[J-38A-C-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

KATHLEEN TOOEY, EXECUTRIX OF THE ESTATE OF JOHN F. TOOEY, DECEASED, AND KATHLEEN TOOEY IN HER OWN RIGHT,	:	No. 21 WAP 2011
	:	Appeal from the Order of the Superior Court entered August 31, 2010 at No. 1540 WDA 2009, reversing the Order of the Court of Common Pleas of Allegheny County entered June 10, 2008 at No. GD 08-005721 and remanding.
Appellant	:	
v.	:	
AK STEEL CORPORATION (INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO ARMCO STEEL CORPORATION); CROWN CORK & SEAL COMPANY, INC. (INDIVIDUALLY, AS SUCCESSOR TO MUNDET CORK COMPANY, AND AS SUCCESSOR TO VAN DORN IRONWORKS COMPANY); E. E. ZIMMERMAN COMPANY; FOSECO, INC.; GEORGE V. HAMILTON, INC.; HEDMAN MINES, LTD; INSUL COMPANY INC.; I.U. NORTH AMERICA, INC.; MCCANN SHIELDS PAINT COMPANY; OGLEBAY NORTON COMPANY (INDIVIDUALLY AND ON BEHALF OF ITS FERRO ENGINEERING DIVISION); TASCO INSULATIONS, INC. (INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ASBESTOS SERVICE COMPANY); THE GAGE COMPANY (FORMERLY PITTSBURGH GAGE AND SUPPLY CO.); THEIM CORPORATION, AND ITS DIVISION UNIVERSAL REFRACTORIES CORPORATION; AND UNITED STATES STEEL CORPORATION,	:	
Appellees	:	

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SPURGEON E. LANDIS AND MARY A. LANDIS, HIS WIFE,	:	No. 22 WAP 2011
	:	
	:	Appeal from the Order of the Superior
Appellants	:	Court entered on August 31, 2010 at No.
	:	1541 WDA 2009, reversing the Order of
v.	:	the Court of Common Pleas of Allegheny
	:	County entered June 10, 2008 at No. GD
A.W. CHESTERTON COMPANY; UNION CARBIDE CORPORATION; CBS CORPORATION, FORMERLY KNOWN AS VIACOM, INC., AS SUCCESSOR-BY-MERGER TO CBS CORPORATION, SUCCESSOR-IN-INTEREST TO WESTINGHOUSE ELECTRIC CORPORATION; INGERSOLL-RAND COMPANY; GRINNELL CORPORATION; GOULDS PUMPS, INC.; GREENE TWEED & COMPANY; HEDMAN MINES LTD.; GARLOCK SEALING TECHNOLOGIES, LLC; CRANE COMPANY; CERTAINTEED CORPORATION; SAFETY FIRST INDUSTRIES, INC., IN ITS OWN RIGHT AND AS SUCCESSOR-IN-INTEREST TO SAFETY FIRST SUPPLY, INC.; ALLOY RODS CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLOY RODS COMPANY; CHEMETRON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLOY RODS CORPORATION AND ALLOY ROD COMPANY; THE ESAB GROUP, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLOY RODS CORPORATION, ALLOY RODS COMPANY AND CHEMETRON CORPORATION; SAINT GOBAIN ABRASIVES, INC. (F/K/A NORTON COMPANY-SAFETY PRODUCTS DIVISION-USA NORTH COMPANY);	:	08-002317 and remanding.

AND HAJOCA CORPORATION,	:	
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	:	
Appellees	:	
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SPURGEON E. LANDIS AND MARY A. LANDIS, HIS WIFE,	:	No. 23 WAP 2011
	:	
	:	Appeal from the Order of the Superior
Appellants	:	Court entered August 31, 2010 at No.
	:	1542 WDA 2009, reversing the Order of
v.	:	the Court of Common Pleas of Allegheny
	:	County entered June 10, 2008 at No. GD
A.W. CHESTERTON COMPANY; UNION CARBIDE CORPORATION; CBS	:	08-002317 and remanding.
	:	
CORPORATION, FORMERLY KNOWN AS VIACOM, INC., AS SUCCESSOR-BY-MERGER TO CBS CORPORATION, SUCCESSOR-IN-INTEREST TO WESTINGHOUSE ELECTRIC CORP.; INGERSOLL-RAND COMPANY, GRINNELL CORPORATION; GOULDS PUMPS, INC.; GREENE TWEED & COMPANY; HEDMAN MINES LTD.; GARLOCK SEALING TECHNOLOGIES, LLC; CRANE COMPANY; CERTAINTEED CORPORATION; SAFETY FIRST INDUSTRIES INC., IN ITS OWN RIGHT AND AS SUCCESSOR-IN-INTEREST TO SAFETY FIRST SUPPLY, INC., ALLOY RODS CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLOY RODS COMPANY; CHEMETRON CORPORATION, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLOY RODS CORPORATION AND ALLOY RODS COMPANY; THE ESAB GROUP INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ALLOY RODS CORPORATION, ALLOY RODS COMPANY AND CHEMETRON CORPORATION; SAINT GOBAIN ABRASIVES, INC. (F/K/A NORTON COMPANY – SAFETY PRODUCTS	:	ARGUED: April 10, 2012

DIVISION-USA NORTH COMPANY); :
AND HAJOCA CORPORATION, :
:
Appellees :

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: NOVEMBER 22, 2013**

I respectfully dissent, as I would find that the diseases in question were meant to be covered by the terms of the Workers' Compensation Act, but that compensation is unavailable due to the expiration of the 300-week statutory period. Thus, I would find that the constitutional claims raised by Plaintiffs have become salient and that the Attorney General should be given an opportunity to participate. My reasoning follows.

As described by the majority, Plaintiffs contend, based on their reading of Section 301(c)(2) of the Workers' Compensation Act ("WCA"),[1] that their common-law claims are not barred by the exclusive-remedy provision appearing in Section 303(a) of the WCA, see 77 P.S. §481, because their injuries are not covered by the act due to the expiration of the 300-week limitation period. Plaintiffs acknowledge that their diseases are "potentially" covered in light of Section 108(l).[2] However, they repeat an argument they made to the common pleas court, that a proviso appearing in Section 301(c)(2) ultimately precludes such coverage. That provision states, in relevant part:

[1] Act of June 2, 1915, P.L. 736 (as amended, 77 P.S. §§1-1041.1; 2501-2626).

