INFECTIOUS DISEASES: COMPENSABILITY, COVID-19, AND RELATED ISSUES UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT

by David B. Torrey, WCJ*

I. Introduction

Infectious diseases are, as a matter of legal causation, compensable under the Pennsylvania Workers' Compensation Act.

They are compensable under our state's two tracks of recovery approach. The first track of recovery for infectious diseases is under the occupational disease provisions of the law. Section 301(c)(2),[1] of course, establishes that the term "injury" encompasses occupational diseases. One cross-references, meanwhile, Section 108 of the Act for the familiar list of those occupational diseases.[2] They are paired with occupations in which certain diseases have been shown – or are thought to be – special hazards. The worker who suffers from the disease who has labored in the associated occupation enjoys a rebuttable presumption of causation. The presumption is found in Section 301(e) of the Act.[3]

The second track of recovery for infectious diseases is under the injury section itself, that is, Section 301(c)(1).[4] Of course, as detailed below, the Supreme Court, in 1987, declared that "injury" means an adverse or hurtful change. This was so held in the landmark case *Pawlosky v. WCAB (Latrobe Brewing Co.)*.[5]

The Pennsylvania Occupational Disease Act (of 1939), though still on the books, is an obsolete law. Since 1972, occupational disease recovery is folded into the Workers' Compensation Act.

II. Claim as Cognizable under Two Theories of Recovery

Notably, while two tracks of recovery exist, no exclusive rule of pleading, or election, exists. Thus, a worker initially pursuing an infectious disease claim as an injury does not "elect

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[1] Section 301(c)(2) of the Act, 77 P.S. § 411(2).

[2] Section 108 of the Act, 77 P.S. § 27.1.

[3] Section 301(e) of the Act, 77 P.S. § 431.

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

[5] Pawlosky v. WCAB (Latrobe Brewing Co.), 525 A.2d 1204 (Pa. 1987).

out" of a potential recovery under the occupational disease provisions. Correspondingly, a worker initially pursuing an infectious disease claim as an occupational disease does not elect out of a potential recovery as an injury. In this regard, the Pennsylvania claimant is entitled to whatever relief the credible evidence shows.[6] The Commonwealth Court, indeed, dealing with a chemical exposure claim, stated, "the Referee found that the claimant suffered from both an injury pursuant to Section 301(c)(2) and an occupational disease pursuant to Section 108(c). The Board held that these findings are not inconsistent. We agree."[7]

While no election exists, it is submitted that the defendant is entitled to notice of precisely what relief the claimant is seeking, and the nature of the proofs being advanced to secure a recovery. Thus, injured worker counsel should highlight for the WCJ and the defense the theory of recovery. Such advice is particularly valuable for the WCJ, who is not a passive referee but, instead, a litigation manager. He or she must focus on efficient administration of the case, scrutinize the proofs as they are developed, and look towards a prompt resolution of the dispute.

III. Compensability of Infectious Diseases over the Decades; Infectious Diseases in the Wake of Trauma

The compensability of infectious diseases, particularly communicable diseases, is prominent in the news of late given COVID-19. However, from a historical point of view, some infectious diseases have always been held compensable, and with little controversy. One of the initial landmarks of Pennsylvania workers' compensation, indeed, involved a death from anthrax. There, the worker incurred a fatal laceration on his neck, caused by a "wool sticker." That case, *McCauley v. Imperial Woolen*,[8] is famous for the unfortunate worker's declaration to his son as to how he became injured – to wit, "I got stuck with a sticker."

In any event, both in the past and the present, the law has provided that infectious diseases that unfold in the wake of *traumatic* injuries are compensable. This was an especially important point in the early days of the law, of course, because the law required an "accident," that is, violence to the physical structure of the body.[9] The Supreme Court in *McCauley* remarked, "When … death results from germ infection, to bring a case of this character within the act of 1915 …, the disease in question must be a sudden development from some such abrupt violence to the physical structure of the body …, and not the mere result of gradual development from long-continued exposure to natural dangers incident to the employment of the deceased person, as in cases of occupational diseases, the risks of which are voluntarily assumed."

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[6] Children's Hospital v. WCAB (Washington), 547 A.2d 870 (Pa. Commw. 1988) ("if relief is justified by the evidence, then it may be granted under a section of the Act other than the one invoked by the Claimant….").

