

Workshop M3

Monday, October 9, 9:00 a.m.–noon and 1:30–4:30 p.m.

WORKERS COMPENSATION UPDATE

“Legal Trends and Developments in Workers Compensation”

Presented by



James E. Pocius
Shareholder
Marshall, Dennehey, Warner,
Coleman & Goggin

For contractors operating across state lines, managing the workers compensation risk requires staying abreast of developments in state laws as well as available options for insuring this exposure. This session takes a look at both of these issues, starting with a review of relevant workers compensation court decisions and legislative actions. The second half of the workshop will review funding options for contractors, with an emphasis on the increasingly popular large deductible programs.

- Reviews recent legislative changes that impact contractors operating in affected states.
- Highlights recent developments in the interpretation and application of workers compensation statutes.
- Examines contractors' options with regard to large deductible programs and individual and group self-insurance.



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James E. Pocius
Shareholder
Marshall, Dennehey, Warner, Coleman & Goggin

Mr. Pocius is a cospeaker for Workshop M3, "Workers Compensation Update," on Monday. As a shareholder in the Scranton, Pennsylvania, office of Marshall, Dennehey, Warner, Coleman & Goggin and a member of the firm's workers compensation department, he supervises the workers compensation attorneys in the firm's Scranton, Allentown, Williamsport, and Harrisburg offices. His practice is dedicated to the full-time litigation of workers compensation claims, including Medicare Set-Asides, federal black lung claims, and employers liability claims. He exclusively represents insurance companies and self-insureds. His experience includes full file development and litigation in the United States District Court for Middle District of Pennsylvania, Court of Common Pleas, Third Circuit Court of Appeals, Federal Black Lung Administrative Law Judges, Workers Compensation Judges, and Appellate Courts in the Commonwealth of Pennsylvania.

Prior to joining Marshall, Dennehey, Warner, Coleman & Goggin, he was in private practice specializing in defense of civil litigation, workers compensation, and federal black lung. He was associate solicitor of the City of Scranton from 1988 until 1990. He was associate professor at Marywood College, teaching workers compensation in the ABA-approved legal program from 1987 until 1997. He has also served as an associate attorney with Lenahan & Dempsey, P.C., in Scranton; as a legal clerk to the Honorable James J. Walsh, Judge of the Court of Common Pleas of Lackawanna County; and as a member of the legal staff at Dollar Savings Bank in Pittsburgh.

In addition to numerous in-service presentations dealing with workers compensation and federal black lung issues for various employers, insurance companies, and self-insured administrators in Pennsylvania, Mr. Pocius has addressed the Pennsylvania Bar Institute and the PCU Society on several occasions. He has also been a speaker for the American Bar Association, the National Workers Compensation and Disability Conference, and the National Business Institute and Lorman Business Institute. He has also been a speaker for Pennsylvania Education Systems, Inc., on numerous occasions. He wrote "Attorney's Fees and Penalties" and was coauthor of "Offsets under Act 57" for the Pennsylvania Bar Institute. His article, "Interaction between the Pennsylvania Workers Compensation Act and the Heart and Lung Act," was published in the *Pennsylvania Bar Association Quarterly* and "Subrogation in Workers Compensation" was published by the Pennsylvania Defense Institute. He was coauthor of "Analysis of the Federal Coal Mine Safety Act," written for International Risk Management Institute's *IRMI's Workers Comp: Coverage, Laws, and Cost Containment*; "Defining the ADA," for the *Pennsylvanian* magazine, and "Litigation in Workers Compensation Claims," for the American Bar Association national magazine, *Compleat Lawyer*. Mr. Pocius is also responsible for multiple articles published in the *Defense Digest* on behalf of Marshall, Dennehey concerning various workers compensation issues.

He earned his juris doctor degree from the Dusquesne University School of Law in Pittsburgh in 1978, and his bachelor of science degree in pre-law from Pennsylvania State University in State College in 1974. He was selected for the *Dusquesne Law Review*, was a student representative from Dusquesne Law School to the American Bar Association, and was news editor for the law school magazine, *Jurist*.

He is a member of the American Bar Association and the bar associations of Pennsylvania and Lackawanna County, and the Pennsylvania Defense Institute.

