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INJURY RESULTING FROM A VIOLATION OF A SAFETY RULE: HELD COMPENSABLE

In the *J.S. Masonry, Inc.* case, the appellate court had occasion to consider a claim of Josef Piatek, a 52 year old bricklayer helper whose duties included the assistance to other workers in the construction of a scaffold. The horizontal rail on the scaffold was to serve as a safety gate and was to be connected to a vertical rail. If properly connected, the horizontal rail would then serve as a safety gate to prevent a fall from the scaffold.

The claimant's duties included the relay of bricks, blocks and mortar to the bricklayers who were performing work on this scaffold. The two rails were tied with wire whereas good safety procedure required a pin. As each load was delivered, the claimant was required to undo the wire connection so that the machine lift operator could place the bricks directly on the scaffold. Each time the load was delivered, the claimant would unfasten the horizontal rail from the vertical rail, after which he would refasten the rails with the wire.

Jan Staszael, the claimant's employer, testified that he reminded the claimant to pin the safety gate rather than rely on the wire connection. Staszael told the claimant that if he did not pin the gate, he would be sent home. The claimant apparently failed to

comply because when the claimant was on the scaffold carrying a brick, he tripped over another brick and fell onto the horizontal rail at which time the wire snapped from the barrier causing the claimant to fall approximately 12 feet to the ground, and as he did so, he sustained an injury to his left side.

The claimant was taken to the Christ Hospital and underwent surgery to repair a comminuted fracture of the distal radius, as well as the repair of a severe laceration to the left leg and foot. Subsequent to the hospital confinement, the claimant continued under the treatment of Dr. Biorel Raducan, of the Parkview Clinic. Approximately five months after the accident, but while the claimant remained under the regular care of Dr. Raducan, the claimant complained of left shoulder pain and stiffness. The claimant had not complained of his left shoulder pain until that date because the other injuries prevented him from trying to lift his left arm until that time. Treatment to the shoulder included manipulation under general anesthesia, followed by aggressive range of motion physical therapy.

The employer argued that the injuries did not arise out of the employment because of the claimant's failure to fasten the safety gate, that failure amounting to a company rule violation, which took the claimant out of the scope of his employment. The claimant contended that he was performing tasks for the benefit of the employer at the time of the accident and that his injuries occurred in the sphere of his employment. The arbitrator denied the claim but, in the unanimous decision, the Commission reversed the arbitrator's decision finding that "regardless of whether or not (the Company) had a safety rule and/or (the

Claimant) violated (the Company's) safety rule," the claimant sustained an accidental injury on June 10, 2002, arising out of and in the course of his employment. The circuit court affirmed the decision and the appeal was taken to the appellate court, which affirmed the Industrial Commission decision.

The parties relied on the language in two separate decisions. The claimant relied on the *Chadwick* case where:

Death benefits under the Act were awarded to the estate of a pipefitter who fell to his death while he was working as a result of his failure to tether himself to the lifeline installed on the scaffold, in direct violation of a safety rule requiring the use of safety belts.

The employer relied on the *Saunders* case. In *Saunders*:

The claimant was denied benefits when he fell from a forklift on which he was riding double as a passenger, a practice forbidden by his employer, for the sole purpose of traveling to the break room in order to retrieve his lunch. Because the claimant's job description did not include "hitching a ride on a passing forklift," the supreme court found that the claimant's act was purely for his own personal convenience and, therefore, did not arise out of his employment, and he was not entitled to benefits under the Act.

The court explained:

Contrary to the Company's arguments, we find no conflict

between the holding in Saunders and the holding in Chadwick. Saunders stands for the proposition that an employee's injury does not arise out of his employment when the injury is the result of an activity prohibited by company rules and conducted solely as a personal convenience. In Chadwick, this court held that an injury suffered while an employee is performing duties for which he was hired arises out of the employment, without regard to the fact that the employee knowingly violated a safety rule. The rule in Saunders is applicable in cases where the employee is acting outside the sphere of his employment when injured, and the analysis in Chadwick is applicable when an injury is sustained while the employee is engaged in an authorized work activity.

In reference to the employer's claim that the claimant never complained of any left shoulder involvement until his visit to the treating physician five months after the accident, the employer noted that the Commission had not addressed the question of this delay in its opinion. The court noted that the Commission had found a causal relationship and that the Commission's finding was based upon the unrefuted medical evidence of the records, as well as the claimant's testimony. The court further noted that any alleged deficiency in the Commission's written decision is due to the employer's failure to request more specific findings, pursuant to Section 19(e) of the Act.

