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APPELLATE COURT DENIES CLAIM FOR “MENTAL INJURIES”

LaVerne Perry was an assembly line worker who, because of unfamiliarity with her assignment, was having difficulty in keeping up with her assembly line duties. Armond Krueger, Richard Cook and Robert Madon were all in a general supervisory position to the claimant. The circumstances of the accident are well-described in the court's opinion:

The claimant testified that on March 5, 1984, she was employed by Ford and assigned to install certain parts onto cars as they moved down an assembly line. She admitted to having problems keeping up with the cars since she was unfamiliar with the assignment. According to the claimant, at approximately 7:30 p.m., her foreman, Armond Krueger, the general foreman, Richard Cook, and the superintendent, Robert Madon, were in the area where she was working. When they were about 40 feet from the claimant, Krueger called out the claimant's name. Krueger and the other supervisors continued to approach the claimant until, in her words, Krueger was “right up in [her] face.” Krueger then, in the presence of the other supervisors, screamed: “Bitch what's going on back here? What are you doing?” Madon, in a loud, nasty voice, said: “She needs to be home cooking.” Cook then stated: “I'm going to take her upstairs tomorrow to the green room. Get her out of here. She can't do the job.” The claimant testified that, as the supervisors were shouting at her, she became embarrassed, her legs felt weak, her stomach became upset, and she began to fall and passed out. The claimant stated that, as she was falling, she could hear Krueger yell: “What are you doing now?”

Krueger, Madon and Cook all testified relating to the events of March 5, 1984. None of them specifically remembered the incident. However, Krueger, although admitting to having yelled at employees when they made mistakes, testified that he never called an employee a "bitch." Cook and Madon testified that they never witnessed Krueger use profanity toward an employee, nor had they ever seen him get out of control. Neither Cook nor Madon could remember having made any comments to the claimant on March 5, 1984, about her inability to handle her work.

In addition to the conflicting evidence as to the accident, the court noted the conflicting histories supplied by the claimant. She reported to the company medical department that she was feeling dizzy, hot and nauseated and began to experience a headache when she passed out. She also complained of pain in her right hip and leg, although no evidence of injury was visible.

Upon being transported by ambulance to the St. Margaret's Hospital in Hammond, the claimant reported feeling hot and dizzy after an argument with her boss and passing out. All vital signs were normal and after receiving a diagnosis of syncope and a contusion/sprain of the right hip and back, she was discharged to see her personal physician.

The following day, the claimant saw Dr. Veerapaneni, who had been treating her previously for unrelated job injuries. She reported that she had become upset at work and passed out. The doctor's records indicate that the claimant had made the same complaint when she visited her physician three weeks prior to the incident in question. On subsequent visits to her personal physician, she was "still upset and crying easily." Consequently, she was referred to Dr. Gojkovich, a psychiatrist.

The claimant treated with Dr. Gojkovich from April 10, 1984 through the arbitration hearing in June of 1997. Dr. Gojkovich described a "major depressive disorder and acute and chronic anxiety." The claimant was confined to the psychiatric ward of Olympia Fields Hospital from June 28, 1984 to July 12, 1984, with a history of having nightmares about work with thoughts about killing her bosses. She was hospitalized again in January, 1987 for a two-week confinement, again with a severe depression. It was the opinion of Dr. Gojkovich that her work event of March 5, 1984 triggered the claimant's anxiety and depression and that her condition had not changed

from that date to the arbitration hearing thirteen years later. The doctor considered the claimant to be totally disabled.

The claimant was seen with reference to her physical injuries by Dr. Hyman Hirshfield, on September 24, 1985 and by Dr. Barry Lake Fischer on February 24, 1997. Both reports contain histories to the effect that the claimant had tripped over an object and fell onto work material, re-injuring her lower back.

At the company's request, the claimant was seen by Dr. Richard P. Harris on three occasions in 1997. Dr. Harris diagnosed the claimant as suffering from "a severe depression with a history of psychotic features." Dr. Harris, however, attributed the claimant's depression with the sense of loss that she experienced when her daughter left for college in the summer or fall of 1984, primarily because of an experience of being alone without any kind of support. Dr. Harris admitted that the confrontation which the claimant reported having with her superiors on March 5, 1984 could have triggered the initiation of her severe depression and could have caused the fainting, anxiety and the mental state that she displayed when taken to St. Margaret's Hospital. Dr. Harris did not believe that the work incident was the cause of her underlying depression and, while he admitted that the claimant could not return to the work force, he felt her continued dysfunction was fueled in part by "secondary gain factors."

