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Fighting for Workers' Rights
Summer 2013

for you



RAMBLINGS OF A LABOR PUGILIST

Joe Pass

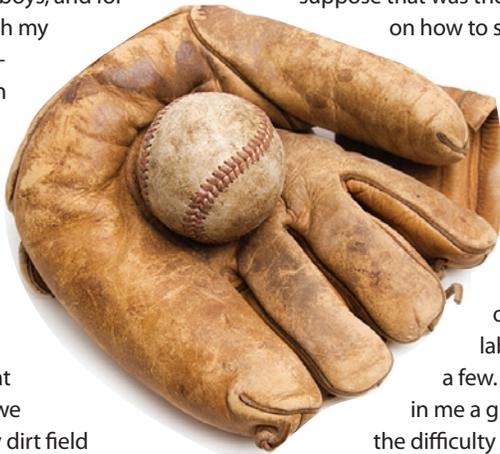


In our newly designed newsletter I have been commissioned to relate to our clients and friends just who we are, where we came from, what we do, and why. And, since I was one of the original founders of our firm, I thought it best to begin with an insight as to my beginnings and philosophy.

I was born and raised in the McKees Rocks area where just about everyone was a "blue collar worker." I was one of three boys, and for my first nine years lived with my mother and father in a one-bedroom apartment, which meant that my older brother and I shared a 10x12 living room as our bedroom and slept on a real "Army cot." I recall growing up wearing my brother's hand-me-down clothes and loving to play ball — any kind of ball. That was back in the day when we would play baseball on any dirt field where we could make our own base paths, using cardboard for bases. If only 10 or 15 kids showed up, a hit to right field was an automatic out. Only a few kids had gloves and it was a good day when we had two or three gloves which were shared between the two teams. The first baseman always had the first choice of

the gloves! Unlike today where kids have all the equipment and are parentally supervised, we picked sides by first playing odds and even. We called our own balls and strikes and outs, and were really lucky if we had one ball wrapped in black tape and another "new ball" which was used only if we lost the black-taped ball.

When we played football or basketball, it was the same — call your own fouls and penalties. I suppose that was the start of my education on how to settle disputes.



I held such jobs as paperboy, farm worker, truck driver, sewer worker, Forbes Field vendor, riverboat deckhand, machine operator and general laborer, just to name a few. That work instilled in me a great appreciation for the difficulty of earning a decent living. Burned into my heart and soul was an appreciation for the work of janitors, waitresses, dishwashers, laborers, truck drivers and all those who toil to make our lives more pleasant and enriched — people whom we often never see.

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Jubelirer, Pass & Intrieri has served as legal counsel for more than 80 local and national labor organizations in various industries in both the public and private sectors. The lawyers at JPI have represented working people and their families in a variety of legal proceedings.

JPI has a well-established track record protecting and enforcing workers' rights. Our attorneys are honored to have been named among Pennsylvania Super Lawyers, Pittsburgh's Top-Rated Lawyers, and Best Lawyers in America. JPI has been designated as a Top-Tier Law Firm by *U.S. News & World Report*.

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PERSONAL INJURY

Attorney Ed Walter

TRAUMATIC BRAIN INJURIES

With all the headline-grabbing stories about sports-related concussions, the medical field is focusing more attention than ever on various types of head injuries that were previously not well-understood. One type of head injury that is receiving a great deal of attention is known as “traumatic brain injury,” or TBI. These injuries are sometimes referred to as closed-head trauma. As TBIs are becoming better understood by the medical community, the impact is being increasingly felt in personal injury and workers’ compensation cases.

TBIs send more than 400,000 people to the hospital for treatment each year. Many of these injuries occur in teenagers and young adults. Although the majority of these injuries are moderate to mild, even a minor TBI can cause the victim to suffer serious problems.

One critical problem with treating TBIs is that many doctors are not adequately trained in the neuroscience of head injuries and are unable to properly diagnose a traumatic brain injury when they encounter one. Although most doctors are capable of recognizing serious TBIs, the less debilitating TBIs tend to be more difficult to diagnose because there are often few outward signs of the internal injury. This failure to recognize the symptoms of moderate TBIs can lead to serious negative medical consequences.

