Employer Liability - Pennsylvania Workmen's Compensation Act - Injured Employee

Peter J. Sheptak

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EMPLOYER LIABILITY—Pennsylvania Workmen's Compensation Act—Injured Employee—The Pennsylvania Supreme Court has held that the Dual Capacity Doctrine, which allows an injured employee to sue his or her employer outside of the Workmens Compensation Act, will only apply if the employee was injured while not performing his or her job function.

*Heath v. Church's Fried Chicken, 519 Pa. 274, 546 A.2d 1120 (1988).*

Inez Heath, while engaged in her duties as an employee of Church's Fried Chicken (Church's), was severely injured while using a "chicken saw" that was designed and manufactured by Church's. Following her injury, Heath applied for and received workmen's compensation benefits. In addition, Heath sought further recovery from Church's by filing an action in the Court of Common Pleas of Philadelphia in trespass and assumpsit. Heath based her claim on causes of action for breach of warranty, negligence, and strict products liability, all arising from the allegedly defective nature of the chicken saw manufactured by Church's.

Heath contended that under the dual capacity doctrine (DCD), an employer who would normally be shielded from tort liability under the exclusivity provision of the Pennsylvania Workmen's Compensation Act (WCA) could become liable in tort to its employees if it occupied a second legal capacity which created in the employer obligations independent of its obligations as an employer. Since Church's was the manufacturer of the chicken saw, Heath argued that Church's occupied a second, or dual, capacity as a manufacturer, and could therefore be sued in tort. In the court of common pleas, Church's moved for summary judgment based on a defense of employer immunity arising from the exclusivity provision of the

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4. 519 Pa. 276, 546 A.2d at 1121.
5. See *supra* n.2.
6. 13 Phila. at 307.
7. *Id.*
Church's argued that the WCA provided limited liability for an employer in exchange for a specified recovery for an employee, and that the WCA excluded any other remedy an employee may otherwise have against an employer. Based on this argument, Church's motion for summary judgment was granted by the trial court. 

Heath subsequently appealed to the Pennsylvania Superior Court, who affirmed the grant of summary judgment in all respects. Upon petition, the Pennsylvania Supreme Court granted allocatur.

Justice McDermott, writing for the majority, first addressed the issue of whether a products liability action could be brought against an employer that manufactured the machinery that injured the employee. The majority began its analysis by stating that in order for Heath to prevail in her appeal, the court would have had to have found that Church's could be sued under the "dual-capacity" doctrine that the court had earlier endorsed in *Tatrai v. Presbyterian University Hospital*. In examining whether the dual capacity exception applied in this case, Justice McDermott analyzed the Supreme Court's decision in *Lewis v. School District of Philadelphia*, in which the court held that the focus of the dual capacity exception was on the circumstances surrounding the workmen's injury. If the employee's compensable injury occurred while she was actually doing her job, then the dual capacity excep-

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8. 519 Pa. 276, 546 A.2d 1121. *Quoting Pa. Stat. Ann.* tit. 77, 481(a) (Purdon Supp. 1989), "the liability of an employer under this act shall be exclusive and in place of any and all other liability to such employee, his legal representative, . . . 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 Pa. Cons. Stat. Ann.* § 481(a) (Purdon Supp. 1989).

9. *Id.*

10. *Id.*


14. *Id.* at 276, 546 A.2d at 1121.

15. *Id.* Under the dual capacity doctrine, "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as an employer." 2A A. Larson, *The Law of Workmen's Compensation*, 72.80 at 14-112 (1976).


18. *Id.* at 475, 538 A.2d at 869.
tion could not apply. As Heath was in fact performing her job at the time of her injury, the majority held that the dual capacity doctrine did not apply, and therefore, the WCA provided Heath's exclusive remedy.

Justice Papadakos joined the opinion, and also filed a separate concurring opinion in which he stated that he reluctantly joined the majority because the issue was controlled by a statutory scheme imposed by the legislature. Justice Papadakos' opinion called upon the legislature to redress the injustice done to the injured party in the present case, and the employees in Lewis, Poyser v. Newman and Co, Inc. and Budzichowski v. Bell Telephone Co. of Pennsylvania; cases that the majority relied upon in reaching its holding in the present case.

