

RECENT DEVELOPMENTS IN WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY LAW

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This survey reviews significant statutory developments and appellate court decisions addressing workers’ compensation issues for the period from October 2015 through September 2016. Workers’ compensation systems are state statutory programs, and the direct effect of laws and case precedents outside of their state of origin is limited. Nevertheless, compensation principles and statutes have much in common among states and much can be learned from studying how legislatures and courts of other jurisdictions have treated similar issues. Notably, when state courts cannot adjudicate an issue based solely upon a statute’s plain language and no precedent of the jurisdiction is determinative, they often consider authority from other states.¹

I. STATUTORY AND REGULATORY DEVELOPMENTS

As discussed in last year’s survey, workers’ compensation has been marked by retractive changes since the 1980s.² This retraction, which is discernible both in the realm of workers’ compensation rights and the comple-

1. See, e.g., *Ball-Foster Glass Container Co. v. Giovanelli*, 177 P.3d 692, 697 (Wash. 2008) (Washington court following Texas case dealing with criteria of coverage for travelling employees); *Hanson v. Transp. Gen. Corp.*, 716 A.2d 857, 862 n.7 (Conn. 1998) (Connecticut court noting, though not following, cases from other states dealing with criteria of determining employee status).

2. David B. Torrey & Lawrence D. McIntyre, *Recent Developments in Workers’ Compensation and Employers’ Liability Law*, 51 TORT TRIAL & INS. PRAC. L.J. 749, 750 (2016).

mentary sphere of tort remedies for workplace injuries, is evident from the leading cases reviewed in this article.

In an Oklahoma case, for example, the state supreme court was confronted with a 2013 statute that precluded workers from recovery for injuries sustained in parking lots adjacent to work. There, the court construed the statute narrowly and awarded benefits; while the injury was indeed sustained in an adjacent lot, the lot was also part of the employer's premises.³ In a Florida case, meanwhile, the state supreme court addressed a 2009 provision that severely curtailed injured workers' attorney fees. In that case, the court struck down the measure as violative of workers' due process rights.⁴ In an Indiana case, the court interpreted 2000 and 2001 amendments to the law that comprehensively foreclosed the ability of injured workers to sue, in tort, their employers' parent corporations.⁵ An Ohio court, for its part, examined a restrictive 2005 amendment to the law surrounding the intentional tort exception and confirmed that the injured worker had failed to make out a tort case under that theory.⁶

So marked has been the retractive character of many statutory amendments that academics and practitioners gathered at Rutgers University Law School in September 2016 for a symposium entitled, "The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century."⁷ The papers presented at the seminar were, from the injured worker point of view, pervaded by a dark existential gloom. Still, just three weeks later, in an ironic turn, the 2013 Oklahoma opt-out statute—the ultimate retraction of workers' compensation—was struck down as unconstitutional.⁸ Thus, limits may exist relative to the retractive reform laws that are so concerning to injured worker interests.

Two regulatory changes in the course of 2015–2016 are remarkable in this analysis. Reflecting a national medical cost-containment trend,⁹ the

3. See *infra* Part IV (discussion of *Legarde-Bober v. Okla. State Univ.*, 378 P.3d 562 (Okla. 2016)).

4. See *infra* Part II (discussion of *Castellanos v. Next Door Co.*, 192 So. 3d 431 (Fla. 2016)). It is also notable that in 2004, the Florida legislature reduced the total number of weeks payable for temporary total disability from 260 to 104. See FLA. STAT. § 440.15(2)(a). That draconian reduction was held to be in violation of the state constitution's guarantee of access to the courts. A mid-level appeals court so held in 2013, and the state supreme court affirmed in 2016. *Westphal v. City of St. Petersburg*, 122 So. 3d 440 (Fla. Dist. Ct. App. 2013), *aff'd*, 194 So. 3d 311 (Fla. 2016) (citing FLA. CONST. Art. I, § 21).

5. See *infra* Part VI (discussion of *Hall v. Dallman Constr.*, 51 N.E.3d 261 (Ind. 2016)).

6. See *infra* Part VI (discussion of *Ball v. MPW Indus. Servs., Inc.*, 60 N.E.3d 1279 (Ohio Ct. App. 2016)).

7. The collected preliminary papers and videos of the presentation may be found at <http://poundinstitute.org/content/2016-academic-symposium>.

8. See *infra* Part II (discussion of *Vasquez v. Dillard's, Inc.*, 381 P.3d 768 (Okla. 2016)).

9. In 2007, for example, the New York legislature enacted comprehensive workers' compensation reform, and among the provisions was a mandate that the Board "issue and maintain a list of pre-authorized [medical] procedures. . . ." N.Y. WORKERS' COMP. § 13-a(5). See

Arizona Industrial Commission adopted the use of medical treatment guidelines based on evidence-based medicine (EBM) protocols. Such guidelines save employers money by placing presumptive limits on treatment and, in addition, hopefully improve care through the avoidance of unproven procedures and overtreatment.¹⁰ The Arizona agency requires that physicians (and adjudicators, in the case of disputes) consult the Official Disability Guidelines (ODGs) for chronic pain treatment cases.¹¹ Under the Arizona formulation, when a physician wishes to deviate from the text's treatment protocols, review is handled via an administrative process within the agency's medical review office. Either party may thereafter request a hearing with an ALJ, who does have the power to alter the ruling.¹² Reflecting another national trend—lessened oversight of proposed compromise settlements¹³—the New York agency stated that it would no longer require a hearing in all cases for settlement review. In this regard, in disability-only cases, the Workers' Compensation Board will undertake only "desk review," that is, reviewing settlement paperwork only. Disability-only settlements are presumably few, but the new desk review process is *also* available "when all parties to the agreement request desk review." The worker is required to watch an official video about settlements, and counsel must attest that he or she has reviewed the release with the injured worker and that the client understands the document.¹⁴

A dramatic change to the West Virginia Act reflects a legislature seeking to strengthen the exclusive remedy. In that state, the legislature amended the intentional tort exception—called the "deliberate intention" exception—to make it more difficult for injured worker plaintiffs to sue their employers under this theory. Under the longstanding West Virginia

also 12 N.Y. COMP. CODES R. & REGS. § 324.2 (Medical Treatment Guidelines); 12 N.Y. COMP. CODES R. & REGS. § 324.3 (addressing variances). *See generally* William M. Zachary & Denise Gillen-Algire, *Evidence-Based Medicine*, IAIABC PERSPECTIVES 25 (July 2016), www.IAIABC.org (registration required).

10. As to cost savings, see the articles found in *Workers' First Watch*, a periodical of the Workers' Injury Law & Advocacy Group. The Spring 2012 issue is entitled, "Evidence-Based Medicine: Cooked-up Locally, Distributed Nationally by Insurers." As to improved medical care, see William M. Zachary & Denise Gillen-Algire, *supra* note 9, at 25 ("The best method to ensure delivery of optimal healthcare to injured workers is to implement the use of EBM. . . ."), www.IAIABC.org (registration required).

11. The rules on this issue were adopted in June 2016 with an effective date of Oct. 1, 2016. *See* 20 ARIZ. CODE R. 20-5-1301 *et. seq.* The rules are also found at https://www.azica.gov/sites/default/files/media/MRO_20_5_Article13_0.pdf (last visited Nov. 14, 2016).

12. *See* 20 ARIZ. CODE R. 20-5-1312; comments to the author (Torrey) of Hon. Luann Haley (Nov. 4, 2016).

13. *See generally* David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER L.J. 199 (2007).

14. *See* "Changes to Section 32 Waiver Agreement Resolution Process," Board Bulletin No. 046-778 (Feb. 23, 2016), http://www.wcb.ny.gov/content/main/SubjectNos/sn046_778.jsp (last visited Nov. 19, 2016).

statute, the injured worker, to make out a tort claim, must establish five aspects of proof (the five factors), including, among other things, the employer's actual knowledge of an unsafe condition; a violation of a state, federal, or industry rule; and a "serious compensable injury or workplace death."¹⁵ The extensive changes to the law clarify the meaning of "actual knowledge"¹⁶ and of safety rules.¹⁷ Yet another clarification is to the definition of "serious compensable injury." The injury, under the amended law, must result in at least a 13 percent permanent partial disability based upon the whole person.¹⁸ This latter change is said to perhaps be the most important in actual practice because it will automatically reduce the number of claims filed.¹⁹

II. THEORY, PRINCIPLE, AND CONSTITUTIONALITY

Appreciation of the theory, principles, and constitutional basis of workers' compensation is critical for the true specialist.

With regard to theory, the operative liability principle of workers' compensation is no-fault liability, that is, the rule that no matter where fault may lie in an injury, the employer's insurance will pay benefits (as opposed to damages).²⁰ In exchange for this remarkable imposition, the employer is immune from tort liability. As explained in 2016 by a Connecticut court, in typical fashion, the Workers' Compensation Act

manifests a legislative policy decision that a limitation on remedies under tort law is an appropriate trade-off for the benefits provided by workers' compensation. . . . Substantively, [the exclusive remedy] is an essential part of the workers' compensation bargain [under which] an employee, even one who has suffered . . . offensive injury, relinquishes his or her potentially large

15. W. VA. CODE § 23-4-2. The statute was originally enacted in response to a court case that recognized an intentional tort cause of action. See *Mandolidis v. Elkins Indus.*, 246 S.E.2d 907 (W. Va. 1978). The amendments are said to have been in response to another case, *McComas v. ACF Industries, LLC*, 750 S.E.2d 235 (W. Va. 2013). See Christopher Edwards, *West Virginia Legislature Proposes Substantial Changes to Deliberate Intent Statute*, JURIST (Feb. 5, 2015), <http://www.jurist.org/hotline/2015/02/christopher-edwards-workers-compensation.php>.

16. W. VA. CODE § 23-4-2(d)(2)(A).

17. W. VA. CODE § 23-4-2(d)(2)(B).

18. W. VA. CODE § 23-4-2(d)(2)(B)(v)(I)(a).

19. Michael P. Addair, *Amendment of West Virginia's Deliberate Intent Statute Will Make it More Difficult to Sue Employers for Workplace Injuries*, <https://www.abcvv.org/NewsMedia/tabid/6592/entryid/3896/Default> (May 25, 2015). For further commentary, see Nick Linn & Matt Hansberry, *West Virginia's Amended Deliberate Intent Statute*, LITTLER INSIGHT: IN-DEPTH DISCUSSION (July 21, 2015), <https://www.littler.com/publication-press/publication/west-virginias-amended-deliberate-intent-statute>.

20. *Locasto v. City of Chicago*, 50 N.E.3d 718, 723 (Ill. App. Ct. 2016) (court stating that the Act "was designed to provide speedy recovery without proof of fault for accidental injuries").

common-law tort damages in exchange for relatively quick and certain compensation.²¹

As to principle, workers' compensation statutes are, by tradition, considered remedial statutes and are hence liberally construed.²² Yet, some states, like Florida, have abandoned this formulation.²³

The past year has been remarkable for the number of significant constitutional issues, which are discussed at length below, that have been faced by courts. In one, a Pennsylvania court held that the legislature undertook impermissible delegation of legislative functions when it adopted prospectively the use of the "most recent edition" of the *AMA Guides to the Evaluation of Permanent Impairment*. In another, the Oklahoma Supreme Court struck down that state's "opt-out" provision, as violative of the constitutional ban on "special laws." The New Mexico Supreme Court held that the exclusion of agricultural workers had no rational basis and deprived such employees of equal protection. The Florida Supreme Court ruled that a schedule that unfairly restricted attorney fees violated injured workers' due process rights. The Utah Supreme Court nullified an attorney fee schedule on separation of powers grounds, and the Oklahoma court struck down, as violative of workers' due process rights, a provision that barred new employees from recovering for cumulative trauma injuries. 2016 was also a remarkable year for the New Jersey courts, which in two cases held that employment contract provisions, which impinged on work injury rights, were void as against public policy.