[7] Temple University v. WCAB (INA), 588 A.2d 603 (Pa. Commw. 1991).

[8] McCauley v. Imperial Woolen, 104 A. 617 (1918).

[9] The statute originally stated, "The terms 'injury' and 'personal injury' … shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom …."

In any event, the current statute provides, "the term 'injury' … shall be construed to mean an injury to an employe regardless of his previous physical condition…, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by disease the injury…." A leading example of this type of injury is found in a 1992 case.[10] There, a worker who sustained a traumatic injury, and who required multiple blood transfusions, became infected by HIV-tainted blood and died from AIDS. Notably, the defense *did not question* that, if true, claimant's disease and ultimate death could be considered work related and the responsibility of the employer. The issue in the case, in the end, was whether claimant's death more than 300 weeks from the date of injury was compensable. Ultimately, the court held that the claim was time-barred by that statute of repose.

IV. Section 108: Specifically-enumerated Infectious Diseases

With regard to the first track of infectious disease recovery, the law lists four specific infectious diseases.

Anthrax. The first is anthrax, incurred by those in occupations involving handling of, or exposure to, wool, hair, bristles, hides, or skins, or bodies of animals either alive or dead. Recovery for anthrax was first included in the now-displaced Occupational Disease Act in 1939, and was included in the 1972 list at Section 108(j).[11] Notably, anthrax in such occupations had long been considered a hazard. In the late nineteenth century, for example, in England, anthrax was "recorded as an occupational disease not just of woolsorters, but of butchers, slaughtermen, dock labourers, fellmongers, hair curlers, carpet makers, brush makers, keepers in zoos and tanners. Those who made charcoal from bones … suffered, as well as the gardeners who used fertilizer made from the powder left over from the bone-crusher…."[12]

Tuberculosis. Tuberculosis, meanwhile, was first recognized, in 1951, as a compensable communicable disease in the now-displaced Occupational Disease Act. It was an occupational disease among nurses and related occupations laboring in "hospitals and sanitoria." In the present day, tuberculosis, an occupational disease listed at Section 108(m),[13] is an occupational disease relative to workers categorized as "blood processors, fractionators, nursing, or auxiliary services involving exposure to such diseases." That tuberculosis was a scourge of society (perhaps like COVID-19 now), and of workplaces, is well known. The novelist Franz Kafka (who was also a European workers' compensation lawyer), perished at a young age from tuberculosis. Notably, early Pennsylvania decisions often recognized the compensability of tuberculosis when a worker would experience a trauma (that is, an accident), which had the effect of lighting up a theretofore dormant tuberculosis. The early treatise writer Skinner

[10] Shoemaker v. WCAB (Jenmar Corp.), 604 A.2d 1145 (Pa. Commw. 1992).

[11] 77 P.S. § 27.1(j).

[12] Hugh Pennington, *Woolsorters Disease*, LONDON REVIEW OF BOOKS, p.26 et seq. (Nov. 29, 2001). And, notably, Selim I, the renowned Ottoman sultan, is said to have died of an anthrax skin infection from his many years of riding horseback in his pursuit of more and more territory.

[13] Section 108(m) of the Act, 77 P.S. § 27.1(m).

collected these cases in a special section.[14] However. Pennsylvania courts would not, with the pre-1972 "accident" requirement, otherwise recognize tuberculosis as a compensable infectious disease outside the occupation of nurses and auxiliary workers laboring in "hospitals, and sanitoria."[15]

Hepatitis. The ailments of "serum hepatitis," infectious hepatitis (or hepatitis B), are compensable as occupational diseases under Section 108(m).[16] The paired occupations are "blood processors, fractionators, nursing, or auxiliary services" involving exposure to such diseases. Notably, under the Pennsylvania Act, the term "auxiliary services" has been liberally construed. The leading case in this regard is *BFI v. WCAB (Jones)*.[17] In that case, the court affirmed an award of benefits to a refuse worker who had been exposed to hepatitis B in the course of employment. The worker, indeed, was held to have had the benefit of the causation presumption; removal of waste material from blood processing facilities such as hospitals could constitute an "auxiliary service" of hospital workers.