[2] The parties agree that Employees' injuries fall within the Section 108(l) definition of "occupational disease." See 77 P.S. §27.1(l) (defining the term to include "[a]sbestosis and cancer resulting from direct contact with, handling of, or exposure to the dust of asbestos in any occupation involving such contact, handling or exposure").

> The terms "injury," "personal injury," and "injury arising in the course of his employment," as used in this act, shall include . . . occupational disease as defined in section 108 of this act [i.e., 77 P.S. §27.1]: 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: And provided further, That if the employe's compensable disability has occurred within such period, his subsequent death as a result of the disease shall likewise be compensable. . . .

77 P.S. §411(2) (emphasis added). As noted by the majority, Plaintiffs have contended throughout this litigation that the above should be interpreted to remove their injuries entirely from the scope of the WCA, which in turn would render Section 303(a)'s exclusivity clause inapplicable. Plaintiffs support this position by adverting to rules of grammar, arguing that the "it" in "it shall apply" refers to "this act" rather than "the basis for compensation." They observe that pronouns often substitute for the immediately preceding noun, see Brief for Appellants at 16 (citing THE CHICAGO MANUAL OF STYLE §5.34 (15th ed. 2003)), and argue that, generally speaking, an act may "apply," whereas a "basis for compensation" is not ordinarily said to "apply."

As a fallback position, Plaintiffs reason that, to the extent Section 301(c)(2) may be ambiguous, such ambiguity should be resolved in favor of permitting a tort cause of action to proceed, since that interpretation will be less likely to raise constitutional difficulties such as a potential violation of the Remedies Clause. See PA. CONST. art. 1, §11 ("[E]very man for an injury done him in his land, goods, person or reputation shall have remedy by due course of law . . .."). Additionally, they posit that considerations such as the object to be attained and the consequences of a particular interpretation, see 1 Pa.C.S. §1921(c), militate in favor of their proffered construction. Here, Plaintiffs note that the WCA establishes a quid pro quo whereby an employer assumes no-fault liability but is shielded from potentially greater liability at common law, while the

employee receives expeditious compensation but forgoes some elements of damages. See Alston v. St. Paul Ins. Cos., 531 Pa. 261, 267, 612 A.2d 421, 424 (1992). They assert that the quid pro quo cannot be effectuated in cases such as theirs where the latency period is greater than 300 weeks, and that such time limitation, if interpreted according to the Superior Court's reasoning, is inconsistent with the WCA's goal of expanding the ability of employees to obtain compensation for work-related injuries. Anticipating that Employers will argue that allowing a common-law remedy would undermine the act's objective of limiting employer liability, Plaintiffs contend that, to the degree the legislation is designed to limit liability, it is only intended to limit no-fault (or absolute) liability. They point out that in a common law cause of action Employers' liability would not be absolute because Plaintiffs would be required to demonstrate negligence and causation. See Appellants' Brief at 19-20.

Finally, Plaintiffs bolster their position by reference to case law from this jurisdiction and one sister State. They draw attention, first, to Lord Corp. v. Pollard, 548 Pa. 124, 695 A.2d 767 (1997), on which the common pleas court relied in denying Employers' motions for judgment on the pleadings. In Pollard, this Court was evenly divided, and one group of Justices reasoned that the employer's demurrer to an employee's negligence claim should not be sustained unless it was clear from the pleadings that the injury was cognizable under either the WCA or the Occupational Disease Act of 1939 (the "ODA").[3] See id. at 129, 695 A.2d at 769 (Opinion in Support of Affirmance). The extra-jurisdictional decision, Stratemeyer v. Lincoln County, 915

[3] Act of June 21, 1939, P.L. 566, No. 284 (as amended 77 P.S. §§1201-1603). The ODA contains an exclusivity provision that this Court has described as "very similar" to that of the WCA. Barber v. Pittsburgh Corning Corp., 521 Pa. 29, 34, 555 A.2d 766, 769 (1989). Compare 77 P.S. §1403 (ODA's exclusivity clause), with 77 P.S. §481, Historical and Statutory Notes (reflecting the WCA's exclusivity clause as it existed prior to a 1974 amendment).

P.2d 175 (Mont. 1996), involved a so-called "mental-mental" injury – that is, a mental injury caused by mental stress – which was categorically excluded from coverage under that state's workers' compensation statute. The Montana court concluded that, where there is no possibility of recovery under the statute, the central quid pro quo is defeated, and hence, the concept of remedy exclusivity is inapplicable – meaning that the employer was exposed to potential common law tort liability. See id. at 180-81.

Employers respond that the workers' compensation scheme was enacted pursuant to an express grant of legislative power reflected in the state charter, see PA. CONST. art. III, §18, and that it was intended by the General Assembly to operate as a comprehensive substitute for common-law tort liability based on concepts of efficiency and compromise.[4] They maintain that the WCA embodies a compromise whereby employers are made liable without regard to fault, while employees forfeit the right to recover greater sums at common law. Employers indicate that remedy exclusivity is integral to the compromise, is firmly entrenched in Pennsylvania law, and is applicable even in instances where no compensation is available due to the expiration of a time limitation – as otherwise employers would be exposed to potentially unlimited liability, which would be contrary to legislative intent. They state that the Commonwealth Court has expressly endorsed this view by pointing out that, while arbitrary time limits may at times seem harsh in their effects, they are necessary because of the practical limits on the amount of benefits that can reasonably be provided – and that such limitations "must be established by the Legislature possessed of all the [actuarial] facts, not by a

[4] Chemetron and the ESAB Group, the employer parties in the Landis litigation, have filed one brief, and Oglebay Norton Company, the employer party in the Tooey case, has filed a separate brief individually and on behalf of its Ferro Engineering division. Because the arguments overlap substantially, they are summarized together except where otherwise noted.

court deciding one case, however unfortunate." Brief for Oglebay at 34 (quoting Bethlehem Steel Co. v. Gray, 4 Pa. Cmwlth. 590, 594, 288 A.2d 828, 829-30 (1972) (en banc)).

