WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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BORROWING EMPLOYER ORDERED TO REIMBURSE LOANING EMPLOYER FOR WORKERS' COMPENSATION BENEFITS PAID

In the summer of 2003, Surestaff, a day labor service, and Open Kitchens, a food service company, which provided meals to various identities in the Chicago Public School and the Chicago Housing Authority, entered into an agreement where Open Kitchens would provide additional workers for the summer lunch program. On July 28, 2003, a temporary worker suffered a fatal injury at the Open Kitchens' facility in Chicago. As the result of the incident, Surestaff paid workers' compensation benefits in the amount of $241,000 to the decedent's beneficiaries. Surestaff subsequently sought reimbursement.

At the trial, Ricardo Fiore, the owner of Open Kitchens, testified that prior to the fatal accident, he met with the owner of Surestaff, Raymond Morelli, and one of Surestaff's sales associates, Frank Amanti, to discuss the terms of the agreement. Fiore testified that various details were discussed and they agreed that Surestaff would pay all of the workers' compensation benefits if one of the temporary workers sustained an injury.

Raymond Morelli testified to the contrary. Morelli testified that he never discussed reimbursements of any benefits. Morelli admitted that he did not know

whether Amanti ever discussed any terms of the ultimate agreement between the parties. Although Open Kitchens had requested Surestaff to produce Amanti to testify at the trial, Amanti, for some unstated reason, did not testify.

Based on the testimony of Morelli, the jury returned a verdict in favor of Surestaff in the sum of $241,000, plus attorney's fees in the sum of $69,000.

Section 1(a)(4) of the Workers' Compensation Act provides:

> *Where an employer operating under and subject to the provisions of the Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such [injured] employee under this Act and as to such employee the liability of such loaning and borrowing employer is joint and several,* ***provided that such loaning employer is in the absence of agreement to the contrary*** *entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses****

A major issue between the parties concerned the obligation to prove the "agreement to the contrary." The court then reviewed existing law and stated that "the loaning employer's right to reimbursement, however, may be waived by an agreement between the respective employers." In the instant case, the court found that Open Kitchens must prove the existence of an agreement by Surestaff to waive its right to reimbursement. The court added:

> *The case law does not specify which party carries the burden of proving the existence of an agreement whereby the loaning employer waives its right to reimbursement. However, we find no prejudice in placing that burden on the party claiming the existence of such an agreement.*

EDITOR'S NOTE: Curiously enough, your editor reported on a somewhat similar issue involving the same day labor service, Surestaff, Inc. where a borrowing employer alleged that Surestaff had orally agreed to be responsible for the workers' compensation. In that case, the jury also found against Surestaff concluding that the parties had agreed Surestaff would provide workers' compensation benefits for its loaned employees injured at the job site of the borrowing employer. The court found that in that case there was an oral agreement whereby Surestaff agreed to pay the workers' compensation for its loaned employees.

Because of its failure to be specific, Surestaff has now been held responsible for the compensation payments in the first case because there had been an oral agreement whereby Surestaff agreed to pay. The borrowing employer's testimony as to the existence of an oral agreement was sufficient. In the most recent case, the court placed the burden upon Surestaff to prove

there was "an agreement to the contrary" and Surestaff had failed to establish such proof. Surestaff had been on both sides of the same issue of "the agreement to the contrary" and had lost both times.

DUAL CAPACITY CLAIM REJECTED

Ramona Kolacki sustained injury to her head when kicked by a horse at her employment with Silvercrest Veterinary Services, Limited. Randall Verink is the sole owner of Silvercrest and works for Silvercrest as a veterinarian. Randall and his wife, co-defendant Laura Verink, owned property in Will County where their home and horse facility are located. Ramona Kolacki worked for Silvercrest at the horse facility doing general upkeep and maintenance.

On November 25, 2005, Ramona was working at the facility cleaning out stalls. Laura requested Ramona to get a horse ready for a prospective buyer. While performing these duties, she was kicked in the had causing significant injuries.

Initially, Ramona filed a workers' compensation claim against Silvercrest. While the claim was pending, she brought a civil action against Laura and Randall as defendants, alleging a violation of the Animal Control Act and negligence based on premises liability.

The defendants moved to dismiss the complaint because of the exclusive remedy provisions of the Workers' Compensation Act. Ramona contended that under the dual-capacity doctrine the defendants were not entitled to the protection of the Act because at the time of the injury they were acting as a separate and distinct capacity as owners of the property where Silvercrest boarded, trained and sold horses.

