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COZEN O'CONNOR

PA Supreme Court Allows Certain Mesothelioma Claimants to Sue Their Employer

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The Pennsylvania Supreme Court recently issued a ground-breaking decision that could potentially expose employers to a wave of new lawsuits by former employees suffering from mesothelioma. In its November 22, 2013 opinion in the case *Tooey v. AK Steel Corp.*, the court ruled that the Commonwealth's Workers' Compensation Act (the WCA) does not apply to claims based on occupational disease that otherwise would fall within the law's ambit but does not manifest until after 300 weeks following the termination of a worker's employment. Significantly, because the WCA does not apply to these claims, workers who develop mesothelioma can now sue their former employers in tort, unlike other workers whose claims fall under the Act and who can only proceed against their employers for worker's compensation benefits.

The Supreme Court Decides the WCA Does Not Apply to Illnesses Manifesting More Than 300 Weeks After a Worker's Employment Ends.

The facts of the *Tooey* case were simple. John Tooey worked as an industrial salesman of asbestos products from 1964 until 1982, during which time he was exposed to asbestos dust. In December 2007, he developed mesothelioma and died less than one year later. Other plaintiffs whose appeals were consolidated with Tooey's faced similar fact patterns. The plaintiffs, through their heirs, filed tort actions against the former employers. The employer-defendants contended that workers' compensation was the plaintiffs' exclusive remedy, but that, under the WCA, workers' compensation benefits were not available because the illness manifested more than 300 weeks after the last date of employment.

The Supreme Court's analysis turned in large part on the grammatical construction of the 300-week rule, codified in Section 3(c)(2) of the WCA. The court ultimately agreed with the plaintiffs, who argued that the 300-week rule as written indicated the legislature's desire to exempt from the entire WCA claims arising from illnesses that manifest 300 weeks after employment. As such, the court rejected the argument made by the defendants, who suggested that the WCA applied, including the exclusive remedy provision, but provided no compensation to such injured workers.

Apart from interpreting the specific language of the Act, the court also observed, perhaps more importantly, that the entire point of the WCA was to provide a remedy to injured workers, a remedy that would be denied if the defendants' interpretation were accepted. Justice Saylor, writing for himself only, dissented, agreeing with the construction offered by the defendants and asserting that the exclusivity provisions of the WCA applied to such claims even if compensation is not available. He wrote that plaintiffs' constitutional arguments — including that the WCA violates their right to just compensation under the Pennsylvania constitution and due process rights under state and federal law — should thus be considered.

Several Important Questions in the Wake of *Tooey*

Tooey creates a rare exception in the worker's compensation law, but several questions remain unanswered. Will this ruling be applied retroactively and will the decision result in new lawsuits based upon mesothelioma claims that were resolved long ago? With the addition of the employers as defendants in certain mesothelioma cases, how will established plaintiff and defendant litigation strategies change? Given standard language in many comprehensive general liability insurance policies, will employer defendants be required to respond directly to such claims?

Conclusion

Prudent employers, whose workers were exposed to asbestos, may want to evaluate the potential

impact of this decision.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply in your particular circumstances, please contact Dexter R. Hamilton **at 215.665.2166 or** dhamilton@cozen.com**.**