As a matter of textual analysis, Chemetron initially stresses the disjunctive nature of the language used in the exclusivity provision (Section 303(a) of the WCA), noting that employer liability is made to exist in place of all other liability on account of injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in Section 108. See 77 P.S. §481(a). Thus, since it is undisputed that mesothelioma is an occupational disease as defined in Section 108, see supra note 2, Chemetron proffers that this alone is sufficient to implicate remedy exclusivity without consulting Section 301(c)(2). Alternatively, Employers state that, even if Section 301(c)(2) is deemed controlling, Plaintiffs' grammatical analysis is in error since the antecedent of the pronoun "it" in the phrase "it shall apply" is not the word "act," but "compensation," and that this construction is appropriate because the commas surrounding the phrase, "for disability or death under this act," signify that the clause is a nonrestrictive one – that is, it contains parenthetical, explanatory information, and as such, the commas may be replaced with parentheses without altering the meaning. See, e.g., Brief for Chemetron at 20 (citing, inter alia, WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 2-5 (3d ed. 1979), and THE CHICAGO MANUAL OF STYLE §5.29 (13th ed. 1982)). This is significant, according to Employers, because it shows that the statutory proviso was not intended to negate the act's coverage of mesothelioma, and any covered disease is subject to the rule of exclusivity even where the injury is ultimately non-compensable on some independent basis (such as the expiration of a limitation period).[5]

[5] Cf. Weldon v. Celotex Corp., 695 F.2d 67, 71 (3d Cir. 1982) (applying similar reasoning within the framework of the ODA); Kilvady v. U.S. Steel Corp., 90 Pa. Cmwlth. 586, 592, 496 A.2d 116, 120 (1985) (same).

Moreover, Employers argue that cases such as Pollard, on which Plaintiffs rely for the contrary position, actually support Employers' argument since the determinative issue in those matters was whether the disease or injury was of a type that was encompassed by the WCA, and not whether the individual plaintiff's particularized circumstances foreclosed compensability. As applied here, Employers reason that, although Plaintiffs' disease first manifested beyond the 300-week period, their condition fell within the WCA's ambit – i.e., was covered by the WCA – and hence, Section 303(a) exclusivity applies notwithstanding non-compensability. See generally Brief for Chemetron at 26 (citing Kline v. Arden H. Verner Co., 503 Pa. 251, 255, 469 A.2d 158, 160 (1983) (suggesting that the WCA has "immunized some [employers] to make possible resources to benefit many, who [were] heretofore without possible or practical remedies")).

As for Plaintiffs' argument pertaining to the WCA's embodiment of a quid pro quo, Employers offer that the central quid pro quo transcends individual cases and pertains to employees and employers as a class who give up certain rights in exchange for others. Employers maintain that the balancing of these rights was performed by the Legislature and that Plaintiffs' disagreement is with that body. Oglebay also implies that the harshness of particular outcomes ensuing from this legislative compromise is mitigated because workers who develop long-latency asbestos diseases may seek redress from non-employer defendants. It avers that, here, Plaintiffs filed actions against numerous entities, and that the Tooey plaintiffs in particular have already obtained settlements from several of them, as reflected in the Supplemental Reproduced Record. Oglebay asserts, in this regard, that individuals who develop asbestos-related cancers may avail themselves of claims procedures with various

bankruptcy trusts established to compensate individuals exposed to the asbestos-containing products of now-insolvent companies.

As noted, Chemetron initially suggests that the dispute can be resolved solely by reference to Section 303(a) in view of its disjunctive phraseology and its reference to Section 108. That provision states, in full:

> The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employe[e], his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) [77 P.S. §411(c)(1) and (2)] or occupational disease as defined in section 108 [77 P.S. §27.1].

77 P.S. §481(a) (emphasis added). The above represents a forceful statement by the Legislature that it intends for both injuries and occupational diseases to be treated uniformly under the act and, more particularly (in my view, at least), to be covered by the remedies prescribed thereunder to the exclusion of common-law remedies. Thus, Employers understandably seek to rely on its language as a shield against common law suits without reference to other provisions. Still, Sections 303(a) and 108 are part of the WCA's overall scheme pertaining to liability for occupational diseases. That scheme also subsumes Section 301(c)(2), which makes the diseases enumerated in Section 108 compensable by classifying them as injuries (thus triggering potential liability under Section 301(a)), see generally Brockway Pressed Metals v. WCAB (Holben), 948 A.2d 232, 234 (Pa. Cmwlth. 2008), and additionally contains the specific 300-week limitation at issue here. Therefore, the analysis would be incomplete if Sections 303(a) and 108 were viewed in isolation. Rather, this Court should also evaluate whether the General Assembly intended that occupational diseases manifesting more than 300 weeks after the last employment-based exposure to the hazard should be subject to WCA remedy

exclusivity even where benefits are unavailable.[6] See generally Allstate Life Ins. Co. v. Commonwealth, ___ Pa. ___, ___, 52 A.3d 1077, 1080-81 (2012) (Opinion in Support of Affirmance) (observing that statutes or parts of statutes in pari materia should be construed together, with the court giving effect to each provision, if possible (citing 1 Pa.C.S. §§1921(a), 1932)).

As recited by the majority, the parties' first point of contention centers on whether the pronoun "it" in the phrase "it shall apply" refers back to "act" or "compensation." Plaintiffs claim that "it" refers to "act," so that late-manifesting occupational diseases are entirely removed from the scope of coverage under the WCA, with the result that the enactment's exclusivity clause has no present application. However, the proviso's most natural reading is that "under this act" simply modifies "disability or death," and not that it was intended to provide the predicate for the following pronoun. See 1 Pa.C.S. §1903(a) (directing that words and phrases should ordinarily be interpreted according to rules of grammar and their common and approved usage). Similarly, the grammatical structure of the proviso, including its placement of commas, militates against Plaintiffs' reading. See generally United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42, 109 S. Ct. 1026, 1030-31 (1989) (deeming comma placement significant in arriving at a statute's plain meaning).[7] In particular, the phrase, "for disability or death under this

[6] Although Section 301(c)(2) references the employee's "last date of employment," 77 P.S. §411(2), this Court has stated that the 300-week period begins on the last day of employment-based exposure to the hazard. See Sporio v. WCAB (Songer Constr.), 553 Pa. 44, 50, 717 A.2d 525, 528 (1998); Cable v. WCAB (Gulf Oil/Chevron USA), 541 Pa. 611, 615, 664 A.2d 1349, 1351 (1995) (plurality). Any distinction along these lines is immaterial to the resolution of these appeals, however, since Employees' mesothelioma manifested more than 300 weeks after both occurrences.