Hepatitis C. Hepatitis C was added as a discrete occupational disease in 2001.[18] That malady is an occupational disease in the occupations of professional and volunteer firefighters, volunteer ambulance corps personnel, volunteer rescue and lifesaving squad personnel, emergency medical services personnel and paramedics, and Pennsylvania and certain other police officers. Other professions paired with hepatitis C are Commonwealth and county correctional employees, as well as "forensic security employees of the Department of Public Welfare, having duties involving care, custody and control of inmates involving exposure to" hepatitis C. Special requirements attend this listed disease in order for the worker to secure the presumption. These include the worker showing that at time of hire, he or she was negative for the condition.[19]

Omission of *HIV/AIDS.* Notably, HIV was never added to the Pennsylvania list in the years of crisis surrounding that disease. One scholar has shown that HIV was held compensable in several jurisdictions, despite a traditional prejudice against compensating communicable diseases. She also discusses the difficulty issue of proving work causation; and the thorny issue

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[14] Skinner states, "The law recognizes the possibility of tuberculosis resulting from bruises on the body…. Proof is not required that the infesting germ was implanted in the body at the time of the injury, but it must be made to appear with reasonable certainty that the resulting condition was brought about by the act complained of." One case Skinner cites is *Rudolph v. Shannopin Coal Co*., 142 Pa. Super. 389 (1940).

[15] A leading 1980 text on workers' compensation and diseases discusses infectious diseases at pages 102-05. *See* PETER S. BARTH & H. ALLAN HUNT, WORKERS' COMPENSATION AND WORK-RELATED DISEASES (M.I.T. Press 1980) The authors identify a New York case where the court awarded benefits to a TB victim who had incurred the disease through using the same telephone headset as her co-worker. *See Mason v. YMCA*, 68 N.Y.S.2d 510 (1947).

[16] Section 108(m) of the Act, 77 P.S. § 27.1(m).

[17] BFI v. WCAB (Jones), 617 A.2d 846 (Pa. Commw. 1992).

[18] Section 108(m.1) of the Act, 77 P.S. § 27.1(m.1).

[19] *See* TORREY-GREENBERG TREATISE, § 4:40 *et seq.* (Thomson Reuters 3rd ed. 2008 & Supp. 2021).

of whether infectious diseases should be covered by workers' compensation systems in the first place.[20]

V. Section 108(n): The Catch-all or Omnibus Provision

If an occupational disease, with paired occupation, is not specifically on the list, Section 108(n) of the Act may still facilitate a worker's potential occupational disease recovery. Section 108(n) is called the "omnibus" or "catch-all" provision. That section provides that an occupational disease can be "[a]ll other diseases (1) to which the claimant is exposed by reason of his employment, and (2) which are causally related to the industry or occupation, and (3) the incidence of which is substantially greater in that industry or occupation than in the general population."[21]

This section was added so that recovery might be afforded given advances in scientific and medical learning with regard to occupations especially at risk of incurring certain diseases.[22] For best results, it is submitted that injured worker counsel will want to develop epidemiological evidence of substantially greater incidence, and not merely rely on an expert's clinical judgment and/or experience.

VI. Presumption of Causation for Section 108 Claims

It is crucial to note that, consistent with the principle that a claimant is entitled to whatever relief the credible evidence shows, potential recovery under Section 108(n) does not exclude potential recovery of an occupational disease *as an injury*. This is an explicit holding of the *Pawlosky* landmark.[23] That decision also explains why recovery for disease as an occupational disease and as an injury is not somehow simply redundant. In this regard, as foreshadowed above, if a worker has a disease with which his occupation is paired, he enjoys a rebuttable presumption of causation.[24]

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[20] Nikita Williams, *HIV as an Occupational Disease: Expanding Traditional Workers' Compensation Coverage*, 59 VANDERBILT LAW REVIEW 937 (2006), https://scholarship.law.vanderbilt.edu/vlr/vol59/iss3/6/.

[21] Section 108(n) of the Act, 77 P.S. § 27.1(n). One researcher has collected cases discussing how these elements can be proven. *See* Pearce Law Firm (Phila.), *Are Infectious Diseases Covered Under Pennsylvania Workers' Comp Laws?* (Lawyers.com, April 5, 2021).

[22] According to the Commonwealth Court, "The intent of this subsection [section 108(n) catch-all] is to bring into the fold of coverage each new occupational disease as medical science verifies it and establishes it as such, without the need for special legislative recognition by addition to the scheduled diseases or otherwise." Fruehauf Corp., Indep. Metal Div. v. WCAB (Cornell), 376 A.2d 277 (Pa. Commw. 1977).