For example, many people who suffer undiagnosed TBIs do not receive appropriate treatment. The long-term effects of a TBI can include seizures, headaches, dizziness, and problems with memory and concentration. TBIs can also cause other symptoms that a victim might not associate with the brain, including loss of muscle control, fatigue, depression and anxiety, speech disorders and sexual dysfunction. Given the variety of symptoms and the difficulty some doctors have connecting those symptoms to a TBI, treatment is often



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delayed or not provided at all. The patient may continue to suffer, often unaware of the root cause of his or her problems.

If you or a loved one has suffered a blow to the head, even a seemingly minor one, and are

suffering from symptoms that weren’t present before the injury, this may be an indication of a TBI. It is important to seek appropriate treatment, and you may also want to consult with an attorney about how your legal rights may be affected.

RAMBLINGS OF A LABOR PUGILIST

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We frequently take for granted that with the flick of a switch electricity comes to us immediately. When we turn on the faucet we get fresh clean water, and when we flush our commodes our waste water is treated and recycled into a clean environment.

Our goods and services are delivered by drivers who travel great distances and work long hours in all sorts of weather; we have safe reliable public transportation to help us get around. Our kids are taken safely to and from our schools where teachers provide the tools with which they can succeed. We often don't think about these hardworking men and women who work to give us these incidents of life's pleasures.

I get infuriated when I hear we should not raise taxes or rates on those who have the most. It isn't that I am against those that have done well financially; in fact, I want everyone to do well. However, I firmly believe that from "those of us who have more, more is expected." I bristle at those who complain that a blue-collar worker is making "too much." That refrain is often heard

simply because the individual complaining isn't doing as well. My answer is when workers do well your wages and benefits will rise to the higher level if you organize. We should not want to be caught in a race to get to the bottom. We should be striving to get to the top. We must be ever vigilant in our quest to improve the wages and benefits of those who provide services to us. When people complain that taxes are too high, or wages too great, I relate a personal story that emphasizes why I think as I do.

Years ago my government was good enough to send me on an all-expense paid trip to a country that had no clean water, no clean air, no sewage, no fire department, no regulated food supply, no roads, and virtually no taxes and fees. It also had plenty of rats, dysentery and lice. It was not the type of place where anyone should be living. Today that country is very progressive with high speed trains, a vibrant industry and a progressive tax rate that approaches 50% for those who have the most — and guaranteed health care for all. That country — South Korea — is now our ally. The moral of this story is simple. There is

no free ride nor is there a free lunch. If we want good services, clean air, water, electricity, and all the other things we enjoy, it requires that those who provide these services be paid decent wages and benefits so they too can become good consumers, for it is the ordinary working American that makes this society grow. It is not the multi-millionaire who drives the economy. It is the average worker who makes good wages and benefits and plows that money into society by buying refrigerators, cars, goods and services that they need in everyday life.

For all of these reasons it is the job of our lawyers and staff at Jubelirer, Pass & Intrieri to do our best to protect and improve the lives of all workers so that all Americans can someday have a decent standard of living and be as lucky as I have been in living the American Dream.

We are interested in hearing from you about the fight to protect and improve workers' rights. Let us hear from you. Give us those ideas, thoughts and comments at jpilaw.com. 



WORKERS' COMPENSATION

Jim Welker

CAN AN INJURED WORKER REFUSE LIGHT-DUTY WORK BASED ON LACK OF TRANSPORTATION?

Consider the situation where you've been injured at work and you are eligible for a light-duty assignment. The only problem is that the light-duty assignment requires you to travel a considerable distance, and you have just lost the use of your vehicle. If you don't have any way to get to the job, can your workers' compensation benefits be affected?

The answer for one injured worker turned out to be yes. In *North Pittsburgh Drywall*

Co. v. W.C.A.B. (Owen), the employer offered the injured worker a light duty assignment at a location one and one-half hours from



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his home. This was approximately the same distance that the employee had to travel for his full-duty employment. After returning to work for two days of light duty,

the employee stopped coming to work. It turns out the vehicle he used to get to work was owned by his father and his father needed the vehicle back. The employer then sought to suspend w/c benefits.

The Commonwealth Court upheld the suspension of the employee's benefits. In the court's view the Claimant's inability to obtain transportation did not excuse him from continuing to work at the light duty job. The Court ruled that the employee was responsible for his own transportation. Relying on earlier decisions, the Court stated that "once a claimant has suitable alternative employment, any loss of earning power not related to the work-related injury does not justify reinstatement of total disability benefits."

