

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## WORKERS' COMPENSATION BENEFITS PAYABLE TO LAND- BASED INJURIES THAT FALL WITHIN THE COVERAGE OF LONGSHORE ACT

*McCoy v. Industrial Commission* presents a jurisdictional question as to the applicability of the Workers' Compensation Act as opposed to the Longshore Act. The arbitrator found that the Longshore Act provided the exclusive source of jurisdiction and denied the claims. The Commission and the circuit court agreed, but the appellate court reversed.

Two claims were filed. The first by Mary McCoy, widow of Arthur Matthews, deceased, and the second by Irene Parker, guardian of Anthony Hampton, allegedly the son of the decedent. After DNA testing ruled out the decedent's parentage of Hampton, the guardian then alleged that the decedent stood *in loco parentis* to him.

The decedent, an employee of Ceres Terminals, was working on a dock untying the ropes of a ship which was about to leave shore. As he was attempting to untangle the ropes, which were caught on the cleat around which they were wrapped, members of the ship's crew began to pull in the ropes. The decedent slipped and fell into the water, where he subsequently drowned. The single question presented was whether a

state may apply its workers' compensation coverage to a factual situation which would appear to be within the coverage of the Longshore Act. The Commission had found that "there was no evidence of injury while decedent was on land" and that the proximate cause of the decedent's death was drowning, which occurred in the navigable water. Ceres pointed out that the death certificate and post mortem examination report both indicate that the cause of the decedent's death was drowning. The claimants, however, contended that the injury resulting in the death did not occur on or in the navigable water, but on the dock. The court presented the issue as follows:

*Sun Ship* involved the consolidated cases of five workers, each of whom was injured on land while engaged in ship building or ship repair activities. In the words of the Supreme Court: "The single question presented by these consolidated cases is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers; Compensation Act (LHWCA) as amended in 1972. We hold that it may." ...

If the injury resulting in the death of the decedent here occurred on water, then the Commission does not have jurisdiction over the consolidated claims brought before it and its order must stand. If, however, the injury resulting in the decedent's death occurred on the dock, as the claimants assert, then the Commission has jurisdiction over the consolidated claims and its order denying those claims cannot stand. We must, therefore, determine where the injury

occurred. ...

*In the instant case, the decedent was working on the dock untying the ropes of a ship which was about to leave shore. As he was attempting to untangle the ropes, which were caught on the cleat around which they were wrapped, members of the ship's crew began to pull in the ropes. The decedent slipped and fell into the water, where he subsequently drowned. Applying the reasoning of the Supreme Court, we find that the claimant's slip on the dock gave rise to his claim for benefits. As this act took place on land, we find that his injury is land based. Furthermore, pursuant to the Supreme Court's holding in Sun Ship, we find that the Commission has jurisdiction over the consolidated claims before it and erred in denying those claims.*

**EDITOR'S NOTE:** Obviously, this factual situation is unusual in that the accidental injury occurred on land leading to an accidental death in navigable water.

### **FORMER EMPLOYER NOT PROTECTED BY EXCLUSIVITY PROTECTION**

In *Hunter v. Southworth Products Corporation, et al*, the Estate of Jeffrey Hunter, deceased, filed an action against the manufacturer of a hydraulic lift table, which collapsed and killed Hunter. Southworth, the manufacturer, then filed a third party action against ExxonMobil, the decedent's prior employer, and Pactiv Corporation f/k/a Tenneco Packaging.

The factual situation was as follows:

1) In 1992, ExxonMobil purchased

and installed the lift table in its plant and, at the time of installation, modified the lift table.

- 2) On January 20, 1995, the decedent was hired by ExxonMobil to work as a plant electrician.
- 3) On October 1, 1995, ExxonMobil sold the plant to Tenneco. After the change of ownership, the decedent continued to work for Tenneco and continued to use a modified lift table.
- 4) On February 4, 1996, the decedent was performing maintenance work on the lift table when it fell on him and caused his death. The third party complaint against ExxonMobil stated that at the time of installation, ExxonMobil made modifications which caused the death.