Justice Larsen, joined by Justice Stout, filed a dissenting opinion that focused on Heath's role as the ultimate user of a manufactured product. The dissent noted that under the majority's holding, workers would be increasingly disadvantaged by a workmen's compensation system that was originally devised and enacted for their benefit. Relying upon his dissent in Lewis, Justice Larsen pointed out that employees may have had many other relationships with their employers such as landlord/tenant or seller/buyer and that the laws that governed those relationships should have determined the rights and liabilities of the parties. In the present case, Justice Larsen reasoned, Heath sought to hold her employer liable, not as an employer, but as the manufacturer of the product that caused her injury. The dissent emphasized the general unfairness of allowing others, who were not employed by the manufacturer of a defective product, to have a cause of action against that manufacturer, but not allowing an injured employee to sue her employer, if that employer happened to be the manufacturer of the product in question. Furthermore, Justice Larsen pointed out

19. Id.
20. 519 Pa. at 277, 546 A.2d at 1121.
21. Id.
24. 519 Pa. at 277, 546 A.2d at 1121.
25. Id.
26. Id.
27. Id. at 278, 546 A.2d at 1122.
28. Id.
29. Id.
that as long as the courts allowed the WCA to limit an employer/
manufacturer's liability, then "the deterrent aspect of strict liabil-
ity law will be seriously undermined" and an employer/manufac-
turer would have no incentive to produce safe devices.30

Finally, Justice Larsen argued that the supreme court in Tatrai
ruled that where a service was provided to the public, a duty
flowed from the provider to the general public, including employ-
ees who used the service.31 Since Heath alleged in her complaint
that the chicken saws were designed, produced, and sold to the
public as a business by Church's, and Church's in its answer de-
ied selling the saws to the public, this raised an issue of fact, and
therefore, the trial court should not have granted Church's motion
for summary judgment.32

In order to put the Pennsylvania Supreme Court's decision in
Heath into perspective, it is helpful to have some background on
workmen's compensation and the dual capacity doctrine. Work-
men's compensation law developed early in this century for two
main reasons.33 The first, and less well-known of the two reasons,
was economic in nature: to make the cost of work-related injuries a
part of the cost of producing goods and services, thereby placing
the ultimate cost of worker injuries on the consumer.34 The second
and more well known reason was to eliminate notions of fault by
allowing an employee to receive a small, but assured, remedy for
his work-related injuries while his employer received full immunity
from all common law claims in tort by the employee.35 In Pennsyl-
vania, this latter purpose was legislatively embodied in the exclu-
sive remedy provision of the WCA.36 Under the exclusive remedy
provision, an employee's remedy for a work-related injury was lim-
ited to that remedy provided under the provisions of the WCA, as
determined by a workmen's compensation referee.37 No other rem-

30. Id.
31. Id. The court in Tatrai, 497 Pa. at 255, 439 A.2d at 1168, said: "There is no
reason to distinguish appellant from any other member of the public injured during the
course of treatment. The risk of injury which the appellant suffered was a risk to which any
member of the general public receiving like treatment would have been subjected." Id.
32. 519 Pa. at 279, 546 A.2d at 1122.
33. See infra note 34.
34. Davis, Workmen's Compensation—Using an Enterprise Theory of Employment
35. 1 A. Larson, The Law of Workmen's Compensation 1.10 (1978), See also Work-
this section.
edy was available to an injured employee. Thus, under the WCA in Pennsylvania, an injured employee no longer had a common law cause of action against his employer for any injury covered by the WCA. In fact, the Pennsylvania Supreme Court has held that the WCA simply deprived the courts of common pleas of jurisdiction over any common law claim in tort by an employee against his employer.

It is very important to note, however, that under the exclusivity scheme, an employee retained his right to sue a third party if the injury was caused by the third party while the employee was in the scope of his employment. In fact, it was the third party liability scheme which led to the development of the DCD. In essence, the DCD sought to allow an employee to sue his employer, but as a third party, if the employer possessed a second capacity which was independent of its capacity as an employer, e.g. landlord, land possessor, or manufacturer. For the purposes of the WCA, an employer could have two separate capacities, one of which was immune from tort liability, while the other retained full tort liability. Therefore, whether or not the DCD was applied became a factual question: Did the employer engage in sufficient activities to be classified as a third party under the WCA?

