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litigation lawflash

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## Pennsylvania Supreme Court Rules on Workers' Compensation Act Case

*Court finds in Tooley that Pennsylvania Workers' Compensation Act does not bar latent occupational disease lawsuits against employers.*

On November 22, the Pennsylvania Supreme Court in *Tooley et al. v. AK Steel Corp. et al.*<sup>1</sup> held that the Pennsylvania Workers' Compensation Act (the Act) did not immunize employers in lawsuits by the estates of two former employees who had allegedly been exposed to asbestos dust during their employment but did not develop mesothelioma until more than a decade later. In a significant shift from existing precedent, the court held that common law claims for an occupational disease that manifests outside of 300 weeks (just over five and a half years) after the last date of employment are not barred by the exclusivity provisions of the Act.<sup>2</sup>

Although *Tooley* involved the latent disease mesothelioma, the court did not limit its reasoning to claims involving exposure to asbestos in the workplace. Under *Tooley*, it is expected that plaintiffs' lawyers will argue that the Act no longer shields employers from other industrial toxic torts that have long latency periods and conditions that manifest years after the end of employment. This presents the possibility that the plaintiffs' bar may attempt to add current and former Pennsylvania employers to a wide range of pending and future latent occupational disease lawsuits.

### Pennsylvania Workers' Compensation Act

The Act has long been found to exempt Pennsylvania employers for suits at common law for work-related injuries. The Act provides employees with expeditious payment of compensation for work-related injuries, and, in exchange, employers are provided with a measure of stability as they are immune from most common-law liability and pay benefits at a set rate into the Pennsylvania Workers' Compensation Fund.<sup>3</sup>

The Act provides broad protection for employers from lawsuits relating to workplace injuries in a provision commonly referred to as the "Workers' Comp. Bar" in section 303(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.<sup>4</sup>

Section 301(c)(2), a related provision at the heart of *Tooley*, provides that "whenever occupational disease is the basis for compensation, for disability or death" under the Act, "[the Act] shall apply only to disability or death

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1. No. 21 WAP 2011, Slip Op. (Pa. Nov. 22, 2013), available at <http://www.pacourts.us/assets/opinions/Supreme/out/j-38a-c-2012mo.pdf#search=%22tooley%22>.

2. *Id.* at 4.

3. 77 P.S. § 411.

4. *Id.* § 481(a).

resulting from such diseases and occurring within [300] weeks after the last date of employment.”<sup>5</sup> Prior to *Tooley*, if a former employee developed a latent disease, such as cancer, more than 300 weeks after the last date of employment, he or she would not be able to obtain workers’ compensation benefits from a former Pennsylvania employer or sue the former employer in tort. Instead, such individuals would often pursue lawsuits against third parties, such as product manufacturers and distributors.

## **Tooley v. AK Steel Corp.**

The workers in *Tooley* alleged that they were exposed to asbestos products and asbestos dust throughout their careers and ultimately developed mesothelioma. After their deaths, the estates of these former employees filed suit against multiple defendants, including their respective former employers. The trial court denied summary judgment motions from the former employers seeking to dismiss the claims against them in light of the Workers’ Comp. Bar. The Superior Court reversed, finding that the Act barred the plaintiffs’ claims at common law against their former employers, even if their mesothelioma developed more than 300 weeks after their last dates of employment.

In a 5-1 decision, the Pennsylvania Supreme Court reversed the decision of the Superior Court. Writing for the majority, Justice Debra McCloske Todd concluded that the plain language and grammatical structure of section 301(c)(2) should be read to mean that “whenever occupational disease is the basis for compensation, for disability or death under the act, [the act] shall apply only to disability or death resulting from such disease and occurring within [300] weeks after the last date of employment.”<sup>6</sup> The majority also interpreted the Act’s remedial aims as supporting their grammatical construction, concluding that to read the Act otherwise would be to deny an employee any remedy against his or her employer.<sup>7</sup>

The lone dissenter, Justice Thomas G. Saylor, reasoned that the plain meaning of section 301(c)(2) simply is that compensation is unavailable under the Act for late-manifesting occupational diseases.<sup>8</sup> Justice Saylor also disagreed that the majority’s interpretation was in line with the Act’s purposes, noting that the result would upset the delicate balance struck by the Act’s limitations on compensation, both in terms of monetary compensation and time restrictions.<sup>9</sup> According to Justice Saylor, the majority’s holding threatens to “undermine the compromise of interests” embodied in the Act.<sup>10</sup>

## **Implications**

As noted above, the decision in *Tooley* represents a significant shift in Pennsylvania law. Employers whose employees may have been exposed to potentially hazardous substances in the workplace may now face potential liability in suits at common law for occupational diseases that have latency periods longer than five and a half years. Considering that the average latency period for many cancers can be much longer than that, the Act’s 300 week exclusivity period may not be implicated in a growing number of occupational disease cases.

Although the facts of *Tooley* involved mesothelioma based on asbestos exposure, it is expected that plaintiffs’ lawyers will argue that the Act no longer shields employers from other industrial toxic torts. It is likely that future plaintiffs will argue to extend the reasoning of *Tooley* to include other occupational diseases with long latency periods between exposure and manifestation of injury. For example, the Act defines “occupational disease,” a phrase used in sections 301(c)(2) and 303(a), as including, among other specifically identified diseases, all other diseases that are caused as a result of an employee’s exposure to hazardous materials where the incidence of that disease is substantially greater in a given industry or occupation than in the general population. This presents

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5. *Id.* § 411(2).

6. *Tooley*, No. 21 WAP 2011, Slip Op. at 11.

7. *Id.* at 19.

8. *Id.* at 12-13 (Saylor, J. dissenting), available at <http://www.pacourts.us/assets/opinions/Supreme/out/j-38a-c-2012do.pdf#search=%22tooley%22>.

9. *Id.* at 14.

10. *Id.*

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the possibility that current and former employers within Pennsylvania may be named in future occupational disease cases where the condition manifests itself more than 300 weeks after the last date of employment.

In the wake of *Tooley*, some plaintiffs have already begun to file motions to add employers to previously filed cases alleging asbestos-related and other latent diseases linked to exposure in the workplace. And, it is likely that employers will continue to be named in newly filed suits across Pennsylvania.

*Tooley* adds to other developments under Pennsylvania law that are impacting workplace exposure cases. The Fair Share Act, which abolishes joint and several liability in most cases, provides that defendants are to be liable for their jury-apportioned shares of liability. The addition of employers could lessen the shares of former manufacturing and distribution defendants by adding new shares in the form of previously immune employers. In addition, employer conduct and other related state-of-the-art evidence, often kept out of negligence cases because of the Workers' Comp. Bar, may now become admissible.

The full impact of *Tooley* will be revealed as new claims and occupational disease cases are pursued against current and former Pennsylvania employers. Employers need to be aware of this significant shift in the liability landscape, as it may impact their interactions with OSHA issues, responses to inquiries by former employees, and litigation strategies if named in lawsuits. In addition to tort litigation counsel, human resources personnel, employment counsel, and others involved with administering workers' compensation claims for a company should be consulted regarding these developments.

## Contacts

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