The arbitrator found for the claimant, with the opinion stating that her immediate mental breakdown constituted an accidental injury arising out of and in the course of her employment. The arbitrator awarded permanent total disability benefits. The Industrial Commission reversed the arbitrator's decision and denied the claimant benefits. As described by the court:

The Commission found that the claimant was not credible and rejected her version of the events which took place on March 5, 1984. It went on to hold, however, that, even if the claimant's version of events were taken as true, she still failed to prove that she sustained an accidental injury compensable under the Act. According to the commission, supervisors yelling at employees in a factory setting is not unusual and the claimant failed to establish that "the situation that occurred during her employment with Respondent [Ford] was of greater dimension than the emotional strain suffered by all employees at Respondent's [Ford's] facility and generally in such manufacturing operations.

The court pointed out that the Commission's factual finding that the claimant's testimony was not credible was supported by the record and made reference to the various conflicting testimony about the accident, as well as the various histories given to the medical provider. The court further stated:

The Commission concluded that, even accepting the claimant's testimony as to the confrontation between her and her supervisors on March 5, 1984, as true for purposes of analysis, she failed to establish that the verbal criticism to which she was subjected, albeit unpleasant, was anything other than an ordinary incident of employment which is not uncommon in a factory setting. We agree.

The court described the higher standard of proof required in psychological injuries, stating:

...recovery for nontraumatically induced psychological injuries is limited to those cases in which the employee can establish that: "1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; 2) the conditions exist in reality, from an objective standpoint; and 3) the employment conditions, when compared with the nonemployment conditions, were the 'major contributory cause' of the mental disorder."

That standard of proof was met in *Pathfinder* where the claimant had extricated the severed hand of a co-employee after a punch press amputation. Not surprisingly, the claimant received a severe emotional shock. In awarding compensation for the non-physical injury, the court stated:

*[A]n employee who *** suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained.*

That standard was not met in the *General Motors* case. As the facts were described by the court:

The claimant sought benefits for psychological injuries he is alleged to have suffered after his supervisor verbally assaulted him using profane language and racial slurs. In reversing the Commission's award of benefits,

we noted that, to be compensable under the Act, a nontraumatically induced psychological injury must, among other things, have been "precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment." We concluded that the claimant had "failed to establish the verbal abuse he suffered, albeit unpleasant, was anything other than an ordinary incident of employment which is not uncommon to and might well be encountered in a great many occupations.

The court added that the facts in the instant case were no more egregious than those in the *General Motors* case and, as a consequence, could not support an award for benefits under the Act.

On the basis of the above, the court felt that the *General Motors* case should apply and compensation should be denied.

EDITOR'S NOTE: Several cases with factual circumstances not quite as severe as in *Pathfinder* have resulted in some weakening of the rule. However, it would seem that a comparison of the *Pathfinder* and *General Motors* cases would demonstrate clearly that the *General Motors* case is almost identical to this Ford case. Nevertheless, a special concurring opinion accepted the court's majority view that the claimant's testimony was not credible but added that if she were to be believed, the case "would more closely come under the *Pathfinder* criteria than *General Motors* in that they were sudden, intense, assaultive and gender abusive ("She needs to be home cooking.") and, unlike rough horseplay, atypical of a well-run workplace." This particular view that the facts in the instant case are closer to *Pathfinder* than *General Motors* is surprising and would suggest a possibility of further weakening of what we had come to regard as the law in mental-mental cases.

COMPENSATION ALLOWED WHEN CLAIMANT'S ATTENDANCE AT COMPANY PICNIC WAS DEEMED MANDATORY

William Woodrum, a 30 year old factory laborer, sustained an injury to his right knee while playing basketball at a company picnic on September 18, 1998, which had been designated "zero defects day" by the employer. The picnic was held on a

regular work day on the company premises. The employees were informed that they could attend the picnic or take a personal or vacation day if they chose not to attend. Employees who chose not to attend the picnic were not subject to discipline. During the picnic, the employer provided areas in which the employees could participate in a variety of activities, including volleyball, touch football, basketball, horseshoes, wall climbing and simulated sumo wrestling. Basketball was played on an outdoor parking lot, at which time the claimant's right foot landed on a rock, causing his right knee to twist and pop. He subsequently underwent knee reconstruction surgery, had returned to work after approximately three weeks and had expended \$29,000 for medical care.