Notes

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LEGAL TRENDS AND DEVELOPMENTS IN WORKERS COMPENSATION

James E. Pocius, Esq.
Marshall, Dennehey, Warner, Coleman & Goggin

I. Coverage Issues In Workers Compensation—Can You Rely on the Statutes?

A. Insurance policies in general

1. Basics
2. Common law
3. Does legislation affect policy?

Metropolitan Property & Liability v. Miller, 580 A.2d 300 (Pa. Sup. Ct.) (1990)

B. Workers Compensation Applications Regarding Coverage Issues

1. Independent contractor
2. Leased employee
3. Estoppel

Aero Trucking v. Barnhart, 606 A.2d 655 (Pa. Comm. Ct.) (1992)

C. Workers Compensation Broker Issues

1. Agency
2. Reliance
3. Joinder

Antimary v. KLM Ins. Group, 655 A.2d 659 (Pa. Comm. Ct.) (1995)

D. Workers Compensation Third-Party Agent Issues

1. Reliance
2. Independent contractors
3. Estoppel

Tri-Union Express v. Hickle, 703 A.2d 558 (Pa. Comm. Ct.) (1997)

E. Workers Compensation Coverage Issues: Actions by Insurance Company

1. Representations in court
2. Attorney duty to investigate
3. Actions during litigation

Overhead Door Co. of Lewistown v. Gill and Overhead Door Corp., 819 A.2d 635 (Pa. Comm. Ct.) (2003)

F. Conclusions

1. Know the facts and review the policy before starting any litigation.
2. Consider removing the coverage issue from workers compensation jurisdiction.
3. Do not fight the merits of the case if you believe there is no coverage (Special Appearance).
4. A settled case is always better than a bad precedent.
5. Do not commit malpractice and avoid conflicts.

II. Highlights of Recent Legislative Changes in Workers Compensation That Impact the Construction Industry

A. Medical costs

B. State changes (S. Carolina, Florida, Missouri, Texas, N. Carolina, Illinois)—will these changes affect rates or slow rising medical costs?

C. Medicare's influence on the workers compensation picture

1. Medicare set-asides
2. Cases settled for under \$250,000 when a person does not qualify for a card
3. Cases settled for over \$250,000
4. Cases settled for under \$25,000 whether a person has a card or not.
5. The process

D. Conclusions

1. It does not appear that the reforms passed in the states this year will affect medical costs.
2. The highest expense regarding medical cost is prescription medication.

3. The ripple effect of Medicare set-asides will be felt throughout the primary and secondary insurance industries. This is primarily due to the expense of prescription medication.
4. Legislative reform.

III. Application of Workers Compensation Statutes and the Interplay between the Statutes and Common Law

- A. Common law, case law, and each statute inter-relate to form a body of law
- B. Subjects of interest
 1. Illegal aliens
 - a. Are benefits allowed?
 - b. Should benefits be allowed?
 - c. Different approaches from different states
- C. Common law agency principles
 1. Control the manner in which the work is to be done
 2. Responsibility for result only
 3. Terms of agreement between the parties
 4. The nature of the work or occupation
 5. The skill required for performance
 6. Whether one employee does engage in a distinct occupation or business
 7. Which party supplies the tools
 8. Whether payment is by time or by the job
 9. Whether the work is part of the regular business of the employer
 10. Whether the worker can be hired and fired by the employer
- D. Contractors

Very limited control can be exerted over an independent contractor.

1. Leased workers

Tech Built v. Virginia Surety, Supreme Court of New Hampshire (4/21/06)

Tech Built was a New Hampshire corporation involved in the construction industry. In April of 1999, Tech Built and Surge, an employee leasing company, en-

tered into a client service agreement in which Surge agreed to furnish staff to Tech Built to perform particular jobs. Surge operated under policies for workers compensation and employer's liability which were issued by Virginia Surety.

Tech Built served as a general contractor for work performed at a condominium project. It contracted with another company to perform framing. The sub-contractor, in turn, hired Scott Thomas who then sustained serious injuries.

Thomas got an award for workers compensation. However, the sub-contractor did not carry workers compensation insurance. The Department of Labor determined that the general contractor, Tech Built, was liable to pay the workers compensation award. Tech Built then sued Surge seeking workers compensation coverage under their own policy. In interpreting the policy, the New Hampshire Supreme Court looked at the policy and determined that a single employer was named as the insured, namely, Surge, and there was coverage only for that employer. The policy then indicated that all employees were covered at all workplaces involving Surge. It did not indicate that the other people involved with the policy were named insureds. Thus, the Court determined that no other companies were named insureds. The policy also indicated that Surge was providing workers compensation benefits only for all Surge Resources, Inc., employees filling job function positions under the terms of this agreement. The Court then went on to conclude that this policy was intended to provide workers' compensation coverage solely for Surge's employees who were leased to Tech Built.