A. Unconstitutional Delegation of Legislative Authority

Many state laws provide that awards of permanent disability are to be based on impairment ratings derived by the American Medical Association manual, *Guides to the Evaluation of Permanent Impairment*. Workers have, over the years, mounted constitutional challenges to the ability of legislatures to adopt the *Guides* by reference.²⁴ As discussed in last year's survey, in 2015 such a challenge was successful, as a middle-level Pennsylvania court held that the law's proviso that the impairment rating evaluation (IRE) physician is to utilize the "most recent edition" of the *Guides*²⁵ was violative of the Pennsylvania constitutional provision forbidding "unconstitutional delegation of authority," found in the state consti-

21. *Velecela v. All Habitat Servs., LLC*, 141 A.3d 778, 781 (Conn. 2016).

22. *See Staton v. Bros. Signal Co.*, 783 S.E. 2d 539, 543 (Va. Ct. App. 2016).

23. *See Castellanos v. Next Door Co.*, 192 So. 3d 431, 434 (Fla. 2016).

24. *See* STEVEN BABITSKY & JAMES J. MANGRAVITI, UNDERSTANDING THE AMA GUIDES IN WORKERS' COMPENSATION 1-3 (5th ed., 2015 Supp.).

25. *See* Section 306(a.2) of the Pennsylvania Workers' Compensation Act, PA. STAT. ANN. tit. 77, § 511.2.

tution at Article II, Section 1.²⁶ The Workers' Compensation Judge on remand was to utilize not the Sixth Edition but, instead, the Fourth—that is, the edition that existed when the IRE statute was enacted in 1996.²⁷ The Pennsylvania Supreme Court accepted the case on appeal, and oral argument was held on November 1, 2016.²⁸

B. Unconstitutional Enactment of a “Special Law”: “Opt-Out” Struck Down

The Oklahoma Supreme Court, on September 13, 2016, declared the state's Employee Injury Benefit Act (also known as the Opt Out Act) unconstitutional.²⁹ Under that law, an employer, if qualified, may opt out of the Act, set up its own, presumably ERISA-governed plan (which need *not* feature the same benefits as the compensation act), yet retain immunity from tort suit.³⁰ The court did so on the basis of the law's violation of the state constitution's ban on “special laws.” The law, in this regard, illicitly created “an impermissible select group of employees seeking compensation for work-related injuries for disparate treatment.”³¹

The case had its genesis in an alleged aggravation injury sustained in September 2014 by an employee, Vasquez, while she was working for Dillard's. Dillard's, a department store, was an enterprise that had been approved as a “qualified employer” under the Opt Out Act. The plan denied Ms. Vasquez's claim, and the internal appeals panel affirmed. The Workers' Compensation Commission, in a February 2016 decision, agreed with Vasquez that the Opt Out Act was, on a number of bases, unconstitutional.³² In the Commission's view, the law in its entirety unconstitutionally deprived injured workers of equal protection, constituted an illicit “special law,” and deprived injured workers of access to the courts. The court then referred the case to an ALJ of the Commission for a trial on

26. *Protz v. W.C.A.B. (Derry Area School Dist.)*, 124 A.3d 406 (Pa. Commw. Ct. 2015), *appeal granted*, 124 A.3d 406 (Pa. 2016). This summary of *Protz* is prepared exclusively by Judge Torrey and not by Mr. McIntyre.

27. *Id.* at 417. The court noted that the Pennsylvania Constitution provides, at Article II, Section 1, “the legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” This provision embodies “the fundamental concept that only the General Assembly may make laws, and cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority.” *Id.* at 412.

28. For a complete discussion, see Torrey & McIntyre, *supra* note 2, at 754–55.

29. *Vasquez v. Dillard's, Inc.*, 381 P.3d 768 (Okla. 2016).

30. See generally David B. Torrey, *The Opt-Out of Workers' Compensation Legislation: A Critical Briefing and the Vasquez v. Dillard's Case*, 52 TORT TRIAL & INS. PRAC. L.J. 39 (2016).

31. *Vasquez*, 381 P.2d at 769.

32. *Vasquez v. Dillard's, Inc.*, No. C-2014-11060L (Okla. Workers' Comp. Comm'n, filed Feb. 26, 2016), http://www.partnersource.com/media/35987/vasquez_vs_dillard's_inc..pdf (last visited October 5, 2016). The Commission issued its ruling after a federal court held that the action was not preempted by ERISA. *Vasquez v. Dillard's, Inc.*, 2015 WL 9906300 (W.D. Okla. Sept. 30, 2015) (citing 28 U.S.C. § 1445(c)).

the merits. Dillard's was to be deemed an insured under the conventional workers' compensation laws.

The Oklahoma Supreme Court affirmed, though on somewhat different grounds.³³ The majority based its decision solely on the Oklahoma state constitution's ban on special laws, and it hence did not reach the other constitutional issues addressed by the Commission. That special law ban is found in Article 5, Section 59, of the Constitution: "Laws of a general nature shall have uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." Here,

The constitutionality of the Oklahoma Employee Injury Benefit Act . . . is squarely before this Court. . . . The core provision of the Opt Out Act . . . creates impermissible, unequal, and disparate treatment of a select group of injured workers [that is, those, like Ms. Vasquez, who are employed by employers who have opted out, in contrast to employees of employers who are bound by the workers' compensation act, with its varying benefits]. . . .³⁴

C. *Unconstitutional Exclusion of Agricultural Workers*

Many state workers' compensation laws exclude certain categories of workers. In a New Mexico case dealing with such a provision, the state supreme court held that the compensation act's exclusion of farm and ranch laborers violated the Equal Protection Clause of the New Mexico Constitution.³⁵

The workers in that case, a chili bean picker and a dairy worker, each suffered work-related injuries and sought compensation benefits. Both claims were denied because the New Mexico statute excludes farm and ranch laborers from workers' compensation coverage.³⁶ Both workers appealed, arguing that the exclusion violated their right to equal protection. The intermediate appellate court applied the rational basis test to determine the legitimacy of the restriction and concluded that the legislature's exclusion of farm and ranch laborers was not rationally related to a legitimate state interest.³⁷

The employers appealed to the New Mexico Supreme Court, arguing that the exclusion was based upon legitimate state interests, namely: (1) cost savings for agricultural employers, (2) administrative convenience, and (3) protection of New Mexico's farming and ranching traditions.³⁸ The high court rejected each of these justifications.

33. *Vasquez*, 381 P.3d 768.

34. *Id.* at 775.

35. *Rodriguez v. Brand W. Dairy*, 378 P.3d 13 (N.M. 2016).

36. *Id.* at 18.

37. *Rodriguez v. Brand W. Dairy*, 356 P.3d 546 (N.M. Ct. App. 2015), *aff'd*, 378 P.3d 13 (N.M. 2016). For a summary of the appellate court ruling, see Torrey and McIntyre, *supra* note 2, at 755–56.

38. *Rodriguez*, 378 P.3d at 27.

With regard to the cost savings argument, the court explained that rational basis review, at a minimum, requires that a cost-saving classification “be based upon some substantial or real distinction between the two classes, and not artificial or irrelevant differences.”³⁹ Therefore, cost containment alone was insufficient to justify the act’s disparate treatment. The court similarly rejected the employers’ contention that farm and ranch laborers pose unique administrative challenges that justify the exclusion. Along these lines, the employers had argued that farm and ranch laborers are “often seasonal and, as such, are inherently transient.”⁴⁰ This, the employers argued, could create problems for insurers, who might not know where to send benefit checks. The court was not persuaded. The majority noted that such administrative concerns are not unique to the farming and ranching industries; yet, the New Mexico Act does not exclude any other employees who work in industries that rely upon substantial seasonal or temporary labor.⁴¹

Finally, the court found no evidence to support the employers’ claim that the act’s exemption would protect the traditions of New Mexico’s small, rural farms.⁴² The court underscored that the compensation act is mandatory only for private employers with three or more workers, meaning that the vast majority of New Mexico’s rural farms would not be required to purchase insurance coverage. Furthermore, the court noted, the exclusion could not be justified on the basis it protects “neighboring,” the tradition in which farmers and ranchers help perform work on their neighbors’ farms and ranches.⁴³ Such practices, the court explained, are not affected by the exclusion because volunteer and unpaid workers are generally not entitled to workers’ compensation benefits.⁴⁴ In light of “the practical difficulties that would result from retroactive application” of the court’s ruling, the majority agreed to apply its holding only prospectively, that is, to any injury that manifests itself after the court’s decision.⁴⁵

D. Violation of Due Process via Discouraging Legal Representation

Every state places limits on the fee that an attorney who successfully represents a workers’ compensation claimant can charge.⁴⁶ In 2016, plaintiffs

39. *Id.* at 27 (quoting *Schirmer v. Homestake Min. Co.*, 118 N.M. 420, 423 (N.M. 1994)).

40. *Rodriguez v. Brand W. Dairy*, 378 P.3d 13, 28 (N.M. 2016).

41. *Id.* at 29.

42. *Id.* at 31.

43. *Id.*

44. *Id.*

45. *Id.* at 33.

46. See UNITED STATES CHAMBER OF COMMERCE 2013 ANALYSIS OF WORKERS’ COMPENSATION LAWS, Chart XI, “Administration: Notice to Employer and Claims,” features an index of the attorney fees laws of the various states.

in two states brought successful challenges to legislatively created attorney fee schedules.

The first of these challenges occurred in Florida, where, in 2009, the state legislature abolished a long-standing requirement that successful workers' compensation claimants were entitled to a "reasonable" attorney fee. In its place, the legislature imposed a mandatory sliding-scale fee schedule.⁴⁷ The Florida Supreme Court, however, held that such a schedule violated the due process clauses of the Florida and U.S. Constitutions.⁴⁸ The claimant in that case, Castellanos, suffered a work injury and, with the help of an attorney, prevailed in his workers' compensation claim. Castellanos filed a motion for attorney fees, seeking an hourly fee of \$350 for his attorney's services. Pursuant to Florida's fee schedule, however, the "reasonable and necessary" fee that the judge of compensation claims could award to Castellanos' attorney (calculated in accordance with the mandatory sliding scale) amounted to only \$1.53 per hour.⁴⁹

Observing that the right of a claimant to receive a reasonable attorney fee had been a "critical feature" of the Florida workers' compensation law since 1941, the court held that the fee schedule violated due process because it contained an "irrebuttable presumption" that whatever fee the schedule dictates was reasonable.⁵⁰ A legislatively created fee schedule would not, ipso facto, be violative of due process. But, if the legislature chooses to implement such a schedule, it must include some mechanism by which a claimant can present evidence that the statutory fee is inadequate in his or her particular case. After finding that the statute was unconstitutional, the court invoked the rule that the judicial act of striking down an amended statute automatically revives its predecessor statute (unless that, too, would be unconstitutional).⁵¹

E. Violation of Separation of Powers and Regulation of Attorneys

The second challenge to a mandatory fee schedule took place in Utah. In that case, a group of plaintiffs successfully argued that the regulation of attorney fees fell within the Utah Supreme Court's exclusive authority to govern "the practice of law."⁵² The Utah act, however, delegated to

47. See FLA. STAT. § 440.34. Specifically, the Act provided that "[a]ny attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first \$5,000 of the amount of the benefits secured, 15 percent of the next \$5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years." *Id.*

48. *Castellanos v. Next Door Co.*, 192 So. 3d 431 (Fla. 2016).