[23] Pawlosky v. WCAB (Latrobe Brewing Co.), 525 A.2d 1204 (Pa. 1987) ("It is appellant's [employer's] position … that Section 108 is intended to accomplish more than merely raising the presumption of entitlement. Appellant construes Section 108 as the exclusive means by which a claimant must prove entitlement for an insidious disease. For the reasons set forth below this exclusivity argument must be rejected….").

[24] *See id.*

That section, Section 301(e), provides, "if it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive."[25]

Because rebuttable, the presumption is arguably flimsy. In this regard, the presumption is merely a procedural device. Importantly, once the employer develops rebuttal, the presumption "disappears" and claimant once again has the burden of proof. This is the way presumptions in general operate under the Pennsylvania law, but the Commonwealth Court specifically identified such operation in the occupational disease context in *Bristol Borough v. WCAB (Burnett)*.[26] This type of presumption, which disappears upon submissions of rebuttal is, in academia, called a "Wigmore-Thayer" presumption.

Pennsylvania courts have not fully explored what type of rebuttal the employer must submit to make the presumption drop out. However, in the Section 108(r) cases (cancer in firefighters), the employer must present an unequivocal opinion of a physician that *some other cause* is responsible for the condition. This is the holding in the landmark case *Sladek v. WCAB (City of Philadelphia)*.[27] Notably, in a 2020 case construing *Sladek*, the Commonwealth Court ruled that the employer's expert *did not* submit a rebuttal opinion sufficient to make the presumption disappear. There, the employer's doctor opined that it was more likely that claimant's cancer arose from cigarette smoking. This opinion was held equivocal and insufficient to shift the burden.[28]

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[25] Section 301(e) of the Act, 77 P.S. § 431.

[26] Bristol Borough v. WCAB (Burnett), 206 A.3d 585 (Pa. Commw. 2019) ("As a general rule, a presumption is but an evidentiary advantage and its only effect is to shift the evidentiary burden of going forward to the opponent…. When evidence is introduced that rebuts the presumption, it disappears.").

[27] Sladek v. WCAB (City of Philadelphia), 195 A.3d 197 (Pa. 2018) (*Sladek II*). Here is how the Commonwealth Court, in an August 2021 decision, nicely summarizes the holding of the case. The Supreme Court held that, "while a claimant asserting an occupational disease under Section 108(r) must establish that his cancer is a type that may be caused by exposure to a known Group 1 carcinogen, he is not required to 'prove that the identified Group 1 carcinogen actually caused [the] claimant's cancer. …. To rebut the presumption that a claimant's cancer was caused by workplace exposure to a Group 1 carcinogen, the employer must demonstrate (1) the specific agent that caused the claimant's cancer, and (2) that exposure to that agent did not occur as a result of the claimant's employment as a firefighter. …. In other words, the employer must 'produce a medical opinion regarding the specific, non-firefighting related cause of [the] claimant's cancer.'" City of Philadelphia v. Estate of Thomas Burke (WCAB), No. 1215 C.D. 2020, filed July 30, 2021, 2021 WL 3234802 (unreported, Pa. Commw. 2021).

[28] Deloatch v. WCAB (City of Philadelphia), 224 A.3d 432 (Pa. Commw. 2020) ("Dr. Sandler's opinion also rejected the notion that Claimant's cancer was caused by exposures to carcinogens during firefighting, concluding, instead, that '[Claimant's] diagnosed lung cancer is most likely caused by his significant personal risk factors, the most important being his personal smoking history.' …. Dr. Sandler's opinion lacks the level of certainty required by law to establish a causal connection between Claimant's nonemployment-related risk factors and his cancer…. Consequently, Dr. Sandler's opinion is also insufficient to rebut the evidentiary presumption.").

It seems to be the rule that, in all cases where the claimant has the benefit of the presumption, the employer, to rebut the same, and make the presumption disappear, must unequivocally identify some other cause.

Claimants' attorneys, upon the employer's development of such rebuttal evidence, will want to affirmatively submit proofs. This is so as claimant will again have the burden of proof. This was the approach of claimant's counsel in an Allegheny County case, *Claim of David W.* There, a hospital employer, faced with a tuberculosis claim by a hospital worker, developed a medical opinion that claimant's infection was caused by a trip home to mainland China. This opinion was advanced even though claimant was negative for TB upon his return from China; the employer's expert testimony was that repeat "false negatives" had been reported on claimant's TB test. In any event, claimant's counsel, in the face of this type of rebuttal, obtained his own expert to testify as to causation. (Claimant ultimately prevailed in that case.)

