

PRACTICAL RAMIFICATIONS OF SUPREME COURT DETERMINATION INVOLVING LATENT MANIFESTATION OF OCCUPATIONAL DISEASES UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT

By Anthony Natale III, Esquire, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, PA

INTRODUCTION

The Supreme Court of Pennsylvania recently published a decision removing the exclusivity provision of the Pennsylvania Workers' Compensation Act (hereinafter "Act") as it relates to latent manifestation¹ occupational disease cases. In *Tooley v. AK Steel Corporation*², the court held that such claims manifesting latently do not fall within the purview of the Act and therefore the exclusivity provision does not apply to preclude an injured employee from filing a common law action against the employer. This decision has removed the exclusivity protection Pennsylvania employers enjoyed regarding occupational disease cases, and has placed employers directly in the cross hairs of major direct law suits. Moreover, in the wake of this decision, there is ample confusion as to the handling of latent manifesting occupational disease cases, insurance issues surrounding these claims and protective measures that can be employed to aid employers in the litigation process.

BACKGROUND: OCCUPATIONAL DISEASE LAW UNDER THE ACT

In order to understand the impact of *Tooley*, a rudimentary foundation in prosecuting occupational disease claims is necessary. Importantly, there are two ways to litigate an occupational disease claim under the Act. First, our Supreme Court has held that an "injury" as contemplated by the Act includes any and all diseases caused by employment and related thereto – the so-called 301(c)(1) claims.³ This section of the Act itself defines "injury" and "personal injury" to mean an injury to an employee, regardless of previous physical condition, arising in the course of employment and related thereto.⁴ One can see that occupational injuries can fall within this section of the Act rather easily.

Second, the Act defines injury arising in the course and scope of employment as including all "occupational diseases" as defined and enumerated by the Act – the so called 301(c)(2) claim.⁵ Under this section of the Act, occupational diseases as enumerated in Section 108 of the Act are included in the definition of "injury." Importantly, Section 108(n) of the Act is a "catch-all" provision that allows non-enumerated diseases to be included as an "occupational disease" if certain criteria regarding the disease are met.

A question arises as to which section of the Act an occupational disease claim should be prosecuted. Clearly, most claimant attorneys will prosecute an occupational disease claim under both sections of the Act to see what sticks. Suffice it to say, there are differing burdens of proof involved for each section. Under a Section 301(c)(1) claim, the claimant must prove by a preponderance of the evidence that an occupational disease injury was sustained during the course and scope of employment and such disease was related to that employment. If death is claimed as a cause for compensation, the death must occur within 300 weeks of the date of injury. Further, if the claim is pursued under this section, notice of the injury must be given within 120 days of the date of injury. However, the Act further holds that this notice may be extended in cases where a claimant does not know the nature of the injury or its relationship to employment. In that scenario, the 120-day notice period does not begin to run until the claimant knows, or by the exercise of reasonable diligence should know, of the existence of the injury and possible relationship to employment – the aptly named "discovery rule."⁶ Finally, such a claim filed under this section must be filed within three years of the date of injury.⁷ Note, there is no discovery rule applied

to the statute of limitations period for occupational disease claims filed under 301(c)(1).

Conversely, an occupational disease claim prosecuted under 301(c)(2) gives additional benefits to the claimant regarding burden of proof, notice and statute of limitation periods, and death claims. Once an enumerated disease is established, a claimant will enjoy a presumption that the disease arose out of and in the course of employment. However, disability or death arising from the occupational disease must occur within 300 weeks from the claimant's last date of employment in an occupation or industry to which there was exposure to the hazards of such a disease. Notice of the injury under this section is contemplated to run within 120 days of a claimant having (a) knowledge; (b) of a disability; (c) in existence; (d) resulting from an occupational disease; (e) as well as having a possible relationship to employment.⁸ Likewise, the three-year statute of limitations begins to run as of the date the claimant is disabled as a result of the occupational disease. Regarding death claims arising from a 301(c)(2) occupational injury, as long as the claimant was disabled within 300 weeks of the last exposure to a hazard, the subsequent death as a result of the disease is also compensable even if the death is outside the 300 weeks.⁹

This brief synopsis of the occupational disease sections of the Act gives insight into how claimant attorneys may formulate claims for prosecution. Clearly, a 301(c)(2) claim gives the claimant more advantages in the litigation process. However, as noted above, there is nothing to prevent a claimant from pursuing claims under both sections of the Act concomitantly.

