Workers' Compensation Alert

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The Ups and Downs of Employer Liability

by William D. Holt

Attorneys constantly are watching the court system for the next great case which will change the way we do business or, at least, make for interesting conversation at lunch. On September 12, 2013, the Eighth District Court of Appeals in Ohio issued its decision in *Rivers v. Elevator*. This case has absolutely nothing shocking in it. In fact, its best feature is that it does nothing at all except tell us things are still the way they are supposed to be. It is, however, a cautionary tale.

Dorothy Rivers was working for the Marymount Hospital as a housekeeper. At break-time during her workday, she summoned an elevator to ride to the cafeteria. This elevator was in a public area and regularly used by the public visitors and hospital employees in the day to day business of doing their jobs. As she was entering the elevator, Rivers tripped and was injured as a result. According to Rivers in a later deposition, after she fell, she noticed the bottom of the elevator car was not even with the floor of the building.

Rivers filed a workers' compensation claim. Marymount, a self-insured employer, certified the claim and paid her over $61,000 in workers' compensation benefits. Rivers also filed lawsuits against the elevator company (which she along with her husband settled for $15,000) and against Marymount. Her lawsuit against Marymount alleged negligence and was later amended to allege an intentional tort.

Pursuant to Ohio Revised Code 4123.74, "[e]mployers who comply with [the workers compensation laws of Ohio] shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment." Nonetheless, as will be discussed in the following paragraphs, a complying Ohio employer may be liable in damages.

Dating back to 1982 when Edward Blankenship and his co-workers were told they could sue Cincinnati Milacron for intentionally exposing them to hazardous substances causing them harm, up to today's provisions in the Ohio Revised Code, an employee pretty much has been able to sue his or her employer for an intentionally caused workplace

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injury or disease. Eastman & Smith Ltd. has provided other articles on intentional torts in the workers' compensation setting and you should turn to them for more information.

My purpose today, is to cover two other areas of civil exposure an employer faces in the workers' compensation setting. These two areas fall under the doctrine of dual injury and the doctrine of dual capacity.

Dual injury generally is considered when some act of the employer further aggravates the effect of a compensable injury. These cases are rare and official reports of them tend to elude discovery. General suggestions of where a dual injury might occur are where onsite medical units may misdiagnose or mistreat an occupational injury or disease causing the condition to be worse than it may have been otherwise. Another possibility is in the course of providing aid in response to an injurious event added harm is caused, particularly where that harm is in a different nature than the problem for which treatment is attempted.

More likely to be alleged, more prevalent in research results and claimed by Dorothy Rivers was an additional injury resulting from the alleged dual capacity of Marymount Hospital. Dual capacity is simply where the employer acts in a role that is distinct from that of being an employer. For example, consider the situation where a worker in a factory that makes cans of spray paint is using one of those cans to paint a guardrail as part of his employment duties and the can explodes due to a defect and the worker is injured as a result. The claim would be compensable under workers' compensation laws and the worker could at least pursue a products liability or perhaps negligence action against the employer as the manufacturer of the can of paint. In Rivers' case, she alleged Marymount served in a dual capacity because it allowed Rivers to use a public elevator thus transfiguring Marymount from employer to non-employer status. In reviewing prior decisions of the Ohio Supreme Court, the Court of Appeals said "the [earlier] Ohio Supreme Court's decisions … direct us to look at the employer's role in relation to the employee rather than just the employee's status in relation to the public." The Court noted Rivers testified she was at Marymount solely for purposes of work, she was on the clock at the time of the accident and, although the elevator was available to the public, Marymount employees use the elevator all the time. The Court found no evidence Marymount "assumed any other persona besides that of employer with respect to [Rivers]" and "the undisputed evidence demonstrates" that Rivers' injuries resulted from her employment use of the elevator. The Court said the dual-capacity doctrine was inapplicable. If, however, Rivers had needed surgery for her injury, if that surgery were performed at Marymount and if some added injury occurred due to an error during that surgery, the relationship between Rivers and the hospital would then be one of patient and provider, not employee and employer, and the issue of dual capacity would be fully in play.

This article would be incomplete if it did not address the outcome of the intentional tort action. Ohio law allows a worker to prevail against his or her employer for an intentional tort where the employer committed an act with the intent to injure another or with the belief that the injury was substantially certain to occur. "Substantially certain" means an employer acted with deliberate intent to cause an employee to suffer an injury, disease, condition or death. The Ohio Supreme Court has said recovery for an intentional tort should be limited only to where an employer acts with "specific intent to cause injury." Rivers argued Marymount should be liable for an intentional tort because "it knew or should have known that the elevator was not working properly" and "elected to continue to operate the elevator instead of shutting it down." Rivers provided an affidavit stating "Marymount knew that the elevator wasn't operating properly on the day of her injury but elected to keep it in operation" and later testified she did not know of any prior problems with the elevator and no one ever told her of any problems before the injury occurred. A worker in Marymount's maintenance department testified no one reported any problems with the elevator, he was unaware of any problems with the elevator and personnel in the maintenance department believed the elevators were working properly on the morning Rivers was injured. The intentional tort statute provides for a rebuttable presumption that the employer intended to injure the worker if the employer deliberately removes a safety guard. In 2012, the Ohio Supreme Court clarified the meaning of an "equipment safety guard" defining it as "a device designed to shield the

operator from exposure to or injury by a dangerous aspect of the equipment" and declined to include "any generic safety-related item" or "something besides a safety guard attached to machinery." (You can read Eastman & Smith's article about this decision on our web site.) The Court of Appeals told Rivers "Decisions when to shut down a public elevator do not fall within the limited definition of an 'equipment safety guard.'" The Court determined there was no evidence, presumed or otherwise, that Marymount intentionally harmed Rivers.

This article has dealt to some extent with "in" "In"jury. "In"tentional. It will close with adding "in"sult to injury. It was mentioned earlier that Marymount paid Rivers over $61,000 in benefits. The actual amount was $61,527.42. She also settled with the elevator company for $15,000. She did not provide notice to Marymount of the settlement at the time. In general terms, in the workers' compensation setting, the Ohio Revised Code provides for subrogation of the settlement of a third party action to the interests of the workers' compensation payer, in this case Marymount. While the subrogated amount basically is limited to what the injured worker recovered in the third party action, if the injured worker does not notify the workers' compensation payer, the injured worker and the third party could be jointly or individually liable to the workers' compensation payer for everything that was paid in the claim. Because she did not notify Marymount of the $15,000 settlement with the elevator company, the Court of Appeals granted Marymount's counterclaim against Rivers for the entire $61,527.42 it paid. Although, as Rivers said, granting the counterclaim for the entire $61,527.42 may seem shocking, as the Court stated, "If [Rivers] wished to avoid liability for all or part of [Marymount's] subrogation interest, [she] could have done so by following the procedures set forth in R.C. 4123.931."

The caution to all employers in this narrative is to keep in mind that even in a simple looking injury claim, there are possibilities for additional exposure and loss. In addition to the risk mentioned here, there are potential pitfalls involving FMLA, ADA and other employment law issues. Eastman & Smith Ltd. has many published articles on these topics at www.eastmansmith.com and regularly offers training in these areas. As for Rivers, the caveat might be – some days you get the elevator, and some days you get the shaft.

Should you have any questions regarding employer liability and /or workers' compensation, please contact William D. Holt in our Toledo office.