WORKERS' COMPENSATION IMMUNITY AND THE EXCEPTIONS THERETO

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Generally, the immunity afforded an employer or a co-employee, under the Workers' Compensation Act ("the Act"), 77 Pa. Cons. Stat. Sections 1-1041.1, is nearly absolute. However, as discussed below, there are some limited exceptions to this otherwise ironclad immunity.

Under Pennsylvania law, employer immunity for work related accidents is generally set forth in 77 Pa. Cons. Stat. Section 481. Specifically, Section 481 states:

> "(a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.
>
> (b) In the event injury or death to an employee is caused by a third party, then such employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employees, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action."

In interpreting Section 481, the courts of Pennsylvania have determined that this immunity is nearly absolute. *Poyser v. Newman & Co., Inc.*, 514 Pa. 32, 35–36, 522 A.2d 548 (1987); *Uon v. Tanabe Intern. Co., Ltd.*, 2010 WL 4861436 (E.D. Pa. 2010) (applying Pennsylvania law); *Dean v. Handy & Harmon*, 961 F. Supp. 798 (M.D. Pa. 1997) (applying Pennsylvania law). Thus, an employee may not bring a common-law cause of action against his/her Pennsylvania employer for work-related injuries. Instead, the employee is guaranteed compensation for injuries incurred on the job without establishing the employer's fault. *Poyser*,

514 Pa. at 36, 522 A.2d 548; *Kline v. Arden H. Verner Co.*, 503 Pa. 251, 254, 469 A.2d 158 (1983). As the Pennsylvania Supreme Court has explained, Section 481 "therefore deprived workers of some rights in exchange for surer benefits, and immunized employers from common law actions in order to make benefits available to workers who were theretofore without practical remedies." *Kuney v. PMA Ins. Co.*, 525 Pa. 171, 174, 578 A.2d 1285 (1990). When the exclusivity provision applies, Pennsylvania courts lack subject-matter jurisdiction to consider an employee's tort claims. *LeFlar v. Gulf Creek Indus. Park No. 2*, 511 Pa. 574, 581, 515 A.2d 875 (1986). "The employer's shield from tort liability on work-related injuries under the [Section 481] is virtually impenetrable no matter how willful or wanton the employer's conduct." *Uon*, supra, at 3.

In *Poyser*, the Pennsylvania Supreme Court analyzed the pertinent statutory language in Section 481 and barred a common-law suit by a worker against his employer even when the employee alleged: (1) he was injured by a machine made unsafe by his employer's willful disregard of its employees' safety and federal and state safety regulations; and (2) the employer had fraudulently misrepresented safety conditions to federal inspectors by concealing the defective machine from them. See also *Wendler v. Design Decorators, Inc.*, 768 A.2d 1172, 1175–76 (Pa. Super. Ct. 2001). Thus, in *Poyser*, the Pennsylvania Supreme Court definitively held that the intentional tort exception to the exclusivity provision no longer existed, if it ever did. The court explained and reaffirmed this holding in *Barber v. Pittsburgh Corning Corp.,* 521 Pa. 29, 555 A.2d 766, 770 (1989) ("In this Court's decision in *Poyser*, *supra*, we expressly held ... that there was no intentional tort exception to the exclusivity provision of the [Worker's Compensation Act]"). See also, *Stylianoudis v. Westinghouse Credit Corp.*, 785 F.Supp. 530 (W.D.Pa.1992)(applying Pennsylvania law).

Notwithstanding the foregoing, there are very limited exceptions to the all encompassing immunity granted to employers. In *Martin v. Lancaster Battery Co.*, 530 Pa. 11, 606 A.2d 444, (1992), an employee had suffered an injury arising from work-related exposure to lead. Federal regulations required the employer to monitor the lead levels in its employees' blood. *Id*. at 14, 606 A.2d 444. The employer intentionally concealed the results of blood tests from the employee and altered the results of those tests. *Id*. As a result of the employee's continued exposure, the employee suffered greater injury than would have occurred had the employee learned the true results of his blood tests and had reduced his exposure to lead accordingly. *Id.* Specifically, the plaintiff was subsequently diagnosed with "chronic lead toxicity, lead neuropathy, hypertension, gout, and renal insufficiency." *Id*. at 15, 606 A.2d at 446. Significantly, the plaintiff did not seek compensation for the injury itself, but instead for the aggravation to the injury caused by the employer's willful failure to disclose accurate test results. *Id*. at 20, 606 A.2d 444. Based upon these allegations, the Pennsylvania Supreme Court allowed the lawsuit to proceed against the employer. The court held that Section 481 did not immunize the employer from a common-law claim for fraudulent misrepresentation which led to an aggravated injury. *Id.* at 19, 606 A.2d 444.

Since *Martin*, the courts have narrowly construed this exception. *Winterberg v. Transportation Ins. Co.*, 72 F.3d 318, (3rd. Cir. 1995) (applying Pennsylvania law); *Simmons v. Community Education Centers*, 2015 WL 1788712 (E.D. Pa. 2015) (applying Pennsylvania law); *Uon*, *supra*; Kostryckyj v. Pentron Lab. Techs, LLC, 52 A.3d 333, 337–40 (Pa. Super. Ct. 2012). Thus, to meet the *Martin* exception, a plaintiff must show a "(1) fraudulent misrepresentation, which (2) leads to the aggravation of an employee's pre-existing condition." *Kostryckyj*, 52 A.3d at 338.