The DCD first arose in the California case of Duprey v. Shane. In Duprey, a chiropractor negligently treated his employee after she was injured in the scope of her employment. The chiropractor's treatment aggravated the employee's injuries. The California Supreme Court held that the WCA did not exclude the chiropractor from a common law medical malpractice suit, reasoning that when the chiropractor decided to treat his injured employee, he took on the duties and responsibilities of any other doctor (his

38. Id.
39. Id.
41. Id. 77 PA. CONS. STAT. ANN. § 481(b) (Purdon 1987). The statute reads in part: "In the event injury or death to an employe is caused by a third party, then such employe . . . may bring their action at law against such third party. . . ." Id. See also Creighan v. Firemen's Relief and Pension Fund Bd. of City of Pittsburgh, 397 Pa. 419, 155 A.2d 844 (1959).
43. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION 72.81(a) at 14-229 (1988).
44. Id. 72.81(c) at 14-244 (1988).
45. Id.
46. 39 Cal.2d 781, 249 P.2d 8 (1952).
47. Id. at 784, 249 P.2d at 11.
48. Id.
second capacity) and the employment relationship was effectively terminated.49

California was also the first jurisdiction to adopt the DCD in a products liability setting in the 1977 case of Douglas v. E. & J. Gallo Winery.50 In Douglas, employees of the winery sued in tort to recover damages for personal injuries they suffered when scaffolding manufactured by Gallo, upon which they were working, collapsed.51 The California Supreme Court held that the employer, as the manufacturer of a defective scaffolding which was also sold to the public,52 was liable to its employees because Gallo took on the second separate capacity of manufacturer. The employer was held liable in its second capacity because the second capacity generated obligations and duties flowing to the employee which were unrelated to Gallo's duties and obligations as an employer.53 The Court, however, limited the holding in this case to an employer who manufactured the defective product for sale to the general public as well as for its own use.54

The DCD was also adopted by Ohio55 and Illinois56 in the late seventies and early eighties. In the Ohio case, Mercer v. Uniroyal, Inc.,57 the employee, a truck driver, was injured when an employer-manufactured tire on the truck he was driving blew out, causing an accident in which Mercer, the employee, was injured.58 The employee recovered workmen's compensation benefits.59 The employee then brought suit to recover against his employer in tort.60 The trial court granted summary judgment for Uniroyal.61 However, the Ohio Court of Appeals reversed, allowing the employee a

49. Id. at 786, 249 P.2d at 13. The court in Duprey stated "[i]t is our conclusion that, when the employing doctor elected to treat the industrial injury, the duties and obligations growing out of the employer-employee relationship terminated, and the doctor assumed the same responsibilities that any doctor would have assumed had he been called in on the case. As will be pointed out, such third party doctor can be sued for malpractice resulting in an aggravation of an industrial injury, or a new injury. It follows that the employer-doctor may be sued for malpractice when he elects to treat the industrial injury." Id.

51. Id. at 104, 137 Cal.Rptr. at 798.
52. Id. at 107 n.1, 137 Cal.Rptr. at 799 n.1.
53. Id. at 109, 137 Cal.Rptr. at 803.
54. 69 Cal.App.3d at 109, 137 Cal.Rptr. at 803.
58. Id. at 276, 361 N.E.2d at 493.
59. Id.
60. Id.
61. Id.
Recent Decision

separate common law tort recovery based on a breach of warranty theory. The Court reasoned that Mercer did not sue as an employee, but rather as a reasonably foreseeable user of a product. In other words, the hazard to which the employee was exposed was not one of employment, but "was common to the public in general". Therefore, the defendant Uniroyal, for the purposes of its employee's injury, acted in a dual capacity as a tire manufacturer, which conferred duties and obligations upon Uniroyal independent of its obligations as an employer, and which allowed its employee to recover outside of the Ohio WCA.

Illinois adopted the dual capacity doctrine in 1979 in Smith v. Metropolitan Sanitary District. In Smith, the employee was injured by a defective truck leased to a joint venture by one of the parties involved in the joint-venture (the plaintiff was employed by the joint-venture). The issue was whether the employer was immune to the liability imposed upon other lessors whose defective leased property caused injury because, in addition to being the lessor of the defective truck, the employer was also a member of the joint venture that employed Smith. The Illinois Supreme Court answered in the negative, allowing the employee a recovery in tort. The Court applied the DCD and stated that the employer here occupied a second, completely separate, legal capacity as a lessor, and was therefore strictly liable to Smith in its capacity as lessor. The Court came to this conclusion by reasoning that Smith's right to bring this particular action should not have depended on whether the defective truck was leased to Smith's employer by one of its members, or by another lessor that had no other ties to the employee's joint-venture employer. Additionally, the court reasoned that the employer's liability should not depend on whether it was solely a lessor, or was a lessor that coincidentally occupied the status of a party to the joint-venture that employed Smith.

