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Legal Update: Recent Court Decisions Favor Ohio's Employers

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The body of law with respect to workers' compensation issues in the State of Ohio is ever-changing. Trial courts, appellate district courts and even the Supreme Court of Ohio frequently consider cases involving workers' compensation issues that potentially could have a significant effect upon employers throughout the State. Most recently, on March 23, 2010, the Supreme Court of Ohio decided *Kaminski v. Metal & Wire Products Co.* and *Stetter v. R. J. Corman Derailment Servs., Inc.*, which upheld the constitutionality of Ohio Revised Code 2745.01, Ohio's intentional tort statute. These highly anticipated decisions represented a significant victory for Ohio's employers. The statute provides that plaintiffs desiring to bring an intentional tort action against their employer must show the employer acted with "deliberate intent" to cause the injury, a higher standard of proof than previously required. In ruling the statute was constitutional, the Court held it did not violate constitutional provisions involving the right to a trial by jury, right to a remedy, open courts, due course of law, and separation of powers. The Court held that while ORC 2745.01 does not eliminate the common-law cause of action for an employer intentional tort, it significantly limits the tort.

Under the statute, employers will enjoy more protection from liability for intentional tort claims. So long as the employer does not act deliberately

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to injure an employee, that employee's exclusive remedy for his or her injuries is through the workers' compensation system. A perhaps unintended consequence, however, could be a negative impact upon Ohio employers' ability to obtain insurance for potential liability under an intentional tort claim. Often, insurance companies will not provide coverage where the employer acted "deliberately." Therefore, insurance companies may now refuse to provide coverage for liability for intentional tort claims because, as a rule, an employer must have acted deliberately to be found liable.

In addition to the *Kaminski* and *Stetter* decisions, there have been several other noteworthy decisions from Ohio's courts regarding various workers' compensation issues affecting Ohio's employers. The following is a discussion of some of the most recent decisions.

Voluntary Abandonment

In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, the Ohio Supreme Court provided employers with a defense against rightfully terminated employees who later attempted to obtain workers' compensation benefits. Under *Louisiana-Pacific*, an employee who engages in specific conduct that leads to his or her termination will be deemed to have voluntarily abandoned his or her employment, and thus ineligible for receipt of temporary total disability (TTD) compensation, if the employer maintains a written policy that: (1) clearly defines the prohibited conduct, (2) has been previously identified by the employer as a dischargeable offense, and (3) is known or should have been known to the employee. Thus, using the *Louisiana-Pacific* defense, employers may defeat any request for TTD compensation where the claimant was discharged for the violation of a written work rule.

Recently, in *State ex rel. Saunders v. Cornerstone Foundation Systems, Inc.* (August 19, 2009), the Court held a claimant could not be considered to have voluntarily abandoned his or her employment where he or she had no notice of the rule he or she allegedly violated or that the rule violation could result in his or her termination. There, claimant was discharged for insubordination a month after he injured his knee at work. The employer argued claimant voluntarily abandoned his employment when he violated a June 2004 work rule, however, claimant alleged he was never provided a copy of the rule in question. The evidence established that while claimant received a copy of the January 2004 work rules, he was never provided a copy of the revised June 2004 rule. Therefore, the Court held the third prong of the *Louisiana-Pacific* test was not satisfied and claimant remained eligible for TTD compensation.

By contrast, in *State ex rel. Galligan v. Indus. Comm.* (January 6, 2010), claimant argued the employer failed to satisfy the requirements of *Louisiana-Pacific* because a copy of the employee handbook was never submitted to the record. Thus, because the actual language of the written work rule allegedly violated was unknown, claimant argued it was impossible for the employer to show that the rule "clearly defined the prohibited conduct that resulted in the termination." The employer argued the absence of the handbook in the record was harmless because claimant's disciplinary write-ups that were in the record sufficiently set forth the policies that were violated. The Court held the evidence established claimant was on written notice from a prior "Employee Consultation" sheet that sleeping at her security post — the offense for which she was eventually fired — was a violation of company policy. The Court found this documentation satisfied *Louisiana-Pacific*'s requirements that the prohibited conduct be both clearly defined and known to claimant.

The *Saunders* and *Galligan* cases serve as important reminders to employers that all employees must be notified of any new or changed work rules or policies. After creating or revising a work rule, employers should

distribute the new rule to all current employees and new hires. Employers also would be well-served to obtain the signed acknowledgement of each employee that he or she has received and reviewed all work rules and policies.