EDITOR'S NOTE: The important language in the decision describes the claimant's "sphere

of his employment."

Here, the claimant was performing the duties for which he was hired, namely to stand atop a scaffold and receive materials, and to relay bricks, blocks and mortar to the bricklayers. He was not in an area in which he was forbidden to enter, and was not engaged in any activity which was unauthorized by the Company. Although he may have been performing his duties in a negligent manner, the claimant was doing exactly the thing he was employed to do.

The only possible solace to the employer is that the Appellate Court opinion is not as strong as the Industrial Commission decision which stated that regardless of the employee's violation of the employer's safety rule, the claim would be compensable. The Appellate Court agreed with the Commission finding that (*the claimant*) *was not in an area in which he was forbidden to enter and was not engaged in any activity which was unauthorized by the Company.*

General Rule ... an employee who performs permitted work in a prohibited manner will not be denied compensation, but the employee may be denied if he is performing prohibited work.

EMPLOYER'S SUBROGATION

**CLAIM NOT WAIVED EVEN
THOUGH SETTLEMENT CONTRACT
TERMS FAILED TO ADDRESS ISSUE
OF SUBROGATION UNDER SECTION
5(b) OF THE ACT**

In our April, 2005 Newsletter, we reported on the appellate court case of *Borrowman v. Prastein*, wherein Borrowman settled his workers' compensation claim for \$200,000, but where the terms failed to acknowledge that his employer was entitled to subrogation in the medical malpractice civil action. Borrowman relied on the terms of the settlement agreement which made no reference to the subrogation claim. The terms included the following:

*The above constitutes a full, final[,] and complete settlement of any and all claims for temporary total disability, permanent partial and/or permanent total disability incurred or to be incurred by said [p]etitioner by reason of an industrial injury occurring on or about April 7, 1995, or by reasons of any claim or cause of action by [p]etitioner against [r]espondent of any nature whatsoever. Rights under [s]ections 8(a) and 19(h) of the *** Act are hereby waived by both parties.*

At the time of the settlement, Watertower, the employer, was aware of the pending malpractice claim which knowledge the court felt to be important while failing to notice that Section 5(b) of the Act requires the employer's consent except where the employer has been fully indemnified or protected by court order. In denying the subrogation claim, the Fourth District Appellate Court stated:

For this court to hold that Watertower was entitled to a lien against Borrowman's malpractice settlement proceeds when Watertower (a) failed to reserve its right in its workers' compensation settlement with Borrowman and (2) knew of the pending malpractice action at the time would completely nullify both parties' good-faith dealings. Such a holding would have Borrowman return to Watertower the money that Watertower previously agreed to give Borrowman without a change in circumstances. It would not only belie Illinois's public policy of encouraging settlements but would effectively serve as a repudiation of the agreement. We hold that Watertower should be bound by the terms of its agreement and is not entitled to a section 5(b) lien on the malpractice case.

In our Editor's Note on the *Borrowman* case, we pointed out that the decision was binding only on the Fourth District (Springfield area), but that the decision would be an incentive for claimants to try to expand the *Borrowman* decision to the other four districts since most settlement contracts contained no reference to subrogation. As expected, soon after the *Borrowman* decision the *Gallagher* case arose in the First District. The *Gallagher* court rejected the *Borrowman* opinion noting that *Borrowman* was unsupported by case law.

Examining the policy considerations behind the Act, the court stated that "[a]n employer's reimbursement of workers' compensation payments from an employee's third-party recovery is crucial to the workers' compensation scheme. The court observed that reimbursing an employer (who

is subject to no-fault liability under the Act) “accords with” “the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer.” The court also pointed out that section 5(b) advances the Act’s policy of preventing an injured worker from receiving a double recovery and that our supreme court has emphasized that” ’ “[i]t is of the utmost importance that the trial court protect an employer’s [workers’ compensation] lien.” Thus, the court concluded that “*Borrowman*’s holding that an employer waives or forfeits its workers’ compensation lien by not specifically reserving it in a settlement of the employee’s workers’ compensation claim when the employer knew of a pending claim against a third-party tortfeasor contravenes the Act’s purposes.”