[7] Because the current version of Section 301(c)(2) was finally enacted after December 31, 1964, its punctuation may be considered. See 1 Pa.C.S. §1923(b); Cash Am. Net of Nevada, LLC v. Dep't of Banking, 607 Pa. 432, 451 n.5, 8 A.3d 282, 294 n.5 (2010).

act," is set off from the main flow of the sentence by a pair of commas. This indicates that it is a "nonrestrictive" clause containing explanatory or descriptive information that is parenthetical in nature. See Cash Am., 607 Pa. at 450-51 & n.4, 8 A.3d at 293 & n.4.[8] As such, the commas could be replaced with parentheses without changing the sentence's essential meaning. See id. at 446-47, 8 A.3d at 291; In re Gallagher, 26 P.3d 131, 136-37 (Or. 2001) (citing CHICAGO MANUAL OF STYLE §5.41, at 167-68 (14th ed 1993), and WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE, 3-4 (3d ed. 1979)). Hence, the pronoun "it" must refer back to a noun appearing in the sentence prior to the nonrestrictive clause.[9] The only such noun that could reasonably serve as the pronoun's antecedent is "compensation." It follows that the proviso states, in effect, that "whenever occupational disease is the basis for compensation (for disability or death under this act) [compensation] shall apply only to disability or death" occurring within the 300-week period. This understanding is consistent with the Legislature's stated intention that the act should "apply to all injuries occurring within this Commonwealth," 77 P.S. §1 (emphasis added), a point the majority overlooks.

I would conclude, then, that the plain meaning of the proviso is more limited than Plaintiffs contend and the majority concludes: in my view, it states that compensation is

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[8] Accord Mumid v. Abraham Lincoln High Sch., 618 F.3d 789, 798 (8th Cir. 2010); DiFiore v. Am. Airlines, Inc., 561 F. Supp. 2d 131, 135 (D. Mass. 2008); In re Jessi W., 152 P.3d 1217, 1220 (Ariz. Ct. App. 2007); Kasischke v. State, 991 So. 2d 803, 812 (Fla. 2008); Xcel Corp. v. Div. of Taxation, 4 N.J. Tax 85, 89-90 (N.J. Tax Ct. 1982) (citing LEGGETT ET AL., PRENTICE-HALL HANDBOOK FOR WRITERS (5th ed. 1970), 124-125); Ingram v. Carruthers, 250 S.W.2d 537, 538 (Tenn. 1952); Griffin v. State, 2004 WL 1277567, at *2 (Tex. Ct. App. 2004) (citing MARGARET SHERTZER, THE ELEMENTS OF GRAMMAR 7, 87 (1st ed. 1986), and TEXAS LAW REVIEW, MANUAL ON USAGE, STYLE, & EDITING B:4:1 (9th ed. 2002)); State v. Tunney, 895 P.2d 13, 16 (Wash. Ct. App. 1995).

[9] The majority suggests that "it" may refer to the word "act" in the phrase "as used in this act," which appears in a sentence extrinsic to the proviso. See Majority Opinion, slip op. at 10 n.3. To my mind, such a reading seems overly attenuated.

unavailable for late-manifesting occupational diseases, but it does not state that the WCA has no application with regard to such diseases. Further, the parties, as noted, agree that Plaintiffs' illnesses fall within the definition of a covered occupational disease for purposes of the act, and Plaintiffs do not suggest any other, independent, aspect of the statute as a basis to conclude that employer liability for their illnesses is not governed by the WCA. See generally 77 P.S. §431 (making employers liable for all work-related injuries with certain exceptions not presently relevant). Still, Plaintiffs assert that their inability to obtain compensation due to the expiration of the 300-week time interval affects Section 303(a)'s command that the liability of an employer under the WCA is "exclusive and in place of any and all other liability[.]" 77 P.S. §481(a). Referencing Pollard and Stratemeyer, they maintain that the presence or absence of actual compensation is the litmus for whether remedy exclusivity applies. See Appellants' Brief at 22, 24. For the following reasons, I disagree.

Workers' compensation is social legislation. Thus, the issue forwarded here touches on social policy which, of course, is the primary domain of the Legislature. The advent of workers' compensation laws in the early twentieth century accomplished two things broadly described in terms of a compromise between the interests of employers and employees. It gave employees compensation based solely on a loss of earning power, and it immunized employers from large and unexpected costs they might incur through the tort system. See Shick v. Shirey, 552 Pa. 590, 603, 716 A.2d 1231, 1237 (1998) (describing this compromise). This system provided employers better means of predicting the costs of doing business, while workers also gained in the aggregate because, under the old common law system, most injuries remained uncompensated notwithstanding the presence, in many cases, of employer negligence or adverse workplace conditions. See Exceptions to the Exclusive Remedy Requirements of

Workers' Compensation Statutes, 96 HARV. L. REV. 1641, 1641 n.2 (1983) (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS §80, at 526, 530 & n.32 (4th ed. 1971) (70% to 94% uncompensated), and COMPENDIUM ON WORKMEN'S COMPENSATION 11 (NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS ed. 1973) (workers recovered for 15% of injuries, although 70% involved employer negligence or workplace conditions)). Such a system inevitably contained limitations on compensation, both in the form of time restrictions (due to its essentially administrative nature) and in terms of substantive limitations on liability. This was necessary in order that the administrative scheme could function with some regularity and so that the aggregate of payouts could remain practically affordable.

Plaintiffs' argument – that, since the act is designed to provide reasonable indemnity to employees who sustain work-related injuries, when such indemnity is lacking employees should have access to the courts as a forum to obtain a remedy – has some logical force. The main difficulty, however, when the broad policy goals are considered, is that such a result would expose employers to potentially unlimited liability for occupational diseases, an exposure that could undermine the compromise of interests described above.[10] In this regard, one of our federal colleagues has aptly stated that, through the WCA, the Legislature has created a "comprehensive statutory scheme encompassing all injuries arising out of accidents occurring within the course of employment." Hartwell v. Allied Chem. Corp., 320 F. Supp. 75, 77 (W.D. Pa. 1970).

