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FALLS - EXPLAINED V. UNEXPLAINED

In Knox County YMCA v. Industrial Commission, Anita Williamson was employed by the Knox County YMCA to perform day-care services for children of working parents. On the day in question, the claimant worked 3:00 to 6:00 p.m. at a local school and was required to attend a CPR course beginning at 6:00 p.m. at the Knox County YMCA. Since no time was allotted between the end of the claimant's shift and the beginning of the CPR class, the claimant stopped at a restaurant on the way to purchase a sandwich and a large soft drink to take with her. The CPR class was held on the second floor of the YMCA building. After the claimant attended the class for ten to fifteen minutes, she was told that she could leave. As she was leaving, she descended a staircase from the second to the first floor on her way out of the building. According to the testimony, the stairwell was well-lit and had railings on both sides of the hallway. The runners on each stair were described as being in "good shape." The claimant was wearing tennis shoes, holding the soft drink in one hand and her purse in the other. While she was two stairs up, she thought she was on the bottom, lost her balance and fell. Claimant acknowledged that there was nothing on the stairs that made her fall, and that as far as she knew, the stairs were not defective.

The Commission's finding of compensability was affirmed by the appellate court. The court stated:

She was performing an act that she was instructed to perform by respondent. It is true that there was no evidence that the stairway was poorly lit, that the stairs in question were defective, and that there was anything on the stairs that caused claimant to fall. Moreover, we acknowledge that, in and of itself, the act of descending a staircase at the employer's place of business does not

establish a risk greater than that faced by the general public. However, as the Commission noted, the presence of the soft drink in one hand and the purse in the other, both of which claimant would not have had absent the mandatory CPR class, increased the risk to claimant. Absent the purse and the soft drink in her hands, claimant would have been able to grab onto the stairwell's railings.

Respondent contended that the decision of the Commission created a "hybrid" category of falls that although "explained," are incorrectly treated as "unexplained." The appellate court disagreed, stating,

Finally, we disagree that the Commission created a "hybrid" type of fall. A complete reading of the testimony demonstrates that claimant was unsure how she fell. That claimant speculated that she fell because she misjudged whether she was at the bottom of the stairs, does not transform the accident into a noncompensable fall. In addition, as there was no evidence that the cause of the fall was of an internal, personal origin, claimant's fall does not fit within the "idiopathic" category.

EDITOR'S NOTE: Ever since the Ceas and Company case, the court has referred to "unexplained" falls as being compensable when actually, in most of those cases, the fall was explained. Such is true in this case because, although the stairs were not defective in any way, the claimant misjudged her position on the stairway and was unable to prevent her fall because of objects being carried in her hands. Why is that not an explanation for her fall? Other cases have held that if the claimant is carrying any object that might be work related or is hurrying for some reason, the claim will, most likely, be considered compensable.

FALLS - EXPLAINED V. UNEXPLAINED

The dispute over the compensability of unexplained falls continued in the recent Circuit Court of Cook County case Christopher Benjamin v. Industrial Commission. In that case, a school custodian was walking along the sidewalk directly in

front of the building when he stepped on something with his left foot, causing his left knee to twist and pop, as a result of which he fell to the ground. As he was being taken from the building, he noticed wood chips scattered on the sidewalk where he had fallen. Although the claimant had undergone a previous surgery to his left knee, the treating physician felt that the claimant had sustained a new fracture of the patella which was due to the fall. Despite this, the Commission found the claimant's testimony, as well as the testimony of his physician, not credible and found for the respondent. The circuit court reversed the Commission decision, stating: 1) there was no evidence that the claimant's fall was idiopathic; and 2) if the fall was not explained or idiopathic, then the fall was unexplained and, based on the Ceas case, unexplained falls are compensable.

It is unknown at this time whether this matter is proceeding on appeal to the appellate court. Although, on the basis of the Knox County YMCA case, a reversal would be difficult to obtain.

EDITOR'S NOTE: It seems strange that the court states that unexplained falls are compensable. In any other type of injury, the claimant must provide an explanation to establish that the injury arose from the risk of the employment. The court seems to say that unexplained falls are compensable as a matter of law. Remember that Benjamin is only a circuit court decision which would not have the same importance as the appellate court finding in Knox County YMCA.