The United States Court of Appeals for the Third Circuit, in applying Pennsylvania law, stated that "flagrant misconduct" or "bad faith" cannot be the standard for applying the *Martin* exception, otherwise the workers' compensation scheme "runs the risk of dismantlement." *Winterberg*, 72 F.3d at 322–23. The Pennsylvania Supreme Court in *Martin* similarly stated: "There is a difference between employers who tolerate workplace conditions that will result in a certain number of injuries or illnesses and those who actively mislead employees already suffering as the victims of workplace hazards, thereby precluding such employees from limiting their contact with the hazard and from receiving prompt medical attention and care." *Martin*, at 19, 606 A.2d at 448.

The other applicable limited exception for a claim against an employer is what has been called the "personal animus" exception. See *Kohler v. McCrory Stores*, 532 Pa. 130, 136, 615 A.2d 27, 30 (1992). It has also been referred to as the "third party attack" exception. See, e.g., *Vosburg v. Connolly*, 405 Pa. Super. 121, 591 A.2d 1128 (1991); *Mike v. Borough of Aliquippa*, 279 Pa. Super. 382, 421 A.2d 251 (1980). This exception derives from the Act's definition of "injury," which states in relevant part: "The term 'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe [sic] because of reasons personal to him, and not directed against him as an employe [sic] or because of his employment ..." 77 P.S. § 411(1).

The Pennsylvania Supreme Court, under the "personal animus/third party attack" exception, stated that the exclusivity provision of the Act "does not preclude damage recoveries by an employee, based upon employer negligence in maintaining a safe workplace, if such negligence is associated with injuries inflicted by a co-worker for purely personal reasons." *Kohler*, 532 Pa. 130, 137, 615 A.2d 27, 30 (1992). The Court further stated that: "The act

excludes from its coverage attacks upon an employee whether or not they occur while he is pursuing his employer's business and whether or not they are caused by the condition of the employer's premises or by the operation of his business or affairs thereon so long as the reasons for the attack are purely personal to the assailant. In such a case, the plaintiff is permitted to pursue his common-law remedy." Kohler, 532 Pa. at 137, 615 A.2d at 31 (quoting *Dolan v. Linton's Lunch*, 397 Pa. 114, 125, 152 A.2d 887, 893 (1959)).

To set forth a valid cause of action implicating this exception, "...an employee must assert that his injuries are not work-related because he was injured by a co-worker for purely personal reasons." *Id.* at 137-38, 615 A.2d at 31. Thus, the main consideration in analyzing a third party attack exception claim is the determination, in the context of a given case, that an attack derives from "purely personal reasons," that is, reasons "purely personal to the assailant," rather than from some work-related cause. See also *Kortyna v. Lafayette College*, 47 F.Supp.3d 225, (E.D. Pa. 2014) (applying Pennsylvania law); *Fugarino v. University Servs.*, 123 F.Supp.2d 838, 844 (E.D.Pa. 2000) (applying Pennsylvania law).

Based upon the foregoing, it appears that it will be the rare case that will pierce the immunity afforded an employer. At the very least, significant discovery will likely need to take place to establish the facts necessary to make that determination.

Notwithstanding the foregoing, it is also important to address whether a claim may be brought by one employee against a co-employee. This requires a slightly different analysis. Liability of co-employees must be analyzed under 77 Pa. Cons. Stat. Section 72. This section provides that: "If disability or death is compensable under this act, a person shall not be liable to anyone at common law or otherwise on account of such disability or death for any act or omission occurring while such person was in the same employ as the person disabled or killed,

except for intentional wrong."*Id*.

In determining whether an allegedly intentional tort will give rise to a cause of action against a co-worker under section 205, Pennsylvania courts examine whether the alleged "intentional wrong" is one that is not normally expected to be present in the workplace. *McGinn v. Valloti*, 363 Pa.Super 88, 525 A.2d 732, 735 (1987), appeal denied, 517 Pa. 618, 538 A.2d 500 (1988). For example, an employee does not normally expect a physical assault or infliction of emotional distress on the job. Therefore, these intentional torts are actionable. *Id.* In contrast, an employee might expect the workplace itself to be unsafe as a result of knowing neglect of safety regulations. Intentional torts such as that are not actionable. *Id.* See also *Stoltz v. County of Lancaster*, 2011 WL 815709 (E.D.Pa. 2011) (applying Pennsylvania law).

In *Holdampf v. Fid. & Cas. Co.*, 793 F.Supp. 111, 114 (W.D. Pa.1992) (applying Pennsylvania law), the plaintiff and the co-worker defendant were co-operators of a tractor trailer. The plaintiff observed that the co-worker was driving unsafely for various reasons. The United States District Court for the Western District of Pennsylvania, however, found that the claims against the co-worker were barred because speeding, tailgating, and poor weather conditions, were in the normal course of employment for a truck driver. See also *Wakshul v. City of Phila*., 998 F.Supp. 585, 589 (E.D.Pa.1998) (applying Pennsylvania law) (a claim of assault barred where the plaintiff was a security personnel employee because the assault was not outside the range of normal expectation for someone who provided security).

Thus, even the immunity provided to co-employees is quite all-encompassing. Again, it will be the rare case that will overcome the immunity blanket. I welcome your questions or comments on this topic.

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