Supporting Hartwell's observation is that the legislative trend in the workers' compensation arena has consistently been to expand the WCA's reach to ever greater

[10] In criticizing this observation, the majority appears to view the act as designed solely for the benefit of injured workers. See Majority Opinion, slip op. at 20. That is indeed one of the central aims of the statute. However, the broader historical context, including the essential underlying compromise, is also relevant to ascertaining legislative intent.

classes of injury. For example, while the legislation originally covered only accidents, it was later amended to bring non-accidental injuries within its scope. Further, the definition of "injury" was eventually changed from "violence to the physical structure of the body" to any work-related "injury to an employe, regardless of his previous physical condition[.]" Act of March 29, 1972, P.L. 159, No. 61, §7 (amending Section 301(c)). Thereafter, occupational diseases were brought within the ambit of the WCA. See Act of Oct. 17, 1972, P.L. 930, No. 223, §§1, 2 (adding Section 108 and 301(c)(2)). As well, the Legislature eventually changed the nature of the scheme from an elective system to a mandatory one. See Act of Dec. 5, 1974, P.L. 782, No. 263; Bible v. Dep't of Labor & Indus., 548 Pa. 247, 254-56, 696 A.2d 1149, 1152-53 (1997); Lewis v. Sch. Dist. of Phila., 517 Pa. 461, 471-72, 538 A.2d 862, 867 (1988). Hence, the legislative motivation and movement has been to steadily broaden the act's coverage while foreclosing recourse against the employer in tort for negligence. See Tsarnas v. Jones & Laughlin Steel Corp., 488 Pa. 513, 519-20, 412 A.2d 1094, 1097 (1980). At the same time, the General Assembly has designated the WCA as the "sole and exclusive" means of recovery against employers for all workplace injuries. Hackenberg v. SEPTA, 526 Pa. 358, 370, 586 A.2d 879, 885 (1991); see 77 P.S. §§1, 481(a). See generally Pawlosky v. WCAB (Latrobe Brewing Co.), 514 Pa. 450, 461, 525 A.2d 1204, 1210 (1987) ("[T]he legislature, by including occupational diseases in the Act's concept of 'injury,' was attempting to create a unified, integrated compensation law for all work-related harm . . .").

Within this historical development, moreover, the General Assembly's particular treatment of occupational diseases is also germane. The Assembly was initially disinclined to provide no-fault compensation for disease victims and, indeed, it waited twenty-two years after the enabling constitutional amendment was ratified to bring such

work-related illnesses within the act's scope. There were various reasons for this delay, including problems of proof in difficult etiological contexts, see Sporio, 553 Pa. at 50, 717 A.2d at 528 (expressing that the disease manifestation requirement serves, inter alia, to "prevent speculation over whether a disease is work-related years after an exposure occurred"), and a "fear that the compensation system could not bear the financial impact of full liability for dust diseases." 3 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW §41.81 (1983). Thus, when the General Assembly ultimately incorporated diseases into the system, it was careful to cabin employers' liability using devices such as defined manifestation periods. See Act of July 2, 1937, P.L. 2714, No. 552, §6(b) (repealed) (reflecting a two-year period); Act of June 21, 1939, P.L. 566, No. 284, §301(c) (reflecting a four-year period under the ODA).

These limitations appear to represent an exercise in legislative line-drawing stemming from a generalized aversion toward holding employers liable to all disease victims under a strict-liability scheme. Accord David B. Torrey, Time Limitations in Pennsylvania Workmen's Compensation and Occupational Disease Acts: Theoretical Doctrine and Current Applications, 24 DUQ. L. REV. 975, 1013 (1986) (hereinafter, "Time Limitations"). More to the point, they do not reflect an intent that, if the disease occurs outside the defined time period, the employee should remain free to prosecute a lawsuit in tort. Rather, the legislative sense has been that, if latent diseases are to be compensable on an absolute-liability basis, businesses and insurers at least need to be able to make rough predictions concerning the cost of coverage, which would be significantly more difficult absent some time-based prerequisite to compensability for diseases that may occur years after employment has ended. See BOND & SILVER, Workers' Compensation[:] Employers and Insurers Present Their Side of the Case, PENNA. L. J. RPTR., Aug. 5, 1985, at 8 ("Although we are not aware of the legislative

intent behind the [300-week] time requirement, it seems to be [an] example of legislative line-drawing intended to afford employers and insurers reasonable limits on their exposure under the act."), quoted in Time Limitations, 24 DUQ. L. REV. at 1015 n.196.[11] In light of these considerations, to conclude, as Plaintiffs urge, that the absence of compensability was intended by the Legislature to alone negate remedy exclusivity, would be inconsistent, not only with the Legislature's expressed intent that the act apply to "all injuries" occurring within Pennsylvania, but with its motivation for imposing time limitations on disease compensability. All of this militates against a litmus based solely on the availability of compensation under the circumstances.[12]

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[11] See also Time Limitations, 24 DUQ. L. REV. at 1015 ("The disease manifestation provisions [of the WCA and ODA] are unique creatures of the statutory scheme . . . reflecting . . . the simple legislative judgment that employers are to be relieved of at least some of the liability which might possibly accrue, by means of an arbitrary time limit on the manifestation of disability-causing diseases."); id. at 979 ("Having sacrificed its common law defenses, the employer faces increased and almost certain liabilities; it is thus reasonable that at least the time frame within which such liability may accrue is established clearly."); cf. 3 ARTHUR LARSON, WORKERS' COMPENSATION LAW §53.03 (criticizing such substantive limitations on compensability as leading to inequities for workers suffering from long-latency occupational diseases, including asbestos-related ailments).