VII. Infectious Diseases as "Injuries": *Pawlosky v. WCAB (Latrobe Brewing Co.)* (1987)

As noted at the outset, a second track of occupational disease recovery exists. This is commonly known as "disease-as-injury." Section 301(c)(1), as noted above, has been construed to mean "any adverse or hurtful change." This was so held in the landmark 1987 case, *Pawlosky v. WCAB (Latrobe Brewing Co.).*[29]

In the *Pawlosky* case, the court approved an award of benefits to a worker whose pre-existing asthma had been aggravated by chemicals at work. The employer had argued that claimant had failed to prove a disease under the Section 108(n) omnibus, and that he was necessarily barred, as a result, from any recovery. However, the court held that the only real question was medical causation, and that claimant had met that burden. In this regard, claimant's expert credibly testified that the work exposures had caused the aggravation, and that claimant had hence sustained a compensable "adverse or hurtful change."[30]

A. Histoplasmosis

The first post-*Pawlosky* case involving an infectious disease was issued just months later. In that 1987 case, the Supreme Court considered the case of a worker infected by the fungal agent (histoplasma) which causes histoplasmosis. The court, remanding the case to the fact-finder, held that histoplasmosis – affecting the claimant's eyes via fungus found in chicken droppings – could potentially be recoverable as a *Pawlosky* "disease-as-injury." This was the case *Landis v. WCAB (Hershey Equipment Corp.).*[31]

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[29] Pawlosky v. WCAB (Latrobe Brewing Co.), 525 A.2d 1204 (Pa. 1987).

[30] For a thorough retrospective on the *Pawlosky* case, see Justin D. Beck, *From the Glass Lined Tanks of Old Latrobe: 30 Years of Pawlosky*, in Pennsylvania Bar Association Workers' Compensation Law Section Newsletter, Vol. VII, No. 129 (Appendix) (March 2017), www.davetorrey.info.

[31] Landis v. WCAB (Hershey Equipment Corp.), 526 A.2d 778 (Pa. 1987).

B. Meningococcal septicemia

A year following *Pawlosky* and *Landis*, the Commonwealth Court (oddly, not citing those cases), again held that an infectious disease could be an "injury" under the Act. There, the court awarded benefits to a widow whose husband had died of meningococcal septicemia.[32] Her husband, an office worker for the City of New Castle, incurred that rare bacterial disease by kissing an infected, but non-symptomatic, carrier of the bacteria. The unfortunate worker had given the infected co-worker a seemingly harmless kiss at a company-sponsored maternity leave event. The court held that the disease was compensable in light of the law's liberal definition of injury.

The court did note, "it is obvious that we are dealing here with a very rare disease, communicable only under very rare circumstances. We do not reach the issue of whether ordinary infections, such as the common cold and other more common communicable diseases contracted from others in the workplace, or in the population at large, constitutes an injury under the Act."[33]

C. Haemophilus Influenza Meningitis

In one case, the Board, in 2007, affirmed a WCJ decision concluding that claimant, an ICU nurse, contracted bacterial meningitis from contact with a patient who was infected with haemophilus. (Haemophilus influenzae disease, according to the CDC, is an illness caused by the bacteria called H. influenzae. "In spite of the name," the CDC website notes, "H. influenzae do not cause influenza (the flu))." The Board concluded that the decision was supported by unequivocal medical testimony that a patient's blood, to which claimant was exposed, contained the bacteria in question.[34]

D. Tuberculosis

The Board, in a 2017 case, meanwhile, held that the claimant had shown a disease as injury in a tuberculosis case.

The court held that a doctor's testimony, including his understanding of claimant's job duties as a unit secretary on the "med-surge" unit, which included direct patient contact, was

[32] City of New Castle v. WCAB (Sallie), 546 A.2d 132 (Pa. Commw. 1988).

[33] *Id.* at 136.