49. *Id.* at 433.

50. *Id.* at 432.

51. *Id.* at 448 (citing *B.H. v. State*, 645 So. 2d 987, 995 (Fla.1994)).

52. *Injured Workers Ass'n of Utah v. State*, 374 P.3d 14, 16 (Utah 2016).

the Labor Commission the authority to “regulate and fix the fees of the attorney.”⁵³ The Commission’s most recent regulation granted successful injured workers’ attorneys a fee of 25 percent of the first \$25,000 of the award, 20 percent of the next \$25,000 of the award, and 10 percent of amounts awarded in excess of \$50,000.⁵⁴

The Supreme Court, striking down the law, pointed to a provision in the Utah Constitution, which provides that “[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.”⁵⁵ While acknowledging that “the practice of law” was a somewhat elusive term that can be difficult to define, the court held that the regulation of attorney fees fell squarely within it. Indeed, the court’s own Rules of Professional Conduct already placed some upper limits upon attorney fees.⁵⁶ Because the authority to regulate attorney fees belonged to the court, the state legislature did not have the power to delegate to the Labor Commission the regulation of fees in compensation cases, and the Commission itself had no power to establish the fee schedule. The court ultimately declined to enact a fee schedule of its own, finding that the fear that unscrupulous attorneys were preying upon injured workers had been greatly exaggerated.⁵⁷

F. *Violation of Due Process and an Irrational Injury Restriction*

In another case treating a retractive statute, the Supreme Court of Oklahoma struck down a provision that required claimants to work for an employer for at least 180 days before they could receive workers’ compensation benefits for a cumulative trauma injury.⁵⁸ The claimant in that case alleged that she suffered a cumulative trauma injury and needed surgery. Her employer argued that, pursuant to the Oklahoma law, she was barred from receiving workers’ compensation because she had not worked for the employer for a continuous 180-day period.⁵⁹ The administrative law judge denied the claim, agreeing that the claimant had not worked for the required 180 days, and the Workers’ Compensation Commission affirmed.

53. UTAH CODE § 34A-1-309.

54. UTAH ADMIN. CODE R602-2-4(C)(3)(a).

55. *Injured Workers’ Ass’n*, 374 P.3d at 20 (citing UTAH CONST. art. VIII, § 4).

56. *Id.* at 22 (citing UTAH R. PROF. CONDUCT 1.5(a) (“A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.”)).

57. *Id.*

58. *Torres v. Seaboard Foods, LLC*, 373 P.3d 1057 (Okla. 2016).

59. See OKLA. STAT. tit. 85A, § 2(14) (defining “cumulative trauma” as an injury “caused by the combined effect of repetitive physical activities” where the employee has “completed at least one hundred eighty (180) days of continuous active employment with the employer”).

On appeal, the claimant argued that the law's 180-day prerequisite was arbitrary, not rationally related to any legitimate state interest, and in violation of her due process rights under the Oklahoma Constitution.⁶⁰ The employer, in response, argued that the 180-day classification served a legitimate state interest, namely preventing workers' compensation fraud. But the court found that the 180-day condition precedent was not rationally related to this legitimate interest.⁶¹ Specifically, the court held that prohibiting injured workers from filing a claim for cumulative trauma during the first 180 days of employment was not reasonably necessary to vindicate the state's legitimate interest in preventing fraudulent claims. In this regard, the court held that the 180-day threshold was dramatically over-inclusive. "When considering the articulated purpose of preventing workers' compensation fraud," the court stated, "a statute creating a class of employees who are injured, in fact, with a cumulative trauma injury during the first 180 days of employment with their then current employer, and then they are conclusively placed within a class of employees who file fraudulent claims, that statutory placement is over-inclusive by lumping together the innocent with the guilty."⁶²

The court also noted that the Oklahoma law's exclusive remedy provision applies—to bar any tort suit by employee against employer—"regardless of whether the injured employee is denied compensation or deemed ineligible to receive compensation."⁶³ Because there could be no rational connection between preventing fraudulent compensation claims and barring injured workers from filing *tort suits*, the court disagreed that this asserted state interest could possibly justify the 180-day rule.

G. *Pre-Employment Waivers Affecting Work Injury Rights*

State laws invariably provide that *outright* pre-employment waivers of workers' compensation rights are invalid.⁶⁴ In some instances, employers may attempt to limit liability for workplace injuries via a different method—by asking employees to sign written waivers of *other* work injury rights when they first begin working. Courts will sometimes refuse to enforce such con-

60. See OKLA. CONST. Art. II, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law.")

61. *Torres*, 373 P.3d at 1079.

62. *Id.* at 1078.

63. OKLA. STAT. tit. 85A, § 5.

64. See, e.g., Section 407 of the Pennsylvania Act, 77 PENN. STAT. ANN. § 731 ("any agreement made prior to the seventh day after the injury shall have occurred, or permitting a commutation of benefits contrary to the provisions of this act, or varying the amount to be paid or the period during which compensation shall be payable as provided in this act, shall be wholly null and void. . . ."). See also N.Y. WORKERS' COMP. § 32 (indicating that a waiver is available only once an employee has filed a claim).

tracts, mostly on public policy grounds. Two New Jersey cases illustrate this judicial skepticism of employee waivers.

A New Jersey appellate court held unenforceable a contract provision that limited an employee's right to sue third parties for negligence (thereby limiting the employee to the benefits that he could recover under New Jersey's compensation act⁶⁵). The plaintiff in that case was injured while working as a security guard for Allied Barton Security Services, which provided security services to various businesses, one of which was Schering-Plough Corporation. While on Schering-Plough's property, the plaintiff tripped and fell down a set of stairs, suffering a neck, back, and shoulder injury. The plaintiff sued Schering-Plough, and a jury awarded him \$900,000 in damages.⁶⁶ Schering-Plough appealed, pointing to a waiver of liability that the plaintiff had signed when he began working for Allied. Pursuant to that waiver, the plaintiff agreed to forgo all claims against Allied's customers "arising from or related to injuries which are covered under the Workers' Compensation statutes."⁶⁷

The appellate court held that the waiver was not "congruent" with the intent of the New Jersey Act for several reasons.⁶⁸ First, the court was troubled by the fact that the plaintiff did not know the identity of Allied's clients when he signed the waiver. Therefore, he could not have anticipated the working conditions he would later encounter. Second, the disclaimer created a disincentive for Schering-Plough to maintain safe premises. Finally, the court noted, to the extent that the contract purported to waive the plaintiff's right to recover for reckless or intentional conduct, the disclaimer was contrary to public policy—and therefore void—under existing precedent.⁶⁹

In another New Jersey case, an employee signed an employment application that contained a provision requiring all applicants, if hired, to bring any employment-related causes of action against the employer within six months after they arise.⁷⁰ The employee was hired, worked for the employer for three years, and then suffered a work-related knee injury, for which he received workers' compensation benefits. Eventually, the employee returned to light-duty work, but was terminated two weeks later.⁷¹

Approximately seven months after his termination, the employee filed a complaint against his employer alleging employment discrimination based upon an actual or perceived disability and for retaliation for obtain-

65. *Vitale v. Schering-Plough Corp.*, 146 A.3d 162 (N.J. App. Div. 2016).

66. *Id.* at 166.

67. *Id.* at 168.

68. *Id.* at 169.

69. *Id.* at 171.

70. *Rodriguez v. Raymours Furniture Co., Inc.*, 138 A.3d 528, 529–30 (N.J. 2016).

71. *Id.* at 532.

ing workers' compensation benefits.⁷² The employer moved for summary judgment, arguing that the employee had agreed to a truncated six-month statute of limitations for any employment-related claims. In response, the employee maintained that the contract was unconscionable and unenforceable.⁷³ The trial court granted the employer's motion for summary judgment, and the intermediate appellate court affirmed.⁷⁴

The New Jersey Supreme Court unanimously reversed, holding that the two-year statute of limitations for filing a claim under the New Jersey Law Against Discrimination (LAD) cannot be contractually shortened by a clause in an employment contract. According to the court, such limitations conflict with the public interest served by the LAD, which was designed to eradicate discrimination from New Jersey's workplaces. Although the court acknowledged the "strong belief in this state, as elsewhere, in the freedom of contract," it also observed that such freedom "is not such an immutable doctrine as to admit of no qualification."⁷⁵

The court opined that a statute of limitations shorter than two years would undoubtedly lead to the dismissal of otherwise meritorious discrimination claims because, as a practical matter, many employees do not immediately realize that they have been discriminated against. Conversely, the court noted, a shortened statute of limitations could compel attorneys to file discrimination claims prematurely without conducting a thorough investigation to reveal whether the claim lacks merit. Ultimately, the court's decision was based upon "the unique importance" of New Jersey's employment discrimination law and "the necessity for its effective enforcement."⁷⁶

Although the court's decision was rooted in the public policy importance of the LAD, the court also noted that it would have reached the same result based upon the provision's unconscionability (as the employee had argued). The court noted that the provision was in a take-it-or-leave-it employment application for an entry-level position, that the employee was not in an equal bargaining position with his employer, and that it was an adhesion contract containing "indicia of procedural unconscionability."⁷⁷

72. *Id.*

73. *Id.*

74. *Id.*

75. *Rodriguez v. Raymours Furniture Co., Inc.*, 138 A.3d 528, 538 (N.J. 2016) (quoting *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960)).

76. *Id.* at 541.

77. *Id.* at 542.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

For a cognizable claim to exist, the worker must demonstrate that he or she is in an employee-employer relationship, that the injury arose in the course of employment and was medically related thereto (i.e., medical causation exists), and that the injury or disease is within the protection of the statute. A scholar of an earlier day referred to these substantive elements of the claim as the “three pillars upon which coverage rests.”⁷⁸

The cases reviewed immediately below discuss the initial pillar of coverage. The classic dispute in this area is over whether a worker is an employee or independent contractor,⁷⁹ but the two cases that follow are more complex.

A. Coverage of Undocumented Workers

The eligibility of undocumented employees for workers' compensation, an issue that has been explored at length in the legal literature,⁸⁰ remained an important issue during 2016. Delaware law on this point, for example, provides that an undocumented worker *is* considered an employee under the state's workers' compensation law.⁸¹ Further, such a worker is not disqualified from ongoing disability benefits, as in some states, because of such undocumented status.⁸² The employer has the burden of proof if it desires to reduce or eliminate benefits.

These aspects of the law are illustrated in a recent case.⁸³ There, the claimant, who labored in the food manufacturing field, was an undocumented worker who spoke no English and possessed few skills. In June 2010, she sustained a compensable left wrist injury.⁸⁴ The claimant was in and out of work until she was placed on total disability in the summer of 2013. She later had wrist surgery and was released to light-duty work.⁸⁵ However, notwithstanding the release, she was not able to find a job.⁸⁶

78. Stephan A. Riesenfeld, *Forty Years of American Workmen's Compensation*, 7 N.A.C.C.A. L.J. 15 (1951).

79. See, e.g., *Edwards v. W.C.A.B. (Epicure Home Care, Inc.)*, 134 A.3d 1156 (Pa. Commw. Ct. 2016) (claimant, a home health aide, working through a referral service, was an employee, not an independent contractor, and this was so even though service exercised significant control over claimant).