Scott Lee, the employee's safety manager, testified that some departments remained in operation during the picnic and those employees could report to work or attend the picnic. Those employees whose departments were closed, such as the claimant, were either to attend the picnic, take a personal vacation day, or go without pay for that day. A number of employees had chosen to take time off rather than attend the picnic. Lee testified that the employer hoped to build up employee morale and increase productivity by rewarding the employees with a picnic.

Section 11 of the Act states in pertinent part as follows:

Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program.

The arbitrator denied compensation reasoning that claimant's decision to play basketball while at the picnic was voluntary and thus his injuries were not compensable. The Commission affirmed the decision but for a different reason. The Commission felt that the claimant's attendance at the picnic was mandatory but since the claimant's participation in the basketball game was voluntary, that the injury at the picnic did not arise out of and in the course of the employment. The circuit court affirmed the Commission but the appellate court reversed and found that the claim was compensable.

Here, we find that the undisputed facts are susceptible to but one inference, i.e., that claimant was assigned the task of attending the ZDD picnic on the day in question and was thus, as a matter of law, entitled to benefits. Where an employee must either go without pay or give up personal/vacation time in order to opt out of attending a company picnic, there is only one single inference that can be drawn from that fact, i.e. the employee was ordered or assigned the task of attending the picnic that day. It was as if the claimant's job assignment for that day was to attend the picnic. Just as on any normal work day, claimant had a choice. He could either report to his assigned duties for the day, e.g., assembly line worker, or if he did not wish to work that day, he could take a personal/vacation day to receive pay for that day, or he could receive no pay for that day. By forcing claimant to choose between a personal/vacation day or no pay if he did not wish to attend the picnic, the employer forced him to either attend or give up pay or a benefit, i.e., a day of paid time-off at his choosing. By forcing an employee to choose between attending the company picnic or giving up a benefit, the employer essentially ordered attendance. We find that requiring the claimant to forego pay or to lose a benefit (vacation/personal day) by not attending the picnic, as with any normal work day, is sufficient incidia that the employer ordered or assigned claimant's attendance at the picnic.

EDITOR'S NOTE: The dissenting opinion felt that the *Auto-Trol Corporation* case, upon which the majority opinion placed reliance, did not actually support the claimant's position. In that case, the attendance was deemed to be mandatory and the other two employees excused from attending the picnic were one whose wife was expecting a baby and another who was in a family wedding. As a result, the Commission could infer that the claim was compensable and this inference was upheld by the appellate court. In emphasizing that, unlike *Auto-Trol*, the Commission in the instant case had adopted a contrary inference that the claim was not compensable, the Commission decision should not be overruled. The dissent stated:

In Auto-Trol the clear business purpose of the picnic, along with other evidence concerning the employer's desire that employees attend the picnic, supported an inference that the claimant therein was ordered to attend the picnic. Here, in contrast, only

a vague statement that it was hoped by the employer the picnic might somehow improve overall morale, and the fact that if an employee chose not to attend the picnic he would have to use a personal/vacation day in order to be paid would support a finding that attendance was ordered. But a finding that claimant was not ordered to attend the picnic can also be inferred from the lack of a clear business purpose to the picnic and the fact that employees could opt out of attendance by simply taking the day off, without the imposition of any form of discipline. Under a manifest weight of the evidence standard of review, it would appear, as in Auto-Trol, that more than one inference can be made from the record, and that the Commission's inferences that claimant was not ordered to attend the picnic is supported by the manifest weight of the evidence.

The Editor believes this case has created a new exception to Section 11. The employee was never told that he must attend as he had a right to spend the day on his own pursuits with the understanding that he would not be paid while he did so. The majority has made it clear that the employee's wage loss if he failed to attend the picnic amounted to compulsion.

RESTRICTIONS ON EMPLOYERS' SECTION 12 IME SCHEDULING RIGHTS WHEN FAILING TO PAY TTD BENEFITS

Hunter v. R.D. Masonry presents a potential restriction on an employer's right to schedule a Section 12 examination with an independent medical examiner. Section 12 of the Workers' Compensation Act states:

An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer...for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of the Act.

...If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under

this Act for such period.