[34] Kapfhammer v. Bon Secours Holy Family Institute, 2007 WL 2429982 (WCAB 2007). This case is identified in Pearce Law Firm (Phila.), *Are Infectious Diseases Covered Under Pennsylvania Workers' Comp Laws?* (Lawyers.com, April 5, 2021). Notably, in this case the WCJ "issued a protective order with respect to the patient's name."

sufficient to support his opinion as to how claimant was exposed to tuberculosis while performing her job duties.[35]

E. Lyme Disease

Lyme disease is another infectious disease which has been the subject of litigation under the Pennsylvania Act.[36] The Board, notably, has long recognized Lyme disease as compensable.[37] In a well-known Commonwealth Court case, the claimant was unsuccessful in proving causation in such a claim.[38] There, the claimant was a landscaper who developed Lyme disease. He maintained that he became ill from Lyme disease through his work duties, but the WCJ, Board, and court all denied his claim. In this regard, his physician was unable to establish a causal link. Claimant, to avoid this problem, argued that expert testimony was in fact not needed, as an obvious causal connection purportedly existed between the duties of a landscaper and contracting Lyme disease. The court, however, rejected this argument, holding that causation was not obvious.

Notably, the Department of Labor & Industry features on its website a public service video cautioning employers and employees about the dangers of the infected ticks responsible for the communicability of Lyme disease.[39]

F. MRSA

In a 2011 case, this writer (Torrey) denied a worker's claim of MRSA. (This ailment, Methicillin-resistant Staphylococcus aureus, a bacterial agent, is a cause of staph infection that is difficult to treat because of resistance to some antibiotics.) The claimant in that case was an Allegheny County prison guard. She maintained that she had contracted MRSA through exposure to an infected inmate. However, in the end, this writer denied the claim, as she did not persuasively establish through her lay or medical testimony that she had in fact experienced an injurious workplace exposure.[40]

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[35] Hirneisen v. Lancaster HMA Inc., 2017 WL 667646 (WCAB 2017). This case is identified in Pearce Law Firm (Phila.), *Are Infectious Diseases Covered Under Pennsylvania Workers' Comp Laws?* (Lawyers.com, April 5, 2021).

[36] *See generally* TORREY-GREENBERG TREATISE, § 4:47.80 ("Lyme Disease as compensable under the Pennsylvania Act").

[37] Dolan v. Pennsylvania Game Commission, 1993 WL 487873 (WCAB 1993). In this case, the claimant apparently supported his claim of contact with ticks from his job of picking up "road kill deer." This case is identified in Pearce Law Firm (Phila.), *Are Infectious Diseases Covered Under Pennsylvania Workers' Comp Laws?* (Lawyers.com, April 5, 2021).

[38] Lebron v. WCAB (Dominick Serrao General Landscaping), 718 A.2d 870 (Pa. Commw. 1998).

[39] *See* https://www.dli.pa.gov/Businesses/Compensation/WC/safety/paths/resources/Pages/Safety%20Meeting%20Webinars/Ticks-and-Lyme-Disease.aspx.

[40] Claim of T.F. v. County of Allegheny (County Jail) (WCJ Torrey, 12.11.2011).

G. Spider Bites

This writer (Torrey) has also entertained a case where the claimant maintained that she had become infected and seriously ill from a spider bite. In the 1994 case that he adjudicated, the employer's defense was that, if indeed claimant had been bitten by a Brown Recluse spider, as she claimed, her ailment was nonetheless not from such a bite. Employer's expert, instead, opined that claimant simply had non-work-related toxic shock syndrome.[41]

This type of infectious disease has been found compensable in several cases. Indeed, in a 2020 Virginia case, a college-dorm housekeeper succeeded in showing that her Brown Recluse spider bite was an "accidental injury," and she was awarded compensation for the same.[42]

H. COVID-19

Infectious disease compensation under workers' compensation has obviously become a critical issue in light of the COVID emergency. The prevailing view, certainly one advanced by this writer,[43] is that illness derived from COVID can constitute "a compensable injury under the Pennsylvania Act, falling within the category referred to by the Supreme Court … as 'disease as injury.'" This is so as an injury under the Pennsylvania Act is, as discussed above, any "adverse or hurtful change." With few exceptions, as also discussed, if medical causation exists as between a condition of work and a resulting pathology, an injury has been established. In short, COVID is compensable as matter of *legal causation*.