APPELLATE COURT REVERSES INDUSTRIAL COMMISSION'S AWARD OF BENEFITS FOR PSYCHOLOGICAL INJURY By John E. Gilhooly

Our office was recently successful in having the appellate court reverse an award of the Industrial Commission which granted a petitioner wage differential benefits for psychological injuries. In Taylor v. Northwest Suburban Special Education Organization, the claimant, James Taylor, was employed by our client as a special education teacher. As such, he regularly dealt with students that had both learning as well as behavioral disabilities. On the date of the alleged accident, a student became disruptive in Taylor's classroom. Taylor escorted this student from the room and, as they were leaving the room, the student kicked out a doorway window. Taylor then summoned the classroom's social

worker, Irving Stone, which was standard practice when problems arose within the classroom.

Stone arrived at the classroom and had a discussion with Taylor. During the course of this discussion, Stone was gesturing with his hands as he spoke. The evidence established that anyone who knew Stone (which Taylor did for eight years) knew that he spoke with his hands and could in no way feel threatened by them. Additionally, at the time of this incident Stone had just returned to work after undergoing treatment for Leukemia. Stone was much smaller than Taylor and was very frail due to his terminal illness.

Taylor testified that during his argument with Stone he felt threatened by Stone. As such, he grabbed hold of Stone's hands and physically moved Stone away from himself, causing Stone to fall to the floor. There were three co-workers in the hallway, all of whom testified that they actually witnessed Taylor grab Stone by the shoulders and throw him to the floor. Additionally, these witnesses testified that Taylor actually continued to go after Stone as he lay on the ground.

The incident was investigated by the School Board and Taylor was suspended for a period of 15 days. Additionally, Stone brought criminal charges against Taylor for his actions, although the criminal court eventually dismissed the battery charge. Taylor filed a union grievance regarding his suspension. This grievance was litigated over the course of one year, consisting of approximately 30 separate hearings. Following the extensive grievance procedure the suspension was upheld.

Approximately ten months after the hallway incident, Taylor began to seek psychiatric treatment for depression. He advised his psychiatrist that he had numerous psychological problems to deal with, including his perception of unfair treatment by the School Board, becoming a father for the first time in his 40's, the difficult pregnancy had by his wife, as well as financial and physical problems associated with a recent automobile accident. The psychiatrist diagnosed Taylor's condition as a paranoid personality disorder accompanied by depression. The psychiatrist ultimately (14 months after the accident) authorized Taylor off work and indicated that because of his psychological injury he would never be able to return to a classroom setting. Taylor eventually

secured alternative employment in the sales field.

At the conclusion of trial, the arbitrator found that Taylor had suffered the requisite physical contact necessary to establish a physical-mental claim. The arbitrator found Taylor's mental disability was caused by the physical contact, as opposed to the numerous mental stresses Taylor was under. As such, the arbitrator found that the claim was not a mental-mental claim, but rather, a physical-mental claim. The arbitrator awarded Taylor 212 weeks of TTD benefits as well as 8(d)1 wage differential benefits for the remainder of his life. In doing so, the arbitrator found that Stone was the aggressor of the incident which took place in the hallway. Both the Industrial Commission and the circuit court affirmed the arbitrator's decision.

The appellate court, however, reversed the award of the Industrial Commission and denied benefits. The court found that Taylor could not be compensated for his psychological injuries under a mental-mental claim since the situation to which Taylor was exposed was not out of the ordinary as compared to that of his normal duties as a special educational teacher. The court reaffirmed its prior decisions which denied psychological injuries arising out of demotions, suspensions, and terminations. Taylor's psychological disability did not begin for some ten months after the incident at work and that incident was not the major causative factor of his psychological disability. For these reasons, the appellate court found that Taylor could not succeed under a mental-mental theory.