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BREATHALYZER TEST RULING IN PENNSYLVANIA COULD AFFECT NUMEROUS PENDING DUI CASES

A recent Dauphin County trial court decision has called into question the accuracy of a breath alcohol testing device routinely used by law enforcement throughout Pennsylvania. This decision could potentially impact many pending DUI cases across Pennsylvania.

On December 31, 2012, in the case of *Commonwealth v. Schildt*, Dauphin County Court of Common Pleas Judge Lawrence F. Clark Jr. held that certain breath testing devices routinely used by law enforcement, particularly the Intoxilyzer 5000EN, cannot reliably detect blood alcohol content above or below the calibrated range of 0.05 percent to 0.15 percent. Judge Clark concluded that test results obtained from these devices are not legally sufficient to meet the burden of proof in highest-rate DUI cases.

After hearing testimony from several qualified experts, Judge Clark wrote:

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." These famous words were first spoken by John Adams in his 'Argument in Defense of the Soldiers in the Boston Massacre Trials' in December 1770. These remarkable words relate to the case sub judice because, after hearing testimony from several extremely qualified expert witnesses offered by the Defendant, and after reviewing the pertinent

statutes and regulations as promulgated in the Commonwealth of Pennsylvania, we are left with the FACTS. And the unvarnished FACTS of this case ultimately establish that the array of breath testing devices presently utilized in this Commonwealth, and in particular the Intoxilyzer 5000EN device manufactured by CMI, Inc. (hereinafter "CMI"), as those devices are presently field calibrated and utilized in this Commonwealth, are not capable of providing a legally acceptable Blood Alcohol Content (BAC) reading, which is derived from a Defendant's breath, outside of the limited linear dynamic range of 0.05% to 0.15%.

Judge Clark ruled that any reading above or below the limited range of 0.05% to 0.15%



cannot be scientifically verified, and "[t]hus, the utilization of any instrument reading above or below that limited dynamic range cannot, as a matter of science and therefore law, satisfy the commonwealth's burden of proof beyond a reasonable doubt on an essential element of a charged offense for an alleged violation of 75 Pa.C.S.A. §3802(c) of the Pennsylvania Motor Vehicle Code."

The Dauphin County Court of Common Pleas decision is a victory for defense attorneys. However, the case is now on appeal to the Pennsylvania Superior Court. We can expect that one issue will be whether the limitations on the Breathalyzer data should be left to the jury to decide as a matter of the weight of evidence. If the Superior Court views the issue as one of admissibility for the judge to decide, it is possible that all breath-testing results obtained with these devices will be rendered invalid. A ruling of this nature might force law enforcement to resort to blood tests as the only acceptable method of BAC measurement in Pennsylvania.

This is a case that will be followed closely by both law enforcement and the defense bar. If you are currently involved in a case where the Commonwealth is relying on Breathalyzer evidence, please consider contacting our firm for a review of how that decision may impact on your case. 

For more go to <http://jpilaw.com/practice-areas/dui.html>

WORKERS' COMPENSATION

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This outcome is different from those cases where an individual's inability to drive to work is actually due to the work-related injury. For instance, if an employee suffers a work-related hand injury requiring a cast, and the treating physician determines that the employee cannot drive a vehicle while wearing the cast, the employee could decline an offer of light-

duty employment. However, transportation problems such as mechanical difficulty or unavailability of a vehicle are not legitimate reasons to turn down a light-duty assignment.

In the present case, Owen admitted he was capable of performing the light duty work, but he left that position because he no longer

had transportation available to him. The Court held that since it was the loss of the borrowed transportation that prevented Owen from returning to the light duty position, he was no longer entitled to workers' compensation benefits. 

PRESERVE OUR GOOD JOBS:

LETTER TO *PITTSBURGH POST-GAZETTE*

There's been a recent push on the state political scene to sell off Pennsylvania's state liquor stores to a private operator. To some the idea of turning over the liquor stores to private

business interests might seem like a good idea for working people who are also taxpayers. Before you decide, consider this problem from a different perspective. One of our attorneys

did just that in a letter to the editor that was published in the *Pittsburgh Post-Gazette* on March 29, 2013. Read on and let his letter tell the "rest of the story":



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Pittsburgh Post-Gazette
Editorial Department

Your editorial relative to the privatization of our liquor stores is short-sighted and a loser for the taxpayers and consumers. If I were to offer to employ 4,500 employees in decent paying jobs (not minimum wage jobs) and provide them with health care, retiree benefits, plus rebating to the state over \$500 million per year, of which at least \$100 million is pure profit, they would chain me to a chair until I signed. That is exactly what we currently have yet we are willing to "give it away" to get a one-shot infusion of money which will quickly disappear. In the process, it will eliminate over 4,500 good-paying jobs and replace them with minimum wage jobs. The Liquor Control Board is the only state agency that pays for itself, does not receive the big box discount of 1% in sales tax, which the purchasers of the licenses shall receive, and collects sales tax on all sales — something that routinely does not happen with private enterprise.