Of course, seeking to prove *medical causation* is another issue. In this regard, many physicians seem shy to assign work causation in disease cases. Too many opportunities for hazardous exposures exist for physicians, even sympathetic treating doctors, to want to vouch for causation in such cases. This seems to be the case in the realm of COVID.

At the time of this writing (August 2021), at least two workers' compensation judge decisions exist where claims of illness from work-related COVID exposure were considered.

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[41] According to the Mayo Clinic website, "toxic shock syndrome is a rare, life-threatening complication of certain types of bacterial infections. Often toxic shock syndrome results from toxins produced by Staphylococcus aureus (staph) bacteria, but the condition may also be caused by toxins produced by group A streptococcus (strep) bacteria…. Toxic shock syndrome can affect anyone, including men, children and postmenopausal women. Risk factors for toxic shock syndrome include skin wounds, surgery, and the use of tampons and other devices, such as menstrual cups, contraceptive sponges or diaphragms." *See* https://www.mayoclinic.org/diseases-conditions/toxic-shock-syndrome/symptoms-causes/syc-20355384.

[42] James Madison Univ. v. Housden, 2020 WL 1145103 (Va. Ct. App. 2020) (illness from Brown Recluse spider bite found compensable as an "accidental injury").

[43] TORREY-GREENBERG TREATISE, § 5:26 (Thomson Reuters 4th Edition 2021) ("COVID-19: A disease injury compensable under the Pennsylvania Act").

In the first case, the WCJ denied the claim of a nurse. There, notably, claimant did not present an expert on causation, and her claim failed. This case, from Philadelphia, was *J.T. v. Presbyterian Medical Center (*WCJ Kelley) (Feb. 3, 2021). In a second case, however, a widow prevailed. There, the deceased worker was a correctional officer in a county prison which had been overrun by COVID infections. The WCJ awarded the claim based both on an injury theory and as an occupational disease. Notably, claimant in this case *did* present an expert. This case is *D.V. v. County of Chester* (WCJ DiLorenzo) (March 8, 2021) (note: case now on appeal).

While the prevailing view is that COVID, as a matter of legal causation, can constitute an injury, this proposition is perhaps haunted by the 1988 declaration of Commonwealth Court that it had not reached the issue "of whether ordinary infections, such as the common cold and other more common communicable diseases" can constitute injuries. On the other hand, for 30 years, the concept of injury has been liberally construed, and illness from COVID does represent an "adverse or hurtful change." It is difficult to imagine the Supreme Court disavowing its injury definition to the detriment of COVID victims and/or their survivors.

VIII. Procedural Issues

Procedural issues exist in the occupational disease realm which are necessarily implicated in the analysis of infectious disease compensability.

A. Statute of Limitations

With regard to the original claim statute of limitations, Section 315 of the Act[44] has been interpreted so that, when a claim is pursued as an occupational disease, a broad discovery rule applies. Thus, the three years only commence their run once the claimant is disabled and has been advised by a physician of the disease and its work-related cause.[45] However, this broad discovery rule does not apply to disease claims when they are pursued as injuries under Section 301(c)(1) and *Pawlosky*. A case standing for this proposition is *Andres v. WCAB (USX Corp.)*.[46] There, the court held that the WCJ did not commit error in dismissing claimant's aggravation of multiple sclerosis claim, based upon his exceeding of the statute of limitations. (He had filed more than three years after last exposure.)

B. Notice of Injury

As to the discovery-rule governed 120-day notice of injury requirement, Section 311 of the Act[47] applies whether the claim is for an occupational disease listed in Section 108; or whether the claim is for a disease pursued as an injury.

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[44] Section 315 of the Act, 77 P.S. § 602.

[45] Price v. WCAB (Metallurgical Resources), 626 A.2d 114 (Pa. 1993).

[46] Andres v. WCAB (USX Corp.), 717 A.2d 593 (Pa. Commw. 1998).