THE TOOHEY HOLDING

The decedents involved in *Tooev* both worked and were exposed to the hazards of the asbestos injury for decades. Mr. Tooev worked from 1964 through 1982 as an asbestos salesman. Mr. Landis worked and was exposed to asbestos through employment from 1946 through 1992. Both men contracted mesothelioma in 2007 and died a short time later. Their respective cases were filed not as workers' compensation claims but as actions directly against the manufacturers of asbestos and their respective employers.

Their cases were consolidated before the Supreme Court on the issue of whether the exclusivity provision contained in the Pennsylvania Workers' Compensation Act¹⁰ barred common law suits directly against the employers.

Three issues were presented to the Supreme Court, with the first two framing arguments that the 300-week provision contained in Section 301(c)(2) violated the state and federal constitutions. Those issues were not addressed by the court.

Instead, the court addressed the third issue before them in keeping with the long held concept that cases should be adjudicated on non-constitutional bases, if possible. Thus, the main issue to be addressed was whether "injury" as defined in Section 301(c)(2) excluded occupational diseases that manifest more than 300 weeks after the last exposure to the hazard at issue and therefore do not invoke the exclusivity provision of the Act. The Supreme Court found the definition of injury under Section 301(c)(2) to exclude latent manifesting injuries and thus exclusivity could not be invoked to insulate the employers from common law suits.

In reaching this decision, there was substantial analysis as to grammatical ambiguities that existed in the sections of the Act at issue. In fact, a large portion of the decision dealt with what the word "it" meant in the second sentence of Section 301(c)(2).¹¹ The court found that the controversial word "it" meant "the Act" as opposed to the "basis for compensation." Thus, it was held that the Act only applies to injuries that

manifest within the 300-week window and nothing more. This analysis of restrictive versus non-restrictive clauses overshadowed any real exploration of the intent of the framers of the Act or the *quid pro quo* between employers and employees that formed the basis of the Act itself.

As such, the holding by the Supreme Court now allows common law suits against employers when occupational injuries manifest outside of the 300-week period noted within Section 301(c)(2) of the Act since the exclusivity provision of the Act and the Act itself would not apply to those injuries.

OBSERVATIONS FOR EMPLOYERS

Manifestation of Disability is a Defense

In light of this decision, many employers now have unexpected exposure to direct laws suits for alleged work-related occupational diseases that manifest outside of the 300-week window discussed above. The first question that needs to be dealt with is how to define the word "manifest." By its very terms, Section 301(c)(2) holds that a claimant's disability or death must occur within 300 weeks of last exposure to the hazard at issue to be compensable. Considering the Supreme Court's determination, the Act then would only apply to those occupational disease injuries within the gamut of Section 301(c)(2) wherein disability or death occur within those 300 weeks. Therefore, it is postulated that the word "manifest" must mean that the claimant was disabled or died within the 300 weeks at issue as a result of the claimed occupational disease.

There is a problem though – the explicit language of this section of the Act uses the terms "disability" and "compensable disability" somewhat interchangeably. While some may argue that manifestation arises when a claimant is disabled as a result of an occupational disease, others will take the position that manifestation occurs only after a disability is adjudicated as "compensable." It is within this rather confusing framework that an employer must take a stand.