Section 12 examinations are typically used when employers dispute the causal connection of the claimed condition of ill-being with the workplace activities or dispute the extent of the petitioner's disability as assessed by the treating physician. Prior to *Hunter v. R.D. Masonry*, a March 2002 decision of the panel majority, an employer's Section 12 rights were virtually unrestricted, other than the caveat that such examinations could not be used to harass the petitioner.

In *Hunter v. R.D. Masonry*, the petitioner, Scott Hunter allegedly sustained accidental injuries to the low back on August 21, 1998 while moving a load of bricks. The petitioner's treating physicians opined a causal connection while the petitioner's IME physician disputed the causal connection (after initially concurring with the treating physicians). The parties proceeded to a 19(b) immediate hearing and the arbitrator found for the petitioner, awarding TTD benefits from the date of accident though the date of arbitration.

While the 19(b) order was being reviewed, the Respondent scheduled a repeat Section 12 examination two months after the initial hearing. The petitioner's attorney instructed his client not to attend the examination stating that Respondent had not paid any disability benefits as ordered by the arbitrator (even though that decision was still under review by the Commission). When the Appellate Court finally upheld the arbitrator's decision, the Respondent proceeded to pay the TTD award and additional benefits through the date of the scheduled Section 12 examination that the petitioner failed to attend.

After a subsequent 19(b) hearing, the Commission majority, in a seeming departure from the legislative intent of Section 12 examinations, held that the petitioner was not required to attend the evaluation because the Respondent was not paying TTD benefits. The Commission stated that respondents were not precluded from paying benefits to encourage attendance because Section 8(b) is clear that the payment of compensation may not be construed as an admission of liability. Thus, there would be no apparent prejudice in the payment of benefits.

The procedural disposition of this claim will be interesting to monitor because it appears to be "bad law." The Commission majority ignores the

situations where respondents dispute the causal connection of the petitioner's injuries. Although Section 8(b) indicates there is no admission of liability for the payment of benefits, the practical impact is that it is very difficult to recover benefits already paid to petitioners when a decision is later rendered in favor of respondents.

The factual basis for the Commission's decision appears to be unique and we would not recommend a significant departure from the way you have been handling Section 12 examinations to date. The Commission's rationale appears to be two-fold:

- 1) Although the respondent's IME physician ultimately found no causal connection, he changed his opinion. The Commission seemed to imply that there really was not a dispute as to causation, and thus no reasonable basis for denying TTD benefits existed;
- 2) Even though there was not a "final" decision, there was at a bare minimum an order from the Arbitrator to pay TTD benefits.

While the procedural disposition of this case is yet to be determined, we certainly would not recommend payment of TTD benefits to ensure attendance at Section 12 examinations. Should the unique case facts of *Hunter* present themselves, we would encourage creative solutions to avoid an arbitrator ruling on this issue. In some instances, a delay in scheduling an independent evaluation may be crucial in the defense of the claim and alternatives such as a small advance might help to avoid this dispute.

By Ryan A. Margulis

FALL IN COMMON AREA NOT COMPENSABLE

In *Kuhn v. Market USA*, where our firm represented the employer, the Industrial Commission denied compensation to a claimant who tripped and fell in a common area while returning from a smoking break to the employment premises. The employer is one of many tenants that lease space in a three-level office building. Pursuant to the lease agreement, common areas included all areas not leased to the tenants, including entrances and walkways that are for the general use and convenience of tenants. Moreover, the landlord retained the obligation to maintain and operate the common areas while the

employer and other tenants contributed to the maintenance costs.

Claimant performed all of her employment tasks in the employer's leased premises located on the second floor. She was permitted to take two breaks each shift. She routinely took an elevator to the basement of the leased premises and walked along a common area through a break room and outside to a patio to smoke. The break room contained vending machines, readily accessible to members of the general public, visitors, and tenants of the building. While the building was smoke-free, the employer did not compel petitioner to limit her smoking to the outdoor patio or any other outdoor location.

While returning from her break, petitioner walked through the break room and through the common area to take an elevator up to the leased employment premises. She tripped and fell over carpeting in the common area. Conflicting evidence was presented as to whether there was a defect in the carpeting or claimant simply tripped. She discontinued working and underwent surgery to the knee.

The Industrial Commission found that claimant was acting in the course of employment since engaged in an act of personal comfort -- returning from break. However, her injury did not arise out of the employment since the fall occurred in a common area open to all tenants of the building and the general public, the employer did not compel or direct the claimant as to the route taken to access the break area and outdoor patio, and the employer did not require the claimant to spend her break on the outdoor patio. Thus, she was not exposed to a greater risk of tripping than that of the general public. Additionally, it rejected petitioner's contention that her fall was unexplained and thus compensable.