The result of this decision was that Tech Built had no insurance coverage for workers comp and could either be sued civilly by the injured worker or would have to provide workers compensation benefits independently. Thus, establishing a lease agreement does not absolve an employer from workers' compensation responsibility.

E. Pandemic disease

1. Bird flu
2. Various occupational diseases (we will probably see more of these cases due to disasters such as Katrina, 9/11, etc.)
 - a. How to defend them
 - b. Will employers still be in existence?
 - c. Effect on rates
 - d. Will rates increase for construction companies working in a disaster area?

F. Erosion of exclusive remedy

The erosion of exclusive remedy follows state by state lines. Pennsylvania still strongly backing the Exclusive Remedy Doctrine while it has eroded in other states, especially in areas where the employer has exhibited willful and wanton negligence. The Supreme Court of Vermont, in *Meade v. Western Slate, Inc.*, 842 A.2d 257 (2004) dealt with an interesting issue. A rock slide occurred in the employer's quar-

ry during the night prior to Plaintiff's injury. A second rock slide on the next day severely injured the employee. The employee wanted to sue civilly. In Vermont, the employee had to prove that the employer was on notice that the second slide was substantially certain to occur. In this case, the Vermont Supreme Court indicated that the Plaintiff did not meet this burden and, therefore, the employer did not commit any type of intentional tort. Thus, the Court did not allow recovery in tort.

However, in Florida, there may be a more liberal interpretation of this substantial certainty standard. In *Bombay Company v. Bakerman*, 3d. 03-1465 (2004 Fla.) Lexis 4590 (2004), employees warned a supervisor that a warehouse ladder was inadequate and dangerous. Based on these comments, an employee was allowed to sue the employer in civil court as these actions gave the employer substantial certainty that the ladder was dangerous. It made no difference that the employees had managed to use the defective ladder for some period of time without injury. However, while there may be an erosion of immunity regarding employer's knowledge and intentional negligence, in New York, the Courts have applied the Exclusive Remedy Doctrine in favor of the employer. In *Quintas v. Pace University*, 804 New York S.2d 67 (2005), a university professor filed a civil action against the university for "negligently failing to award a distinguished professorship status to him." In an interesting decision, the Court held that the suit was barred by the exclusive provisions of the New York Workers' Compensation Act.

In another Florida case, the Florida Supreme Court dealt a serious blow to the Doctrine of Immunity. In *Jones v. Martin Electronics*, 31 Fla. Law Weekly, S 380 B (6/15/06), a unique situation occurred. Claimant in this case suffered third degree burns when an explosion occurred at the employer's premises. Workers compensation benefits were voluntarily provided. A dispute arose concerning the hourly rate for attendant care and a petition was filed only on the attendant care costs. Prior to a hearing, the parties signed a stipulation form indicating that the accident was accepted as compensable. A judge approved the petition and stipulation and ordered that the additional monies for the claimant's attendant care be paid. While receiving the comp benefits, the plaintiff filed a civil complaint seeking damages in tort. In the civil complaint, the injured worker suggested that his injuries were the result of intentional conduct on the part of his employer that was substantially certain to result in injury or death. Under the circumstances, the employer moved for summary judgment (to have the case dismissed on the basis that the plaintiff had elected the workers compensation system as his remedy). After differing decisions in the Courts below, the matter went to the Florida Supreme Court.

Initially, the Court determined that there was a conflict with regard to employer's immunity under the workers compensation statute and Florida's desire to allow civil suits where an employer is not protected from liability from an intentional tort against an employee. Especially, in situations where intentional conduct was substantially certain to result in injury.

The Court concluded under the circumstances of this case that "An employee who was injured in the workplace during the course and scope of his or her employment and receives workers' compensation benefits, but does not pursue a compensation claim to a conclusion on the merits, may file an action against an employer for that workplace injury under the circumstances if the employer's conduct is to the level of intentional conduct substantially certain to result in injury."

