

## Introduction to the Fourth Edition

---

This treatise was first published in 1995, with the Second Edition (a change from loose-leaf to hardcover) released in 2002, and the Third Edition in 2008. I prepared this Fourth Edition during 2021, a period, fortunately, of stability in Pennsylvania workers' compensation law.

This new edition was prompted by my realization that thirteen years had passed since I had last undertaken such an effort. Of course, the book has been updated every spring with the publication of a pocket-part, and the Westlaw version received its corresponding update. Still, the hardcopy supplements were growing thick and some material had become dated. Further, changes in the law had indeed unfolded over the years. In this regard, the legislature had not profoundly altered the Act, but revised regulations had been enacted. The courts, meanwhile, had been busy handing down opinions that critically affected law and practice. And, significantly, the agency that administers the law (my employer) had gone paperless.

A new edition was plainly in order.

To prepare the Fourth Edition, I re-read the text from beginning to end and decided what should stay, what could be pared off, and what needed to be added. When I executed the plan (January-July 2021) I moved much dated material to archival, historical, or "prior practice" sections. I also removed many pinpointed internet links; website references, however valuable, often become obsolete and useless – often without notice. I am trusting that most researchers can effectively use Google to identify the precise URL desired. In light of the move to a paperless courtroom, I expanded Chapter 1 to highlight the importance of the Department of Labor & Industry website – the portal through which data is reported, petitions are filed, and litigated claims are facilitated, managed, and adjudicated (via WCAIS, or the Workers' Compensation Automation and Integration System). I also sought, throughout, to make my language clearer and abbreviations and other prose details consistent.

A good law book (or brief, for that matter) does not merely cite cases as authority but provides explanatory parentheticals or

“squibs.” Another aspect of preparing the Fourth Edition was adding missing squibs, particularly to cites in Chapters 2, 3, and 4. I have also scrutinized quotes from the Rules of Evidence and the Rules of Appellate Procedure and ensured that they are up to date. My law student assistants and I have also quote-checked many other statutory, regulatory, and case citations. A key effort, meanwhile, was the reorganization of Chapter 9 (medical benefits/medical cost containment), particularly the sections addressing fee review. This is an area of law that has recently encountered material expansion and increased litigation.

I have not, meanwhile, tried to create with this text a manual for use of WCAIS. While this is a book about practice, the best way to learn about WCAIS is resort to the Department of Labor & Industry website at its WCAIS links. There, the lawyer is exhaustively – and definitively – briefed on navigating the system. The agency also has expert phone counselors to troubleshoot and assist with WCAIS challenges. These resources are top-notch, and I do not think that I could, or should, presume to supply any superior information.

The best single item of advice, however, is wisely set forth by Director of Adjudication Joseph DeRita and leading Judge John McTiernan: lawyers should learn to use WCAIS and master it – and not solely rely on paralegal assistance. This treatise adopts and explicitly endorses this recommendation. I have also not ventured to provide advice on how lawyers best make their presentations in the pandemic-era Teams video hearings which have become so popular. It seems to me that all the traditional advice about effective hearing presentation remains essentially the same. Of course, the time-honored admonition with regard to careful preparation – close attention to meticulous detail – has become all the more important.

\*\*\*

What, most remarkably, has unfolded in Pennsylvania workers’ compensation over the last decade? This book, starting at Section 1:84, features “critical developments” sections, so I will not repeat that material again here. Still, a few especially remarkable items bear mention. The most dramatic court decision – leading to significant modification of Chapter 6 – was the Supreme Court’s 2017 holding in *Protz v. W.C.A.B. (Derry Area*

