Comments for the House Labor and Industry Committee's Hearing on HB 1234

Kristopher A. Kachline, Esq.

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On November 13, 2013, the Supreme Court of Pennsylvania overturned 98 years of jurisprudence and understanding about how work-related injuries are to be dealt with in Pennsylvania. In a landmark ruling, the Court held that the exclusive remedy provision of the Pennsylvania Workers' Compensation Act, found at Section 303(a), 77 P.S. §481, applies only to injuries that fit into the workers' compensation adjudication system. In other words, if a claim is barred by the Workers' Compensation Act, the injured worker is not precluded by the aforementioned exclusive remedy provision from suing her or his employer in another venue.

In 1915, the Commonwealth of Pennsylvania enacted legislation creating the Bureau of Workmens' (now Workers') Compensation. Behind only New York state, Pennsylvania was a leader in industrialization. But, employees were not fairly treated when they were injured on the job. Common law remedies were confounded by employer liability statutes, both of which relied on three main defensed to claims made by employees: 1) the fellow servant rule, under which an employer could not be responsible for negligence of another employee; 2) the employee's own contributory negligence; and 3) the employee's assumption of the risk. These defenses made it nearly impossible for an employee to recover for a work-related injury or disease. The Workers' Compensation Act changed the landscape by removing the element of responsibility for the accident or disease, but at the same time limited the scope of benefits and, most importantly, made the Workers' Compensation Act the exclusive remedy for workplace injuries or work-related diseases.[1]

The exclusivity of the workers' compensation system as the place to adjudicate workplace injuries was a trade-off. Employees received reliable compensation for injuries, regardless of responsibility, from a system that made adjudication of claims simple. Employers were provided predictability with respect

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[1] This author acknowledged that diseases were not included in the definition of "injury" until 1938 and the passage of the Pennsylvania Occupational Disease Act. The Workers' Compensation Act did not include occupational diseases as injuries until 1972. The Occupational Disease Act was never repealed, but it was superseded by the including of occupational diseases into the Workers' Compensation Act.

to the type and extent of benefits it must pay for workplace injuries and were assured that suit would not be filed in another venue. This trade-off, which lasted 98 years, is referred to as the Grand Bargain. Many challenges to the exclusive remedy provision of the Act have been made in those 98 years, though unsuccessfully. Over and over, Pennsylvania Courts had ruled that the exclusive remedy provision was not only unambiguous, but was a reasonable, bargained-for trade-off that benefited employers and employees alike.

The Court's opinion in Tooey v. AK Steel was circulated on November 10, 2013. By late November, employers were being sued in Courts of Common Pleas for diseases arising out of the workplace where the last exposure to the substance that caused the disease may have occurred decades earlier. Since 2013, certainly hundreds, if not thousands, of cases have been filed in which an employer is named as a defendant in cases focused on diseases that arose out of the workplace. No employers are immune. Often these cases are brought by out of state plaintiff firms already engaged in asbestos manufacturer litigation. Manufacturers, transportation companies, school districts, fire departments, and municipalities, among many other industries have been impacted and those impacts are growing at an exponential rate, threatening bankruptcy for private employers and property tax increases by public employers. Insurers that issued policies in the 1960's are being put on notice. Employers with no insurance that might cover this liability are reaching into their general funds to pay sums in cases that, before 2013, never existed. A verdict in such a case can reach multiple millions of dollars.

Employers and insurers alike have felt the impact. The liability for "Tooey cases" is passed to insurers, but only if the employer carried employer's liability insurance in the year the employee was last exposed to the condition that caused the disease. Typically, policy limits for employer's liability claims were typically set at $100,000.00 per claim, which would cover only a fraction of a typical Tooey settlement, let alone a jury verdict. Most employers also carried an umbrella policy that would cover above and beyond the employer's liability policy. Some of these employer's liability policies have 36-month claim period, which requires a claim to be made within 36 months after the last date of exposure. Other insurers that issued excess or umbrella policies also defend and pay in these cases.

In many cases, employers are left to defend and pay for these cases on their own. According to Mealey's Litigation Report, the national average mesothelioma award is $2.4 million. In the first post-Tooey verdict in Pennsylvania, Busbey v. ESAB Group, a Philadelphia County jury brought back a verdict solely against a Pennsylvania employer for $1.7 million in 2015.