Violation of a Specific Safety Requirement

It is the responsibility of every employer in the State of Ohio to provide a safe workplace and adhere to all safety rules. To that end, an injured worker with a workers' compensation claim may be eligible to receive an additional award of compensation where the workplace injury occurred as a result of the employer's violation of a specific requirement (VSSR) as outlined in the Ohio Administrative Code. In order to establish eligibility for a VSSR, a claimant must show that the safety requirement was both specific and applicable, the employer was not in compliance when the accident occurred and the non-compliance was the proximate cause of the injury, illness or death. The law places a high burden of proof upon the injured worker, providing that the specific safety requirement will be "strictly construed" in favor of the employer.

Two recent Ohio Supreme Court decisions illustrate the high standard that must be satisfied by a claimant when bringing a VSSR claim. In *State ex rel. R.A.M.E., Inc. v. Indus. Comm.* (February 24, 2010), *R.A.M.E.* hired claimant as a general laborer/roofer to assist with installing a roof on a new school building. Claimant was injured when he fell off of the roof. He was not wearing the safety harness he had brought to the job site. After his workers' compensation claim was allowed, he applied for an additional award, alleging *R.A.M.E.* violated Ohio Adm. Code 4123:1-3-03(J)(1), which states: "Lifelines, safety belts or harnesses and lanyards shall be provided by the employer and it shall be the responsibility of the employee to wear such equipment when *** exposed to hazards of falling where the operation being performed is more than six feet above ground ***." Claimant testified he brought his brother's harness to the jobsite on the date of injury because *R.A.M.E.* did not provide one. The Supreme Court held the mere possession of another's safety harness did not compel finding that the injured worker was not provided with a safety harness. Therefore, the Commission was ordered to vacate its order granting the VSSR application.

In *State ex rel. AK Steel Corp. v. Davis* (November 12, 2009), claimant was hurt when she was assigned to help operate a mill. While preparing the mill for production, claimant attempted to clean a spot on one of the work rolls without realizing the mill was on. The rolls grabbed the rag she was using, along with her hand, causing her injury. After her workers' compensation claim was allowed, claimant filed an application for a VSSR award, alleging the employer violated Bulletin 203, Section 207 (now Ohio Adm.Code 4123:1-5-05(H)), which required that feed rolls be guarded to prevent the hands of the operator from coming into contact with rolls at any point. The Court held the definition of "feed rolls" included the requirement that the feed rolls have a single function. Since the mill's feed rolls were not a single function apparatus (in addition to feeding material to the point of operation, they also tempered the steel as it passed through), they were not feed rolls as defined in the rule. Thus, the Commission was directed to vacate its order granting claimant's VSSR application.

These cases demonstrate there are many arguments available to employers when defending against an application for an additional award based upon the violation of a specific safety requirement. Therefore, employers should consult with an attorney upon receiving notice of a VSSR application to explore all available options for defending against potential liability.

The Substantial Aggravation Standard

Employers were pleased when the Ohio Legislature enacted Senate Bill 7, which contained a more stringent standard for claimants to satisfy in establishing a claim for aggravation of a pre-existing condition. Under the new standard, subjective complaints alone are insufficient to prove aggravation of a pre-existing condition. Instead, claimants are now required to prove a "substantial aggravation" with verifiable evidence, which includes objective diagnostic findings, objective clinical findings or objective test results. In addition, the Industrial Commission's Hearing Officer Manual requires hearing officers to "cite in the order evidence which documents the substantial aggravation by objective diagnostic findings, objective clinical findings, or objective test results" when allowing a claim for the substantial aggravation of a pre-existing condition.

Despite this language, however, hearing officer decisions have been inconsistent, with some strictly adhering to the new rule and others seemingly ignoring it altogether. For example, certain hearing officers may require evidence of objective test results both before and after the injury documenting a substantial worsening of the pre-existing condition, while others remain quite liberal in the type of evidence that will be accepted to establish a substantial aggravation. Thus, claimant's attorneys continue to have some success in arguing that a claimant's testimony that his or her symptoms substantially worsened after the injury, was sufficient to establish a substantial aggravation. In addition, it is unclear whether evidence of "objective" clinical test results such as a positive straight leg raise is enough to satisfy the new standard.

Senate Bill 7 went into effect on August 25, 2006. To date, there have been no significant court decisions regarding the new standard. Likewise, there have been no new jury instructions developed based upon the statutory language. Therefore, unless and until the courts provide further clarification of the proper application of the new standard, it is important that employers carefully evaluate and aggressively defend substantial aggravation claims where appropriate in order to protect the new standard from possible erosion.

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