*Sch. Dist.*).<sup>1</sup> There, the court struck from the Act a critical section providing that the “most recent edition” of the *AMA Guides* be used by physicians evaluating, in their exams, the existence of permanent impairment for partial disability determination purposes. The court held that such a statutory device constituted an impermissible, unconstitutional delegation of legislative authority. The system was restored – to date successfully – with Act 111 of 2018. That law features the directive that the Sixth Edition of the *Guides* be utilized, a “fix” which surely is constitutionally valid. Still, challenges to Act 111, and disputes with regard to how *Protz* is to be applied to past cases, continue. Overall, *Protz*, with its upsetting of twenty years of law and practice, was the biggest judicial disruption (for better or for worse) of the system since the famous *Baksalary* case of 1984.<sup>2</sup>

Another remarkable development was the court’s 2013 decision in *Tooy v. AK Steel Corp.*<sup>3</sup> There, the court held that if a worker’s disease disability or death manifests itself outside the Act’s 300-week statute for repose, leaving the claimant without right or remedy under the Act, a civil action in tort as against the employer will lie. Like the decision in *Protz*, the ruling refuted many decades of lower state and federal court holdings to the contrary. The *Tooy* ruling also tempered the common wisdom (or at least my rhetoric) that the Pennsylvania Supreme Court “enforces the exclusive remedy with an *iron fist*.”

Other developments are memorable. The Workers’ Compensation Judge Rules of Practice were, over the last decade, overhauled. Among other things, for the first time the rules explicitly provide for the summary disposition of cases.<sup>4</sup> (Some judges were reluctant to undertake such a practical course without legislative or regulatory authority.) Meanwhile, the Workers’ Compensation Act, enacted in 1915, enjoyed its centennial, an event marked by educational conferences, the publication of an illustrated book,<sup>5</sup> the casting of a custom medal, and a gala dinner. These efforts were undertaken by the Workers’ Compensa-

---

<sup>1</sup> *Protz v. W.C.A.B. (Derry Area Sch. Dist.) (Protz II)*, 161 A.3d 827 (Pa. 2017).

<sup>2</sup> *Baksalary v. Smith*, 579 F. Supp. 218 (E.D. Pa. 1984), later proceeding 591 F. Supp. 1279 (E.D. Pa.1984), appeal dismissed, 105 S.Ct. 890 (1985) (provision of Act allowing unilateral cessation of disability checks constituted violation of due process).

<sup>3</sup> *Tooy v. AK Steel Corporation*, 81 A.3d 851 (Pa. 2013).

<sup>4</sup> 34 Pa. Code § 131.53b(b) (“A motion which may result in disposition of a petition may be filed at any time....”).

<sup>5</sup> David B. Torrey, ed., *The Centennial of the Pennsylvania Workers’ Compensation Act: A Narrative and Pictorial Celebration* (Pennsylvania Bar Association 2015).

tion Law Section of the Pennsylvania Bar Association, with the cooperation of the Department of Labor & Industry. In 2018, finally, Thomson Reuters published a new edition of Purdon’s Title 77 (workers’ compensation), expanding from three to four this valuable set of annotated statutes.

\*\*\*

With regard to developments in the realm of legal research – the reason for being of a book like this – the most important has been the phenomenon of the unreported, yet citable, court opinion.<sup>6</sup> The Commonwealth Court, in its revised Rule 414, effective January 1, 2011, began to allow counsel to cite unreported “memorandum” opinions for their persuasive value. By way of background, the rule *against* citing unpublished decisions had its genesis in the concerns that non-experts in a particular field would not have ready access to such decisions; and that “the sheer volume of unpublished opinions would overwhelm zealous advocates attempting to do comprehensive legal research.”<sup>7</sup> In any event, in 2011, revised Rule 414 for the first time provided that “parties may cite an unreported panel decision of this court issued after January 15, 2008, for its persuasive value, but not as binding precedent....”<sup>8</sup> The rule has now been codified with the amendment of Pennsylvania Rule of Appellate Procedure 126.