62. Id. at 279, 361 N.E.2d at 496.
63. Id.
64. Id.
65. Id.
66. 77 Ill.2d 313, 396 N.E.2d 524 (1979).
67. Id. at 315, 396 N.E.2d at 526.
68. Id. at 313, 396 N.E.2d at 528.
69. Id.
70. Id.
71. Id.
72. Id.
Most other states have either rejected the DCD or have reserved judgment on it. The reason for this rejection or indecision appeared to be the fact that, in the states where the DCD was accepted, the DCD was seen by many commentators to have undermined the exclusivity provision of the WCA, and therefore, the whole machinery of the WCA itself. As a result of this perceived invalidation of the exclusivity provision, the California legislature abolished the DCD in 1982, opting instead for an increased schedule of benefits written into the California Workmen’s Compensation statute. Additionally, in 1983, the Ohio Supreme Court in Freese v. Consolidated Rail Corp., replaced the DCD in Ohio with the dual persona doctrine, espoused by Professor Larson in his treatise on workmen’s compensation. The dual persona doctrine appeared to be much more restrictive and logically compatible with the intended purpose of the WCA’s exclusivity provision than the DCD.

In Pennsylvania, the first case with dual capacity overtones was Tatrai v Presbyterian University Hospital, which was decided by the Supreme Court of Pennsylvania in 1982. In Tatrai, the plaintiff, a hospital employee, was injured by a falling X-ray machine after being told by her supervisor to report to the hospital emergency room rather than to the employee health service provided free by the hospital to its employees. The issue in this case was whether the hospital could effectively defend a common law negligence action by an injured employee by using the exclusivity provision of the Pennsylvania WCA. In answering this question, the

73. 2A A. Larson, supra note 21, 72.83 at 14-252.
74. Id. 72.81(a) at 14-229.
75. Id. 72.81(c) at 14-243. Assembly Bill No. 684 sec. 6, amending § 3602 of the Labor Code (Calif. 1982).
76. 4 Ohio St.3d 5, 445 N.E.2d 1110 (1983). The plaintiff, a motorcycle policeman, was injured when his motorcycle hit a pothole in the street. The plaintiff sued the city, for which he worked, for negligence. The court held that the DCD did not apply in this case, and said that the doctrine would apply only if the employer had a second legal capacity so completely independent of its capacity as an employer as to create a separate legal person. Id., 4 Ohio St.3d 5, 445 N.E.2d 1110.
77. 2A A. Larson 72.81 at 14-229 (1988). “An employer may become a third person, vulnerable to tort suit by an employee, if-and only if-he possesses a second persona so completely independent from and unrelated to his status as an employer that by established standards the law recognizes it as a separate legal person.” Id.
78. Id.
80. 497 Pa. at 248, 439 A.2d at 1163.
81. Id. See supra note 8 for a text of the exclusivity provision.
court gave two separate rationales for its answer.\textsuperscript{82} Justice Nix\textsuperscript{83} determined that Tatrai, an employee of the hospital, was not in the course and scope of her employment when her injuries occurred.\textsuperscript{84} Therefore, the workmen's compensation statute did not apply, and Tatrai was not precluded from suing her employer in tort.\textsuperscript{85} However, the concurring majority opinion of Justice Roberts used a different rationale to reach the same result as Justice Nix.\textsuperscript{86} Justice Roberts reasoned that it was irrelevant whether or not the employee's injury arose in the scope of her employment.\textsuperscript{87} Rather, the relevant conclusion was that the hospital acted in a separate capacity when it chose to treat its employee in a medical facility open to the general public.\textsuperscript{88} Therefore, the hospital owed its employee the very same duty that it owed to any other patient.\textsuperscript{89} In essence, the fact that Tatrai was an employee was not a sufficient basis upon which to distinguish her from any other patient.\textsuperscript{90} Consequently, Justice Roberts reasoned that the exclusivity provision of the WCA would not bar Tatrai's recovery in this case.\textsuperscript{91} Thus, recovery was available for the employee outside the workmen's compensation statute.\textsuperscript{92}

