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Workers' Compensation Alert

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Court Gives Broad Meaning to the Phrase "Equipment Safety Guard"

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Ohio's intentional tort statute is an exception to the exclusive remedy provided by the Workers' Compensation Act. Under R.C. §2745.01, an employer is liable if the plaintiff "proves that the employer committed [a] tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." Subsection (C) of R.C. §2745.01 creates a rebuttable presumption that the employer committed a tortious act "with the intent to injure" if the plaintiff can show that the employer deliberately removed an "equipment safety guard."

With no definition of "equipment safety guard" from the General Assembly or the Ohio Supreme Court, the responsibility lies with lower courts. Recently, in *Hewitt v. L.E. Myers Co.*, Eighth Dist. No. 96138, 2011-Ohio-5413, the Eighth District Court of Appeals interpreted "equipment safety guard" to include items of clothing such as protective rubber gloves and sleeves.

In June 2006, Larry Hewitt was electrocuted and suffered severe burns to his right arm after he was allegedly instructed by his supervisor to work alone with high-voltage power lines without wearing protective rubber gloves and sleeves. Mr. Hewitt claimed that his supervisors told him he did not need to wear the protective rubber gloves and sleeves because the electrical lines on which he was working were not energized.

Mr. Hewitt filed a workers' compensation claim which was allowed for numerous physical and psychological conditions. He also filed an intentional tort claim under R.C. §2745.01. L.E. Myers Co. ("L.E. Myers") filed a motion for directed verdict on Mr. Hewitt's intentional tort claim; however, the trial court found Mr. Hewitt provided sufficient evidence to let a jury decide the R.C. §2745.01(C) claim. The jury returned a verdict in Mr. Hewitt's favor for \$597,785 in compensatory damages. The employer appealed to the Eighth District Court of Appeals.

On appeal, the court had to determine whether a supervisor's order to not wear protective rubber gloves and sleeves amounted to a deliberate removal of an equipment safety guard and thus created a rebuttable presumption of an intent to injure. The employer argued the phrase "equipment safety guard" should apply only to items that are a part of the equipment itself. The court disagreed with the employer's interpretation, writing that "[i]f we accept L.E. Myers interpretation, then employees

who, by the very nature of their profession, work with equipment other than a machine or press would be barred from recovery under R.C. §2745.01(C).”

The court then looked to the definition of each word used in the phrase “equipment safety guard” to determine the meaning of the phrase as a whole. Finding the definitions from Merriam-Webster’s Collegiate Dictionary persuasive, the court found the protective rubber gloves and sleeves to be equipment “designed to be a physical barrier, shielding the operator from exposure to or injury by electrocution (the danger).” Therefore, the court determined that the supervisors’ decision to place Mr. Hewitt near high-voltage power wires without wearing protective rubber gloves and sleeves amounted to a deliberate removal of an equipment safety guard within R.C. §2745.01(C). Accordingly, the judgment of the trial court was affirmed.

L.E. Myers filed a notice of appeal to the Supreme Court on December 2, 2011. The Supreme Court of Ohio will ultimately decide how expansively the statute should be interpreted. In the meantime, the *Hewitt* decision should act as a reminder to employers of the significance of requiring the use of personal protective equipment.

If you have any questions about the *Hewitt* case, would like guidance on proper employee safety training, or have or any other workers’ compensation or labor and employment law issue, please contact Mark A. Shaw or Garrett M. Cravener in Eastman & Smith Ltd.’s Columbus office by calling 614-564-1445.

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