

The Interplay Between Workers
Compensation and Asbestos
The post *Tooley* and *Folta* world



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Tooey v. AK Steel/Landis v. A.W.

Chesterton Co., 81 A.3d 851 (Pa.2013)

- Employees with long latency diseases arising from workplace exposure are now able to bring an action against their employers in tort.
- The exclusive remedy of workers compensation has been pierced by the *Tooey/Landis* cases.
 - Pennsylvania Workers Compensation Act was enacted in 1915 and covered only “injuries”.
 - Occupational Disease Act was enacted in 1939 to compensate employees for diseases which resulted from the employees’ employment (including asbestosis and silicosis).
 - The PA Workers Compensation Act was amended in 1972 to include Occupational Diseases, including asbestosis and silicosis.
 - Both Acts are still law.

Statute of Repose

- Section 301(a) of the Workers Compensation Act, 77 P.S. §411
- “injury. . . shall include . . . occupational disease as defined in Section 108 of this act: Provided, 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 300 weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease. . .”

The cases – *Tooey and Landis*

- 2008 personal injury cases arising out of mesothelioma diagnoses. They brought suit against their employers, despite the exclusive remedy of the Pennsylvania Workers Compensation Act.
- Both alleged asbestos exposure until they retired in 1992. Both were diagnosed with mesothelioma in 2007. Under the statute of repose, an “Injury” would have to manifest within 300 weeks of retirement, or around 1998.
- Both went through the trial court, intermediate appellate court and then to the Pennsylvania Supreme Court.

The Court's Decision

- The Supreme Court held:
 - **“Claims for occupational disease which manifests outside of the 300 week period prescribed by the Act do not fall within the purview of the Act, and, therefore. . .the exclusivity provision. . . does not apply to preclude an employee from filing a common law claim against an employer.”**
- The Court reasoned that the Act “only applies to disability or death resulting from such disease and occurring within three hundred weeks after the last day of employment . . .”

The Court's Decision

- Court recognized that given the average latency period of 30-50 years, “the 300 weeks time window operates as a de facto exclusion of coverage for mesothelioma claims.”
- The Court determined that an employer should not be allowed to escape liability for both workers compensation and liability given the fact that mesothelioma is most certainly a result of asbestos exposure.

What Now?

- Cases are being filed against employers who traditionally provided documentation of asbestos exposure for employees and contractors, and who traditionally were only sued for premises liability by third party.
- Railroad employers have been dealing with this issue under FELA.

What Now?

- Groups of employers are being formed to lobby the legislature to change the law in PA to bring mesothelioma back within workers compensation.

What Now?

- There are issues as to insurance coverage.

Implications:

CGL v. Employer Liability Coverage

- CGL has an exclusion for “bodily injury to an employee arising out of an in the course and scope of employment”
- Employer liability (part B)(part two) is now being invoked for claims arising out of asbestos.
- Limitations on time frame for employer liability coverage
- Occurrence based – last date of exposure?
- Employers are going back years looking for the employer liability policies in effect during the employees career.
- Some employers end up without coverage for the asbestos liability claims of their employees.

Implications:

Document Destruction Policies

- Medical files
 - Workers Compensation Files
 - Personnel Files
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- Smaller Employers such as construction companies have been affected, bring dragged into an area of litigation where traditionally they were not involved.

What Now?

- Summary judgment/judgment on the pleadings have been filed.
- No decisions have been made by the courts as of this writing.

Defenses

- Most obvious defense is to keep the case within the workers compensation law.
- Screening programs paid for by the employer
- Workers Compensation claims for asbestosis in the past
- Two disease rule is NOT the rule under workers compensation
 - ***Sporio v. WCAB (Songer Construction)***, 553 Pa. 44, 717 A.2d 525 (Pa.1998) Supreme Court held for purposes of workers compensation, asbestosis and cancer are the same injury.
 - “While asbestosis does not medically progress to cancer, the legislature’s coupling of these two diseases together as an occupational disease supports a contemplation that both diseases would occur in workers exposed to asbestos and they should be treated as one occupational disease for purposes of workers compensation benefits.”

Defenses

- **Occupational Disease Act (ODA):** the “discovery rule” is applicable to the ODA, therefore, later latency cases can be filed within the 3 year statute from date of discovery.
 - Construed more liberally and there may not be any statute under the ODA
 - 300 week statute of repose doesn't apply
 - 4 year statute of repose was removed
 - Two Defendants asserted this argument in two separate actions in different courts, one was denied by the trial court, the other was granted, but the motion was unopposed.

Changing the Law

- Any state with a limitation or exclusion to the right to bring a workers compensation claim for an occupational disease may see similar arguments.
- **Montana:**
 - Prior to 1989, statute required comp claim to be filed within 3 years of last day of work
 - *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 717 P.2d 21 (Mont. 1986), allowed tort claim against employer when no comp claim due to statute.
 - 1989 amendment allows claim for “occupational disease” to be filed within 1 year from date Claimant knew or should have known.

Changing the Law

- **Missouri:**
- 2005 Workers Compensation Amendments required strict construction.
- Consequences were that all occupational diseases were excluded.
- 2013 legislation provided increased benefits for claimants:
 - New category of “occupational disease due to toxic exposure”
 - Mesothelioma receives triple benefits – permanency
 - Employer can purchase separate coverage for mesothelioma liability

Changing the Law

Pennsylvania

- We are looking at changing the workers compensation law to include a discovery rule that a workers compensation claim can be brought within three years of discovery, bringing it in line with the injury provisions of the Act.
- Pennsylvania is not a permanency state and is only a wage loss state. Therefore, most likely, Plaintiffs would only be covered for medical expenses if they have retired.

Conclusion

- ***Tooney/Landis*** gives employees the right to bring suit for damages resulting from mesothelioma.
- There have been more and more suits being filed, but not the tsunami of cases some were predicting.
- There have been insurance coverage issues.
- Employers are looking to amend the Workers Compensation Act.
- It remains to be seen whether this will expand to any case where the statute of limitations has run.
- Employers and defense attorneys are fighting back.
- No cases have been decided yet.
- Employers need to look at document destruction policies.