Significantly, the appellate rule, effective May 1, 2019, also applies to unreported decisions of the Superior Court. Those decisions, too, may address workers’ compensation issues. The new rule provides, in any event, that “[n]on-precedential decisions ... may be cited for their persuasive value,”<sup>9</sup> and explains, “As used in this rule, ‘non-precedential decision’ refers to an unpublished non-precedential memorandum decision of the Superior Court filed after May 1, 2019, or an unreported memorandum opinion of the Commonwealth Court filed after January 15, 2008.”<sup>10</sup>

The rule change has materially altered practice. Indeed, lawyers have begun to routinely invoke the holdings of memoran-

---

<sup>6</sup> David B. Torrey & Justin D. Beck, Introduction, Commentary, and an Unabridged Digest of Workers’ Compensation Unreported Memorandum Opinions, 2018 (Monograph, Pennsylvania Bar Association 2019) (reprinted in Pennsylvania Bar Association Workers’ Compensation Law Section Newsletter, Vol. VII, No. 138, p.103 *et seq.* (June 2019)).

<sup>7</sup> Kevin McKeon, Blog Post, Superior Court Unpublished Opinions on or After May 2, 2019 Citable for Persuasive Value, Pennsylvania Appellate Advocate (March 9, 2019).

<sup>8</sup> 210 Pa. Code § 69.414.

<sup>9</sup> Pennsylvania Rule of Appellate Procedure R.126(b)(2).

<sup>10</sup> *Id.* at R.126(b)(1).

dum opinions. And, significantly, the court has published several opinions *relying* on memorandum decisions. Given this evolution of practice, familiarity with and research into the unreported cases is crucial for effective representation in and litigation of workers' compensation claims. Certainly you will find, for the first time, several unreported cases referenced in this Fourth Edition. Counsel must now utilize Westlaw or other legal databases to search for supportive unreported decisions. It is submitted that familiarity with and research into the unreported cases is now part of the lawyer's professional duty.

Two other essential research developments of the last decade exist. First, Westlaw now reports many decisions of the Workers' Compensation Appeal Board. While these decisions are not precedent, they can be cited to workers' compensation judges as persuasive authority and can, in any event, foreshadow to the researcher how judges, the Board, and even Commonwealth Court, may view an issue. Decisions of the Board in the present day are of superb quality and an invaluable resource for learning about and understanding the law. The effective lawyer will search out this information. Second, law firms now post an immense amount of educational material on their websites. In the past, in contrast, lawyers closely guarded their work and reserved educational materials for such things as privately-distributed newsletters and law review articles. In any event, some of these postings can be of astonishing quality. For example, after the Supreme Court confirmed the rule that the workers' compensation carrier subrogee has no direct cause of action against a third party,<sup>11</sup> the firm of White and Williams LLP, virtually overnight, commented on the decision and suggested creative strategies to accommodate the ruling.<sup>12</sup> The effective lawyer will want to search out this type of information.

\*\*\*

The estimable William A. Skinner, author of a fine workers' compensation treatise for many years, concluded the preface to *his* 1947 Fourth Edition by remarking, "The author has arrived at that age where it appears certain that future editions will not be edited by him ...."<sup>13</sup> Skinner was 73 at the time. I, meanwhile, have not quite arrived at such an age. I look forward, accordingly, to not only updating annually the book you hold today but, at

---

<sup>11</sup> The Hartford Insurance Group on Behalf of Chen v. Kamara, 199 A.3d 841 (Pa. 2018).

<sup>12</sup> Robert M. Caplan, "Bad Kamara/Good Karma"—Life After Hartford v. Kamara (Nov. 29, 2018), available at [Bad Kamara/Good Karma](#) — Life After Hartford v. Kamara - The Subrogation Strategist (last visited October 1, 2021).

<sup>13</sup> William A. Skinner, *The Workmen's Compensation Law of Pennsylvania*,

some future date, to preparing a Fifth Edition.

David B. Torrey  
Pittsburgh, PA, October 1, 2021

---

p.xvi (Gregory T. Bisel Co., 4th Edition 1947).