[47] Section 311 of the Act, 77 P.S. § 631 ("[I]n cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, the time for giving notice shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the

C. Suspension of Award to Preserve Future Disability Claim

Often, a worker may become injured or diseased but not lose seven days from work. This is certainly a common phenomenon among office and other sedentary workers. For these workers, the running of the three-year statute of limitations can be a challenge. It may be possible, in a serious claim, for a worker to receive an award granted, and at once suspended, to facilitate medical treatment benefits and to toll the original-claim limitation of action. Though the case may have been limited by later precedent, authority for this relief may be found in the influential 1981 case, *U.S. Steel Corp. v. WCAB (Airgood)*.[48]

D. Risk of Injury

Under the liberal definition of injury, even the risk of injury may be potentially compensable. In one well-known case, for example, a claimant convinced the court that the employer was responsible for HIV testing and hepatitis B prophylactic treatments after he had been exposed, as a volunteer firefighter, to a motor vehicle accident victim who had been found to be HIV- and hepatitis B-infected.[49]

E. Injury via Inoculation

The COVID crisis has presented the issue of whether an injury incurred in the testing and vaccination process can potentially be an injury. Certainly, with the liberal definition of injury, an "adverse or hurtful effect," such incidents are compensable. This is certainly so if expert medical evidence (as always) shows causal relation.[50]

IX. Worker's Remedy if Infectious Disease is Barred as a Matter of Law

While most, if not all, work-related infectious diseases should be compensable under the Pennsylvania Act, a ruling to the contrary has implications with regard to worker rights and employer liability. A ruling that an infectious disease is not, as a matter of law, compensable

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existence of the injury and its possible relationship to his employment. The term 'injury' in this section means, in cases of occupational disease, disability resulting from occupational disease.").

[48] U.S. Steel Corp. v. WCAB (Airgood), 437 A.2d 92 (Pa. Commw. 1981).

[49] Jackson Tp. Volunteer Fire Co. v. WCAB (Wallet), 594 A.2d 826 (Pa. Commw. 1991).

[50] *Compare* Colagreco v. WCAB (Vanguard Group, Inc.), 232 A.3d 971 (Pa. Commw. 2020) (claim featuring a worker who received a flu shot at work and developed problems in her right arm; employer had treated such development as an injury arising in the course of her employment and issued an NCP, which document described the injury as "sub-acromial bursitis secondary to a needle stick.").

This issue is also discussed by Michael B. Sherman, *Is an Adverse Reaction to an Employer-Mandated COVID-19 Vaccine Compensable Under the PA Workers' Compensation Act?*, Chartwell Law Blog (January 14, 2021), https://www.chartwelllaw.com/resources/is-an-adverse-reaction-to-an-employer-mandated-covid-19-vaccine-compensable-under-the-pennsylvania-workers-compensation-act.

under the Act (even if medical causation exists), should give rise to plaintiff rights and defendant liabilities in tort law. Notably, in *Lord Corp. v. Pollard*,[51] the Supreme Court reversed a trial court's grant of summary judgment in favor of the employer in a case where the employee sued in negligence based on an alleged work-related disease. The court held that such suits are to be stayed pending a determination by the compensation authorities with regard to whether the disease in question is compensable under the Act.

X. Conclusion

Several items of practical advice certainly come to mind from an examination of the foregoing issues and cases.

First, demonstrating exposure can be a major challenge, especially in the healthcare setting. In one case discussed above, the claimant was able to establish her injurious exposure by identifying the infected patient; she apparently did so by convincing the WCJ to issue a protective order shielding the patient's identity from the public record.

Second, if a claimant develops threshold proofs demonstrating that he or she is entitled the presumption of causation, employer must remember that its own expert rebuttal proofs must unequivocally establish some other cause for the disease. Speculation, outright rejection of the presumption, and the opinion that no physician can competently render opinions as to causation, will not, as a matter of law, be sufficient.

Third, if the employer does submit such sufficient rebuttal, claimant must remember that he or she once again has the burden of proof by the preponderance of the evidence to prove causation – just as in any other case.

Fourth, while Section 108(n) constitutes a beneficial catch-all under which a disease claim may be prosecuted, it is likely that prosecuting the infectious disease case as an injury is more practical. This is certainly so if epidemiological evidence of substantially greater incidence is not available.

Finally, it seems likely that the vast majority of infectious disease claims implicate pathologies that have no obvious causal connection to work. Infectious disease claims must, in virtually cases, be supported by unequivocal expert medical testimony. As demonstrated above, claimant attempts arguing for obvious connection have met with defeats.

In the trenches of litigation, the pivotal role of expert testimony cannot be overstated. Thus, even if claimant, during the litigation, seems to be enjoying the presumption of causation, injured worker counsel is still advised to present an expert with regard to causation.

[51] Lord Corp. v. Pollard, 695 A.2d 767 (Pa. 1997).