Those employers who take the position that manifestation occurs when the claimant is disabled as a result of the

occupational disease (regardless of whether a claim petition is filed and adjudicated) are attempting to bind the claimant to the Act and eliminate a common law tort action against them. This is the first and primary defense that employers can use to possibly defeat a common-law suit against them. Employers facing these suits may be fooled by the fact that the now deceased claimant never filed a workers' compensation action alleging disability within the 300-week window. The issue is not whether the claimant filed a workers' compensation claim, but whether the claimant was disabled within the 300 weeks following the compensable exposure. It is submitted that if the claimant was indeed disabled during this critical time (regardless of whether a workers' compensation action was filed) the resulting claim falls under the purview of the Act and the exclusivity provision applies. After all, a claimant has a colorable workers' compensation claim under Section 301(c)(2) once he or she is disabled as a result of an occupational disease and has an understanding of a possible causal relationship to employment. Just because a claimant does not pursue the claim under the Act does not mean the disease has not manifested within the meaning of the Act. In other words, the *Tooev* holding cannot be used to file a claim directly against the employer because the claimant failed to perfect a claim during the 300 weeks post last hazardous exposure.

It appears that our Supreme Court is receptive to this type of analysis. The court has held in death claims falling outside the statute of repose arising out of Section 301(c)(2), that a claimant-decedent's "disability" within the 300-week window allowed claimant-widow to file for death benefits under Section 301(c)(2) outside of the 300-week window even though no lifetime claim for benefits was filed on the claimant-decedent's behalf.¹² The court reasoned that the claimant was disabled within the 300-week period and that triggered the extension of the death claim. The court did not differentiate between "disability" and "compensable disability," but instead

continued on page 12

Practical Ramifications

continued from page 11

held that even though no claim petition was filed, the medical evidence showed that the claimant was disabled within the 300-week period at issue. There was no requirement that the claimant-decedent file an action within the 300 weeks for lifetime benefits.

This holding must be contrasted with similar case scenarios where the court seems to indicate that a claim petition must be filed within the 300-week period at issue in order for a death outside of the 300-week period to be held compensable.¹³ These cases focus on the fact that the disability at issue must be “compensable” in order to meet the requirements of Section 301(c)(2). The court seems to state that compensability is synonymous with adjudicated disability.

This dichotomy in the case law leaves employers in a perplexing position. A question arises as to whether the court intended to allow a claimant to choose the forum for an occupational disease claim where death occurs outside of the 300-week statute of repose. More aptly put, if a claimant is disabled within the 300-week period at issue, but chooses not to file a claim petition, can the resulting death then escape the purview of the Act, per *Tooley*, and force the employer to face a common law tort claim? It is submitted that this result is absurd. If disability exists within the 300-week period and can be proven by the employer, then arguably the claim should remain under the purview of the Act regardless of whether the claimant instituted a claim petition. Still, claimants will likely point to the line of cases holding that compensable disability has not been established. Clearly, this is a legal skirmish waiting to happen.

Proving a claimant was disabled within the meaning of the Act within the 300-week period discussed above is not an easy task (especially if the claimant is dead) but is doable. Care should be taken to secure all medical treatment records available. Medical records describing an occupational disease which disabled a claimant within those critical 300 weeks could be proof positive of a compensable

claim under the Act and could therefore insulate employers from liability in a common law suit.

Insurance Concerns

At this point, it appears that the Supreme Court decision will be construed as retroactive and already many employers are being joined into pre-existing common law suits involving occupational diseases. With the piercing of the tort immunity shield, employers can be exposed to a proportional share of liability which some mass tort defendants may welcome. Unfortunately, the conduct of employers during a claimant-decedent’s period of employment can be now made an issue in these cases¹⁴ – a concept heretofore wholly foreign to employers who had enjoyed the exclusivity provision of the Act.

Since the court has found that latent manifestation of an the occupational disease mesothelioma is not considered within the definition of an “injury” within the Act, employers can no longer rely on traditional workers’ compensation insurance to cover their potential exposure. Employers now may be looking to Part B of the workers’ compensation insurance policy to protect this newly adjudicated exposure. This part of the policy is designed to cover employers for workplace injuries that are not contemplated by the workers’ compensation act. Sadly, the policy limits for this type of coverage are usually low and certainly may not cover an employer’s proportional share of liability in a common law occupational disease action. Employers probably will not have effective supplemental or umbrella coverage in place based on the extreme change in the law engendered by *Tooley*. Additionally, the triggering mechanism for Part B coverage may be tricky when attempting to correlate a latent manifesting occupational disease claim with last injurious exposure more than 20 years old. Employers must engage in a reassessment of appropriate insurance coverage in order to combat the propensity for common law verdicts in the occupational disease setting.