In addition to Tatrai, there were three other cases that the Supreme Court of Pennsylvania discussed in Heath.\textsuperscript{93} Along with Tatura...
these three cases established the history of the DCD in Pennsylvania. The first case, *Budzichowski v. Bell Telephone Co.*, decided in 1983, involved a telephone installer who sued, for alleged negligent medical treatment, both the telephone company for which he worked, and the company physicians who treated him after he received a work-related injury. The issue was whether or not Bell Telephone was acting in a dual capacity as both the provider of medical care and as an employer when Budzichowski received his negligent medical treatment so that Bell Telephone was liable to Budzichowski despite the exclusivity provision of the WCA. The Pennsylvania Supreme Court held that both the physicians and Bell Telephone were not operating in a dual capacity when the alleged negligent medical treatment occurred. The court held, as distinguished from *Tatrai*, that as the employee was not treated in medical facilities open to the public, the employee would not have been treated but for his employment relationship with Bell. Therefore, Bell Telephone, in treating the injured employee, was merely fulfilling one of its duties as an employer, so consequently no dual capacity existed. However, the court expressly recognized the existence of the DCD in Pennsylvania.

The next case that the Pennsylvania Supreme Court discussed in *Heath* was *Poyser v. Newman & Co., Inc.*, in which the employee was injured while using a "notching machine" designed and manufactured by Newman, the employer. The DCD was not put forward by Poyser as a ground for allowing a recovery in tort. Rather, Poyser attempted to pierce the WCA's exclusivity provision by showing that Newman had in effect intentionally caused Poyser's injuries by omitting from the employer-manufactured "notching machine" several federally mandated safety devices.

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95. 503 Pa. at 160, 469 A.2d at 111.
96. 503 Pa. at 161, 469 A.2d at 112.
97. *Id*. at 168, 469 A.2d at 115.
98. *Id*.
99. *Id*.
100. *Id*. at 167, 469 A.2d at 114.
102. 514 Pa. at 34, 522 A.2d at 550.
103. *Id*.
104. *Id*. 

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The issue was whether the employee's assertion that his work-related injury was caused by "deliberate derelictions" of his employer could have operated to take the employee's action out of exclusivity clause of the WCA.\textsuperscript{105} The court denied recovery for Poyser on the ground that such an exception to the exclusivity provision was not written into the Pennsylvania WCA, and whether or not such an exception existed was for legislative, rather than judicial, determination.\textsuperscript{106} However, in dicta, the Pennsylvania Supreme Court again affirmed that the DCD did exist in Pennsylvania.\textsuperscript{107}

Finally, in \textit{Lewis v. School District of Philadelphia},\textsuperscript{108} the Pennsylvania Supreme Court formulated the DCD as it exists today and as it was used by that court in \textit{Heath}. In \textit{Lewis}, the plaintiff was employed by the Philadelphia School District as a bus driver.\textsuperscript{109} While driving his bus, Lewis was injured in an accident involving an uninsured motorist.\textsuperscript{110} As a result of his injuries, Lewis received workmen's compensation benefits.\textsuperscript{111} However, Lewis also demanded that his employer pay him additional monies pursuant to the Pennsylvania Uninsured Motorist Act,\textsuperscript{112} since the school district was self-insured.\textsuperscript{113} The issue was whether or not the Pennsylvania WCA provided the sole remedy for an employee injured in this type of situation.\textsuperscript{114} The court answered in the affirmative, stating that the WCA was the exclusive basis for employee recovery as far as the employer was concerned.\textsuperscript{115} The court then analyzed whether the school district could have been sued under the DCD in its status as an insurer, i.e. whether liability arose, not from the school district's status as an employer, but rather "from its status as an insurance carrier."\textsuperscript{116} The court, in denying Lewis a recovery, stated that the focus of the DCD was on the circum-

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\begin{itemize}
  \item \textsuperscript{105} \textit{Id.}
  \item \textsuperscript{106} \textit{Id.} at 35, 522 A.2d at 551.
  \item \textsuperscript{107} 514 Pa. at 36 n.4, 522 A.2d at 550 n.4.
  \item \textsuperscript{108} 517 Pa 461, 538 A.2d 862 (1988).
  \item \textsuperscript{109} \textit{Id.} at 464, 538 A.2d at 863.
  \item \textsuperscript{110} \textit{Id.} at 465, 538 A.2d at 863.
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Id.} The court was referring to 40 PA. CONS. STAT. ANN.\textsuperscript{§} 2000 \textit{et seq.} which required that auto insurance companies covering personal injury liability must have also provided protection against uninsured motorists. \textit{Id.}
  \item \textsuperscript{113} 517 Pa. at 465, 538 A.2d at 863.
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.} at 470, 538 A.2d at 866.
  \item \textsuperscript{116} \textit{Id.} at 474, 538 A.2d at 868.
\end{itemize}
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stances in which the injury occurred.\textsuperscript{117} The DCD exception could not be applied when, as in Lewis' case, "the injury occurred while he was actually engaged in the performance of his job."\textsuperscript{118} In other words, when the employee was actually performing his job, the employment relationship was of such paramount importance that no other relationship between the employer and the employee was judicially recognized in Pennsylvania.\textsuperscript{119}

