

# What's Hot in Workers' Comp.

Significant Workers' Compensation Case Summaries.



MARSHALL, DENNEHEY, WARNER,  
COLEMAN & GOGGIN

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## Pennsylvania Workers' Compensation

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Francis X. Wickersham

### *The Employer's Issuance of a Box Four Notice of Workers' Compensation Denial Does Not Estop the Employer From Denying a Work Place Injury.*

*Shawn Morrison v. W.C.A.B. (Rothman Institute)*; 403 C.D. 2010; filed November 23, 2010; by Judge McCullough



G. Jay Habas

The employer issued a Notice of Workers' Compensation Denial, acknowledging that a low back injury took place but denying that the claimant was disabled as a result of the work injury. The claimant then filed a Claim Petition. During litigation of the Claim Petition, the employer

presented evidence that the claimant was terminated from his job for performance reasons. In addition, the employer presented evidence that the claimant never notified his supervisor of a work-related injury or the need for physical accommodations. The Workers' Compensation Judge denied the Claim Petition, and the Workers' Compensation Appeal Board affirmed the Judge's decision.

At the Commonwealth Court level, the claimant argued that the Notice of Compensation Denial issued by the employer acknowledged that the claimant suffered a work injury and that the employer should, therefore, be estopped from denying the injury. The court, however, rejected this argument and dismissed the claimant's appeal. According to the court, although the denial acknowledged an injury, the claimant failed to establish that the injury was disabling, which, according to the court, is a part of the claimant's burden of proof in a Claim Petition. II



Robin Romano, Esq.

*Robin Romano, shareholder in our Philadelphia office, has been invited by the New Jersey Self Insurers' Association to speak at their annual spring meeting in Atlantic City on May 5-6, 2011.*

*Robin will participate in an attorney panel discussion entitled "So You Think You've Got It Bad?" For more information about this meeting, contact NJSIA at 732-219-0319 or visit their web site at <http://www.njsselfinsurers.com>.*

This newsletter is prepared by Marshall, Dennehey, Warner, Coleman & Goggin to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects when called upon.

*What's Hot in Workers' Comp* is published by our firm, which is exclusively a defense litigation law firm with over 400 attorneys residing in 19 offices in the Commonwealth of Pennsylvania and the states of New Jersey, Delaware, Ohio, Florida, and New York. Our firm was founded in 1962 and is headquartered in Philadelphia, Pennsylvania.

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# New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or [djbadalamenti@mdwgc.com](mailto:djbadalamenti@mdwgc.com))



Dario J. Badalamenti

## *The Appellate Division Holds That an Employer May Retain Its Section 40 Lien Rights as Part of a Section 20 Resolution.*

*Calle v. Hitachi Power Tools and American Style Construction, Inc.*, Docket No. A-1015-09T1, 2011 N.J. Super. Unpub.

LEXIS 341 (App. Div., Decided February 15, 2011)

The decedent, who was an employee of co-defendant A, was fatally injured during the course of his employment while operating a nail gun manufactured by co-defendant B. The administrator of the decedent's estate filed a complaint against co-defendant B in the Law Division, alleging that manufacturing and design defects in the nail gun caused the decedent's death. The complaint also alleged that co-defendant A was liable in tort for alteration of the nail gun's safety mechanism. In addition to these tort actions, the plaintiff's administrator filed a simultaneous claim for dependency benefits with the Division of Workers' Compensation.

On July 25, 2006, the Judge of Compensation entered an order approving a settlement of the workers' compensation claim in the amount of \$100,000 pursuant to N.J.S.A. 34:15-20. The order expressly provided that co-defendant A would retain lien rights of up to \$50,000 of the amount paid against any third party recovery that the estate might recognize as a

result of its third party actions pending in the Law Division. The transcript of this hearing indicates that the parties made the following stipulations:

[Counsel for co-defendant A]: As your Honor said, this matter is coming before you as a proposed settlement pursuant to Section 20 of the statute. The reason for the lump sum settlement is there are serious issues regarding dependency. The proposed settlement is for \$100,000; however, [co-defendant A] reserves its Section 40 lien rights up to \$50,000[.]

[Counsel for decedent]: I concur, your Honor.

Under oath, and following questioning from his own counsel as to co-defendant A's retention of its lien rights, the estate acknowledged that he understood the implications of the settlement.

Thereafter, co-defendant A filed a motion for summary judgment in the Law Division, which was granted. The estate and co-defendant B eventually settled for an undisclosed amount. Co-defendant A subsequently sought reimbursement of the \$50,000 lien it had reserved pursuant to the terms of its July 25, 2006, order disposing of the workers' compensation claim. In response thereto, the estate filed a motion in the Law Division seeking to declare co-defendant A's lien null and void. The Law Division granted the estate's motion, citing *Aetna Life & Casualty v. Estate of Engard*, 218 N.J. Super. 239 (Law Div., 1986). Co-defendant A appealed.

(more)

## What's Hot in Workers' Comp

### Pennsylvania

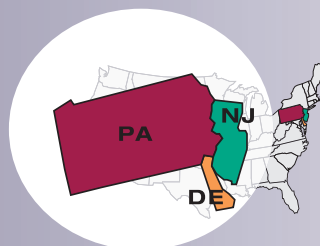
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In reversing the lower court's ruling, the Appellate Division found that the entitlement of an employer or its insurance carrier to reimbursement for workers' compensation benefits paid from a recovery obtained from a third-party tortfeasor was well established. As the basis for this proposition, the Appellate Division cited *Danesi v. Am. Mfrs. Mut. Ins. Co.*, 189 N.J. Super. 160 (App. Div., 1983). In *Danesi*, the court examined the provisions of N.J.S.A. 34:15-40, which provides for an action by the employee or his dependents against a third-party liable for the same injuries covered by the workers' compensation award. The *Danesi* court held that:

The statute proportionately extinguished the employer's obligation to pay further compensation upon payment by the third-party tortfeasor; created a right of reimbursement for workers' compensation paid; and created a lien, when perfected, to secure reimbursement to the employer.

Based on this analysis, the Appellate Division concluded that co-defendant A had a statutory entitlement to reimbursement from the proceeds of the estate's third-party recovery.

The Appellate Division also found that the Law Division's reliance on *Aetna* in granting the estate's motion was flawed and that *Aetna* was factually distinguishable from the case at hand. Whereas the carrier in *Aetna* made no efforts to retain its lien rights as to dependency benefits, co-defendant A expressly reserved on the record its lien on a stated portion of the monies to be paid to the estate. The Appellate Division found this factual distinction to be of significance, as retention of co-defendant A's lien rights was negotiated as a material part of the settlement. As the Appellate Division reasoned:

A settlement agreement between parties in litigation is a contract. Significantly, the administrator acknowledged under oath his understanding of the terms of the settlement. The parties relied upon that understanding when they entered into that agreement[, and] it would be unjust to permit the administrator to repudiate that understanding after the fact. ||