injury litigators and judges than the "automatic"[13] and "absolute"[14] right to subrogation afforded by Section 319 of the Act. I often hear from my civil colleagues how "unfair" and "disruptive" the subrogation rules are to plaintiffs and defendants seeking to resolve work-related third-party actions.

While workers' compensation defense counsel generally find a certain amount of comfort in knowing that in nearly every instance Section 319 affords their clients the kind of leverage they are normally forced to concede to claimants' counsel, an under publicized development in the Insurance Code that took place in 2002, has it seems finally to have come to the attention of the workers' compensation community.[15]

The general "collateral source" rule[16] contemplated by the Insurance Code has traditionally prohibited a party defending a civil action from seeking an offset for amounts paid by other insurance programs. The Medical Care Availability and Reduction Act ("MCARE") set forth in Section 1303.508[17] of the Code has changed the rule with respect to medical malpractice actions - effective March 20, 2002 - by now permitting such an offset. In doing so, the MCARE provision supposedly maintains the fundamental balance inherent in workers' compensation subrogation theory,[18] by simultaneously voiding the subrogation rights of the collateral insurance payor – the workers' compensation payor - for **past benefits** paid to the civil plaintiff.[19]

The balance or *quid pro quo* referenced above is maintained by preventing the civil malpractice plaintiff from "boarding" his past medical specials and wage loss compensated under the Act, while simultaneously preventing the workers' compensation insurer from recovering subrogation reimbursement for past compensation paid. Because the malpractice plaintiff retains the option of disclosing at trial past medical costs incurred – as a means of highlighting the severity of the injury at issue – not for the purpose of obtaining civil reimbursement for such costs, the statute does not deprive the plaintiff of a key tool for enhancing the "pain and suffering" component of the claim.

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[13] See Powell v. Sacred Heart Hospital, 99 Pa. Cmwlth. 575, 514 A.2d 241 (1986).

[14] See Winfree v. Philadelphia Electric Co., 520 Pa. 392, 554 A.2d 485 (1989); Monessen, Inc. v. Workers' Compensation Appeal Board (Flemming), 875 A.2d 415 (Pa. Cmwlth. 2005).

[15] See Pennsylvania Bar Association Workers' Compensation Newsletter, June, 2007, Vol. VII, No. 92, with comments by WCJ David B. Torrey. Many of the comments included in this presentation are those of this author's collaborator, Judge Torrey, who in my opinion and in the opinion of many is the definitive authority on Pennsylvania Workers' Compensation law and procedure.

[16] A good summary of the policy underlying the rule is included in the Supreme Court opinion issued in Gallagher v. Pennsylvania Liquor Control Board, 584 Pa. 362, 883 A.2d 550 (2005).

[17] 40 P.S. §1303.508

[18] In Gallagher, supra, the Supreme Court observed that "via the Medical Care Availability and Reduction Error Act, Act of March 20, 2002, P.L. 154, No. 13, the General Assembly negated the substantive collateral source doctrine in medical professional liability actions."

[19] Thanks also to Brian L. Calistri, Esquire for his consultations on this issue.

Indeed, although it has been observed that by "[a]llowing defendants to reduce the recovery of plaintiffs by amounts received for third party sources will clearly decrease the amount recoverable"[20] one has to wonder whether the option of disclosing past medical costs incurred to the jury could ultimately hurt both the workers' compensation insurer and malpractice insurer.

The MCARE statute provides, in pertinent part, as follows:

§ 1303.508. Collateral sources

(a) GENERAL RULE. -- Except as set forth in subsection (d), a claimant in a medical professional liability action is precluded from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent that the loss is covered by a private or public benefit or gratuity that the claimant has received prior to trial. (emphasis supplied).

(b) OPTION -- The claimant has the option to introduce into evidence at trial the amount of medical expenses actually incurred, but the claimant shall not be permitted to recover for such expenses as part of any verdict except to the extent that the claimant remains legally responsible for such payment.

(c) NO SUBROGATION -- Except as set forth in subsection (d), there shall be no right of subrogation or reimbursement from a claimant's tort recovery (emphasis supplied) with respect to a public or private benefit covered in subsection (a).

(d) EXCEPTIONS -- The collateral source provisions set forth in subsection (a) shall not apply to the following:

(1) Life insurance, pension or profit-sharing plans or other deferred compensation plans, including agreements pertaining to the purchase or sale of a business.

(2) Social Security benefits.

(3) Cash or medical assistance benefits which are subject to repayment to the Department of Public Welfare.

(4) Public benefits paid or payable under a program which under Federal statute provides for right of reimbursement which supersedes State law for the amount of benefits paid from a verdict or settlement.

[20] See R. Mulhern & D. Nichols, "Update on Medical Malpractice in Pennsylvania Under the New Medical Care Availability and Reduction of Error Act," available at http://library.findlaw.com/2003/Aug/18/133017.html.

