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WORKERS' COMPENSATION BULLETIN

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LEGAL CAUSATION: A CAUSAL CONNECTION STILL REQUIRED BETWEEN THE EMPLOYMENT AND THE INJURY

In *Ex parte Patton*, 2011 WL 1522325 (Ala. April 22, 2011), Alabama's Supreme Court held, that to recover workers' compensation benefits for a work-related accident, there must be a causal connection between the employment and the injury. In so holding, the Court restored the plain language of Alabama's Workers' Compensation Act and overruled prior precedent to the effect that legal causation could be established in traumatic injury cases by merely proving that an alleged "accident" occurred.

Patton/employee sustained an injury when she inexplicably fell while walking from the coffee station in the rear of the store. Korner Store denied her claim for workers' compensation benefits because it contended her fall was due to either an idiopathic characteristic (i.e., a preexisting physical weakness or disease) or an unexplained, but not work-related cause. At trial, the court granted Korner Store's Motion for Summary Judgment, stating "The evidence in the record [did] not support a conclusion that [the employee's] injury arose out of her employment."

On appeal, the Court of Civil Appeals reversed, noting that the Supreme Court's decision in *Ex parte Byrom,* 895 So. 2d 942, (Ala. 2004), "deemed controlling language contained in a footnote in *Ex parte Trinity Indus., Inc.,* 680 So. 2d 262 (Ala. 1996), to the effect that an employee who claims to have been injured by 'a sudden and traumatic external event' that would constitute 'an accident' in the colloquial sense need only, in order to demonstrate legal causation, produce substantial evidence tending to show that the alleged 'accident' occurred."

The Supreme Court granted Korner Store's petition for a writ of certiorari, noting that for causation to be satisfied, an employee must demonstrate that her injury is caused by an accident both arising out of and in the course of the employment. The Court agreed with the Court of Civil Appeals that "[t]here is no dispute that the employee's accident occurred 'in the course of' her employment, i.e., within the period of employment at a place where the employee would reasonably be and while she was reasonably fulfilling employment duties or engaged in doing something incident to it." As for the "arising out of" prong, however, the Court stated "[t]he principle fault line that has been revealed by the application of the 'arising out of' requirement by Alabama courts is the distinction between accidents that are at least partially attributable to an affirmative employment contribution and those that are attributable solely to what are called 'idiopathic' factors."

The Court next examined prior cases and overruled *Ex parte Byrom,* 895 So. 2d 942 (Ala. 2004), stating:

> [I]t appears that the 'but-for' language espoused in the body of this Court's opinion in *Byrom* conflicts with prior case law dealing with causation and is creating confusion in the arena of workers' compensation law. That confusion is evident in the present case, in which the Court of Civil Appeals, applying *Bryom,* completely dispensed with the element of legal causation… Such an interpretation clearly contravenes both the plain language of the Act, which prescribes a causal-connection element in order for an injury to be deemed compensable, and the rationale of authority in which this Court explicitly rejected a 'but-for' test for causation in workers' compensation cases. The utilization of a 'but-for' test negates the statutory requirement that, to be compensable, an injury or death 'arise' out of employment and instead requires only one part of the statutory test – that the injury occur 'in the course of employment' … to the extent that *Byrom* conflicts with those previous decisions, it is due to be, and is hereby, overruled.

This decision is important because it restores the "arising out of" causation standard which the *Byrom* decision essentially abrogated. It is therefore not enough for an employee to simply prove that the alleged accident occurred to establish causation; there must be some link to the employment. If the accident is caused by idiopathic factors which cannot be linked to the claimant's employment, causation is not proven.

MEDICAL REFERRALS NOW HAVE A LIMIT

In the recent case of *Ex parte Imerys USA*, 2011 WL 1716572 (Ala. Civ. App. May 6, 2011), the Court of Appeals limited how far referrals can go in workers' compensation cases. Wilson/employee sustained a work-related back injury in November 2006 and was initially treated by Dr. Pinson. Wilson then requested a panel of four orthopedists from which he chose Dr. Dewey Jones. Wilson was then referred to Dr. Mark Downey for pain-management treatment. Dr. Downey referred Wilson to the Doleys Clinic/Pain and Rehabilitation Institute where he saw Dr. Thomas Ryder. Dr. Ryder then attempted to refer Wilson to Dr. Andrew Cordover, an orthopedist, to determine if he would benefit from surgical intervention, but the employer/Imerys denied this referral. Instead, Imerys made an appointment for Wilson to return to Dr. Jones for this determination, but Wilson refused to see him.