[12] To the degree the majority suggests that the long latency period associated with mesothelioma "operates as a de facto exclusion of coverage under the Act for essentially all mesothelioma claims," Majority Opinion, slip op. at 18, the majority is mistaken. The latency period is measured from the first exposure, see, e.g., Jones v. United States, 751 F. Supp. 2d 835, 840-41 (E.D.N.C. 2010) (referencing the definition of "latency period" provided by the Centers for Disease Control and Prevention), whereas the 300-week statutory interval is measured from the last exposure. See supra note 6. This distinction is significant for persons who have had a long occupational history of exposure. The majority responds by pointing out that many workers may fall outside such a group. See Majority Opinion, slip op. at 18 n.5. Indeed, the rights of some workers will undoubtedly be negatively affected by legislative line drawing. However, legislation by its nature involves line-drawing and classifications. Accord Ryan v. Burlington County, 889 F.2d 1286, 1291 (3d Cir. 1989). Our initial task exclusive of Appellants' separate constitutional claims, is not to judge the wisdom of (…continued)

Nor does Plaintiffs' position find support in our case precedent. To the contrary, where an injury is of a class that is cognizable under the WCA, this Court has virtually always construed the enactment to foreclose an action at law even if compensation is ultimately unobtainable. In Kline v. Arden H. Verner Co., 503 Pa. 251, 469 A.2d 158 (1983), for example, the Court affirmed remedy exclusivity although the worker could not receive compensation for some of the injuries he sustained in a work-related accident. Kline explained that the act's remedies are exclusive even where compensation is unavailable, because the WCA by its terms "covers 'all injuries,' and the exclusivity clause bars tort actions flowing from any work-related injury." Id. at 256, 469 A.2d at 160 (emphasis in original); see also Scott v. C. E. Powell Coal Co., 402 Pa. 73, 77-78, 166 A.2d 31, 34 (1960) (explaining that, when an employee sustains injuries that bring him within the provisions of the WCA, such provisions determine the amount he may be compensated and, as such, provide the exclusive remedy even if no

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(continued…)
specific lines the Legislature has chosen to draw, but to endeavor to ascertain that body's intention at the time it drew them. Here, I see no reason to suppose that the General Assembly, when it brought diseases within the scope of the Act beginning in 1937 or moved from an elective to a mandatory scheme in 1974, meant to leave employers open to suit in the event the disease in question would manifest beyond the period of repose. Indeed, the decisions this Court rendered in the era when diseases were incorporated point in the opposite direction – namely, that if a particular type of work-related injury is covered by the Act, the lack of compensability under the circumstances does not render the employer liable to common-law tort liability – and the majority's protestation that it is "inconceivable" that the Legislature would have intended such a result, Majority Opinion, slip op. at 19-20, is difficult to reconcile with such cases, which are briefly discussed below. Finally, to the extent the majority suggests Bowman v. Sunoco, Inc., ___ Pa. ___, 65 A.3d 901 (2013), prohibits such a result based on public policy, the majority misapplies Bowman. The policy referenced in that case relates to preventing an employer, through an exercise of bargaining power, from requiring an employee to relinquish his rights under the Act in the pre-injury timeframe. See 77 P.S. §71(a). That situation is materially different from discerning legislative policy in enacting a statute of repose.

compensation is available); Moffett v. Harbison-Walker Refractories Co., 339 Pa. 112, 117, 14 A.2d 111, 113-14 (1940) (enforcing remedy exclusivity relative to a plaintiff who suffered a disability due to work-related silicosis but was unable to obtain any compensation because his disability was only partial; the Court reasoned that the Legislature's provision of benefits for total silicosis disability manifested an intent to bring all silicosis sufferers under the act). See generally 7 DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION LAW & PRACTICE §10.15 (3d ed. 2011) ("It is . . . the rule under the [WCA] that a common law action is barred even if there is no specific recovery available under the [WCA].").

Conversely, where courts have permitted an action at law for a work-related disease, the illness in question was of a type that was totally excluded from the definition of a compensable injury. Thus, in Billo v. Allegheny Steel Co., 328 Pa. 97, 195 A. 110 (1937), the plaintiff's lawsuit was permitted because no occupational diseases had yet been brought within the scope of the act, see id. at 99-100, 195 A. at 112, and indeed, Moffett expressly distinguished Billo on that basis. See Moffett, 339 Pa. at 117, 14 A.2d at 114.[13] The reasoning of Pollard's Opinion in Support of

[13] I am not convinced by the majority's attempt to distinguish Moffett on the grounds that it was decided at a time when participation in the workers' compensation system was elective. See Majority Opinion, slip op. at 17. The central point made in Moffett was that, as a matter of statutory interpretation in light of the history of Pennsylvania's workers' compensation legislation, once the Legislature decided to bring a certain occupational disease within the scope of the act's coverage, the statutory remedies were intended to be exclusive even where the act made compensation unavailable under the circumstances. See Moffett, 339 Pa. at 116, 14 A.2d at 113 (recognizing that there are various types of limitations on compensability under the WCA, but that none of them have been construed as permitting a common-law remedy so long as the WCA covers injuries stemming from the disease in question). Although potential constitutional difficulties are perhaps more pronounced in a non-elective scheme, it would be a misreading of Moffett to suggest that the holding in that matter rested on the availability of an opt-out provision for employees.

Affirmance is similar. Although that opinion, at one point, appears to predicate the existence of a common law claim on the lack of "compensab[ility]," see Pollard, 548 Pa. at 129, 695 A.2d at 769, the use of the term is imprecise in context because the focus of the opinion is on whether the injury itself is covered under the WCA, and not on whether compensation is or is not barred by some other feature of the statute.[14] See also Perez v. Blumenthal Bros. Chocolate Co., 428 Pa. 225, 227-28, 237 A.2d 227, 229 (1968) (permitting a common law trespass action to proceed because the plaintiff's illness fell outside the scope of defined occupational diseases under the ODA); cf. Martin v. Lancaster Battery Co., 530 Pa. 11, 17, 606 A.2d 444, 447 (1992) (allowing a suit for fraudulent misrepresentation where the employee was "not seeking compensation for the work-related injury itself"); Urban v. Dollar Bank, 725 A.2d 815, 820 (Pa. Super. 1999) (permitting a defamation suit against the plaintiff's employer upon finding that harm to reputation is not a covered injury under the act). Finally, the Stratemeyer case from Montana is to the same effect: because "mental-mental" injuries were categorically excluded from coverage under that state's workers' compensation act, an action at law could be maintained. See Stratemeyer, 915 P.2d 180.

