IADC COMMITTEE NEWSLETTER

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

In this issue, Diane Fleming Averell and Pamela R. Kaplan of Porzio, Bromberg and Newman, P.C. address the nationwide impact since the Pennsylvania Supreme Court found, in its 2013 Tooey decision, that where latent asbestos-related diseases manifest more than 300 weeks after the employment end date, employees are not subject to workers' compensation exclusivity and are free to sue their employers directly in tort.

Tooey's Trail of Trepidation: The Impact of the *Tooey* Decision on Asbestos-Related Claims against Employers

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Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases.

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It was a decision that would shake up asbestos litigation everywhere – or so it seemed. Following the Pennsylvania Supreme Court's decision in *Tooey v. AK Steel Corp*., 623 Pa. 60 (2013), legal pundits predicted trouble for employers in asbestos cases. No longer would the Workers' Compensation bar protect them from claims by former employees with latent asbestos-related diseases. Rather, where the disease did not manifest until over 300 weeks after the employment end date, plaintiffs were free to sue their employers directly. Was this the beginning of a trend that would sweep the nation, some publications pondered? Would plaintiffs' attorneys try to extend this ruling beyond asbestos claims to other long-latency diseases? Was *Tooey* in fact "Not Just a Bunch of 'Hooey'"?[1]

The *Tooey* Case Revisited

The Pennsylvania Workers' Compensation Act mandates that, "whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply only to disability or death resulting from such disease and occurring ***within three hundred weeks after the last date of employment*** in an occupation or industry to which he was exposed to hazards of such disease. *See* 77 P.S. 411(2) (emphasis added). Further, "[t]he liability of an employer under this act shall be ***exclusive*** and in place of any and all other liability to such employees…" 77 P.S. 481 (emphasis added).

In *Tooey*, the Pennsylvania Supreme Court considered whether an occupational disease that manifests ***after*** the 300-week period prescribed by the Act is subject to its exclusivity provision. In other words, where a disease is not diagnosed until after this 300-week period, and is thus not compensable under the Act, may that employee bring a common law claim against the employer for damages?

Plaintiffs John Tooey and Spurgeon Landis each brought direct tort actions against their respective employers for their alleged occupational exposure to asbestos and resulting mesothelioma, which were diagnosed years after the expiration of the 300-week threshold. Their employers moved for summary judgment on the basis of the exclusivity provisions of Pennsylvania's Workers' Compensation Act *and* Occupational Disease Act. The trial court denied the motions, finding that a tort action was permissible "where, as here, a disease falls outside the jurisdiction, scope, and coverage of the Act." *Tooey*, at 68.

On the employers' interlocutory appeals, Pennsylvania's intermediate appellate court reversed the trial courts and, standing upon

[1] Christopher N. Santoro, Esq. and Christine P. Dower, Esq., "Tooey Is Not Just a Bunch of 'Hooey' – Practical Tactics for Defending an Employer in the Realm of Toxic Tort Litigation," Marshall Dennehey Warner Coleman & Goggin (Sept. 1, 2014), available at http://www.marshalldennehey.com/defense-digest-articles/tooey-not-just-bunch-%E2%80%9Chooey%E2%80%9D%E2%80%94-practical-tactics-defending-employer-realm.

principles of *stare decisis*, found that the exclusivity provision bars even those cases where a plaintiff's disease is diagnosed beyond the 300-week period and, thus, not compensable under the Act. *See Ranalli v. Rohm & Haas Co.*, 983 A.2d 732 (Pa.Super.2009) and *Sedlacek v. A.O. Smith Corp.*, 990 A.2d 801 (Pa.Super.2010). The Pennsylvania Supreme Court disagreed.

In its lengthy analysis of the language and intent of the Pennsylvania Workers' Compensation Act, the Pennsylvania Supreme Court held that the exclusivity provision does not preclude a plaintiff's common law claims against his employer where the alleged occupational injury manifests more than 300 weeks after the last occupational exposure and thus where no remedy is available under the Act. *Tooey*, at 81-82. The *Tooey* Court found that the strict application of the exclusivity provision in such cases where an employee would have "no opportunity to seek redress under the Act" and "no remedy against his or her employer" is "a consequence that clearly contravenes the Act's intended purpose of benefiting the injured worker." *Id.* at 81. The Court blithely dismissed the dissent's concern that the real impact of this decision would be to expose employers to potentially unlimited liability for occupational diseases, and emphasized that the Act is "intended to benefit the worker, and, therefore, the Act must be liberally construed to effectuate its humanitarian objectives." *Id.* at 82.