80. See, e.g., Paul Holdsworth, *America's (Not so) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 U. RICH. L. REV. 1369 (2014); see also Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INS. PRAC. L.J. 247 (2008).

81. *Del. Valley Field Servs.*, 105 A.3d 396 (Del. Super. Ct. 2012).

82. *Campos v. Daisy Constr. Co.*, 107 A.3d 570, 572 (Del. 2014).

83. *Roos Foods v. Guardado*, 2016 WL 355002 (Del. Super. Ct. 2016), *reversed and remanded*, 2016 WL 6958703 (Del. 2016).

84. *Id.*

85. *Id.*

86. *Id.*

The employer thereupon filed a termination petition, arguing that the claimant was physically able to return to work.⁸⁷ The petition was supported by a labor market survey undertaken by a vocational expert who, unfortunately, did not inquire of potential employers whether they would accept an undocumented worker. The Board denied the petition, finding that although the claimant was medically able to work, she was a *prima facie* “displaced” worker based upon her individual circumstances (that is, one obviously unable to undertake anything except specially created work), and that employer failed to establish, in response, that work was available to her.⁸⁸

The employer appealed, arguing that the Board erred in relying on the claimant’s undocumented worker status to conclude that she was a *prima facie* displaced worker instead of requiring her displacement to be causally related to her work injury.⁸⁹ The court, however, affirmed. It explained that a worker is displaced if such worker is so disabled from a work injury that he or she cannot be employed in the competitive labor market and would require a specially created job in order to be steadily employed.⁹⁰ The Board, in undertaking this analysis, legitimately considered the claimant’s immigration status. This was so even though that status was unrelated to her accident at work. The court stated that although federal restrictions preventing employers from hiring undocumented workers may make it more difficult for an employer to prove job availability, any difficulty is appropriately borne by the employer, which must take the employee as it hired her.⁹¹ In this case, the claimant was undocumented when hired. The court explained that the employer could have avoided the current situation had it checked the claimant’s immigration status before the date of hire.⁹² Thus, the fact that the claimant may have had difficulty getting another job because of her immigration status was an item for which the employer was responsible as it endeavored to show job availability.⁹³

The supreme court, however, reversed and remanded.⁹⁴ Undocumented workers are indeed potentially entitled to ongoing disability benefits. Still, with regard to the “displaced worker” analysis, the court agreed with employer that an undocumented worker’s immigration status is not

87. *Id.*

88. *Roos Foods v. Guardado*, 2016 WL 355002 (Del. Super. Ct. 2016), *reversed and remanded*, 2016 WL 6958703 (Del. 2016).

89. *Id.* at *2.

90. *Id.* (citing *Torres v. Allen Family Foods*, 672 A.2d 26 (Del. 1996)).

91. *Id.* at *3 (citing *Campos v. Daisy Constr. Co.*, 107 A.3d 570, 572 (Del. 2014)).

92. *Id.*

93. *Id.*

94. *Roos Foods v. Guardado*, 2016 WL 6958703 (Del. 2016), *reversing*, 2016 WL 355002 (Del. Super. Ct. 2016).

dispositive in determining whether he or she is a *prima facie* displaced worker.⁹⁵ Instead, such status is only a relevant factor to be considered in determining whether she is an *actually* displaced worker.⁹⁶ A remand was required so that the Board could rehear the case and undertake the correct legal analysis.⁹⁷ The claimant, in this regard, would be obliged to show that she was “actually displaced” because of inability to find work due to undocumented status. Then, the burden would shift to the employer to prove the contrary, specifically, “availability to [her] of regular employment within her capabilities [which] must take into account her status as an undocumented worker.”⁹⁸ Remarkably, the court suggested that this task could be satisfied by the employer producing expert evidence of the types of jobs that are in fact filled by undocumented workers.⁹⁹ The court stated, with some irony, “That burden is not an unreasonable one for employers to bear, particularly when they hired an undocumented worker in the first place.”¹⁰⁰

B. Statutory Employment and the Role of Franchisor

Workers' compensation statutes provide that enterprises that seek to perform, through contractors, aspects of their regular and recurrent business, become the employer of such contractors' employees in the event they fail to secure workers' compensation insurance. The classic situation is where a general contractor on a building site lets out various specialty tasks to subcontractors.¹⁰¹ This construct is called “statutory employment.”

In a Pennsylvania case, an appellate court reversed an agency adjudication that held a restaurant franchisor could be a statutory employer.¹⁰² There, a worker, Gaudio, was apparently on Social Security Disability for various musculoskeletal injuries, but he became employed at a Salad Works restaurant, specifically the unit of the franchise in the Bourse Building in Philadelphia. He sustained an injury arising in the course of his employment when he slipped and injured both knees.¹⁰³ His claim was denied, and he then filed a claim petition.

As it turned out, his immediate employer was not Salad Works at all but, in fact, an entity called G21, LLC, owned by the franchisee,

95. *Id.* at *12–13.

96. *Id.* at *13.

97. *Id.* at *18.

98. *Id.* at *12–13.

99. *Id.* at *15.

100. *Id.*

101. *See, e.g.,* Frank M. Hall & Co. v. Newsom, 125 P.3d 444 (Colo. 2005) (general contractor was indeed “statutory employer” of its subcontractor’s worker within meaning of Act; thus, it was immune from worker’s tort suit).

102. Salad Works, LLC v. W.C.A.B. (Gaudio & UEGF), 124 A.3d 790 (Pa. Commw. Ct. 2015), *appeal granted*, 135 A.3d 1016 (Pa. 2016).

103. *Id.* at 791.

Mr. Ko.¹⁰⁴ Because Mr. Ko was uninsured, the claimant also filed a claim against the Uninsured Employers Guaranty Fund (UEGF). The UEGF, meanwhile, filed a joinder petition against the franchisor, Salad Works, alleging the same was “jointly and severally liable.”¹⁰⁵ Salad Works denied that it could be a statutory employer. At hearings, Salad Works representatives stated that “we sell franchises to prospective franchisees to open up their businesses with Salad Works’ concept.”¹⁰⁶ It was Mr. Ko who “independently owned” the unit where the claimant worked. It was also notable that the franchise agreement obliged Mr. Ko to carry workers’ compensation insurance, which he had not done.

As foreshadowed above, the court dismissed the petition. Although a new Pennsylvania Supreme Court case seemed to have broadened the concept of statutory employer—clarifying that the concept was not reserved to construction projects—the court considered that case to be distinguishable. The court stated, “[t]his Court must agree with Salad Works that its main business is the sale of franchises to franchisees that desire to use its name and ‘system’ and marketing expertise. . . . While Salad Works provides certain services to independent franchisees like G21, *it is not in the restaurant business or the business of selling salads.*”¹⁰⁷ The state supreme court accepted the case on appeal. The precise issue is “whether a franchisor may be subject to liability as a statutory employer under Section 302(a) of the Workers’ Compensation Act.”¹⁰⁸

IV. INJURIES IN COURSE OF EMPLOYMENT AND ARISING OUT OF EMPLOYMENT

The second pillar of coverage under workers’ compensation law is the requirement that the worker have sustained the injury “arising out of” and “in the course of” employment. The worker who has clocked in and is hard at work at the lathe when injured will obviously meet this two-part test. Still, many gray areas exist that give rise to disputes.

The Oklahoma legislature, in a recent reform, sought to restrict the compensability of parking lot injuries sustained by workers before and after the actual commencement of their job duties. In a 2016 case, however, the state supreme court declined to afford this provision a broad exclusionary reading and, instead, awarded benefits to a worker.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 799 (distinguishing *Six L’s Packing v. W.C.A.B. (Williamson)*, 44 A.3d 1148 (Pa. 2012) (interpreting Section 302(a) of the Act)).

108. *Salad Works, LLC v. W.C.A.B. (Gaudio & UEGF)*, 135 A.3d 1016, 1016 (Pa. 2016) (order accepting case on appeal). On December 16, 2016, the court dismissed the appeal as improvidently granted.

In that case, the claimant slipped and fell on ice in her employer's parking lot.¹⁰⁹ She had been employed as a teacher at a university child development lab.¹¹⁰ The employer had given her a parking permit and instructed her to park in a lot located on its premises.¹¹¹ After the fall, the employer specifically noted on the injury report that the incident had, indeed, occurred on its premises.¹¹²

The employer denied the claim, arguing that the injury did not arise in the course and scope of the claimant's employment.¹¹³ The workers' compensation authorities agreed and denied the claim.¹¹⁴ The court, however, reversed. In its view, the statute did not exclude the claimant's injury. The pivotal statute, in this regard, defined "course and scope of employment" as follows:

[a]n activity of any kind or character for which the employee was hired and that relates to and derives from the work, business, trade or profession of an employer, and is performed by an employee in the furtherance of the affairs or business of an employer. The term includes activities conducted *on the premises* of an employer. . . .¹¹⁵

The injury was compensable under this statute. In the court's view, the claimant's actions at the time of her injury were related to and in furtherance of the business of the employer.¹¹⁶ True, the statute excluded from course and scope "any injury occurring in a parking lot or other common area *adjacent* to an employer's place of business before the employee clocks in or otherwise begins work for the employer or after the employee clocks out or otherwise stops work for the employer."¹¹⁷ It was also true that the claimant had not yet clocked in when the accident occurred. Still, the court explained that this exception did not apply because the accident was not in a "parking lot or other common area *adjacent* to an employer's place of business."¹¹⁸ To the contrary, the parking lot where the injury occurred was in fact *on* the employer's premises.¹¹⁹

109. *Legarde-Bober v. Okla. State Univ.*, 378 P.3d 562 (Okla. 2016).

110. *Id.* at 564.

111. *Id.*

112. *Id.*

113. *Id.* at 562.

114. *Legarde-Bober v. Okla. State Univ.*, 378 P.3d 562 (Okla. 2016).

115. *Id.* at 564 (citing OKLA. STAT. tit. 85A, § 2(13) (emphasis added)).

116. *Id.*

117. *Id.* at 564 (citing OKLA. STAT. tit. 85A, § 2(13)(a-d) (emphasis added)).

118. *Id.* at 564–65 (emphasis added).

119. *Id.*

V. INJURY AND DISEASE COMPENSABLE

The third pillar of coverage is the requirement that the worker have sustained an injury or incurred a disease that is in fact covered by the law. In this regard, while the range of injuries has generally been liberalized through the decades, some states still exclude certain conditions, and retractive reform has also caused restrictions. For example, the West Virginia Act explicitly states that mental stress causing mental disability injuries is not covered by the law.¹²⁰ The Pennsylvania Act, on the other hand, maintains a liberal regime. For example, the Pennsylvania statute indicates affirmatively that tuberculosis is a covered disease; indeed, for certain workers, like nurses, a presumption of causation exists.¹²¹

A. *Meaning of "Accident" in Virginia*

Under the Virginia Act, the compensable event is termed an "accident,"¹²² and several cases in that jurisdiction have construed the concept narrowly.¹²³ This approach was taken in a new case by the Deputy Commissioner and, on appeal, by the Commission. The appellate court, however, reversed.