The theory behind the dual-capacity defense is that the ultimate wrongdoer should pay for the loss. A plaintiff alleging dual capacity has the burden to show that the defendant actually operated in a separate capacity which was distinct from his first capacity as the plaintiff's employer.

The court dismissed the case stating that the plaintiff had failed in her burden to show that the dual-capacity doctrine permitted the plaintiff to sue the owner defendants because it was clear that only one business was being conducted on the premises, that being the business of Silvercrest.

The court noted that property ownership alone did not give rise to a separate and distinct capacity for purposes of dual-capacity doctrine. It reviewed similar cases where it had been held that the dual-capacity doctrine did not apply:

1. When the partnership defendant owned a construction business that employed plaintiff, even though partner defendant also owned the property where the construction work was being done;

2. An individual defendant who was manager of a corporate owned restaurant business even though defendant owned the property;

3. An individual defendant who was president and CEO of a grain business even though the defendant originally owned the property where the grain business was located and where plaintiff's injury occurred;

4. Individual defendants who were employees of a company-owned fertilizer business that employed plaintiff even though the individuals owned the property where the business was located;

5. Individual defendant who was agent of a construction business that employed plaintiff even though the defendant was beneficial owner of the property where the construction work was being done; and

6. Individual defendants who were owners of a corporate-owned concrete business that employed plaintiff even though individual defendants were the beneficial owners of the property.

The court stated:

An employer, as part of his business, will almost always own or occupy premises, and maintain them as an integral part of conducting his business. If every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to a shambles.

EDITOR'S NOTE: In effect, the court went beyond the actual individual or corporate status as the employer merely happened to have an ownership requiring him to maintain the location where the business was being conducted.

DISMISSAL OF SUIT BY REASON OF THE EXCLUSIVITY PROVISIONS OF THE WORKERS' COMPENSATION ACT WAS HELD TO BE PREMATURE

William Foster and John Johnson were both employees of the CTA in a Chicago facility. On October 17, 2002, Johnson allegedly committed a battery against Foster and filed a civil action. Initially, Foster had filed a workers' compensation action stating that the CTA had paid $657 in medical treatment and had thereafter denied the claim alleging that the plaintiff's injury did not arise in the course of his employment.

The trial court dismissed the case on the basis of the printed briefs without actually hearing any evidence. The court held that the exclusivity clause of the Act precluded the plaintiff from filing a suit for battery because a workers' compensation payment was made for some of his medical bills, regardless of the amount of the payment.

The appellate court reversed on the basis that the record lacked any facts describing the events and circumstances that preceded the altercation. For example, there was no information which of the two combatants was the aggressor and what may have precipitated the physical altercation. In referring the matter back to the trial court, the appellate court stated that:

We believe that the trial court must conduct a hearing on the facts and circumstances of the incident which gave rise to the lawsuit and the workers' compensation claim. There simply was not enough information upon which to determine whether the plaintiff had chosen the correct forum in which to advance his case. Compensability under the Act must be established to defeat the

plaintiff's civil action against the defendant, individually. We have no opinion regarding the outcome of such a hearing. However, the specific facts and circumstances of this case require such an inquiry by the trial court prior to dismissing the plaintiff's lawsuit.

EDITOR'S NOTE: Clearly, the pleading did not discuss the relationship and a final determination could not be made until some evidence on this issue was available to the trial court, particularly because the CTA had actually denied that it had liability for workers' compensation.

EMPLOYER'S ACTION DISMISSED AGAINST THE DEFENDANT PHYSICIAN WHO FAILED TO DISCLOSE PRIOR MEDICAL CONDITION

Hollywood Trucking, Inc. is an interstate motor carrier located in Illinois with its operations regulated by the DOT. The statute requires each motor carrier to investigate and make inquiries with respect to the physical and medical condition of the driver. The statute reads:

The medical examiner must be aware of the rigorous physical, mental, and emotional demands placed on the driver of a commercial motor vehicle. <u>In the interest of public safety</u>, the medical examiner is required to certify that the driver does not have any physical, mental, or organic condition that might affect the driver's ability to operate a commercial motor vehicle safely.

The driver filed a workers' compensation claim. Hollywood, which had no compensation insurance, asserted that the driver was ineligible for benefits because he had made false representations regarding his medical history in the DOT fitness report. Hollywood then filed a suit against Dr. Robert Watters and the Primary Care Group. As a part of its complaint against Dr. Watters, Hollywood noted that Dr. Watters' report stated that the driver had no previous back surgeries or other difficulty when, had he examined the driver's back, he could have seen the surgical scars.