As a result, the law continued to be uncertain with the Fourth District in *Borrowman* and the First District in *Gallagher* submitting opinions which contradicted each other. We have just now received the Second District opinion in the *Harder* case. As in the other two cases, the terms of the settlement contract made no reference to subrogation but merely concluded all claims for compensation, medical, hospital and other expenses arising out of the Workers’ Compensation Act. The *Harder* case agreed with the *Gallagher* case, thereby concluding that the workers’ compensation claim remained open. In a rather scathing contradiction of *Borrowman*, the *Harder* case states:

The settlement agreement in Borrowman, like the agreement in the present case, does not contain any reference to the employer’s workers’ compensation lien and, specifically, does not include a waiver of that lien. Based on the

general contract principles cited above, the court should presume that if the employer meant to waive its statutorily created lien as part of the settlement of the employee’s workers’ compensation claim, it would have specifically included such a waiver in the settlement agreement. Borrowman’s holding instead rewrites the contract, which was negotiated by lawyers representing both parties, and adds a provision which the parties did not include. The plain language of the settlement agreement indicates that the parties did not intend to resolve the issue of the employer’s workers’ compensation lien within that settlement. The Borrowman court assumed, without any basis, that the agreement’s silence on the issue of the workers’ compensation lien meant that the employer chose to waive that lien and its right to recover hundreds of thousands of dollars from any future third-party recovery by the employee. Such an assumption contravenes well-established contract law in Illinois.

Further, waiver is the voluntary and intentional relinquishment of a known right by conduct inconsistent with an intent to enforce that right. [Citation] The absence of any reference to an employer’s lien in a settlement agreement, without more, cannot constitute such a voluntary and intentional relinquishment of that right.

EDITOR’S NOTE: It would appear that except for cases in the Fourth District, courts would generally conclude that the workers’ compensation subrogation claim

was not surrendered by the employer in the terms of the settlement contract. After the *Borrowman* decision was rendered, numerous attempts were made by claimants to avoid reimbursement of the employer for its subrogation lien. Since a settlement contract rarely made reference to the subrogation claim it would only be natural for the claimants to utilize *Borrowman* to avoid the subrogation requirements of Section 5. Perhaps, one of these cases could be appealed to the Illinois Supreme Court but it would appear to be most unlikely that the *Borrowman* theory would be sustained.

WORKERS' COMPENSATION CLAIM LEADS TO CIVIL ACTION BASED ON INTRUSION UPON SECLUSION

What type of claim is *intrusion upon seclusion*? What does it have to do with workers' compensation? Before those questions can be answered, one would need a list of characters involved in this scenario. They are best described in an appellate court decision brought by James Burns.

On April 3, 2000, Burns sustained a back injury while employed by Masterbrand Cabinets, Inc., who then retained the services of Gallagher Bassett to adjust the claim and manage the litigation. Gallagher Bassett then engaged Metro Private Investigations, Inc., whose employee, John Kennedy, undertook to perform personal surveillance of Burns. The factual situation is best described in the opinion of the appellate court:

Plaintiff alleges that prior to November 12, 2005, Gallagher retained codefendant Metro to perform personal surveillance of plaintiff. On November 13, 2002, an employee of Metro, Kennedy, approached plaintiff's mobile home

and sought entry into his home under the false pretense that he was looking for a missing juvenile. Plaintiff alleged that Kennedy was holding the picture of a young girl when he approached his home. Once inside, plaintiff alleges that Kennedy asked him questions about the missing juvenile.

Kennedy used a hidden camera in a fanny pack to record plaintiff's movement and conversation while plaintiff was inside his home. Kennedy later filed an affidavit stating that the recording device did not record the conversation he had with plaintiff, only the visual interaction. On December 17, 2002, Kennedy testified in plaintiff's workers' compensation case with regard to plaintiff's physical limitations. The entry into plaintiff's home was the basis for Kennedy's testimony. Plaintiff alleges that Kennedy admitted under oath at a prior arbitration hearing that he used a false story regarding a missing juvenile to gain access to plaintiff's home.

Plaintiff alleges the intrusion was highly offensive and that he sustained anguish and suffering as a direct and proximate cause of Kennedy's entrance into his home.

The trial court initially dismissed Burns' complaint but the appellate court reversed. The court provided a thorough explanation as to how *invasion by intrusion* is a form of *invasion of privacy* and refers to the recent case involving Valley Forge Insurance Company in the opinion.