As Lewis showed, the DCD was a recognized exception to the exclusivity provision of the WCA in Pennsylvania, but the DCD could never be applied if the employee was actually performing his or her job when his or her injury occurred. Since Lewis was followed by the majority in Heath as precedent, it is easily understood why Heath lost her case against Church's, as Heath was using the chicken saw in her work when she was injured. In fact, that was the extent of the Pennsylvania Supreme Court's analysis in Heath. The majority in Heath merely made a summary application of the holding in Lewis to the facts in Heath. Therefore, the Pennsylvania Supreme Court's holding in Heath was good law, at least in that it followed and reaffirmed the existence of the DCD, and when the doctrine \textit{would not} be applied by the courts in Pennsylvania.

However, the Pennsylvania Supreme Court has never said in which cases the DCD \textit{would} be applied. There has never been a case in Pennsylvania in which the doctrine, as formulated in Lewis and Heath, was successfully used by an injured employee to recover against his employer outside of the confines of the WCA. The question that really must be answered is: under what employment circumstances must an employee have been injured so that the employee can recover workmen's compensation benefits and simultaneously recover a reward from his employer under another legal theory, such as strict products liability or negligence? In order to answer this question, the Pennsylvania Supreme Court's holdings in Lewis and Heath must be read in conjunction with the Pennsylvania Workmen's Compensation Act. Recall first that the Act applied to, and provided the exclusive remedy for, injuries received by an employee that arose "in the course of his employment" and were related thereto.\textsuperscript{120} Second, injuries caused by a

\textsuperscript{117} Id. at 475, 538 A.2d at 869.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
third party, but which still arose in the course of employment, were not covered exclusively by the WCA; hence the origin of the DCD—the injured employee could sue the responsible "third party" whether he was the employer or not.\textsuperscript{121} The phrase "injury arising in the course of his employment" referred to all injuries sustained by the employee while he was actually performing his job,\textsuperscript{122} whether the employee was on the employer's premises or not. Furthermore, the Act covered injuries sustained by the employee when he was not actually performing his job, if he was on the premises of the employer and his presence there was required by the nature of the employment.\textsuperscript{123}

Upon review, several ideas become evident from the above. First, an employee could have always sued his employer if the employer-caused injury did not occur while the employee was in the "course and scope" of his employment. In fact, the employee could not have recovered any workmen's compensation benefits in this situation. This was so because the WCA did not apply at all in this case, rather, standard principles of negligence would have been applied. Secondly, from the DCD as formulated in \textit{Heath} and \textit{Lewis}, the only remedy available to an employee injured while actually performing his job was that which was provided by the WCA. Therefore, using the \textit{Heath} court's reasoning, the only time an employee could assert the DCD successfully and recover under both the WCA and another legal theory, was if the employee was injured while in the course and scope of employment, but he was not actually performing his job. According to the standard judicial interpretation of the WCA, this occurred when the employee was not engaged in his work, but was on the premises of the employer because the nature of the employment required the employee to be there. This time period included lunch time,\textsuperscript{124} employee use of bathroom facilities,\textsuperscript{125} employee preparation to begin or to leave work,\textsuperscript{126} and other similar situations.

Therefore, in the above situations, it seems likely that if an injured employee could have proved his or her injury arose from a relationship which was distinct from the employer/employee rela-

\textsuperscript{121} Id.
\textsuperscript{125} Id.
tionship, and that that relationship had invoked a different set of obligations flowing from the employer to the employee, then there should have been no reason why the DCD would not have allowed an injured employee to sue and recover from his or her employer outside of the WCA.