The defendants moved to dismiss on the basis that the complaint did not establish the existence of a duty owed by Dr. Watters and Primary Care Group to Hollywood. In reviewing the complaint, the court stated:

Hollywood suggests that Dr. Watters should be held liable for negligently misrepresenting the results of the DOT fitness examination because he is an approved evaluator who undertook to examine Atkinson and record the results of the examination for the specific purpose of directly benefitting prospective employers. Hollywood contends that it was an intended beneficiary of the relationship between Dr. Watters and Atkinson. We disagree. The circumstances of this case do not fit within the parameters of cases where a professional has been hired by a client to render services for the specific purpose of conferring a benefit on a third party.

...

In this case, Dr. Watters conducted a DOT medical examination on

Atkinson for the purpose of determining whether he had any condition or infirmity that would likely interfere with his ability to operate and control a commercial motor vehicle on the public highways. The DOT medical examination was not performed for the purpose of certifying that he would not reinjure or aggravate his back while performing his work-related duties, and the result of the examination was not expected or intended to be used to assess the likelihood that Atkinson would suffer an on-the-job injury and to calculate the potential exposure to a prospective employer under the Workers' Compensation Act if it hired Atkinson. Additionally, we note that the complaint does not allege that Hollywood actually relied upon the results of Dr. Watters' examination or that it would be required to accept the opinion of a prospective employee's physician under the federal regulations.

The court also questioned the jurisdiction of a trial court to interpret the Workers' Compensation Act other than to point out that in determining an employee's entitlement to workers' compensation benefits the matter must first proceed to the Industrial Commission before reaching the circuit court.

EDITOR'S NOTE: Obviously, the statute was not intended to permit the employer to file an action against a physician who was not performing the examination because of a duty to the employer. It should also be noted that the complaint did not allege that Hollywood actually relied on the results of Dr. Watters' examination or that it would be required to accept the opinion of a prospective employee's physician.

LOANING AND BORROWING EMPLOYERS BOTH IMMUNIZED FROM COMMON LAW LIABILITY

In our August 2007 Newsletter, we discussed the case of Marshall Behrens, who was sent by a labor service (People Link) to California Cartage Company. At the same time, Cynthia Smith had been sent by another labor service (Staffers Resources) to California Cartage Company, as well. Smith allegedly caused Behrens' injury. Behrens sued both California Cartage Company and Staffers Resources after collecting compensation from People Link. The court dismissed Behrens' suit on the basis that Smith's loaning and borrowing employers were immunized by Section 5.

In our Editor's Note, we wondered why this case was ever filed. Recently, in another case, Roberto Chavez, in an action against Transload Services, attempted to circumvent Section 5. Chavez was sent by Tandem Staffing, a day labor service, to Transload Services where he was injured. In his civil complaint, Chavez attempted to distinguish his employment from the other Transload employees. Chavez argued that his work duties were more limited than the full time Transload employees, including the prohibition against his using dangerous equipment, as well as the manner in which his time was recorded. He further contended that he had not consented to be an employee of Transload. The appellate court disagreed and, in response to Chavez' allegations stated:

Similarly, in the instant case, plaintiff accepted Transload's employee handbook and received individualized training from

Transload. While the time ticket placed some restrictions on his employment, Doug Stone stated that he had the right to discharge plaintiff for any reason, set plaintiff's schedule, and control his work, all of which indicate that Transload exercised a large degree of control over plaintiff's employment. Plaintiff was treated the same as the Transload employees in that he worked the same hours, took breaks at times so designated by Transload, and received instructions from Transload as to how particular work was to be performed. Furthermore, plaintiff impliedly consented to the borrowed employment relationship by accepting the employment assignment with Transload, as well as its control and direction of his work activities.

EDITOR'S NOTE: Perhaps the finding that both loaning and borrowing employers are immunized on the basis of Section 5 will discourage any further actions on this issue.

CONTRACTORS HIRING INDIVIDUALS AS SUBCONTRACTORS MAY FIND THAT NEW ILLINOIS STATUTE WOULD CLASSIFY THE INDIVIDUALS AS EMPLOYEES

The Employee Classification Act became effective January 1, 2008. The stated purpose of the Act "is intended to address the practice of mis-classifying employees as independent contractors." As a result, a contractor who engages an individual or partnership under a subcontract may find that said contractor may be deemed to be an employee of the contractor.

Under the definition of contractor, the statute includes any general contractor or subcontractor "permitted by law to do business within the state of Illinois who engages in construction as defined in this Act." "Construction" is defined very extensively and includes almost any type of improvement involving real estate whether under, upon or above any real estate. The definition, as used in this Act, includes the following:

any structure, project, development, real property or improvement, or to do any part thereof, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or article of merchandise. Construction shall also include moving construction related materials on the job site to or from the job site.