ExxonMobil argued that the exclusivity of the Workers' Compensation Act barred the plaintiff from bringing an action against a former employer. As a part of its claim for contribution, Southworth argued that, at the time of the injury, ExxonMobil was not decedent's employer and that the relationship of the parties at the time of the accidental injury establishes the availability of the exclusivity defense to an action in tort. The court noted:

*It is undisputed in this case that, had the fatal accident occurred while ExxonMobil owned and operated the plant, the exclusive remedy would have been under the Act even though the alleged improper modification of the lift table occurred prior to decedent's employment by ExxonMobil.*

ExxonMobil's status as employer of decedent subsequent to the alleged negligent installation of the lift did not create any liability since the accident occurred after ExxonMobil sold the plant. In view of the fact that ExxonMobil had no liability to pay workers' compensation benefits to the decedent at the time of the accident, it was prevented from using the exclusivity defense. The court also noted that ExxonMobil was not even carrying workers' compensation insurance after the plant was sold to Tenneco.

**EDITOR'S NOTE:** It is not surprising that the exclusivity was not available to ExxonMobil as the employer/employee relationship did not exist at the time of the accident.

### **NEGLIGENT SPOILIATION OF EVIDENCE BY EMPLOYER NOT BARRED BY EXCLUSIVITY DEFENSE**

On December 30, 1989, Malcolm Schusse, an employee of Pace Suburban Bus, was driving a bus when the driver's seat collapsed, allegedly causing a spinal cord injury to the plaintiff. That same day, the plaintiff reported the accident and on May 8, 1990, he filed a claim with the Illinois Industrial Commission. In October, 1990, Pace replaced the suspension system for the driver's seat.

On October 23, 1991, the plaintiff filed suit against the manufacturers of the bus and the driver's seat. Subsequently, the manufacturers filed third party complaints against Pace. In April, 1995, one of the third party complaints was amended to add a count alleging negligent spoliation of evidence. Up to this time, the plaintiff had not filed any direct action against Pace, his employer. On October 25, 1995, plaintiff

amended his complaint to add Pace as a defendant, making the same allegation of negligent spoliation of evidence. For reasons unknown, plaintiff voluntarily dismissed his complaint on February 21, 1997 and refiled the matter on November 26, 1997.

On August 26, 2000, Pace filed a motion to dismiss alleging that the suit was barred by the exclusivity provisions in Section 5 of the Act. Following a hearing, the trial court agreed that the motion to dismiss was appropriate. The plaintiff appealed.

The appellate court reversed the trial court stating that the spoliation claim was completely distinctive from any compensation claim.

1. The preservation or spoliation of evidence did not in any way arise out of the plaintiff's employment.
2. The basis of the claim was not suffered "in the course of employment" as it had no relation to the plaintiff's performance of his work duties.
3. The spoliation did not involve medical treatment or lost time.

After pointing out that the spoliation claim was "completely distinctive" from the workers' compensation claim, the court admitted to certain similarities but continued to insist that the similarities are not controlling, stating:

*Although the measure of damages in a spoliation of evidence claim will be similar to that which could have been obtained in an underlying tort action, "Illinois law makes it quite clear that the nature of and basis of liability for those damages [are] quite different (citing the Supreme Court case of Fremont*

*Casualty Insurance Co.). Pace's brief distinguishes Fremont on the ground that it involved the interpretation of the phrase "bodily injury" in a workers' compensation and employers liability insurance policy. However, in ruling that spoliation was not a "bodily injury" under the policy, the court rejected the argument that the damages the plaintiff sought were for the injury he suffered when he fell from the ladder. Thus, Fremont establishes that the two injuries are distinct.*

In summary, the appellate court felt that the *Fremont* case set the precedent and held that the workers' compensation accident is completely different from the negligent spoliation which obviously occurred later and is based on the employer's failure to undertake an obligation which did not begin with the original accidental injury.

**EDITOR'S NOTE:** It would be wise for an employer to determine if the cause of the original accident was a defect in any equipment which caused the accident. In such case, the employer should maintain the equipment necessary to permit testing for the existence of a defect. Keep in mind that the claimant would be entitled to file a spoliation claim within a five-year period after he learned of the defect.

## NEW FIRM ASSOCIATE

Brian H. Driscoll has joined our firm as of November 1, 2002. Brian received his Bachelor Arts Degree from Marquette University in 1983 and his Juri Doctor from IIT Chicago-Kent College of Law in 1987. From 1985 to 1988 he was employed as a Workers' Compensation Department Law Clerk for Travelers Insurance Company with

responsibilities that included: legal research and brief writing for the Industrial Commission, Circuit Court and Illinois Appellate Court. From 1988 to present, he has performed duties in workers' compensation defense litigation, including: claim evaluation, trial preparation, trials, settlement negotiation, expert depositions, appellate argument, client contact and seminar presentation.

We are very happy to have this well-qualified, experienced defense attorney as a part of this firm.

FRANK J. WIEDNER  
Editor