Settlements are more difficult to estimate due to privacy issues. But, it is reasonable to estimate that settlements paid directly by employers in "Tooey cases" reaches into the high tens of millions, if not hundreds of millions of dollars, since 2013. The true immeasurable impact comes from businesses that refuse to open for business in, or expand business to, Pennsylvania for refusal to do business in a state that exposes the business to liability that does not exist in any other state, save one.[2] There are other states, including Pennsylvania, California, Massachusetts, and others that allow employees to sue employers for willful conduct.

House Bill 1234 addresses the central ruling set forth in the Court's opinion in Tooey v. AK Steel. As you will hear from other panel members, the Court in Tooey ruled that the exclusive remedy provision of the Workers' Compensation Act does not apply to employees who have disease claims that violate the manifestation rule set forth in Section 301 (c)(2) of the Act. Section 301(c)(2) provides, in pertinent part,

> 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 three hundred weeks after the last date of employment in an occupation or industry to which he was exposed to hazards of such disease.

Section 301(c)(2) (emphasis added). The Court correctly identified this 300-week manifestation rule as a statute of repose for occupational disease claims, for which a discovery rule did not apply. Therefore, if an employee is seeking benefits for a disease, that disease must cause disability or death within 300 weeks of the last date of employment with exposure to the disease-causing agent. Only then does "it" apply. If the disease manifested in disability or death outside the 300-week statute of repose, the claim was barred. But, the Court ruled that "it" was the entirety of the Workers' Compensation Act, including the exclusive remedy provision found therein. Therefore, there was no remedy ~~is~~ in workers' compensation, but there was also no exclusive remedy to apply to that disease.

After the Tooey opinion was circulated and the floodgates opened for occupational disease lawsuits against employers for negligence, a fix along the lines of HB 1234 was sought. Because the Court ruled that the whole of the Act would

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[2] Oregon permits direct negligence actions against an employer, but only if workers' compensation benefits are adjudicated and denied as not substantially related to a work event. In Texas, an employer can opt to forgo obtaining workers' compensation insurance, after which an employee's only remedy would be filing suit in another venue.

not apply to a disease with a latency period beyond 300 weeks, the only way to restore the Grand Bargain - the bedrock of workers' compensation law - was to reintroduce all occupational diseases back into the workers' compensation system by expanding the statute of repose. House Bill 1234 seeks to achieve that end.

The bill, if made effective law, would add a statute of repose for disease with proven latency periods of more than 300 weeks. Recall, the Workers' Compensation Act added the language of the Occupational disease Act in 1972, but the Occupational Disease Act was written in 1938. Needless to say, scientific understanding of complex disease states like cancer have come a long way since then. In fact, most of the diseases enumerated in the Occupational Disease Act were acute poisoning diseases and caisonns disease.

Generally accepted latency periods for exposure-caused cancers range from 15-40 years, varied by form of cancer. Even studies looking at high-dose radiation exposure show latency periods of more than 300 weeks. Therefore, while HB1234 is an advisable fix for the Tooey problem, it also helps the Workers' Compensation Act conform to modern science and medicine.

Later in this hearing, you may hear an objection from the asbestos arm of the plaintiff's bar that the workers' compensation remedy contemplated by HB 1234 is not as generous as the current Tooey remedy. I respectfully disagree and would further suggest that the workers' compensation arm of the plaintiff's bar might also disagree. There is a clear benefit for employees with cancer.

I am happy to discuss the difference between the workers' compensation remedy proposed in HB 1234 and the current Tooey remedy. The key points are as follows: (1) there is no negligence standard in workers' compensation adjudication, workers' compensation is a no-fault disability system, and therefore the standard for compensation is reduced; (2) the time to adjudicate a workers' compensation claim is less than the typical time it takes to fully litigate a negligence claim and therefore the injured worker gets relief nearly immediately; and, (3) perhaps most importantly, workers' compensation benefits include payment of medical benefits, with no contribution (via co-pay, deductible, or a gap in coverage) from the injured worker. It is worth noting that workers' compensation medical benefits may include treatment that a private health insurer or Medicare may not pay for, including life-saving experimental treatment. Workers' compensation medical benefits also would save uninsured retirees or union health and welfare funds. The unfortunate reality is that a significant number of workers pass away before their cases are even litigated and/or any recovery obtained. Our retirees' last days should not be spent

consumed in the mire of litigation and depositions; but rather, focused toward recovery and treatment with their families. And that is what HB 1234 would accomplish if enacted.