Again, it is important to consider that the rule applies only to **"past"** medical costs covered by the collateral source **– it does not apply to future medicals** to be incurred - meaning that a workers' compensation insurer retains the power to **assert a lien against future compensation paid**.

In fact, Section 1303.509 of the MCARE Act instructs that the "trier of fact" in the medical malpractice action must "**make a determination with separate findings**" setting forth "the amount of . . . past damages [and] "future damages" . . . for "medical and other related expenses in a lump sum, loss of earnings in a lump sum and noneconomic loss in a lump sum."

Because of the highly technical nature of the MCARE regime it is probably appropriate for workers' compensation defense counsel to consider intervening in the malpractice action so as to fully protect the remaining rights of the workers' compensation insurer or employer under Section 319 of the Act.

There are other instances in which subrogation will be unavailable to the workers' compensation employer or insurer.

In a ruling that should please claimants' counsel and personal injury civil practitioners, the Pennsylvania Workers' Compensation Appeal Board has followed the Commonwealth Court ruling in Cullen v. Pennsylvania Property & Casualty Insurance Guarantee Association, 760 A.2d 1198 (Pa. Cmwlth. 2000), that an employer's workers' compensation subrogation cannot be reimbursed under Section 319 where the injured worker obtains civil damages under the Pennsylvania Guarantee Association Act[21].

In Cullen, the workers' compensation insurer was not permitted to execute its lien against the third-party civil recovery, obtained by the injured worker through the Pennsylvania Property & Casualty Insurance Guarantee Association because the insolvency insurer **had already reduced** its civil liability by the amount recovered by the injured worker under the Pennsylvania Workers' Compensation Act.[22]

The policy governing the ruling in Cullen is certainly logical – a double offset or the charging of a claimant's tort recovery **twice** for the same workers' compensation recovery – once by the insolvency insurer and once by the workers' compensation insurer – would be contrary to subrogation principles.

Counsel should be mindful, however, that where the insolvency insurer does not reduce the civil award to the injured worker by the amount recovered by the worker under the Workers' Compensation Act, the workers' compensation employer or insurer will be permitted to assert its lien.[23]

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[21] See Perkey v. ABF Freight System, Inc. The Property and Casualty Insurance Guarantee Act provision can be found at 40 P. S. 991.1801 et seq.

[22] The reduction in the award was required by Section 1817 of the Property & Casualty Guarantee Association Act, which provides in pertinent part that "[a]ny amount payable on a covered claim under this act shall be reduced by the amount of any recovery under other insurance."

[23] See Schmidt v. Workers' Compensation Appeal Board, (Pepsi Cola Company), 835 A.2d 877 (Pa. Cmwlth. 2003). In Schmidt the insolvency insurer did not reduce its civil award to the injured worker by

IV. Course of/Arising Out of Employment

An issue that should be of interest to both workers' compensation and civil defense counsel is the compensability of a "mental injury" sustained by an employee as a consequence of unwanted sexual advances by a co-worker.

Section 301(c)(1) of the Act includes the "personal animus" defense which provides that that a work injury "caused by an act of a third person intended to injure the employe (sic) because of reasons personal to him, and not directed to him as an employe (sic) or because of his employment" is not compensable.

In 2004, the Commonwealth Court sought to apply the foregoing rule while declaring in Heath v. Workers' Compensation Appeal Board (Pennsylvania Board of Probation and Parole), 811 A.2d 90 (Pa. Cmwlth. 2004) that injuries resulting from the intentional, provocative sexual advances of a co-employee are not compensable, reasoning that the such an advance necessarily constitutes an intentional act of a third person for "reasons personal" to the third person.

Although the ruling did not raise the kind of uproar that it probably should have raised in the workers' compensation community – due perhaps to the fact that "mental-mental" injuries are generally not favored by the claimants' bar these days - it did cause some concern for those sensitive to the theory underlying the "personal animus" defense.[24] That concern being that the "reasons personal to him" language of Section 301(c)(1), it is believed, refers not to the reasons of the sexual predator, but to the victim of the sexual advance.

On January 11, 2007, however, the Supreme Court of Pennsylvania issued a ruling in Rag (Cyprus Emerald Resources, L.P. v. Workers' Compensation Appeal Board (Hopton), 590 Pa. 413, 912 A.2d 1278 (2007) that apparently laid to rest the notion that legitimate injuries arising out of intentional sexual advances against the employee undertaken by a third person are not compensable under the Act. The Hopton case involved an alleged psychological injury suffered by a coal miner as a consequence of a series of homosexual advances made by a co-employee. Although the Supreme Court did not address the "personal animus" defense, it did rule that the worker's evidence, if accepted as true, would be sufficient to establish a compensable injury under the Act. In other words, the Court took for granted that injuries suffered by the victim of a workplace sexual advance or attack are not precluded from seeking benefits under the Act.