It is surmised that an employer’s commercial general liability policy will

be of no avail. These policies exclude injuries arising in the course and scope of employment. Arguments have already started regarding the court’s interpretation that the mesothelioma is not a work injury defined by the Act and therefore a general liability policy should recognize and trigger. With due respect, this argument lacks merit since the policy makes no distinction between injuries that are recognized by the Act or not recognized – arising in the course and scope of employment perfects the exclusion. Many of these policies may also have additional exclusion language regarding occupational diseases such as asbestos or asbestos-related diseases.

Ramifications to Other Sections of the Act

Even though the *Tooley* decision centered on a mesothelioma disease, the decision itself arguably applies to all occupational disease claims contemplated by Section 301(c)(2) of the Act. This means that employers can have exposure to direct tort actions for any enumerated disease that latently manifests. It is therefore imperative that employers be cognizant of any workplace exposure that results in disability during the period of compensability under the Act.

Questions have arisen as to the effect of the Supreme Court decision on non-occupational disease claims. It is submitted that claims outside the realm of Section 301(c)(2) are not subject to the piercing of exclusivity. This decision is designed to correct a perceived flaw in occupational disease cases where manifestation is outside of the 300-week statute of repose. Thus, the court would be hard-pressed to try to formulate a comparable decision as it relates to an injury under Section 301(c)(1) of the Act.

Proponents of the decision from the claimant bar have nonetheless begun to make parallel arguments to the 300-week statute of repose contained in Section 301(c)(1) of the Act¹⁵ regarding death claims. These proponents seek to have the word “it” in this section defined as “the Act” and argue that death claims outside of the 300-week statute of repose can pierce the exclusivity provision of the Act in much the same way as the

Tooev holding. It is submitted that this argument fails on its face since the injuries contemplated in Section 301(c) (1) are effectively covered by the Act regardless of whether a death claim can be perfected within 300 weeks. The statute of repose here does not eliminate a claimant's ability to sue for a cause of action but merely limits the extent of the action.

CONCLUSION

The Supreme Court holding in *Tooev* definitely changes the landscape of occupational disease claims from the employer perspective. It is submitted that employers must reassess their Part B coverage in light of this decision. Additionally, employers must be vigilant when it comes to determining whether

their employees' potential occupational disease claims have "manifested" in order to defend their interests and keep hold of the exclusivity shield.

ENDNOTES

¹Latent manifestation as used in this article pertains to manifestation of an occupational disease outside of the 300 week period prescribed by section 301 (c)(2) of the Act.

²Case No. 21 WAP 2011 (Pa. S. Ct. 11/22/13); 2013 Pa. LEXIS 2816

³*Pawlosky v. WCAB (Latrobe Brewing Co.)*, 525 A.2d 1204 (Pa. 1987).

⁴Section 301(c)(1) of the Act, 77 P.S. 411(1)

⁵Section 301(c)(2) of the Act, 77 P.S. 411(2)

⁶Section 311 of the Act, 77 P.S. 631.

⁷Section 315 of the Act, 77 P.S. 602.

⁸*Republic Steel Corp. v. WCAB (Zacek)*, 407 A.2d 117 (Pa. Commw. 1979).

⁹*Cable v. WCAB (Gulf Oil/Chevron USA, Inc.)*, 664 A.2d 1349 (Pa. 1995).

¹⁰Section 303(a) of the Act, 77 P.S. 481.

¹¹Section 301(c)(2) reads in part as follows:

Provided that whenever occupational disease is the basis for compensation, for disability or death under this act, *it* shall apply to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to the hazards of such a disease. (Emphasis added).

¹²*City of McKeesport v. WCAB (Miletti)*, 746 A.2d 87 (Pa. 2000).

¹³*Sporio v. WCAB (Songer Construction)*, 717 A.2d 525 (Pa. 1998).

¹⁴For example, negligence of an employer may be an issue as well as duty to act and/or employer's knowledge of hazard.

¹⁵Section 301(c)(1) states in part:

...and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such injury...and occurring within three hundred weeks after the injury.