Post-*Tooey* Decisions Around the Country

The *Tooey* decision initially incited panic among employers across the U.S. Many feared that other states would follow *Tooey* and employers would be crushed by a tsunami of direct common law claims brought by employees with any and all types of alleged occupational injuries arguably diagnosed long after the expiration of the coverage periods prescribed by the individual states' workers' compensation systems. Two years later, it appears that the nationwide panic may have been all for naught. Indeed, the *Tooey* decision has gained little traction outside of Pennsylvania since it was rendered.

The Illinois State Supreme Court recently tackled the *Tooey* issues in *Folta v. Ferro Engineering,* 2015 IL 118070 (Ill. Sup. Ct. Nov. 4, 2015), and considered whether the exclusivity provision applies where a long latency period renders compensation impossible under statutorily dictated time limits on employer liability. Like *Tooey*, Plaintiff James Folta was diagnosed with mesothelioma many years after ending his employment with Ferro Engineering and outside the window for recovery under the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.*, and the Workers' Occupational Disease Act, 820 ILCS 310/1 *et seq*. *See Folta* at ¶3.

Plaintiff relied on the *Tooey* decision, and also claimed that the exclusivity provision of the Act operates to deprive employees of equal protection under the law because

those suffering from diseases with short latency periods have access to recovery, whereas those with long latency periods do not. *Id.* at ¶46. The Illinois Supreme Court disagreed, and found that the statutory scheme was designed to treat all claimants equally and with no categorical limits on long-latency diseases. The Court further found that the determination of benefits is based on an assessment of the specific facts and circumstances of an employee against the legal scheme set forth in the Workers' Compensation Act. *Id.* at ¶40. The Court also reasoned that application of the exclusivity provision did not, in fact, leave this Plaintiff without a remedy because he could seek recovery from third parties allegedly responsible for this disease. This line of reasoning diverged from *Tooey*, because while the Pennsylvania Supreme Court acknowledged that the employers had argued that "such individuals still may seek compensation from nonemployer defendants," it did not explore the availability of this remedy in its decision. *Tooey* at 78. This was surprising given that the defendants named in *Tooey* included several product manufacturers and premises owners. The *Folta* court, by contrast, addressed this issue head-on:

> The acts do not prevent an employee from seeking a remedy against other third parties for an injury or disease. Rather, in this case, the acts restrict the class of potential defendants from whom Folta could seek a remedy, limiting Folta's recourse for wrongful death claims to third parties other than the employer. ***In this case, Folta named 14 defendant manufacturers of asbestos related products. Folta was not left without any remedy.***

Folta at ¶50 (emphasis added). While *Tooey* focused solely on the inability for plaintiffs to recover ***from the employer***, *Folta* took a broader view and focused on other third parties from whom plaintiffs could recover even if compensation could not be recovered from the employer. Thus, the Illinois Supreme Court held that plaintiffs were precluded from bringing a direct claim in tort against the employer even where the employee's claims under the Illinois Workers' Compensation Act were deemed time-barred. *Id.*

Other courts, while not addressing the long-latency issue specifically, have indicated that they will continue to apply the exclusivity provision to bar cases involving long-latency diagnoses of asbestos-related diseases. For example, a recent decision in Wisconsin barred a claim against an employer under the exclusive remedy provision of the Wisconsin Workers' Compensation Act where Plaintiffs claimed that their exposures occurred in locations at a plant where no "work-related" activities were conducted. In *Boyer v. Weyerhauser Company*, 39 F.Supp.3d 1036 (W.D.Wisc. 2014), an employee alleged exposure to asbestos while working at a door manufacturing plant. The Complaint was drafted so as to circumvent the exclusivity provision and alleged that at least a portion of the exposure occurred in areas of Plaintiff's

home or car where asbestos fibers had migrated, or areas of the plant where no work-related activities occurred. *Id.* at 1039. The Court refused to accept this argument and instead found that the employee was limited to the remedies outlined in the Workers' Compensation Act. *Id.* at 1043-44.[2]

Similarly, in *Melendrez v. Ameron International Corporation*, 240 Cal.App.4th 632 (Cal. Ct. App. 2015), the 2nd Appellate District in California refused to allow Plaintiff to overcome the exclusivity provision simply because during his employment with a pipe manufacturer, he was permitted to take home scraps of insulated pipe for personal use. Plaintiff alleged that because that exposure occurred in his home, he should be permitted to seek relief directly from his employer through common law tort claims, separate and apart from the compensation scheme outlined in the California Workers' Compensation Act. The court disagreed and found that it was "undisputed that a substantial contributing cause of Melendrez's disease was his exposure to asbestos from the manufacture of….pipe in the course of and arising out of his employment…" *Id.* at 641. Therefore, even though the Plaintiff might have been exposed to asbestos from working with scrap pipe at home, that exposure did not constitute a "separate injury outside workers' compensation coverage that is compensable in tort law." *Id.* Accordingly, the court held that the state Workers' Compensation Act thus prohibited a separate tort claim.