In the final analysis, the Pennsylvania formulation of the dual capacity doctrine affords some measure of relief, at least in products liability cases, to employees who were injured by an employer-manufactured item. However, that relief does not reach an injured employee in Heath’s situation, where Heath was actually working when she was injured. In Heath, the chicken saw may have been negligently manufactured by Church’s, or perhaps Church’s purposely manufactured the chicken saw in a substandard fashion in an attempt to take advantage of its limited liability to its own workers under the WCA. For an employer of the latter frame of mind, the deterrent aspect of the law of strict products liability means little or nothing.127

At this point, another look at Justice Larsen’s dissenting opinion in Heath seems appropriate, for Justice Larsen was concerned about the situation previously discussed, that Heath, and others like her, unfortunately have found themselves in all too often. Justice Larsen began his dissent by pointing out that employees have historically enjoyed relationships with their employers other than the employment relationship, and the laws that governed each relationship would “determine the rights and liabilities of the parties”.128 These other relationships included buyer/seller, landlord/tenant, and others.129 Justice Larsen then stated that it was unfair to preclude an injured employee from suing his employer as the third party manufacturer of a defective product simply because he happened to be the manufacturer’s employee, when another, who was not employed by the manufacturer clearly would have a common law cause of action against that manufacturer. Justice Larsen then concluded that by limiting the liability of employer/manufacturer in cases such as Heath’s, any deterrent aspect of strict products liability law vanished, and “Rube Goldberg” devices that have placed production above the health of employees would continue

127. 519 Pa. at 278, 546 A.2d at 1122 (Larsen, J., dissenting), “As long as the majority limits the liability of the manufacturer of a defective product to a workman’s compensation award in these cases, then the deterrent aspect of strict liability law will be seriously undermined. ...” Id.
128. 519 Pa. at 278, 546 A.2d at 1122.
129. Id.
Recent Decision

In the final analysis of the dual capacity doctrine and the workmen's compensation statute in Pennsylvania, there remains a fundamental problem which was faced by Heath in her law suit against Church's Fried Chicken, and which was astutely recognized by Justice Larsen. The problem is best illustrated by a hypothetical situation. Consider two employees, A and B. A works for the ASD corporation and B works for the BNM corporation. Both A and B, while engaged in their identical jobs, use a large stamping machine which was designed and manufactured by ASD. If B, while performing his job, is injured by the machine, Pennsylvania law allows B to recover workmen's compensation benefits from his employer BNM, and the law also allows B to sue ASD as a third party manufacturer. However, if A is injured by the same defective machine under the same circumstances as B's injury, A can only recover workmen's compensation benefits and nothing else because A was actually engaged in the performance of his job when he was injured. A is precluded by Lewis and Heath from successfully employing the DCD and suing his employer for the same injury for which B can recover against ASD. This hypothetical presents the situation of two similarly situated individuals, A and B, being treated differently under the laws of Pennsylvania. Only the unhappy accident of who is employed by whom allows or precludes recovery for A or B under the law of Pennsylvania.

In conclusion, the law concerning the dual capacity doctrine in Pennsylvania is fairly clear and straightforward: the doctrine will probably be applied if the injured employee was in the scope of his or her employment, but was not actually working, when injured. However, there is a major problem in this area of workmen's compensation law as demonstrated by the above hypothetical. Individuals in Inez Heath's situation are simply not receiving the legal benefits and protection to which they are entitled. Your author, therefore, would join with Justice Papadakos in his concurring opinion in Heath in which the Justice calls upon the Legislature to "review and correct the apparent injustices wrought to the injured parties in Lewis; Poyser; Budzichowski; and in the present case". Justice Papadakos seems to feel that the Pennsylvania Legislature could easily amend the Workmen's Compensation Act

130. Id.
131. 519 Pa. at 278, 546 A.2d at 1121 (Papadakos, J., concurring).
to rectify this situation.¹³² The WCA could be amended by expanding the amount of workmen’s compensation benefits in situations like Heath’s, in order to keep the deterrent aspect of strict liability viable. Or, the WCA could be amended by limiting the application of the WCA’s exclusivity provision, thereby making an employer liable to an injured employee, upon a threshold showing by an employee that his or her employer abused the workmen’s compensation system in some way. Such abuse would include the employer’s intentional disregard of accepted or required federal or state safety practices or procedures (such as when an employer/manufacturer purposely omitted required safety devices, or had manufactured a product for use by his employees in a substandard fashion in order to save costs). Only by such legislative action will employees in Heath’s position be given the full benefit of a workmen’s compensation system enacted for their benefit.

Peter J. Sheptak