As to any argument that privatization will be more convenient to the public, let me assure you not only will that not happen, but it will be far more expensive to the public. Recently, my state representative challenged me to visit "Total Wine," a big box liquor store. I had the occasion to do so in Florida. First of all, big box stores are located about 50 miles apart at the closest point and the price on nine randomly selected liquors and wines at "Total Wine" versus what we pay in Pennsylvania revealed that overall nine purchases in Pennsylvania were cheaper! More importantly, if you buy at the corner store, or what we might call the "convenience store", the prices for the same nine liquors were more than \$25.00 cheaper here in Pennsylvania!! Privatization is a nice reward for those who contributed to the Governor and Republican House members. Have you ever wondered why it is that private enterprise will be paying millions of dollars for these licenses? It is not because they want to give the state money! The reason is patently obvious — they will make the profit, not the state! And believe me, prices for liquor and wine will go up! Wake up — this is nothing but a money grab by those who have the money and want more at our expense. The solution is to continue to modernize and expand our current system and keep the profits for the Pennsylvania taxpayers!

Joseph J. Pass

Joseph J. Pass



LABOR AND EMPLOYMENT LAW

Attorney Ernie Orsatti

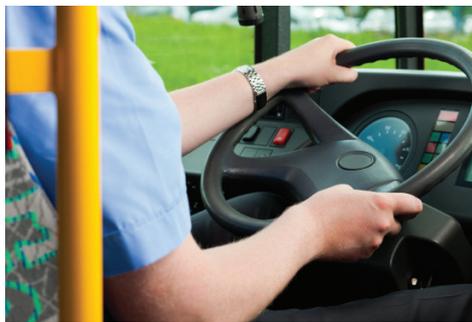


PA SUPERIOR COURT CONFIRMS DENIAL OF INSURANCE BENEFITS TO DRIVER

The Pennsylvania Superior Court, in a case involving an injured driver, upheld the denial of certain insurance benefits to that driver based on a little-known provision of his automobile insurance policy. The Court confirmed that if the driver's personal insurance policy has an exclusion known as a "Regular-Use" exclusion, then the driver can't collect certain benefits resulting from an injury while driving his work vehicle.

Most insurance carriers will market personal automobile insurance policies with the "Regular-Use" exclusion included as part of the policy. This exclusion allows the carrier to refuse to pay certain benefits known as underinsured and uninsured benefits when an employee gets hurt while driving his or her employer's vehicle.

The driver in this case [*Adamitis v. Erie Insurance Exchange*] was injured while he was working as a bus driver. The driver was hurt in an accident



with another vehicle, but the owner of the other vehicle did not have enough insurance coverage to satisfy all of the losses that the driver suffered. Normally the driver would be allowed to look to his own personal insurance policy for some additional benefits, but this driver had a policy that included a "Regular-Use" exclusion. The "Regular-Use" exclusion means that if the driver was hurt driving a vehicle that he did not own (in this case his employer's bus), then he could

not look to his own personal insurance policy for any additional benefits.

In this particular case, the injured employee did not even drive the same bus every day, and the bus was never available to him for his regular use. Those facts weren't enough to avoid the "Regular-Use" exclusion. The Superior Court confirmed that as a legal matter the employee drove a bus regularly for his employer, and that was enough to allow the insurance company to deny the injured employee those benefits. A number of cases have attempted to overturn this rule of law because it is extremely unfair to the injured worker. The worker has no control over how much insurance his employer purchases, and with this rule the employee can't even protect himself through his own personal insurance policy. Unfortunately the Superior Court turned down these arguments in favor of the insurance carriers.

Employees who drive on a regular basis for their employer should examine their personal automotive insurance policy to see if the policy has a "Regular-Use" exclusion. If the employee finds himself or herself in a situation where benefits are being denied based on a "Regular-Use" exclusion in their policy, the employee may need to seek legal advice about whether the exclusion was incorrectly applied in their situation.