By Michael F. Doerries

EDITOR'S NOTE: The aforesaid decision provides a basis to dispute the compensability of falls in a common area when the employer does not direct the route taken by the employee, the common area is open to members of the general public, and there is no inherent risk of injury such as a defect associated with traversing the common area.

SUPREME COURT SAYS LAST EMPLOYER BEARS LIABILITY FOR ENTIRE HEARING LOSS

In our January 2002 newsletter, the "last

employer” provisions of the Occupational Diseases Act for imposition of hearing loss liability were discussed. In *Hamilton v. ANCC/Silgan Container*, the Appellate Court interpreted §1(d) of the OD Act in literal fashion. That particular provision imposes mandatory liability upon the employer in whose employment the employee was last exposed to excessive noise. The Illinois Supreme Court recently affirmed the Appellate Court holding.

The essential rule of law is that the employer liable for compensation for hearing loss shall be the last employer in whose employment the employee was last exposed to excessive noise.* Similarly, the insurance carrier shall be the carrier whose policy was in fact covering the employer thus liable.

Briefly, in *Hamilton*, claimant began working for ANCC in 1970. He was exposed to loud noise and had hearing loss on testing. In 1995, the company was bought by Silgan. Claimant continued in his same job. He suffered incrementally greater hearing loss with Silgan and filed OD hearing loss cases against each employer. The arbitrator apportioned loss as between the two employers since hearing tests were taken during each period of employment. The Industrial Commission determined that ANCC, since it was not the last employer, was not liable for hearing loss. Ultimately, the Appellate Court agreed.

The Supreme Court of Illinois clarified that, as written, § 1(d) of the OD Act imposes liability for the entire amount of an employee’s hearing loss on the employer in whose employment the employee was last exposed to excessive noise.* The Court held, further, that the judiciary was accordingly without authority to apportion liability between employers. This was noted to be consistent with the social welfare nature of the Act; and allowed more certainty of remedy for the employee seeking compensation.

* Excessive noise is a phrase with distinct legal import. §7(f) of the OD Act and §16(f) of the WC Act set out presumptively harmful noise levels. Claims for progressive noise-induced occupational hearing loss are usually brought under the OD Act. An employee seeking compensation for noise induced hearing loss must show exposure to sufficient noise for the requisite amount of time as set forth in the Act. Factors affecting duration/degree of noise exposure include, of course, use of effective hearing protection.

By: Robert L. Smith

NEW PARTNERS

The firm is happy to announce that **Mark P. Matranga** and **Robert L. Smith** have become Partners.

NEW ASSOCIATES

John S. Pearman, born Paris, Illinois, May 13, 1970; admitted to bar, 1995, Illinois. Education: Loyola University-Chicago (B.A. Cum Laude, 1992); Southern Illinois University (J.D. 1995). Assistant Illinois Attorney General (1995-1998, 2000-2002), Deputy Chief of Staff (2001-2002). Member: Illinois State Bar Association, Workers’ Compensation Lawyers Association.

Emily E. Borg, born Omaha, Nebraska, December 19, 1973; admitted to bar, 2000, Illinois. Education: Michigan State University (B.A., 1996); DePaul University (J.D., 2000). Illinois Appellate Court Clerk (2000-2002). Member: Chicago and Illinois State Bar Associations.

Kelly Anne Robertson, born Lincoln, Nebraska, March 30, 1976; admitted to bar, 2001, Illinois, U.S. District Court, Northern District of Illinois. Education: Indiana University (B.S. 1998); DePaul University College of Law (J.D. 2001). Member: Chicago, Illinois State and American Bar Associations. General Federal and State Civil Trial and Appellate Practice, Employer’s Liability, Employment Litigation, Insurance Coverage and Subrogation Litigation.

Christine M. Jagodzinski, born Evergreen Park, Illinois, June 20, 1976; admitted to bar, 2002, Illinois; Education: Loyola University of Chicago (B.S., Honors, Summa Cum Laude, 1998); Loyola University of Chicago (M.A. 2000); Loyola University School of Law (J.D., cum laude, 2002). Phi Alpha Delta. Member: Chicago and Illinois State Bar Associations.

FRANK J. WIEDNER
Editor