Thus, there is a qualitative difference between coverage and compensability under the WCA. Accord Hartwell, 320 F. Supp. at 77; cf. Weldon v. Celotex Corp., 695 F.2d 67, 72 (3d Cir. 1982) (distinguishing coverage from compensability in interpreting

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[14] This understanding is confirmed because that portion of the opinion relies on Boniecke v. McGraw-Edison Co., 485 Pa. 163, 401 A.2d 345 (1979), where this Court stated, centrally, that claims may be asserted in the common pleas court only if they are based on "diseases not covered by" the WCA and ODA, id. at 167, 401 A.2d at 346, and thus, the crucial issue was whether the plaintiff's illnesses were defined as occupational diseases by those statutes. See generally Sedlacek v. A.O. Smith Corp., 990 A.2d 801, 807-08 (Pa. Super.) (observing that this Court has sometimes been imprecise in its terminology by using terms such as coverage, cognizability, recovery, and relief interchangeably), alloc. denied, 607 Pa. 706, 4 A.3d 1055 (2010).

the similar manifestation period under the ODA).[15] I would therefore reject Plaintiffs' contention that compensability is the sole appropriate litmus for ascertaining whether the act's remedial provisions are "exclusive and in place of any and all other" avenues of relief. 77 P.S. §481(a). In my analysis, Section 301(c)(2) is limited to specifying that compensation is unavailable for diseases manifesting beyond the 300-week time window; hence, it functions only as a temporal limitation on the availability of compensation as part of the overall legislative scheme, and not as a means to exclude from "coverage" under the act all diseases enumerated in Section 108 that manifest in a delayed timeframe. It functions, in other words, as a statute of repose in that it obviates potential liability after a defined amount of time has elapsed. See Abrams v. Pneumo Abex Corp., 602 Pa. 627, 649 n.10, 981 A.2d 198, 212 n.10 (2009) (in dicta, describing Section 301(c)(2) as a statute of repose); 8 DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION LAW & PRACTICE §14.10 (3d ed. 2011) (expressing that Section 301(c)(2)'s time limitation constitutes a "substantive prerequisite to ascertainment of the compensability," intended to "establish, via arbitrary time basis, some outside limit to govern the potential liability of the employer"). Accordingly, I would hold that the 300-week limitation in Section 301(c)(2) has no effect on whether a worker's occupational disease comes within the WCA's coverage. As

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[15] The Third Circuit explained its reasoning as follows:

> Since it is coverage that takes away employees' rights under the common law, the employer's immunity from tort liability continues even though the limitations period in the [ODA] bars compensation for the employee. . . . Although that result is harsh, arbitrariness is a necessary result of any period of limitations, and no system of compensation yet devised avoids all inequities.

Celotex, 695 F.2d at 72 (emphasis added).

such, the exclusivity mandate appearing in Section 303(a) of the statute applies, in my view, to preclude Plaintiffs from maintaining a negligence-based lawsuit against Employers.[16]

As I would conclude that the Workers' Compensation Act provides the exclusive remedy for Plaintiffs' injuries although compensation is unavailable, I would find that the constitutional issues raised by Plaintiffs are salient. These issues pertain to whether the time-based limitation under review violates the Reasonable Compensation Clause of Article III, Section 18 of the Pennsylvania Constitution, the Remedies Clause contained in Article I, Section 11 of the state charter, or the federal Equal Protection Clause or Due Process Clause. Plaintiffs have provided substantive advocacy on these constitutional questions, to which Employers have responded on the merits.

Employers additionally state that Plaintiffs did not give notice to the Pennsylvania Attorney General of their challenge to the constitutionality of the WCA in the common pleas court in compliance with civil procedural rule 235. They also allege that Plaintiffs failed to provide the Attorney General with similar notification at the appellate level and a copy of their appellate briefs as required by our appellate rules. See Pa.R.A.P. 521(a). They indicate that, where a party fails to notify the Attorney General that the

[16] I pause to emphasize that I am not without sympathy for workers who suffer from diseases that manifest beyond the time period permitted for compensation under Section 301(c)(2), and am cognizant of the harshness of the result that would ensue in such cases under my present interpretation. However, I am constrained by what I believe to be the legislative policy and intent underlying the time limitation, and as such, I would affirm the Superior Court's expression that, absent constitutional infirmity, "removal or fine-tuning of the statute of repose is for the legislature, not for the courts." Ranalli v. Rohm & Haas Co., 983 A.2d 732, 735 (Pa. Super. 2009). Additionally, I would observe that, in some cases at least, the injured worker will have recourse against other parties besides the employer. See, e.g., Supplemental Reproduced Record of Oglebay (reflecting that the Tooey plaintiffs have reached settlements with several defendant corporations).

constitutionality of a statute is being attacked, the issue is deemed waived. See Kepple v. Fairman Drilling Co., 532 Pa. 304, 313, 615 A.2d 1298, 1303 (1992).

In reply, Plaintiffs maintain that they "did indeed serve notice of their challenge to the constitutionality of the Workers' Compensation Act," and reference portions of the common pleas docket sheets reflecting that "Plaintiffs have served their Challenge to the Constitutionality of the Workers' Compensation Act." Appellants' Reply Brief at 10 (citing RR. 12a (Tooey), 107a-108a (Landis)).[17] In the alternative, Plaintiffs proffer that notice to the Attorney General is unnecessary because the constitutionality of the WCA is being "vigorously defended" by powerful corporations. Appellants' Reply Brief at 12. Finally, Plaintiffs advocate that notice to the Attorney General is not required because their constitutional challenges are as-applied, rather than facial. They argue that this distinction is sensible because successful facial challenges invalidate the statute entirely, whereas successful as-applied challenges only prevent application of the statute under the factual circumstances before the court. See id. at 11.

The Pennsylvania Attorney General is the Commonwealth official statutorily charged with defending the constitutionality of all enactments passed by the Pennsylvania General Assembly. See City of Phila. v. Commonwealth, 575 Pa. 542,

[17] This aspect of Plaintiffs' representation appears somewhat evasive, as Plaintiffs do not state that they served notice on the Attorney General. Plaintiffs also attach to their reply brief two documents purporting to be such notices at the common pleas level, one for the Tooey plaintiffs and the other for the Landis plaintiffs. Each contains a single sentence, stating: "Notice is hereby given that on May 13, 2008, the Plaintiffs have served their Challenge to the Constitutionality of the Workers[']' Compensation Act." The documents do not specify who received service of the challenge. The common pleas docket entries are similar.

In denying an allegation with waiver implications predicated on an alleged lack of notice to the Attorney General, an express indication concerning who received the notices in question seems indispensable. That Plaintiffs fail to give this Court any such indication makes their presentation appear less than forthright.