There, the employee was a skilled laborer who worked long hours on his feet.¹²⁴ He had a long history of left knee problems that, at the time of his 2014 work injury, went back many years. In 1994, he tore his ACL and had it surgically repaired.¹²⁵ Following the surgery, he was released to return to work. However, his surgeon expressed concern that "if he returns to a job that involves walking on unlevel terrain, that he would be at risk for a re-injury to the knee," although he "may do any other types of jobs at present which do no[t] involve ambulation on unlevel terrain."¹²⁶ He repeated the caution a year later. A decade later, the claimant again underwent surgery and his surgeon recommended that he "use a cane or a walking stick when in the woods or on long distances . . . and use good judgment in regards to his knee."¹²⁷

120. W. VA. CODE § 23-4-1 ("It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.").

121. Section 108(m) of the Pennsylvania Workers' Compensation Act, PA. STAT. ANN. tit. 77, § 27.1(m) (providing for compensability of tuberculosis). See Section 301(e) of the Pennsylvania Workers' Compensation Act, PA. STAT. ANN. tit. 77, § 413 (establishing presumption of causation).

122. See VA. CODE § 65.2-101 ("Injury" means only injury by accident. . . .).

123. See, e.g., *Stenrich Group v. Jemmott*, 467 S.E.2d 795 (Va. 1996) (various cumulative trauma injuries did not constitute "accidents").

124. *Staton v. Bros. Signal Co.*, 783 S.E.2d 539 (Va. Ct. App. 2016).

125. *Id.* at 541.

126. *Id.*

127. *Id.* at 542.

In 2014, the claimant was working as a field superintendent. He was walking around a job site and, after walking down a hill, stepped in a hole. While attempting to free himself, he again injured his left knee.¹²⁸ The workers' compensation authorities, in their adjudication, denied his claim because he did not sustain an "unexpected 'injury by accident.'"¹²⁹ They reasoned that the knee injury was "not medically unexpected" because the claimant "did not follow reasonable adherence to his physician's repeated instructions" to "stay off of unlevel terrain" and to "use a cane or walking stick when in the woods or on long distances."¹³⁰

On appeal, the claimant argued that the evidence did not show that his injury was the expected result of violating his medical restrictions.¹³¹ He asserted that he was not under any medical restrictions at the time of his accident, and that even if he was, he did not intentionally violate the same. The court, agreeing with claimant, reversed. The court first noted that the law was remedial and liberally construed to advance the humanitarian purpose of compensating employees for injuries from workplace accidents. The expression, "injury by accident," as used in the Act, should indeed be liberally construed.¹³²

The court then explained that the basic and indispensable ingredient of an accident is unexpectedness. Thus, the court acknowledged that there may be instances where workers' compensation is rightfully denied when a claimant violates his work restrictions and sustains a predictable injury. The rationale, in this regard, is that the Act does not compensate injuries that are voluntarily inflicted.¹³³ With these thoughts in mind, the court held that medical restrictions must be clearly communicated and specified before a claimant's violation of those restrictions prevents a claimant's recovery of benefits.¹³⁴ Generalized medical admonitions, in contrast, are insufficient.¹³⁵ The court further explained that when medical restrictions have been communicated to an employee, the evidence must clearly demonstrate that the violation of the specific restriction caused the employee's injury.¹³⁶ In addition, the injury sustained by the employee must be the type of injury the restriction was designed to prevent.¹³⁷

In this case, the court explained that that doctor's instructions to avoid walking on uneven ground, which was communicated fifteen to twenty

128. *Id.* at 540.

129. *Staton v. Bros. Signal Co.*, 783 S.E.2d 539, 542 (Va. Ct. App. 2016).

130. *Id.*

131. *Id.* at 543.

132. *Id.*

133. *Id.*

134. *Staton v. Bros. Signal Co.*, 783 S.E.2d 539, 543 (Va. Ct. App. 2016).

135. *Id.* at 544.

136. *Id.*

137. *Id.*

years before the accident, and predated the claimant's subsequent knee surgeries and treatment, were not sufficiently specific to justify the preclusion of benefits based upon claimant's violation of such restrictions. On the contrary, the doctor's final instructions to the claimant were simply to use "good judgment."¹³⁸ Also, even were the instructions deemed sufficient and the claimant violated the restrictions by walking down the hill, the evidence failed to prove that the purported violations *caused* his knee injury.¹³⁹ Instead, the evidence showed that he injured his knee only *after* he had walked down the hill.¹⁴⁰

B. *Presumption of Causation in Firefighter Cases*

Although the trend in workers' compensation laws is for legislatures to restrict coverage, this has not been the case in terms of providing benefits for firefighters. Many states have strengthened their laws to afford coverage for diseases sustained by such workers.¹⁴¹ In 2011, the Pennsylvania legislature, with Act 46, amended the Act by adding cancer to the list of recognized occupational diseases suffered by firefighters. Under Pennsylvania law, when a disease is on the list, it receives a presumption of causation.¹⁴²

In a 2016 case, a Pennsylvania court interpreted this section for the first time.¹⁴³ The pivotal issue was whether the presumption of causation applies to *any* cancer, once the firefighter shows that he was exposed to a known carcinogen, or whether the claimant must *first show* that the type of cancer from which he suffers has been shown by scientific evidence to be caused by exposure to a known carcinogen.

The workers' compensation authorities held, in their adjudication, that once a claimant had cancer, the presumption applied, and he or she need *not* show that the particular cancer at issue was caused by exposure to a known carcinogen.¹⁴⁴ The Commonwealth Court, however, reversed, stating, "it was incumbent upon claimant to prove that his malignant mel-

138. *Id.*

139. *Id.*

140. *Id.*

141. See David B. Torrey, *Firefighter Cancer Presumption Statutes in Workers' Compensation and Related Laws: An Introduction and a Statutory/Regulatory Case Law Table*, www.NAWCJ.org (Comparative Adjudication Systems Project).

142. Cancer suffered by firefighters is found at Section 108(r) of the Act, 77 PA. STAT. ANN. § 27.1(r). The basic presumption is found at Section 301(e) of the Act, 77 PA. STAT. ANN. § 413. Act 46, notably, added "another condition" to the presumption, which provides that, for the presumption to apply, the disease must manifest "at or immediately before the date of disability." The *further* proviso states "the presumption of this subsection may be rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting."

143. *City of Phila. Fire Dep't v. W.C.A.B. (Sladek)*, 144 A.3d 1011 (Pa. Commw. Ct. 2016).

144. *Id.* at 1020.

anoma [the type of cancer implicated in the case] is a type of cancer *caused by* the Group 1 carcinogens to which he was exposed in the workplace to establish an occupational disease. Only then do the presumptions in Section 301(e) and (f) of the Act come into play.”¹⁴⁵

VI. EXCLUSIVE REMEDY

In exchange for imposition of liability regardless of fault, injured workers and their dependents are limited, as their exclusive remedy, to the insurance benefits available under the workers' compensation law. As discussed below, a major exception exists when the employee can plead an intentional tort. In the face of such an allegation, the “intentional tort exception” in some states may defeat immunity and permit a civil suit. The precise boundaries of exclusive remedy immunity are, in any event, always being tested.

A. Co-Employee Immunity

In a Missouri case, the supreme court considered whether an employee retained his right to pursue a common law negligence action against his co-employee supervisor.¹⁴⁶ The employee in that case was injured when a row of 200-pound rebar paver baskets, used in concrete construction, fell from a flatbed truck. He subsequently filed a negligence suit against his supervisor, who he alleged had been warned about the potential dangers posed by the baskets, but did nothing to remedy the situation.¹⁴⁷

The supervisor filed a motion to dismiss, arguing that the employee's claims fell within the exclusive remedy provision of Missouri's workers' compensation law. The trial court granted the supervisor's motion, holding that the employee had not alleged any negligent conduct that would fall outside of his employer's nondelegable duty to provide a safe workplace.¹⁴⁸

On appeal, the Missouri Supreme Court affirmed. The court acknowledged that, at the time of the employee's injuries, the Missouri Act provided no immunity to co-employees from common law negligence actions.¹⁴⁹ Thus, the employee was free to pursue any cause of action against his co-employee that would have been viable at common law.

The court went on, however, to explain that, under the common law, co-employees were liable to their fellow employees for breaches of a duty

145. *Id.* at 1021–22.

146. *Peters v. Wady Indus., Inc.*, 489 S.W.3d 784 (Mo. 2016).

147. *Id.* at 799.

148. *Id.* at 787.

149. In 2012, the state legislature amended the act to provide immunity to co-employees except when “the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.” *See* MO. REV. STAT. § 287.120.

owed independently of the master-servant relationship.¹⁵⁰ Stated differently, co-employees were liable *only* if they breached a duty that was separate and distinct from the employer's nondelegable duties. With this standard in mind, the court concluded that the employee had failed to plead facts demonstrating such a breach in his complaint. According to the court, the unsafe work environment did not result from the employee's supervisor negligently carrying out his own work. Rather, the employee's supervisor had negligently carried out *the employer's* nondelegable duty to provide a safe workplace.¹⁵¹

B. *Intentional Tort Exception*

In a recent Ohio case, a plaintiff's attempt to invoke the intentional tort exception was unsuccessful.¹⁵² There, an employee of an industrial cleaning company suffered second and third degree burns while removing fly ash¹⁵³ from a coal-burning power plant. After receiving workers' compensation benefits, he also sued his employer in tort on an intentional tort theory. The trial court entered summary judgment in favor of the employer, and the appellate court affirmed.

The court noted that, under Ohio law, an employee can recover for an employer's intentional tort only when the employer "acts with specific intent to cause an injury."¹⁵⁴ Thus, absent a deliberate intent to injure, an employee's exclusive remedy is within the workers' compensation system. Ultimately, the court held that the employee had not met this difficult evidentiary burden.

The court rejected the argument that an employee need only show that his employer knew that an activity was dangerous or that injury was substantially certain to occur. Quoting Larson's *Workers' Compensation Law*, the court explained that "an employer's knowingly permitting a hazardous work condition to exist [and] knowingly ordering employees to perform an extremely dangerous job falls short of the kind of actual intention to injure that robs the injury of accident character."¹⁵⁵

A plaintiff in Illinois was also unsuccessful with his intentional tort action. On this occasion, the action failed not because of weak factual allegations, but because of a deemed election out of tort law. In that case, a Chicago Fire Department trainee was injured while participating in a

150. *Peters*, 489 S.W.3d at 787.

151. *Id.* at 797.

152. *Ball v. MPW Indus. Servs., Inc.*, 60 N.E.3d 1279 (Ohio Ct. App. 2016).

153. "Fly ash" is the byproduct of burning coal. In an electric power generating plant, fly ash accumulates in a pile, which is cool on top, but very hot inside. Fly ash piles are often unstable and prone to collapse. *Id.* at 1281.

154. *Id.* at 1285. See OHIO REV. CODE § 2745.01.

155. *Id.* at 1286 (quoting 6 LARSON, WORKERS' COMPENSATION LAW § 103.03, 103-7 to 103-8 (2001)).

paramedic training program.¹⁵⁶ The claimant sought and received workers' compensation benefits, but later sued the city for damages, alleging that its agents intentionally injured him by forcing him to engage in rigorous physical exercise with minimal water breaks. According to the plaintiff, these activities resulted in his dehydration and acute kidney failure.

