

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

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Wiedner & McAuliffe, Ltd
One North Franklin, #1900
Chicago, IL 60606
(312) 855-1105
wmlaw.com

**APPELLATE COURT FINDS THAT
ATTACK ON JEWEL FOOD STORES
TRUCK DRIVER WHILE MAKING
A DELIVERY WAS COMPENSABLE
AS TRAVELING EMPLOYEE -
REVERSES COMMISSION DENIAL
OF BENEFITS**

On February 27, 1995, Thomas Potenzo, a truck driver for Jewel Food Stores, was attempting to make a delivery at the Jewel store located at 4355 North Sheridan Road, Chicago. The claimant backed his truck up to a hydraulic lift used in the process of unloading trucks making deliveries at the store. He had placed two pallets of goods on the platform and was attempting to lower the device with a hand control when he felt someone grab his ankle. As he turned, he was struck in the back of the head, immediately lost consciousness and next remembers waking up in a hospital two days later.

His injuries were substantial and included a parietal skull fracture, a compression fracture at L3, a right radial arm fracture, a nasal fracture, a facial fracture, a liver laceration, damage to several teeth and other contusions and sprains. He lost slightly more than three months from work and returned to work without restrictions.

The loading dock is located in the rear on an alleyway which separates the store building from a condominium structure.

The alleyway had gates, which were controlled at both ends by the condominium building. The claimant had no knowledge as to any reason for the attack. Nothing was missing from the delivery items nor was the truck or trailer damaged. After regaining consciousness, the claimant was unable to locate his wedding ring or his watch, thereby hinting at a possible robbery. However, he admitted that he had no way of knowing that the items were taken by his assailant.

The claimant testified to circumstances which would suggest that the attack occurred in an area of greater risk. He had seen vagrants rummaging in dumpsters. He had seen the victim of a stabbing, witnessed a theft from a truck and observed “a lot of police activity” in the neighborhood surrounding the Jewel store. He claimed that “several of us” complained “on and off” about a security problem in the dock area. However, he had no specific recollection of making a prior complaint. Over objection, he made an offer of proof that if the lift would have included a rail, it could have prevented him from falling.

Jewel produced four witnesses to controvert the claimant’s testimony. The condominium building manager reviewed the records and found no evidence of any other incidents occurring in the alley. The condominium property manager testified that she was not personally aware of any other incidents, nor did her condominium records have any reference to any other incidents occurring in the alleyway. Jewel’s Fleet Maintenance Supervisor had previously repaired various items of equipment at the store but had never been requested to investigate any altercation. Jewel’s vice president for real estate also testified to the absence of any knowledge of

any altercation occurring in that alleyway.

The arbitrator, the full Commission and the circuit court all found that the injuries did not arise out of the claimant’s employment with Jewel. The appellate court conceded that the claimant had failed to establish that the area in which he was working was in a high crime area or a dangerous neighborhood. The court also conceded that, in assault cases, the injured employee had the burden of showing that the assault was work related in order to be entitled to benefits under the Act. However, the court agreed with the plaintiff’s argument that, as a traveling employee, he was exposed to all street risks to a greater degree than the general public. While conceding that the appellate court should not disturb the Commission’s (occurred) finding of fact, unless it was against the manifest weight of the evidence. The court felt that this assault did arise out of the employment and that the Commission finding was against the manifest weight of the evidence:

The undisputed evidence in this case establishes that the claimant was a traveling employee whose duties required him to travel the streets and unload a truck in areas accessible to the public. The risk of being assaulted, although one to which the general public is exposed, was a risk to which the claimant, by virtue to his employment, was exposed to a greater degree than the general public. See C.A. Dunham Co., 16 Ill.2d at 111. Unlike the circumstance present in Greene v. Industrial Comm’n, 87 Ill.2d 1, 428 N.E.2d 476 (1981), there is no evidence in this case which would support an inference that the attack upon the claimant was based on a

purely personal motive. Finally, it is undisputed that, when he was assaulted, the claimant was in the process of unloading his truck, an activity which was reasonably foreseeable by Jewel.

EDITOR'S NOTE: The evidence provided by the respondent would suggest that the claimant suffered his injuries in an area which was probably safer than the surrounding streets and alleyways. The court is seemingly expanding the definition of traveling employee. Based on this philosophy, it would seem that any employee who is on the public way as a part of his employment would be considered as being at a greater risk than any employee whose work does not take him out on the public way. The employer would need to prove that the reason for the attack was personal in nature.

From the employer's view, this case is certainly disappointing. The arbitrator, the Industrial Commission and the Circuit Court all agreed that the injury did not arise out of the employment. Nevertheless, the Appellate Court has found that there could not be a reasonable inference except for the conclusion that the injuries did arise out of the employment.