From a theoretical standpoint, therefore, the proper interpretation of the "reasons personal to him" language of Section 301(c)(1) attributes the precipitating personal reasons to the victim – not to the aggressor. Stated another way, if the victim suffers from the effects of the

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the amount recovered by the injured worker under the Act. That non-deduction apparently resulted from the insurer's application of the old Pennsylvania Insurance Guarantee Association Act ("PIGA"), which apparently did not require the workers' compensation deduction. The 1994 Guarantee Association Act, which replaced PIGA, affirmatively requires the deduction.

[24] Torrey & Greenberg spent considerable time analyzing the issue in anticipation of the drafting of its 2005 Pocket Part Supplement.

sexual attack or advance because the victim brought the attack into the workplace on the basis of his or her personal life situation, the ensuing claim will not be compensable under the Act.

V. Exclusive Remedy Provision

It is of course axiomatic under Sections 303 and 305 of the Act, that an employer and its workers' compensation insurer are immune from suit for injuries arising out of a compensable work injury.

That essential feature of the workers' compensation scheme has been extended to those vendors retained by the employer or insurer in performing functions necessary for the administration of the workers' compensation claim.[25]

An exception to the general rule provides that where the workers' compensation administrator undertakes to control the injured worker's medical treatment[26].

An issue that arises under such unusual circumstances is whether the alleged tortfeasor has effective insurance coverage for the civil claim.

In Atlantic Mutual Insurance Co. v Gula, 926 A.2d 449 (Pa. Super 2007), decided on May 17, 2007, the Superior Court has ruled that a writer of Comprehensive General Liability insurance coverage for a case management company, assigned to assist in the administration of a workers' compensation claim by a workers' compensation insurer, did not have a duty to defend or indemnify on the basis tort allegations arising out of the insured's alleged negligence in administering an injured worker's work-related medical treatment.

In so ruling, the court reasoned that the alleged tort – the failure of the case management company to authorize medical treatment - is not an "occurrence" for which the policy at issue afforded coverage and that the policy at issue did not presume to afford coverage for professional services or the quality of the case management services provided[27] but rather excluded such coverage while affording coverage for fortuitous injuries resulting from accidental events "the CGL policy covering [the case management company] cannot be converted into a professional services policy."

VI. Pension Offsets

Following the Commonwealth Court ruling in Department of Public Welfare/Polk Center v. v. Workers' Compensation Appeal Board(King), 884 A.2d 343 (Pa. Cmwlth. 2005),

[25] See Alston v. St. Paul Insurance Cos., 531 Pa. 261, 612 A.2d 421 (1992); Kuney v. PMA Insurance, supra.; Shaffer v. Proctor & Gamble, 412 Pa. Super. 630, 604 A.2d 289 (1992).
[26] Taras v. Wausau Insurance Companies, 412 Pa. Super. 37, 602 A.2d 882 (1992)
[27] The case management company did have professional negligence coverage from another insurer, but not for the time period at issue in the case.

affirming the disallowance of an employer pension offset under Section 204(a) of the Act, the Pennsylvania workers' compensation community saw a flood of Petitions filed by public employees challenging the offset when sought in connection with "defined benefit pension plans."

Up until November, 2006 it appeared that the claimants' bar had succeeded in convincing WCJs and appellate tribunals alike that the methodology for calculating pension offsets for defined benefit plans administered by a number of public retirement systems, was insufficient as a matter of law, effectively eliminating the offset for such plans.

On November 17, 2006, however, the Commonwealth Court issued an en banc[28] Opinion and Order in The Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal), 911 A.2d 225 (Pa. Cmwlth. 2006), declaring, in essence, that the actuarially-based methodology implemented by both the Pennsylvania State Employees' Retirement System ("SERS") and the Pennsylvania Public School Employees' Retirement System ("PSERS") in calculating the pension offset under Section 204(a) is legally sufficient: " Since an employer cannot provide evidence of actual contributions for the use of an individual member of a defined benefit pension plan, it may meet its burden of proof . . . with expert actuarial testimony [which if accepted as credible by the WCJ] is legally sufficient to establish the extent to which Employer funded Claimant's defined benefit pension for offset purposes."

In other words, the actuarial method of calculating an employer's contribution to a defined benefit pension plan is legally sufficient to facilitate the offset contemplated by the Act.

It should be noted that the claimant objection to the actuarial methodology has been submitted to the Pennsylvania Supreme Court through claimant's filing of a Petition for Allowance of Appeal.

Since the request for Allocatur has been pending for nearly one year, it is expected that the Court will issue a ruling any day. Considering the significant economic ramifications of the issue raised, it is anticipated that the Court will agree to hear claimant's appeal.

VII. Conclusion

The Pennsylvania Workers' Compensation regime remains what it has been over the past thirty-five years, a highly technical administrative system that is in a constant state of evolution and that continues to impact other areas of the law.

[28] In a panel decision issued on March 9, 2006 the court affirmed the denial of the offset. By Order dated May 2, 2006 the court vacated its panel decision and granted the employer's Motion for Reargument.