The language of the statute deems the individual to be an employee unless it passes the three-part test. The individual is deemed to be an employee of the contractor unless it can be shown that 1) the individual will be free from control in the performance of service for the contractor; 2) the service performed by the individual is outside the usual course of services performed by the contractor; and 3) the individual is engaged in an independently established trade, occupation, profession or business.

Even if the individual has passed the three-part test, it will be deemed to be an employee unless it meets <u>all</u> of the requirements of the twelve-part test.

1. The individual must have direction and control over the means of providing the service;

2. The agreement shall not be subject to cancellation upon severance of the relationship between the two;

3. The individual's interest must involve a substantial investment of capital beyond ordinary tools and equipment;

4. The individual must be subject to the gains or losses;

5. The individual's services must be available to the general public;

6. The individual must use a Federal Income Tax schedule to show the business as independent;

7. The services must be performed under the individual's name;

8. The individual must pay for the license or permit in the individual's own name;

9. The individual must furnish the tools and equipment to perform the service;

10. The individual must hire his own employees and pay them without reimbursement from the contractor and must also report the employee's income to the IRS;

11. The individual must not be shown as an employee of the contractor; and

12. The individual has the right to perform similar service for others.

The contractor must post a notice in a conspicuous place on each site where the individual, who performs services, is not classified as an employee. The notice requires that it be posted in "English, Spanish and Polish." The mere failure of the contractor to designate an individual as an employee when the individual does not satisfy the prior requirements, shall constitute a violation of this Act.

Enforcement

The enforcement of this Act carries significant penalties. The Department of Labor is authorized to inspect all documents to determine whether the individual is an employee and may compel, by subpoena, the attendance and testimony of witnesses and the production of all records. The Department is further permitted to take any affirmative action to collect wages or compensation denied or lost to the individual improperly classified and to assess civil penalties.

With reference to penalties, any entity that violates any provisions of this Act shall be subject to a civil penalty up to $1,500 for each violation found in the first audit and a civil penalty of up to $2,500 for each repeat violation within a five-year period. The amount of the penalty may be recovered in a civil action filed by the Director of Labor <u>or a person aggrieved by a violation of this Act.</u> The interested party may be awarded 10% of the amount recovered. In view of the numerous "interested parties," this will be a new significant class of litigants.

For a second violation within five years, the individual shall not be awarded any state contract until four years have elapsed from the date of the last violation.

Further penalties are imposed for any other possible violation of this Act. Any

entity or employer that willfully violates the Act commits a Class C misdemeanor and with the second or subsequent violation within a five-year period commits a Class 4 felony. Should the employer or entity retaliate in any way against any person for exercising rights under this Act, such retaliation shall subject the employer or entity to civil penalties, or a private cause of action, or both. If that person makes a complaint to some organization or agency, institutes proceedings under this Act or testifies in any investigation, any retaliation by the employer or entity would constitute a further violation of this Act.

Finally, the person aggrieved by a violation of this Act may file suit in the circuit court and would be entitled to collect the financial loss due to the violation, compensatory damages up to $500 for each violation, as well as attorney's fees and costs.

However, the legislature was thoughtful enough to exclude from the Act the state, its officers, agencies or political subdivisions, as well as the federal government.

EDITOR'S NOTE: This legislation was the product of the unions in the state of Illinois. Unions have failed in their attempts to organize the employees in this state but have found that the cooperation of our Illinois legislators is not as difficult. Can the average home owner be considered a contractor? As stated above, the definition of a contractor is an individual "permitted by law to do business within the state of Illinois who engages in construction as defined by this Act." If so, is that definition broad enough to include the homeowner?

A question remains as to whether the classification of an "employee" under this Act will extend to other areas of liability. Will that "employee" under the Employee Classification Act extend to the definition of employee under the Workers' Compensation Act? The Employee Classification Act does include a provision that the Department of Labor shall share information with the Industrial Commission.

Underwriters of contractor's liability and workers' compensation insurance policies should be aware that this new statute might increase the number of tradesmen who would be classified as employees? Should the contractor insist on a "hold harmless" agreement with the individual if this Act results in the subcontractor to be deemed an employee? The legislative minutes reveal that the bill's sponsors were speaking on behalf of unions and the opponents on behalf of business. The votes documented the partisan nature of the legislation with the House approval being 64-51 and the Senate 38-19.

FRANK J. WIEDNER
Editor