The city sought summary judgment, arguing that the claimant's receipt of workers' compensation benefits precluded his tort case in light of the exclusive remedy provision of the Illinois Workers' Compensation Act.¹⁵⁷ The trial court agreed that the Act barred the claimant's civil suit, and the appellate court affirmed. In doing so, the court rejected claimant's argument that his tort suit fell within the intentional tort exception to the exclusive remedy. In this regard, because the employee elected to obtain compensation under the Illinois Act, he was barred from bringing a tort action against the city.

The court emphasized that the Act "was designed to provide speedy recovery without proof of fault for accidental injuries."¹⁵⁸ Thus, the court concluded, "collecting workers' compensation benefits for an injury is inconsistent with a common law suit alleging the injury was the result of an employer's or co-employee's intentional conduct."¹⁵⁹ Although nothing prevents a cautious employee who has a pending workers' compensation claim from also filing a suit in order to preserve any common law intentional tort claims, the employee's actual acceptance of compensation benefits bars civil recovery. This rule, the court underscored, is consistent with the intent of the Illinois Act, which serves "as a substitute for an employee's common law right of action and not as a supplement to it."¹⁶⁰

C. Parent/Subsidiary Immunity

Workers' compensation is the exclusive remedy for recovery for injuries arising out of and in the course of employment.¹⁶¹ Thus, most workers' compensation laws prohibit any common law claim brought against the employer for a work-related injury.¹⁶² However, most workers' compensation laws permit an action for injury against a third-party tortfeasor, provided the third party is neither the plaintiff's employer nor a fellow employee.¹⁶³ An Indiana case presented the issue of how these rules

156. *Locasto v. City of Chicago*, 50 N.E.3d 718 (Ill. App. Ct. 2016).

157. See 820 ILL. COMP. STAT. 305/5.

158. *Locasto*, 50 N.E.3d at 721 (quoting *Fregeau v. Gillespie*, 451 N.E.2d 870, 873 (Ill. 1983)).

159. *Id.*

160. *Id.* at 722 (quoting *Rhodes v. Indus. Comm'n*, 442 N.E.2d 509, 511 (Ill. 1982)).

161. *Hall v. Dallman Contractors, LLC*, 51 N.E.3d 261, 264 (Ind. Ct. App. 2016) (citing *GKN Co. v. Magness*, 744 N.E.2d 397, 401–02 (Ind. 2001)).

162. *Id.*

163. *Id.*

work when the defendant in a third-party lawsuit is in fact the parent corporation of the immediate employer.

In that case, the claimant was working for a company called Ameritech when she tripped and fell on ice in a walkway adjacent to an ongoing construction project at an AT&T building.¹⁶⁴ Ameritech was a subsidiary of AT&T. As a result of the fall, the claimant injured her arm.¹⁶⁵ She voluntarily received workers' compensation from Ameritech.¹⁶⁶

The claimant thereafter filed a civil action against AT&T Services, the enterprise that was responsible for maintenance and snow removal at the AT&T building.¹⁶⁷ AT&T Services in response sought summary judgment, asserting that the claims against it were barred by the exclusive remedy.¹⁶⁸ The trial court granted the motion, finding that Ameritech and AT&T Services were both subsidiaries of AT&T and therefore were "joint employers" of the claimant.¹⁶⁹ The trial court concluded that workers' compensation was her sole and exclusive remedy.¹⁷⁰

The claimant appealed, arguing that the state supreme court had previously held that an employee was not precluded from bringing a negligence action against the parent corporation of her employer.¹⁷¹ The appeals court, however, affirmed. It explained that, effective July 1, 2000, the definition of "employer" under the Act was amended to provide that "[a] parent or a subsidiary of a corporation . . . of employees shall be considered to be the employer of the corporation's, the lessee's, or the lessor's employees. . . ."¹⁷² In 2001, the legislature further amended the definition of "employer" to provide "[a] parent corporation and its subsidiaries shall each be considered joint employers of the corporation's, the parent's, or the subsidiaries' employees. . . ."¹⁷³ These amendments abrogated the supreme court's previous holdings. Hence, the trial court had ruled correctly that Ameritech and AT&T Services were joint employers entitled to immunity.¹⁷⁴

164. *Id.* at 263.

165. *Id.*

166. *Hall v. Dallman Contractors*, 51 N.E.3d 261, 263 (Ind. Ct. App. 2016).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Hall v. Dallman Contractors*, 51 N.E.3d 261, 264 (Ind. Ct. App. 2016).

172. *Id.* at 265 (quoting IND. CODE ANN. § 22-3-6-1(a)).

173. *Id.*

174. *Id.* at 267.

VII. SUBROGATION

All state workers' compensation laws provide for employer subrogation, that is, the right of reimbursement out of claimant's third-party recovery, to account for payments of compensation it has made.¹⁷⁵ Three cases illustrate the complexities that this rule can create.

A. Right of Carrier, as Opposed to Employer, to Pursue Subrogation

Most state statutes contain express language granting the employer the right to sue in subrogation. However, many laws are silent on an *insurer's* right to sue. A Connecticut case now holds that carriers have a right to an "equitable" subrogation claim.¹⁷⁶

In that case, the claimant sustained work-related injuries and his employer's workers' compensation insurance carrier paid benefits voluntarily.¹⁷⁷ The carrier later brought a subrogation action against three construction companies.¹⁷⁸ The carrier asserted that the defendants were negligent for failing to provide certain safety equipment and that their negligence caused the claimant's injuries.¹⁷⁹ The defendants filed motions to dismiss, asserting that the carrier lacked standing to sue either under the Connecticut Workers' Compensation Act or the common law doctrine of equitable subrogation.¹⁸⁰

The trial court granted the defendants' motions, reasoning that the carrier cited to no authority granting it the right to sue for subrogation.¹⁸¹ The trial court further reasoned that the Act deviated from the common law by creating a specific right for the employer, not the insurer, to pursue a third-party action.¹⁸²

The state supreme court reversed, holding that a carrier can properly assert an "equitable" subrogation claim.¹⁸³ The court explained that subrogation is a doctrine of equity to be "generously applied"¹⁸⁴ and is intended to do justice "without regard to form or mere technicality."¹⁸⁵ Subrogation works to prevent a tortfeasor from being unjustly enriched merely because an insurer covered the victim's loss.¹⁸⁶ In this case, due to the carrier's obligation to pay benefits to the claimant as a result of

175. See, e.g., CAL. LABOR CODE § 3858.

176. Pac. Ins. Co. v. Champion Steel, 2016 WL 5030577 (Conn. 2016).

177. *Id.* at *1.

178. *Id.*

179. *Id.*

180. *Id.*

181. Pac. Ins. Co. v. Champion Steel, 2016 WL 5030577 (Conn. 2016).

182. *Id.*

183. *Id.* at *6.

184. *Id.* at *5.

185. *Id.* at *3.

186. *Id.*

the defendants' negligence, the carrier had a colorable claim and a direct interest in the outcome of the action.¹⁸⁷ Therefore, the carrier had standing to sue in equitable subrogation.

The court also insisted that permitting an insurer's right to subrogation is supported by public policy.¹⁸⁸ In this regard, allowing insurers to bring subrogation actions serves the public policy of containing the cost of workers' compensation insurance.¹⁸⁹ Cases may exist, after all, where employees and employers have no incentive to *bring* third-party actions.¹⁹⁰ For example, an employee may not wish to incur the costs of litigation when his injuries have been fully compensated by a workers' compensation insurer.¹⁹¹ Similarly, an employer may not want to invest time and money in an action against a third party because the employer has not provided any workers' compensation benefits out of its own pocket.¹⁹² In such cases, workers' compensation insurance carriers would be without recourse and, as a result, the costs of workers' compensation would likely increase.¹⁹³

B. Subrogation, the "Make Whole" Doctrine, and Lien as Not Extending to Pain and Suffering Damages

While workers' compensation insurers are generally entitled to recovery of the amount paid to the employee in benefits, questions arise as to the extent of such recovery. For example, in some states the employer's subrogation interest is only cognizable once the injured worker has been "made whole" via the third-party recovery. Thus, in a Montana case dealing with a conflict of laws, the court applied Montana law (recognizing the doctrine) over Oklahoma law (not recognizing the same) and disallowed the employer's subrogation claim.¹⁹⁴

A Massachusetts case, meanwhile, held that an employer was not entitled to subrogation out of damages attributable to pain and suffering. There, two Massachusetts employees sustained work-related injuries and collected workers' compensation benefits.¹⁹⁵ Later, the employees reached settlement agreements with third parties that included damages for, among other things, their pain and suffering.¹⁹⁶ The same carrier for both employees, invoking Section 15 of the law,¹⁹⁷ sought reimburse-

187. *Pac. Ins. Co. v. Champion Steel*, 2016 WL 5030577, at *2 (Conn. 2016).

188. *Id.* at *4.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Talbot v. WMK-David, LLC*, 380 P.3d 823 (Mont. 2016).

195. *DiCarlo v. Suffolk Constr. Co.*, 45 N.E.3d 571 (Mass. 2016).

196. *Id.* at 574.

197. See MASS. GEN. LAWS ch. 152, § 15 (providing that, where the injured worker receives workers' compensation benefits and then recovers damages for the same injury from a third-

ment out of the employees' recoveries, including their awards for pain and suffering.¹⁹⁸ In one case, the trial judge held that the insurer's lien attached to the employee's entire recovery, including pain and suffering.¹⁹⁹ However, the judge in the other case held that the lien did not so attach.²⁰⁰ Hearing the cases together, the appeals court determined that the employer's subrogation claim did not extend to such damages.²⁰¹

On further appeal, the Supreme Judicial Court of Massachusetts affirmed. The court first reviewed the critical statutory language, concluding that the phrase which defines the employer's lien, to wit, the "gross sum received in payment for the injury," means "injury for which workers' compensation is payable."²⁰² This conclusion foreshadowed a ruling that the lien did not apply to pain and suffering. In this regard, workers' compensation covers lost wages and medical expenses,²⁰³ and it does not compensate for pain and suffering.²⁰⁴ Further, under its ruling, the fact that a claimant would receive both workers' compensation benefits and damages for pain and suffering did not constitute a "double recovery."²⁰⁵ The court admonished that "[i]n determining whether an employee has received double recovery, we do not focus on the dollar amounts recovered, but upon the nature of the injury asserted."²⁰⁶

The court concluded by noting that its ruling would not deprive an insurer of its reimbursement rights where an employee and a third-party defendant reach a settlement that would "stack the deck" against the insurer by inappropriately allocating the bulk of damages to pain and suffering.²⁰⁷ The court explained that Section 15 precludes such a result by requiring that all settlements be approved by the Department of Industrial Accidents, or by a judge, after a hearing, at which the insurer has a right to participate.²⁰⁸ Moreover, a settlement amount allocated entirely or in large part to pain and suffering will "be eyed by the court with a healthy dose of skepticism."²⁰⁹

party tortfeasor, "[t]he sum recovered [from the third party] shall be for the benefit of the [workers' compensation] insurer."

198. *DiCarlo*, 45 N.E.3d at 574-75.

199. *Id.*

200. *DiCarlo v. Suffolk Constr. Co.*, 45 N.E.3d 571, 574-75 (Mass. 2016).

201. *Id.*

202. *Id.* at 576-77.

203. *Id.*

204. *Id.*

205. *DiCarlo v. Suffolk Constr. Co.*, 45 N.E.3d 571, 576-77 (Mass. 2016).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (quoting *Hultin v. Francis Harvey & Sons, Inc.*, 666 N.E.2d 1323 (Mass. App. Ct. 1996)).

