

## Pennsylvania Again Advises that Tooey is the "Controlling Law" on Toxic Tort Claims Not Barred by Workers' Compensation Act

The Pennsylvania Superior Court recently issued a decision in *McCloskey v. Cemline Corp.*, 2015 Pa.Super. Unpub. LEXIS 1793 (decided 6/17/2015), following *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013), regarding the issue of the exclusivity of the Workers' Compensation Act (WCA).

The plaintiff's decedent in *McCloskey* developed mesothelioma during his employment at PPG Industries. PPG's motion for judgment on the pleadings was granted by the trial court based on the controlling authority at the time, *Sedlacek v. A.O. Smith Corp.*, 990 A.2d 801 (Pa. Super. 2010). *Sedlacek* held that the exclusivity provision of the WCA applied to bar the plaintiffs' common law negligence claim against PPG, even though more than 300 weeks had passed since the last date of the plaintiff's employment at PPG and the plaintiff could no longer seek recovery under the WCA.

Since the filing of PPG's motion for judgment on the pleadings and the *Sedlacek* decision, the Pennsylvania Supreme Court decided *Tooey v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013). *Tooey* held that the WCA does not bar a common law claim where the claims are not recoverable under the Act. The exclusivity provision does not apply where more than 300 weeks have passed since the last employment based exposure.

The Pennsylvania Superior Court in *McCloskey* reviewed both cases and determined that *Sedlacek* was supplanted by *Tooey*. Accordingly, based on the plaintiffs' allegations that his workplace exposure ended in 1995, and he was not diagnosed with mesothelioma until 2007, his claims would not be barred by the exclusivity provision of the WCA. The Court vacated the August 31, 2010, order and remanded for the development of evidence and discovery to support the plaintiffs' allegations regarding last workplace exposure to asbestos.

**Comment:** The decision by the Pennsylvania Superior Court in *McCloskey* is important, because it reaffirms the standard set forth in *Tooey*, and provides clear guidance that if more than 300 weeks have passed since the plaintiff's last date of employment, then the plaintiff's claim will not be barred by the exclusivity provision of the WCA.

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