Secondly, the court rejected the Industrial Commission's finding that the claim gave rise to a compensable physical-mental claim. Taylor overreacted to the incident in the hallway with Stone. Taylor could not be compensated for the psychological injury wherein it was Taylor who caused the physical contact in question. The court specifically found that at no time did Stone cause contact with or strike Taylor. Based upon its prior denial of benefits in the Chicago Board of Education case (wherein claimant [school teacher] was denied benefits after being struck in the face by a student) the appellate court held that they could not award benefits to Taylor who was responsible for causing the contact in question.

Two of the appellate court justices have

certified that this claim involves a significant question of law which warrants consideration by the Illinois Supreme Court. Under the law, a party does not have an automatic right to appeal a decision to the supreme court. Instead, a Petition for Leave to Appeal must be filed with the supreme court asking that they consider the appeal. If granted, the entire claim is then considered by the supreme court. If the supreme court decides not to hear the case, the appellate court's decision remains final. We will continue to keep you updated as to the status of this very interesting claim.

PHYSICIAN'S TESTIMONY, THOUGH UNREBUTTED, WAS NOT SUFFICIENT TO PROVE CAUSAL RELATIONSHIP

In Fickas v. Industrial Commission, the Commission found that the claimant's cubital tunnel syndrome was not causally related to his accident. The major issue in his case concerned the medical testimony. Dr. Meyer, the treating physician who performed a cubital tunnel release, testified to a causal connection to the accident. Dr. Fletcher, the respondent's examining physician, testified to a lack of causal connection but the Commission struck the causal connection portion of Dr. Fletcher's testimony. Claimant contended that since the medical opinion of Dr. Meyer was now uncontradicted that the Commission erred as a matter of law in rejecting the sole medical testimony on the causation issue. The claimant argued the Dean case where there was only one medical opinion on issue of causation and it was held that the causation issue now became one of law and could not be discounted by the Commission. The court disagreed, pointing out that it had rejected the Dean decision in both the Kraft and Sorenson cases, stating in Kraft:

In [Sorenson], we directly addressed this argument and rejected it, disagreeing with statements made by the majority in Dean to the contrary and agreeing, with the dissent. In particular, we found persuasive the statement that if the Commission was bound by the sole medical testimony, it "would be forced to find that the earth is flat if such testimony were presented." Again, we reiterate that the sole medical opinion may not be arbitrarily rejected. However, it is not binding on the Commission simply by virtue of the fact it is the sole medical

opinion.

EDITOR'S NOTE: Even though the testimony of the treating physician as to causal relationship was not as farfetched as the finding of a flat earth, the court made the point that the Commission need not accept incredible testimony because it happens to be the only testimony on the issue. See, Fickas v. Industrial Commission.

PROCEDURAL ISSUE - PROPER IDENTIFICATION OF THE RESPONDENT

As we all know, petitioner's attorneys are sometimes careless in the identification of the respondent. We have all seen cases where the respondent has been described under an assumed name, rather than the correct legal entity, whether that be a corporation, partnership or sole proprietor. Petitioner's attorneys often seem to be unaware of the danger of this procedure.

In Mora v. Industrial Commission, the respondent was named as "Seven Stars Electronics." Among those testifying on behalf of Seven Star Electronics was Mi Sun Park, who testified through a Korean interpreter that Seven Star Electronics did not have workers' compensation insurance at the time of Agustin Mora's injury. She admitted that she was "just one owner" and paid half of the claimant's regular salary while he was away from work. Approximately one month after her testimony, the claimant filed an Amended Application, including Seven Star Electronics as a respondent and adding "Mi Sun and Hae D. Park (the husband)" as an additional respondent. The claimant orally moved to amend his application "to add the second respondent to conform with the evidence that was provided at trial." The arbitrator denied the motion and entered an award only against Seven Star Electronics. The Commission affirmed the denial of the claimant's motion to amend the application because 1) the amendment was not filed prior to the hearing before the arbitrator; 2) the claimant did not move to amend at the time he first learned that the Parks could be the owners of Seven Star Electronics; and 3) the claimant had never proved that the Parks actually owned Seven Star Electronics.

EDITOR'S NOTE: To add further insult to injury, the court noted that at the time the claimant's proposed amendment was denied, the claimant had

over a year to file a new application naming the partners as respondent. Nevertheless, the claimant took no further action.