C. Subrogation as Arising Only Upon Development of Lien

As a general rule, a party is entitled to subrogation only to the extent that it has actually paid a sum of money.²¹⁰ In a West Virginia case, this rule was applied. The state supreme court held that an insurance carrier did not have a right of subrogation where, because of a large deductible maintained by its insured, it had never paid workers' compensation in the first place.²¹¹

There, a mining electrician suffered catastrophic injuries when he was struck and run over by a shuttle car.²¹² At the time, he was employed by Speed Mining. Under Speed's policy with Old Republic, a \$2 million deductible amount applied.²¹³ The policy also provided that the carrier retained all rights to subrogation, even as to deductible amounts, in the event that it made "advances or [other] payment[s]" ascribable to the deductible.²¹⁴ Given this arrangement, Speed paid \$1.8 million in benefits, out of its own funds, to the claimant and his providers.²¹⁵

The employee thereafter sued the employer under "deliberate intention" and common law negligence theories.²¹⁶ He also asserted a products liability claim against third-party companies and individuals.²¹⁷ The employee eventually settled the deliberate intention claim against the employer.²¹⁸ Notably, in the settlement agreement, the parties expressly declared: "this Agreement is the entire agreement and encompasses all terms and agreements negotiated by them in settlement of *any and all claims relating to the Subject Incident*. . . ."²¹⁹ Under West Virginia law, notably, the settlement for the deliberate intention claim was *not* subject to subrogation.²²⁰ In essence, double recovery as against the employer is allowed.

Old Republic necessarily made no claim for subrogation out of the deliberate intention recovery. Yet, while it had not itself disbursed workers' compensation, it asserted a lien for the \$1.8 million with respect to any settlement obtained by the claimant from the third-party defendants.²²¹ The employee ultimately settled with those defendants for \$3.5 million.²²² In the settlement, he did not take any action to protect Old Re-

210. W. VA. CODE § 23-2A-1.

211. Old Republic Ins. Co. v. O'Neal, 788 S.E.2d 40 (West Va. 2016).

212. *Id.* at 43.

213. *Id.* at 44.

214. *Id.*

215. *Id.*

216. Old Republic Ins. Co. v. O'Neal, 788 S.E.2d 40, 44 (West Va. 2016). In West Virginia, an injured worker may pursue a common law tort action under a theory of "deliberate intention." See W. VA. CODE § 23-4-2.

217. *O'Neal*, 788 S.E.2d at 44.

218. *Id.* at 45.

219. *Id.* (emphasis added).

220. *Id.*

221. Old Republic Ins. Co. v. O'Neal, 788 S.E.2d 40, 45 (West Va. 2016).

222. *Id.*

public's claimed subrogation.²²³ When Old Republic asserted its subrogation claim, he filed for declaratory relief, seeking freedom from such claim.²²⁴

The circuit court granted the employee relief, finding that Old Republic had no contractual or statutory right to subrogation.²²⁵ The carrier appealed, but the supreme court affirmed. The court held that the carrier was not entitled to subrogation.²²⁶ The court explained that the employer had, in the initial deliberate intention settlement, foreclosed any carrier right to subrogation.²²⁷ As recited above, the settlement agreement for the deliberate intention action expressly agreed to a "*settlement of any and all claims. . .*"²²⁸ In any event, the court, examining the unique facts of the case, held that the carrier was attempting to recover money that it never paid and that its insured was not entitled to receive.²²⁹ Were the carrier allowed to gain subrogation, the carrier would receive a windfall by receiving monies that it never expended.²³⁰ Furthermore, the employer would be allowed to circumvent its settlement of the deliberate intention claim since it gave up any claim of reimbursement as part of the terms of the settlement of that claim.²³¹

VIII. SETTLEMENT

Most state laws allow the parties to engage in compromise settlements, although law, practice, and procedure vary considerably among states.²³²

In an Illinois case, an appellate court found that where the plaintiff never intended to include a particular defendant in a workers' compensation settlement, he was not precluded from later seeking damages in tort against the same named defendant.²³³ There, the plaintiff, while repairing a roof, was struck in the head by a piece of lumber. He filed a claim with the Illinois Workers' Compensation Commission against CENTRO, his alleged immediate employer, seeking benefits. In July 2012, the Commission approved a settlement contract "signed by the plaintiff, his attorney, and the attorney representing CENTRO."²³⁴ The caption of the settle-

223. *Id.*

224. *Id.*

225. *Id.* at 46.

226. *Old Republic Ins. Co. v. O'Neal*, 788 S.E.2d 40, 55 (West Va. 2016).

227. *Id.* at 53.

228. *Id.* (emphasis added).

229. *Id.*

230. *Id.* at 54–55.

231. *Id.* at 55.

232. *See generally* Torrey, *supra* note 13.

233. *Marquez v. Martorina Family, LLC*, 55 N.E.3d 1252 (Ill. App. Ct. 2016).

234. *Id.* at 1253.

ment included reference to IPSA, the general contractor overseeing construction on the jobsite at time of injury.²³⁵

In October 2013, the plaintiff commenced a civil action against multiple defendants, including IPSA, for damages in negligence as it related to the same injury.²³⁶ The circuit court granted defendants' individual motions for summary judgment, holding that, as it pertained to IPSA, the plaintiff was barred from recovering civil damages pursuant to the previous settlement contract wherein IPSA was listed as his employer. Although a genuine issue of fact existed as to whether plaintiff was a "borrowed employee" of IPSA, the terms of the settlement necessarily released IPSA from any tort liability arising out of the injury.²³⁷

The Illinois Appellate Court reversed and remanded. It noted that, in the present case, the plaintiff had never asserted in the workers' compensation claim that he acted as an employee of IPSA, nor did any language in the body of the settlement identify IPSA.²³⁸ Further, because the record did not reflect IPSA as ever being made party to the workers' compensation claim, the "commonality of parties necessary for the application of *res judicata*,"²³⁹ as it pertained to plaintiff's allegations of employment status, was absent. Therefore, the court ruled that plaintiff was "not precluded from suing IPSA for damages in a civil action by reason of his having settled his workers' compensation claim."²⁴⁰

Significantly, it was CENTRO that unilaterally included IPSA in the settlement; IPSA was not aware of such inclusion until after the settlement had been finalized. In remanding the case to the lower court, the appellate court ruled that a genuine issue of fact existed as it pertained to whether plaintiff was a borrowed employee in the service of IPSA at the time of injury. On remand, if the lower court were to find such employee status, the plaintiff would be barred by the exclusive remedy from suing IPSA in tort.²⁴¹

235. *Id.* at 1258–59.

236. *Id.* at 1254.

237. *Id.* at 1255. A worker becomes a "borrowed employee" of an entity when the latter asserts control of the "manner" of the worker's labor. *Suter v. Ill. Workers' Comp. Comm'n*, 998 N.E.2d 971, 975 (Ill. App. Ct. 2013).

238. *Marquez v. Martorina Family, LLC*, 55 N.E.3d 1252, 1258–59 (Ill. App. Ct. 2016).

239. *Id.* at 1258.

240. *Id.* at 1259.

241. See 820 ILL. COMP. STAT. 305/5(a) ("No common law . . . right to recover damages from the employer . . . while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act. . . ."). The court, notably, declined to follow a precedent, *Gray v. National Restoration Systems, Inc.*, 820 N.E.2d 943 (Ill. App. Ct. 2004) (neither the doctrine of judicial estoppel nor the doctrine of *res judicata* bars a plaintiff from asserting a civil action against a defendant who previously provided compensation pursuant to a settlement agreement).

IX. INSURANCE

Insurance coverage disputes in the workers' compensation realm are fairly rare, principally because the standard policy, in all states, provides that the policy will pay "the benefits required by law."²⁴² Further, if a dispute arises between an employer (the insured) and the carrier (the insurer), the injured worker is not to be prejudiced, and the contract dispute is typically entertained in civil court.²⁴³ Still, coverage disputes arise, as illustrated by two 2016 cases.

A. Procedure When Two Policies Are in Place

In a Massachusetts case, the state's Supreme Judicial Court, responding to a certified question from a federal court, adopted the "equitable contribution" doctrine and ruled that, "where two workers' compensation insurance policies issued by different companies provide coverage for the same loss, an employer, by electing to provide notice of the claim only to one insurer, does not foreclose that insurer from obtaining equitable contribution from the other insurer."²⁴⁴

There, an employee was injured while traveling abroad on a business trip. The employer, Progression, Inc., had previously purchased two workers' compensation policies from two different companies. The first, Insurance Company of the State of Pennsylvania (ISOP), provided compulsory coverage while the second, Great Northern Insurance Company, provided coverage to employees traveling outside the United States and Canada. Both were basic policies—neither qualified as an excess policy.²⁴⁵ While the employee provided timely notice to the employer, Progression gave notice only to ISOP, leaving Great Northern unaware of the claim. Accordingly, ISOP began making payments and defended the claim.²⁴⁶

Upon learning that Progression was also insured by a Great Northern policy, ISOP communicated with Great Northern, giving notice of the claim and requesting contribution. Great Northern subsequently declined the "attempted tender," replying that Progression had intended only to tender the claim to ISOP, and that ISOP was not authorized to "report or tender the claim to Great Northern."²⁴⁷

242. DAVID D. THAMANN & DIANA B. REITZ, WORKERS' COMPENSATION GUIDE: INTERPRETATION AND ANALYSIS 9 (2000).

243. ARTHUR LARSON, WORKERS' COMPENSATION § 152.01 at 151–2 (Desk Ed. 2000) ("[A]lthough the employer's misstatements affecting the risk do not relieve the insurer of its obligation to the employee, they may vitiate the contract as to the employer.").

244. *Ins. Co. of State of Pa. v. Great N. Ins. Co.*, 45 N.E.3d 1283 (Mass. 2016).

245. *Id.* at 1285.

246. *Id.*

247. *Id.*

Thereafter, ISOP filed a declaratory judgment action against Great Northern in federal district court, seeking judgment based on the doctrine of equitable contribution and demanding Great Northern pay one-half of the past and future defense costs and indemnity payments related to the claim. The district court, however, granted Great Northern's motion for summary judgment, ruling "that any obligation . . . does not arise until a claim . . . is tendered by the insured. . . ." ²⁴⁸

On appeal by ISOP, the First Circuit certified the question to the Massachusetts Supreme Judicial Court. That court advised the federal court that it was formally adopting the doctrine of equitable contribution. Under this doctrine, "where multiple insurers provide coverage for a loss of an insured, an insurer who pays more than its share of the costs . . . may require a proportionate contribution from the other coinsurers." ²⁴⁹ In requiring such contribution, the doctrine prevents the unfair result where a company that pays first is left responsible for the entire loss. Likewise, the doctrine guarantees that one insurer does not profit at the expense of another, ensures that an insured does not selectively report to one insurer over the other, and deprives an insurer of the incentive to avoid paying a claim in the hope a coindemnitor will pay. ²⁵⁰ A majority of jurisdictions have adopted the doctrine. ²⁵¹

Great Northern, while accepting "the wisdom of the equitable contribution doctrine," ²⁵² argued that it owed no duty to provide coverage because Progression purposely tendered the claim only to ISOP, thereby violating the terms of the policy wherein Progression was required to provide it with notice of the claim; if Great Northern had no duty, there could thus be no equitable contribution. ²⁵³ The court rejected this proposed "selective tender" exception, finding it to be recognized by only a minority of jurisdictions and at odds with the Massachusetts workers' compensation statute. The statute only requires employees to notify the insurer or insured (i.e., the employer) of an injury. ²⁵⁴

Given these considerations, the court reasoned that "Great Northern's obligation to defend and indemnify the claim was triggered by the notice

248. *Id.* at 1286. See *Ins. Co. of St. of Pa. v. Great N. Ins. Co.*, 43 F. Supp. 3d 76 (D. Mass. 2014).