Future Implications of *Tooey*?

It remains to be seen whether other states will adopt Pennsylvania's approach to Workers' Compensation Act exclusivity, but thus far, *Tooey's* holding does not appear to be stretching beyond its own state boundaries. However, within Pennsylvania, the significant consequences of this decision have begun to wreak havoc on employers in asbestos litigation. In November of 2015, in *Busbey v. Yarway Corp*., No. 120503046, Pa. Comm. Pls., Philadelphia Co., a Pennsylvania court rendered its first *Tooey* verdict against an employer. Plaintiff Doris Busbey was awarded a $1.7 million jury verdict against her deceased husband's employer in connection with his mesothelioma diagnosis that occurred ***after*** the expiration of the 300-week window prescribed by the Pennsylvania Workers' Compensation Act.

The decedent had worked at ESAB Group Inc. as a laborer for 39 years, where his primary exposure allegedly came from using a golf-cart-size sweeper to clean the plant's approximately 300,000 square feet.[3]

[2] It is noteworthy, however, that on reconsideration, this Court ***did*** permit a distinct nuisance claim against the employer for asbestos exposure based on the "release of asbestos fibers into the community via ambient air, in landfills, etc." *Id.* at 1049. The Court made sure to note, however, that it is "highly skeptical that plaintiffs will ultimately be able to untangle their multiple exposures to asbestos on the job from community exposures in a manner that would permit a reasonable jury to award separate damages for community exposure." *Id.*

[3] *See* "Laborer Asserted Company Knew of Asbestos Exposure," Verdict Search, available at

Plaintiff claimed that the machine kicked up debris which exposed the decedent to airborne-asbestos particles. Prior to the decedent's passing, he and his wife sued his former employer on a tort-based claim of negligence, and also sued numerous product manufacturers on a product liability theory.[4] *Id.* As to the decedent's employer, Plaintiff's proofs focused on ESAB's alleged failure to protect its employees from dangers associated with asbestos-containing products allegedly present at the plant for decades. Plaintiff also presented evidence that the decedent had worked with and around those asbestos-containing products during his 39-year career at the plant. *Id.* In response, ESAB reportedly attempted to demonstrate that the decedent should be allocated some portion of comparative fault for failing to wear a mask. *Id.* ESAB also maintained that Defendant Midland-Ross should be held strictly liable as the manufacturer of the ovens that allegedly originated whatever asbestos dust may have been present at the plant. *Id.* Plaintiff countered with evidence suggesting that it was ESAB's duty to maintain and repair these ovens to prevent such dust in the plant. *Id.*

The jury found ESAB 100% liable, allocating no liability to either John or Midland-Ross, and awarding $1.7 million dollars to Doris Busbey based on her Wrongful Death and Loss of Consortium claims, and her deceased husband's Wrongful Death and Survival claims. *Id.*

Employers with operations in Pennsylvania now fear that the *Busbey* verdict will invite a never-ending stream of common-law tort claims against employers for long-latency diseases that would otherwise have been barred under the Pennsylvania Workers' Compensation Act. And while this fear is, in many respects, warranted, practitioners should take note that the facts of *Busbey* highlight a critical difference between traditional lawsuits against product manufacturers in strict liability and this new wave of employer-focused lawsuits. As the *Tooey* Court observed, common law claims against employers sound in ***negligence***, and thus, not only will defendants "retain all of their common law defenses," such as comparative negligence, but plaintiffs will also be required to "bear the higher burden of proof in terms of causation and liability." *Tooey* at 82. While the *Busbey* jury did not allocate comparative negligence to the decedent, defense counsel for employers must be vigilant about holding plaintiffs to their burden of proving their *prima facie* case while building a record that demonstrates the employee's comparative negligence. Guided accordingly, defense practitioners might turn the tide in Pennsylvania and start to create a less hospitable forum for *Tooey*-minded plaintiffs.

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http://verdictsearch.com/verdict/laborer-asserted-company-knew-of-asbestos-exposure/.

[4] With the exception of one product manufacturer that was nonsuited at trial, all of the other product manufacturers resolved their claims prior to trial.

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