The court noted that Black's Law Dictionary's definition of 'right of

*privacy,' which is defined as '[a]n unjustified exploitation of one's personality or intrusion into one's personal activities' and includes 'invasion of privacy by intrusion' ***. [Invasion of privacy by intrusion is] defined as '[a]n offensive, intentional interference with a person's seclusion or private affairs' ***. In addition, Webster's defines 'privacy' as 'the quality or state of being apart from the company or observation of others: seclusion.'*

Plaintiff has alleged the court elements of the tort: (1) an unauthorized intrusion or prying into the plaintiff's seclusion, (2) the intrusion must be offensive or objectionable to a reasonable man, (3) the matter upon which the intrusion occurs must be private, and (4) the intrusion causes anguish and suffering. We also acknowledge the Restatement's definition, which says, 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.'

EDITOR'S NOTE: Most respondents and their insurance carriers will recall cases where surveillance, particularly those involving the video camera, have proved to be very successful in the situations involving exaggerated claims. Consistently, these investigators are very careful in avoiding any intrusion into the claimant's residence. However, they frequently involve surveillance of the claimant's activities on his outside premises with the

photographer being very careful to avoid entering upon the premises themselves.

It should be noted that the opinion does not describe any misconduct on the part of Masterbrand Cabinets, Inc. or Gallagher Bassett. In addition, the court is merely permitting the claimant to file his lawsuit based on intrusion upon seclusion and is not making any decision as to the credibility of the allegations.

WAGE LOSS CLAIM APPROVED BASED ON ESTIMATED COMPENSATION OBTAINED BY INVESTIGATOR

Mary Khatri, employed by First Assist, a medical clinic, began her employment in June of 1991. She performed the services of an operating nurse which duties consisted of assisting doctors during surgery, including the handling of surgical instruments but also involving lifting of patients on and off the operating table. On January 6, 2000, while transferring a 350 pound patient from the operating table to a stretcher, she felt a pop in her left shoulder. She immediately went downstairs to the Memorial Medical Center emergency room and sought treatment. Thereafter, she began a course of treatment beginning on January 10, 2000 until January 3, 2002, during which time she saw a number of physicians because of complaints in the left shoulder. She underwent an arthroscopic subacromial decompression and a left distal clavicle resection. Physical therapy provided little relief. Just prior to her return to work, she was examined by the employer's selected physician who stated that the claimant's surgery had a "failed outcome." No further surgery was prescribed and she was placed on permanent restrictions which prevented lifting of more than 25 pounds and any activities above shoulder level with the left arm.

On November 13, 2002, she obtained a job within her restrictions as an office nurse for Cardinal Respiratory at a salary of \$16 per hour. She finally secured a position with Capital Care as a staff nurse in a nursing home earning \$19 per hour and she was engaged in that employment at the time of the arbitration hearing.

To establish a current value of her services, Bob Hammond, a vocational rehabilitation consultant for the claimant, telephoned First Assist and learned from speaking to a First Assist employee that First Assist was now paying operating room nurses \$43 per hour as of the date of the arbitration hearing.

The arbitrator denied the claim for wage differential on the basis of inadequate proof. On review, the full Commission modified the arbitrator's decision and awarded wage differential benefits in the sum of \$640 per week, with the Commission calculating the wage differential based on the claimant's present salary of \$19 per hour as a staff nurse at a nursing home and the current rate of \$43 per hour allegedly being paid by First Assist to operating room nurses as established by Hammond's testimony.

First Assist objected to the testimony of Hammond because Hammond had not obtained the identity of the nurse recruiter who took his telephone call. According to Hammond that individual who answered identified him as Glen and stated that he was a nurse recruiter.

The appellate court accepted the claimant's testimony, stating:

The claimant's attorney laid a proper foundation for Hammond's phone conversation with First Assist's nurse recruiter. Hammond testified that he obtained the

number for First Assist from the phone directory, that he dialed the number, and the person to whom he spoke identified himself as Glen, the nurse recruiter. The fact that Hammond did not recognize the voice of the person to whom he spoke and does not even know his full name does not render the evidence inadmissible. It is sufficient that Hammond called First Assist's business phone number which he obtained from a phone directory and spoke to an individual regarding First Assist's business activities.

On the questions of whether Hammond's testimony regarding the content of his conversation is hearsay, we note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When, as in this case, the statement has been made by an employee of a party, the test for the application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment. The statement of "Glen," First Assist's nurse recruiter, satisfied both requirements.

The court further refused to disallow the claimant's testimony as to the number of hours earned per week and the claimant's alleged failure to conduct a more thorough job search. However, the court did refer the matter of the wage rate back to the Commission. The decision fixing the claimant's wage differential award at \$640 per week was incorrect because the wage differential applicable to this case would be the maximum PPD rate in effect on the

accident date, namely \$485.65 per week.

FRANK J. WIEDNER
Editor