570, 838 A.2d 566, 583 (2003) (citing 71 P.S. §732-204(a)(3) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes . . .")). As such, when a constitutional attack upon an act of the Assembly is lodged, "the Attorney General stands in a representative capacity for, at a minimum, all non-Commonwealth parties having an interest in seeing the statute upheld." Id. at 570-71, 838 A.2d at 584. Moreover, the Attorney General may wish to seek further review on behalf of the Commonwealth of an adverse decision on the constitutional question. See Pa.R.A.P. 521(b) & Note. Therefore, where (as here) the Commonwealth is not a party to the proceedings, the party challenging the validity of a statute is required,

> upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record raising the issue, and to file proof of service of such notice.

Pa.R.A.P. 521(a). See generally Md. Cas. Co. v. Odyssey Contracting Corp., 894 A.2d 750, 755-56 (Pa. Super. 2006) (recognizing that the Rule 521(a) notification requirement is separate from, and in addition to, the counterpart requirement under civil procedural rule 235).

Under prevailing precedent, a threshold question is whether Plaintiffs allege a facial, or as-applied, challenge to the constitutionality of the provision under review. This is because, as Plaintiffs observe, Kepple indicated that an as-applied challenge does not implicate civil rule 235 or appellate rule 521(a). See Kepple, 532 Pa. at 313 n.3, 615 A.2d at 1303 n.3. However, the policy rationale underlying Rule 521 is implicated where a meritorious as-applied challenge would invalidate a statute as to an entire class of parties who are not before the Court. Indeed, the term "as applied" is susceptible of different meanings and, moreover, a reviewing court may declare a statute facially unconstitutional when adjudicating an as-applied challenge. Thus, I

would find Kepple's simple dichotomy (for which the Court cited no authority) insufficient to provide meaningful guidance as to whether the Attorney General must be given an opportunity to participate.[18] As such, excepting from the scope of Rule 521(a) all challenges that can, in some sense, be labeled "as applied" – an exception that, in any event, does not appear in the Rule's text – may leave the Attorney General without notice in some instances where she should be given an opportunity to participate.

These appeals present such a case. Plaintiffs are seeking to maintain an action at law, and they propose that the exclusive-remedy command of Section 303(a) may not constitutionally be applied to them. Their challenge, in that limited sense, is as-applied. However, Plaintiffs' argument focuses on whether Section 303(a)'s exclusivity clause can constitutionally be enforced in conjunction with Section 301(c)(2) under any circumstances, not just their own. See Plaintiffs' Reply Brief at 12. Indeed, Plaintiffs do not purport to rely on any facet of their circumstances that would differentiate them from any other worker whose occupational disease occurs beyond the 300-week period, nor do they assert that such proviso, in conjunction with remedy exclusivity, can potentially be applied to other workers under different circumstances. See generally Citizens United v. FEC, 558 U.S. 310, 331, 130 S. Ct. 876, 893 (2010) (discounting any "as-applied" label since the constitutional claims at issue would, if meritorious, invalidate the

[18] See, e.g., Sonnier v. Crain, 613 F.3d 436, 458 (5th Cir. 2010) (Dennis, J., dissenting) ("[F]acial and as-applied challenges are not categorically different types of cases to which different rules of decision apply[; o]n the contrary, in order to adjudicate constitutional challenges, courts apply whatever constitutional doctrines and tests are relevant to the substance of each particular case, and the results of that analysis determine whether a challenged law is unconstitutional, either on its face or as applied to a particular situation."), majority op. withdrawn in part on reh'g, 634 F.3d 778 (5th Cir. 2011); Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 HARV. L. REV. 1321, 1336 (2000) (indicating that it is misleading to suggest that there is a sharp, categorical distinction between facial and as-applied adjudications).

challenged statute as to all corporations); id. at 375-76, 130 S. Ct. 876, 919 (Roberts, C.J., concurring). Thus, while the challenge here may nominally be as-applied, it has many of the incidents of a facial challenge. See Richmond Med. Ctr. For Women v. Herring, 570 F.3d 165, 172 (4th Cir. 2009) (noting that facial challenges allow courts to "efficiently address [the] constitutional concerns of a large group without engaging in the long and unwieldy process of case-by-case analyses"). Under these circumstances, where the constitutional validity of enforcing an act of the General Assembly vis-à-vis a large class of potential litigants is being challenged, I would conclude that the Attorney General should be given an opportunity to participate in conformance with Rule 521(a).[19]

Here, Plaintiffs do not specifically allege that they provided notice to the Attorney General. See supra note 17. Further, the docket sheets from this Court and the Superior Court do not contain entries to that effect, nor is there any indication in the record of an appellate-level notification. Finally, as Plaintiffs have not sought to augment the record with such proof, there is no basis to believe that Plaintiffs satisfied their obligations under Rule 521(a).

Regarding issue preservation, it is true, as Employers contend, that Kepple reflects a holding of this Court that failure to notify the Attorney General as required ordinarily results in waiver. See Kepple, 532 Pa. at 313, 615 A.2d at 1303; see also In re Adoption of Christopher P., 480 Pa. 79, 90, 389 A.2d 94, 100 (1978) (finding

[19] It may be true, as Plaintiffs suggest, that various parties involved in this litigation are interested in seeing the statute upheld. Still, I disagree with Plaintiffs' suggestion that this Court's waiver analysis should consider whether those parties are powerful corporations who defend the enactment vigorously. Such considerations would require the Court to inquire into the financial strength of the parties before it and make an assessment as to whether their advocacy was sufficiently forceful that the Attorney General's input would be superfluous – a standard that would be unworkable in practice.

constitutional issues waived where the challenger failed to notify the Attorney General and also failed to raise the issues in the orphan's court). However, I would find it unduly harsh to dismiss Appellant's constitutional claims as waived in the present context. Plaintiffs were entitled to rely on Kepple's statement that waiver is only triggered for facial challenges and, in a limited sense at least (as explained above), the present challenge may be termed as-applied. Thus, I would not dismiss such claims as waived. At the same time, I would not overlook the requirements of our appellate rules.

For the reasons given above, I would hold that Plaintiffs' injuries are covered by the Workers' Compensation Act, but that compensation is unavailable. Additionally, I would retain jurisdiction and direct that Plaintiffs give immediate written notice to the Attorney General concerning the constitutional issues raised by such a holding, in conformance with appellate rule 521(a). Accordingly, I respectfully dissent from the majority's decision to reverse the Superior Court's order and remand to the common pleas court for further proceedings.