**ANOTHER HOPELESS ATTEMPT
BY A LOANED EMPLOYEE TO
COLLECT ON A PERSONAL
INJURY CLAIM AGAINST THE
BORROWING EMPLOYER**

In our recent Newsletter of September 2007, we described the *Behrens v. California Cartage* case where loaning and borrowing employers were both immunized from common law liability because of the

exclusivity provisions of Section 5. You may recall that in that case, the plaintiff and defendant were referred by two separate temporary employment agencies to California Cartage. In denying the claim, the court noted that since the two employees were loaned to the same employer they clearly became employees of that borrowing employer.

In the recent *Robert Chavez v. Transload Services* case, Chavez was clearly referred by Tandem Staffing Solutions, a temporary employment agency to Transload Services, the borrowing employer. In attempting to avoid the exclusivity provisions of Section 5, the claimant attempted to show that his situation was different. His reasons were as follows: Chavez stated he was treated differently because he was not permitted to operate dangerous or unprotected equipment, that he submitted a daily time ticket which contained multiple terms and conditions and that the officers of Transload had testified that they did not regard him as an employee and insisted that they would not have honored a workers' compensation claim if one has been made against them. The court pointed out that Transload had the right to discharge the claimant for any reason and exercised a large degree of control over claimant's employment. He worked the same hours, took breaks as designated by Transload and received instructions from Transload as to how particular work was to be performed. Despite the opinion testimony of the Transload officers, Chavez was clearly an employee.

The claimant also argued that he had never consented to be an employee of Transload and that there is no evidence that he gave such consent. He further maintained he had no reason to believe he

was a Transload employee because he was paid by Tandem. The court emphasized that the claimant responded to the control and direction of the work activities, he accepted Transload employees handbook and received individualized training from Transload. Chavez thereby supplied all of the necessary consent.

EDITOR'S NOTE: The fact that the claimant was treated differently is hardly reason to avoid the defense of Section 5. Again, it seems rather surprising that this case was ever brought.

TEMPORARY TOTAL DISABILITY PAYMENTS MADE DURING FMLA LEAVE PERIOD DID NOT PREVENT TERMINATION OF EMPLOYMENT AT CONCLUSION OF TWELVE-WEEK FMLA PERIOD

Brian Dotson, employee of BRP US, Inc. was terminated from his employment after filing a workers' compensation claim. In support of the termination, the employer relied on the fact that Dotson's absence from work exceeded the amount of time allotted by the Family and Medical Leave Act. The company allowed workers up to twelve weeks of unpaid leave after which it relied on the following handbook notification: *an employee who is unable to work for more than twelve weeks will be considered automatically terminated at the expiration of that period, regardless of the reason for the inability to work.* (Emphasis added). In his suit against BRP, Dotson specified three particular acts or omissions that had harmed him: 1) the employment was terminated after he attempted to work with restrictions for a work-related injury; 2) he complained that BRP wrongfully required him to utilize FMLA leave rather than affording him TTD

time as authorized by law; and 3) he asserted that BRP violated the Workers' Compensation Act by wrongfully terminating him for exercising his lawful right to claim workers' compensation.

In response to the first allegation, the court pointed out that BRP had provided in their handbook that he could be terminated after twelve weeks' absence for any reason. Under Illinois law, an employer may terminate an employee for excessive absenteeism even if the absence is caused by a compensable injury. The handbook notice together with BRP policy and practice justified the termination.

With reference to the requirement that BRP improperly utilized the FMLA leave, the court noted that BRP had designated the absence as an FMLA absence and provided the employee with appropriate notice.

Finally, with reference to the third point, the court stated that the claimant had not been wrongfully terminated for exercising his lawful claim to workers' compensation benefits. The FMLA regulations included the following:

An employee may be on a worker's compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer).

...

If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12

weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

The claimant relied on the case of *Siekierka v. United Steel Deck*, which was described in our July 2007 Newsletter. The court noted that the employer in *Siekierka* had a markedly different absenteeism policy. The policy permitted the employer to decide on a case-by-case basis whether to grant an extension. After the first month extension, the employer refused to extend the leave further when Siekierka was still unable to return to work. Siekierka complained that the employer made it impossible for him to return within the time granted to him. Siekierka was forced to wait four weeks for a surgical procedure which had been recommended by Siekierka's own physician but delayed for eight weeks by the employer. If Siekierka had been treated immediately, he could have returned to work in time to meet the employer's requirements.

In distinguishing *Siekierka*, the court noted:

Nothing about Dotson's case calls into question the company's stated reason for the termination, that Dotson exceeded the twelve-week leave period allowed by the company's absenteeism policy. We have considered Dotson's other arguments and find them equally unavailing. Because Dotson has no evidence linking his termination with his exercise of rights to workers' compensation benefits, the district court was correct to grant summary judgment in favor

of BRP.

EDITOR'S NOTE: While the action of BRP may have seemed too harsh, it should be noted that the claimant retained his rights under the Workers' Compensation Act. However, if the employer provides the appropriate notice and follows the provisions of the FMLA regulations, the employer has a right to terminate any employee who exceeded twelve weeks of FMLA leave in a 12-month period, whatever the cause of the absence from work.

FRANK J. WIEDNER
Editor