In addition, we have met with various representatives of workers' compensation insurance carriers, who raise concerns about the perceived retroactivity of the Tooey fix contemplated by HB 1234 and the potentially significant liability associated with the legislation, which may trigger premium increase. First, with respect to the potential liability, it should be acknowledged that virtually all claims paid under HB 1234 - medical benefits and wage loss - will be subject to the subrogation provisions of the Workers' Compensation Act. In this sense, from both the employee and employer's perspective, HB 1234 creates a win-win scenario - the employee gets immediate access to medical care and the ultimate costs of that care will be paid for by a future settlement or verdict from the asbestos manufacturer or from the Asbestos Trust Fund.

With respect to the retroactivity argument generally, we do not view HB 1234 as retroactive, nor did the Supreme Court when it imposed tort liability on employers for occupational diseases that were caused, but completely unknown to the worker decades ago.

Indeed, in the wake of the Tooey decision, HB 1234 presents a clear policy choice for the General Assembly: (1) the status quo, which presents a material risk of bankruptcy for the employer and places significant burdens on the employee with an uncertain outcome at best; or (2) the application of the Grand Bargain between employers and employees to occupational diseases, like mesothelioma and other cancers, that addresses both the needs of our retirees and result in the protection of current and future jobs.

I welcome any questions that the Committee has.

EMPLOYEE ADVANTAGES OF A WORKERS' COMPENSATION CLAIM V. A TORT CLAIM

	Workers' Compensation	Tort System
Burden of Proof	No-fault system. Employee is not required to prove the employer is at fault for injury, only that the employee was injured during the course of their employment.	Plaintiff has burden of proving employer's negligence caused their injury.
Timing of Benefits	Medical and cash benefits are paid immediately upon voluntary acceptance of the claim or upon adjudication. If an employer appeals, benefits can be payable within 30 days. Typically the entire worker's comp claims takes 12 to 18 months to resolve.	Claims can languish in the tort system for years. The appeals process for personal injury verdicts can be equally unending.
Future Medical Costs	Employer bears burden of future medical care related to occupational disease. Bills go directly to worker's comp. carrier or third party administrator.	Employee responsible for future medical care.
Scope of Benefits	Generally, compensation is limited to lost wages and medical bills. Funeral expenses and weekly benefits are also paid to the surviving spouse/dependent children if work-related injury is a substantial contributing factor to results in the death of the employee. Although an employee cannot recover punitive damages and compensation for pain and suffering in the worker's comp system, an employee is not limited to maintaining one type of claim. An employee could file a worker's comp claim against their employer while pursuing a tort claim against product manufacturers or other third parties allegedly liable for the conditions that produced the injury/disease exposure.	Employee can seek punitive damages and compensation for pain and suffering.
Legal Fees	Lower cost – Legal fees are capped by statute at 20% of recovery + costs.	Legal fees can be 40% of recovery + costs. Additionally, costs associated with a tort claim are significantly higher.

Tax Treatment for Benefits	Recoveries from a worker's comp claim are income and wage tax exempt.	Any settlement amount attributed to lost wages or punitive damages are taxed as income
Statute of Limitations/Repose	With legislative fix, an employee would have 5 years and 40 weeks from actual diagnosis of occupational disease to file a claim.	Claim must be filed within 2 years of diagnosis of occupational disease
Availability of Benefits	All companies are required to have worker's comp insurance or be an approved self-insured employer. Claims on this insurance can be made even if the employer is bankrupt and self-insured companies need to demonstrate how they will post security to obtain approval from the Workers' Compensation Bureau in order to be considered as a self-insured employer. This legislative fix would close a loophole where an employee would be left without workers' compensation remedy for their work-related injury if the latency period of the disease was more than 300 weeks from when they were last exposed to the hazard of the disease.	Claims cannot be made against bankrupt companies unless the company set up a bankruptcy trust specifically for this purpose.