COMMUNICATION WITH TREATING PHYSICIAN

In our April, 1999 Newsletter, we referred to the Industrial Commission case of Anderson v. Hydraulics, Inc., wherein the Industrial Commission used the Petrillo Doctrine to prevent the employer from communicating with the employee's treating physician. The dissenting opinion noted that other states have found that a Petrillo application would be inconsistent with the legislature's intent to create a compensation system that reduces litigation and minimizes the adversarial process. Such a case has recently surfaced in the Alabama Supreme Court case of Harris v. Smitherman Brothers Trucking.

That case upheld the right of a nurse case manager to speak with the treating physician concerning the employee's medical care. The claimant argued that all communications should be in writing, relying on the Alabama Statute which provided that upon written request of the employee or employer, the physician shall furnish a written statement of his or her professional opinion as to the extent of the injury and disability.

The court stated that the employer was not limited to only a written request, stating that the law "places an affirmative duty on an employer to pay for an employee's reasonably necessary medical expenses."

Implicit in this provision is an employer's right to oversee that treatment so as to ensure not only that the employee receives the proper treatment, but also that that treatment is reasonably necessary and that it is provided in the most efficient and cost-effective manner, without compromising quality of care.

EDITOR'S NOTE: It appears to be the unanimous opinion in all other reported jurisdiction that by the very nature of the obligation created by the Workers' Compensation Statute that the employer must be in a position to communicate with the treating physician. This Alabama court's reasoning is similar to that in

the Commission dissent in Anderson.

ADA Corner

By Jason Coggins

"REGARDED AS" LIABILITY UNDER THE ADA

In recent years, employees have sought to expand employer liability under the ADA using the "regarded as" prong of the definition of disability under the ADA. This concept provides protected status to an applicant or employee under the ADA even if the individual is not actually disabled. This trend is of particular concern at the interviewing stage where employers attempt to secure information on an applicant's medical condition after a conditional offer of employment has been extended. Thankfully, courts have established limits on "regarded as" liability. Wright v. Illinois Dept. of Corrections is a recent example of this point.

In Wright, the plaintiff sought a correctional officer position with the Illinois Department of Corrections. The employer gave written and physical tests, which plaintiff was able to pass. Despite the fact that the plaintiff disclosed that he was not able to run long distance due to an ankle injury, he was placed on the eligibility list and given a conditional offer. However, after plaintiff learned that training included marching, he disclosed that he had a disability in the form of limited ability to walk, stand, or sit down. The employer required the plaintiff to take a specialized medical exam, which ultimately was rescheduled due to the plaintiff's tardiness. While the exam was being re-scheduled, the plaintiff was dropped from the eligibility list.

The plaintiff sued the Illinois Department of Corrections for disability discrimination. Relying on the "regarded as" definition of disability, he argued that the employer took him off the eligibility list for the corrections officer position because it thought he was unable to perform the job. The federal district court dismissed the case which was then appealed to the Seventh Circuit Court of Appeals. The court held that the employer did not regard the plaintiff as disabled. The court reasoned that the employer considered the plaintiff qualified for the job after the plaintiff was able to pass the initial agility test. It was only after the plaintiff himself questioned whether he

was able to perform the essential functions of the position that Department of Corrections scheduled the specialized exam to determine whether he was qualified. The court held that the employer was merely determining whether the plaintiff was able to perform the essential functions of the position, which is permitted by the ADA.

This case demonstrates that employers are allowed to seek information from applicants about their ability to perform the essential functions of the position sought. Moreover, it also provides support for the argument that an employer does not regard an applicant or employee as disabled under the ADA simply because the employer seeks information regarding the applicant's medical condition *after* the applicant has put his or her ability to perform the essential functions of the position in doubt. However, to avoid potential liability under the "regarded as" prong of the ADA, employers must always be careful of the types of questions they ask during the interviewing process as well as the comments that are made to the employee during employment.

EDITOR'S NOTE: If the plaintiff had been hired, the employer might soon be faced with a claim that the plaintiff's condition had become aggravated by his employment so that he was no longer able to perform the duties of a correctional officer.

FRANK J. WIEDNER
Editor