249. *Ins. Co. of State of Pa. v. Great N. Ins. Co.*, 45 N.E.3d 1283, 1286 (Mass. 2016).

250. *Id.* (citing *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1308 (1998)).

251. *Id.* See S.M. SEAMAN & J.R. SCHULZE, ALLOCATION OF LOSSES IN COMPLEX INSURANCE COVERAGE CLAIMS § 5:2 (3d ed. 2014).

252. *Ins. Co. of State of Pa.*, 45 N.E.3d at 1287.

253. *Id.*

254. *Ins. Co. of State of Pa. v. Great N. Ins. Co.*, 45 N.E.3d 1283, 1288 (Mass. 2016). See MASS. GEN. LAWS ch. 152, § 41. This notification preserves the employee's right to benefits in the event his or her employer subsequently fails to provide notice to the insurer.

given to Progression by its injured employee, regardless of whether Progression gave notice of the injury to Great Northern.”²⁵⁵ Any such language to the contrary in Great Northern’s policy was deemed null and void with respect to a Massachusetts employee.²⁵⁶ As a public policy consideration, the court further noted that adoption of a selective tender doctrine would reward insurers that ignore their coverage obligations and encourage insureds to report only to particular insurance companies. The doctrine would thereby “prevent the conscientious insurer from seeking equitable contribution.”²⁵⁷

B. Coverage for Employer’s Principal in Assault Action by Co-Employee

The Court of Appeals of Wisconsin ruled that a workers’ compensation insurer had no duty to defend an employee of its insured who faced a civil action by a co-employee arising out of his alleged sexual groping in the workplace.²⁵⁸ There, Marvin Rydberg, an employee of Veterinary Medical Services (VMS), was accused of sexually groping the co-employee, Stacey Rhyner, while in the midst of their work. Rhyner filed suit against Rydberg, alleging battery and intentional infliction of emotional distress. Rhyner made no claims against VMS, and VMS was not a named party.²⁵⁹

Rydberg subsequently sought coverage for these claims by General Casualty, VMS’s workers’ compensation and employers liability carrier. General Casualty, for its part, filed a declaratory judgment action, arguing that it had no duty to defend or indemnify Rydberg in the event he was found liable. The circuit court agreed, granting the carrier summary judgment, and Rydberg appealed.²⁶⁰

The appeals court affirmed. On the issue of workers’ compensation coverage, it noted that battery by a co-employee was not precluded by the exclusive remedy of workers’ compensation.²⁶¹ Such allegations by Rhyner were brought under emotional distress and assault exceptions to the exclusive remedy. Further, Rhyner did not *seek* workers’ compensation benefits. Because General Casualty’s workers’ compensation policy provided coverage only to VMS for workers’ compensation claims, the court found that the policy necessarily did not extend to Rydberg in these circumstances.²⁶²

255. *Id.*

256. *Id.* at 1289.

257. *Id.*

258. *Rhyner v. Rydberg*, 2016 WL 2992244 (Wis. Ct. App. 2016).

259. *Id.* at *1.

260. *Id.*

261. *Id.* at *2.

262. *Id.*

Rydberg further argued that General Casualty owed a duty to defend under the employers' liability portion of the policy, which provided coverage for "'bodily injury by accident' arising out of and in the course of the injured employee's employment."²⁶³ The policy specifically enumerated the covered parties; namely, an employer as named in the policy and any members of the business partnership. Rydberg was neither an employer nor named insured under the policy. Therefore, the court determined that General Casualty owed no duty to defend Rydberg in the intentional tort claim. Because no duty existed, the court did not reach the questions of whether the alleged bodily injury was by accident or whether policy exclusions precluded coverage.²⁶⁴

X. PROCEEDINGS TO SECURE COMPENSATION

Most workers' compensation appeals deal not with the unusual legal issues explored above, but with matters touching on procedure. Two cases bear mention here. In the first, a Florida court deals with a nuance surrounding the remarkable procedure by which the judge is obliged to appoint an impartial expert physician in cases of medical disputes. A minority of states have adopted this type of reform.²⁶⁵ In the second, an employer alleged that the injured worker had not tendered effective "notice of injury" when the full character of her injury had not become manifest for many months after the original accident. The case is remarkable if only because this type of defense has been reliably unsuccessful among jurisdictions for decades.²⁶⁶

A. *EMA Opinion and Presumption of Correctness*

In Florida, questions regarding the appropriate utilization and boundaries of expert medical advisor (EMA) opinions continue to arise in the course of litigation. A Judge of Compensation Claims (JCC) is obliged to solicit an EMA's opinion in a disputed case when a disagreement exists in the medical opinions of at least two health care providers; such opinion, when received, is afforded a presumption of correctness.²⁶⁷

263. *Id.* at *3.

264. *Id.*

265. See MICHAEL C. DUFF, WORKERS' COMPENSATION LAW 263-79 (2013).

266. See, e.g., *Gen. Cable Corp. v. Levins*, 11 A.2d 61 (N.J. 1940) (employer had received notice of accident and fact that claimant determined only later that he had sustained detached retina did not bar claim on late notice grounds; notice requirement applied to accident, not ultimate diagnosis).

267. FLA. STAT. § 440.13(9)(c). For a discussion, see David W. Langham, *Will the Florida Legislature Change the EMA?*, FLA. WORKERS' COMP ADJUDICATION, Feb. 7, 2016 (blog posting), <http://florjcc.blogspot.com/2016/02/will-florida-legislature-change-ema.html> (last visited Nov. 6, 2016).

The Florida District Court of Appeal, ruling on an issue not previously addressed, held that *all* opinions rendered by an EMA are relevant and admissible, although the all-important presumption of correctness extends only to those opinions within the scope of the questions originally posed by the JCC.²⁶⁸ There, the claimant, after filing a petition for benefits, submitted a notice of conflict alleging that a disagreement existed between claimant's doctors over whether she required rotator cuff repair surgery. Finding that a conflict existed with regard to diagnosis, causal relationship, and recommended treatment, the JCC appointed an EMA.²⁶⁹

In a letter to the EMA, the JCC solicited opinions on two questions: (1) Was surgery medically necessary for the claimant's shoulder?; and (2) If surgery was medically necessary, was the work injury the major contributing cause of the need for surgery? On the same day these questions were submitted to the EMA, the parties stipulated that a cognizable employer affirmative defense was "[s]hould the JCC find for Claimant, then the [employer/carrier, or E/C] is entitled to apportionment due to Claimant's pre-existing condition."²⁷⁰ At the ensuing deposition, the EMA opined that claimant's malady was an aggravation of a pre-existing condition,²⁷¹ an opinion potentially *barring* the claim.

The claimant thereafter moved to strike the EMA's opinion on questions of apportionment. The JCC granted the motion, ruling that because the EMA was not directly asked about apportionment and because the issue only revealed itself during deposition rather than in the EMA report itself, he would not rely to any extent on any opinions rendered by the EMA regarding apportionment.²⁷² He then apparently ruled in the claimant's favor, allowing the shoulder surgery. The E/C appealed, arguing that the JCC erred in excluding relevant medical evidence.²⁷³

The appeals court agreed. Finding statutory authority ambiguous, the court looked to legislative intent, observing that the legislature sought to create a mechanism "by which an independent medical expert would offer assistance to the [JCC] when he or she is faced with conflicting medical evidence from the parties' experts."²⁷⁴ Other authority, meanwhile, provided that the JCC should admit all relevant evidence, that is, evidence which tends to prove or disprove a material fact. With these two thoughts in mind, the court held that all aspects of the EMA's opinion were *admis-*

268. *Lowe's v. Beekman*, 187 So. 3d 318 (Fla. Dist. Ct. App. 2016).

269. *Id.* at 319.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Lowe's v. Beekman*, 187 So. 3d 318, 319 (Fla. Dist. Ct. App. 2016).

274. *Id.* at 321 (citing *Broward Children's Ctr., Inc. v. Hall*, 859 So. 2d 623, 626 (Fla. Dist. Ct. App. 2003)).

sible. The court held that, when opinions of the EMA exceed the scope of the JCC's solicited opinion, they are deemed admissible, although lacking a *presumption of correctness*. Opinions that carry the presumption of correctness "are only those that address already identified disagreements in medical opinions; all other medical opinions expressed by the EMA carry the same weight as that of an independent medical examiner or an authorized treating physician."²⁷⁵ The court then remanded the case for the JCC to consider the EMA's opinion on the apportionment issue.

B. *Notice of Injury versus Notice of Accident*

As a general rule, employees must, as a condition precedent to a cognizable claim, provide their employers timely notice that a work accident has occurred. A New York case held that an employer need only obtain knowledge of the accident, and not necessarily knowledge of the specific *injury*, for notice effectively to have been provided.

In that case, the claimant slipped on a wet floor while performing her job duties.²⁷⁶ The claimant reported the fall and that she had sustained a left knee injury,²⁷⁷ and the employer acknowledged same.²⁷⁸ About a year later, she filed a claim for benefits, alleging injuries to her neck, knees, shoulders, as well as headache, from the accident.²⁷⁹ The employer refused to pay on account of these further maladies, taking the position that her claim included only the left knee injury.²⁸⁰ A judge thereafter denied the claim with respect to the additional injuries, holding that the employer had not been provided effective notice.²⁸¹ However, the Workers' Compensation Board disagreed. It found that the applicable notice provision did not preclude the claim for additional injury "sites."²⁸²

The employer appealed, arguing that in order for the notice provision to be excused, the employer needed not only knowledge of the *accident*, but also knowledge of the *injuries*.²⁸³ The appellate court, however, affirmed. It first noted that the notice section of the Act provided as follows: "[n]otice of an injury . . . for which compensation is payable . . . shall be given to the employer within thirty days after the *accident* causing the injury." The same provision also provides that late notice may be

275. *Id.* at 322.

276. *In Re Logan*, 32 N.Y.S.3d 342 (N.Y. App. Div. 2016).

277. *Id.* at 343–44.

278. *Id.*

279. *Id.*

280. *Id.*

281. *In Re Logan*, 32 N.Y.S.3d 342, 343–44 (N.Y. App. Div. 2016).

282. *Id.*

283. *Id.*

excused upon certain grounds, including “that the employer, or his or its agents . . . had knowledge of the *accident*.”²⁸⁴

The court explained that the term “accident,” which is the pivotal term of the provision, was not synonymous with the term “injury.” As dictionary definitions made clear, “the term accident pertains to an event that may cause an injury. . . .”²⁸⁵ Accordingly, the notice provision indicated that the legislature intended to excuse late notice when the employer, or its agent, had notice of the event alleged to have caused the injury.²⁸⁶ Here, the court indicated that claimant had satisfied this requirement with her initial report of the accident.

284. N.Y. WORKERS' COMP. § 18. (Emphasis added).

285. *In Re Logan*, 32 N.Y.S.3d at 345.

286. *Id.*