The logic of the Court here indicated that Mr. Jones' action in completing a standard pre-trial form questionnaire when he agreed that he was pursuing workers compensation benefits did not show a conscious intent to choose the workers compensation forum. The Court then indicated that the mere receipt of compensation benefits under the circumstances did not constitute an election of remedies. Not even the fact that claimant filed a petition to receive additional attendant care benefits did not, in the Court's view, show a clear intent to receive workers compensation benefits and waive common law tort remedies.

G. Coming and Going Rule

Essentially, under the common law, any employee who has a fixed place of employment, is not entitled to workers compensation benefits if traveling to or from work. However, there are various exceptions to this rule. They are as follows:

1. The employer had no fixed place of work.
2. The employment contract included transportation to and from work.
3. The employee is on special assignment for the employer.
4. Special circumstances are such that the employee was furthering the business of the employer. (Traveling employees have a much greater coverage under most workers' compensation statutes.)

Stanley v. Burns, 161 N.C. 722 (2003). In this case, a North Carolina employee was killed in an automobile accident as she traveled home after a work shift. This was only four days after the area had been struck by a hurricane. The plaintiffs tried to prove that she felt compelled to travel to work in spite of flooding and other hazardous conditions in the area. However, the judge found this evidence was not credible. The Coming and Going Rule was upheld.

In *Zoucha v. Touch of Class Lounge*, #A-03-971, 2004, Neb. Lexis 109 (May 2004), a bartender was assaulted by a drunken patron as she left her employer's lounge after locking up for the evening. The assault took place within 50 feet of the employer's door. The assault took place in a public parking lot.

The Nebraska Appellate Court held that in spite of the fact that the assault was connected to the workplace, the Coming and Going Rule applied because the employer exercised no control over the parking lot in which the assault took place.

In the case of *Marshall v. Craft Forklift*, 589 S.E.2d 456 (2003), a Virginia employer gratuitously allowed an employee to use a company van to get to work. It was not part of her work contract. Claimant then suffered an injury while driving to work. It was held not to be compensable due to the Coming and Going Rule.

However, recently, a circular letter was issued by the Michigan Workers' Compensation Placement Facility. The circular letter #206 addressed "Michigan employees working outside of Michigan." It was aimed at the construction industry. Essentially, the State of Michigan indicated that due to the recent rash of severe weather that had struck the southern states, contractors from Michigan may travel to some of the affected states to do repair work. The agency reminded the Michigan employers

that a Michigan based employer may take Michigan residents hired in Michigan to any state and be afforded workers' compensation coverage by the Michigan law if the injured employee makes a claim for Michigan benefits. The circular goes on to state that all employers needed to be made aware that if their employee is in another state, coverage extended by the Michigan policy may not satisfy the insurance requirements of the state where the work is being done and the employer may be subject to monetary penalties for failing to carry insurance in that state. The letter concludes that the purchase of a workers compensation policy to satisfy another state's requirement does not negate the Michigan coverage or the resulting premium that may be due. Thus, any employer who is dealing with multiple states should carry coverage in the states where the employees are actually working. Purchase of insurance in one state may not be adequate for a workers' compensation claim filed in another.

H. Conclusions

1. Coverage issues in workers compensation cannot be determined by relying on the statutes. Case law must be consulted in every situation.
2. While states continue to try to reform workers compensation laws in order to keep costs reasonably in check, the federal government, through Medicare, has greatly increased the cost of workers compensation settlements. This author believes that the costs of these settlements will eventually ripple through the industry hardening prices for both primary insurance and reinsurance.
3. There have been no major changes with regard to treatment of independent contractors and leased workers. However, the pitfalls of attempting to transfer workers' compensation risk through contract remain. One must be extremely careful not to contravene the common law definitions of independent contractors and leased employees. If the relationship is not absolutely clear, Courts will always interpret the parties actions to include coverage for the injured worker.
4. The Coming and Going Rule is still viable under the terms and provisions of most workers' compensation statutes. However, there are numerous exceptions to the rule and employees traveling to and from work can easily be included in coverage based on the circumstances of the case.
5. It appears the Exclusive Remedy is continuing to be eroded in states where civil actions are allowed after intentional misconduct of the employer. On this issue, the Courts continue to expand the definition of the employer's willful negligence.

However, the Doctrine appears to be strong in cases and states where employees are suing the employer for reasons other than willful negligence.

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