

Tooey v AK Steel

Pennsylvania Supreme Court Allows Direct Action Against Employers for Asbestos and Other Latent Diseases

Pennsylvania employers may be sued more frequently or drawn into ongoing asbestos litigation due to a case decided recently by the Pennsylvania Supreme Court.

In a case that will have far reaching impact in the areas of Products Liability, Premises Liability, Workers' Compensation and Insurance Coverage, the Court has decided that the exclusivity provision of the Pennsylvania Workers' Compensation Act does not apply to latent disease cases such as asbestos exposure where the disease does not manifest for many years after exposure.

In Tooey v AK Steel, the Court discussed that because the employee's mesothelioma (a rare cancer caused by asbestos exposure) manifested more than 300 weeks after his last occupational exposure, he was time barred from asserting a Pennsylvania workers' compensation claim. The Court then determined that since the employee could not assert a workers' compensation claim, he could instead bring a direct action against his employer for negligence.

This is a crucial decision that could affect numerous employers. Diseases such as mesothelioma often take decades to manifest. There are currently hundreds of asbestos cases pending in Pennsylvania with alleged exposure dating back to the 1940's. Those cases will likely be amended to add former employers as additional defendants. Because asbestos was so prevalent up until the 1980's, and since asbestos plaintiff firms commonly sue defendants with even minute potential liability, many Pennsylvania employers could be brought into existing asbestos litigation even if the employee only worked at a particular company for a short period of time.

All of these new defendants will be seeking insurance coverage from policies issued decades ago. In particular, claims against employer liability policies will likely see a sharp increase as a result of this decision as employers seek defense and indemnity for these claims. Yet to be determined is if the Tooey decision will be interpreted to also remove the prohibition on suits against co-employees in this type of case. A creative plaintiff's firm could name not only an employer in a suit, but also numerous co-workers as well, and a question would arise as to which insurance policy, if any, would owe defense and liability for such a claim.

Before this decision, the only other state to exclude asbestos and other latent diseases from its workers compensation laws was Missouri, whose Supreme Court handed down a decision with similar effect in 2009. The decision was met with substantial outcry from business groups and resulted in amendments to the Missouri Workers' Compensation Act passed earlier this year which will bring these claims back within the purview of workers compensation starting in 2014.