Imerys moved to compel Wilson to attend the appointment with Dr. Jones. Wilson sought authorization from the court to allow him to be referred to Dr. Cordover. The court denied Imerys' motion to compel and ordered Imerys to authorize evaluation and treatment by Dr. Cordover. Imerys filed a petition for writ of mandamus which was granted by Alabama's Court of Civil Appeals. The Court held that if an injured employee is dissatisfied with the physician selected, he or she may request that the employer provide a panel of four physicians from which the employee may choose a treating physician and noted, "[t]here is no other method by which the employee may choose another physician provided by the employer." The Court further recognized that an authorized treating physician can refer an employee to another physician for reasonably necessary medical treatment. The other physician to whom the employee is referred becomes an authorized physician. The Court held, "[h]owever, the referral does not transfer to the referred physician the right to control all aspects of the employee's treatment. That is, the referred physician does not become the authorized treating physician for all purposes by virtue of the referral."

In this case, the Court found that Dr. Jones did not give up his control over Wilson's course of orthopedic treatment, and he remained Wilson's original authorized treating physician. Wilson must seek further orthopedic evaluation or treatment from Dr. Jones.

NEVER ASSUME VENUE IS PROPER

The sole issue on appeal in *Ex parte Tyson Chicken, Inc.,* 2011 WL 1449031 (Ala. April 15, 2011), was where venue was proper. The employee filed suit where she resided, and the employer/Tyson moved to transfer the case to where the accident occurred. Alabama's Court of Appeals stated that venue is governed by Ala. Code 1975, Section 6-3-7. Subsection (3) states that venue is proper against a corporation in the county in which the plaintiff resides if the corporation is doing business by agent there. The Court rejected the employee's argument that venue was proper in Etowah County because Tyson places its products in the stream of commerce there, noting that the employee confused venue with the due process standards for personal jurisdiction. The Court explained that the language of the statute implies more than the undirected arrival in the county of products produced by the defendant corporation. "It has been interpreted to mean that the corporation with some regularity, performs there some of the business for which it was created." *Id.* Citing *Ex parte SouthTrust Bank of Tuscaloosa,* N.A., 619 So. 2d 1356 (Ala. 1993)). Because there was no such evidence presented here, the case was properly transferred to where the accident occurred.

BE CAREFUL: CLAIMANTS MAY GET MORE INJURIES OUTSIDE THE SCHEDULE

The recent decision of *Ex parte Hayes*, 2011 WL 926047 (Ala. March 18, 2011), could have a significant impact on the ability of workers' compensation claimants to take a scheduled injury outside of the schedule. In *Hayes*, the Alabama Supreme Court reversed the Court of Civil Appeals to hold that the employee plaintiff was permanently and totally disabled where his severely broken heel interfered with the efficiency of the remainder of his body.

After his heel was surgically repaired, the employee experienced infections, complications requiring surgery and was unable to accommodate a congenital defect in his other foot. As a consequence, he was limited to standing and walking for a maximum of one hour per day, only using a cane or walker. He was also required to sit or lie down frequently and elevate his foot to alleviate painful swelling.

The Court of Appeals found that the injury did not fall outside of the schedule and relied upon *Ex parte Drummond Co.*, 837 So. 2d 831, 834 (Ala. 2002), holding, "Hayes has not established that his right-foot injury caused an injury to any particular nonscheduled part of his body." Alabama's Supreme Court disagreed and reversed, holding that the employee's scheduled heel injury sufficiently interfered with the efficiency of other parts of his body to take the injury outside the schedule. The Court explained that the test for taking an injury outside the schedule "clearly does not require damage to the physical structure of other parts of the body…. Rather, the employee must prove that the injury to the scheduled member causes pain or other symptoms that render the non-scheduled parts of the body less efficient." *Id.*

This decision both provides clarity to the scheduled injury exception and muddies the waters. On one hand, the case plainly instructs that a scheduled injury need not cause a physical injury to the remainder of the body to fall outside of the schedule. Rather, the scheduled injury must only "interfere with the efficient functioning" of the remainder of the body. On the other hand, what constitutes sufficient "interference with efficient functioning" is a question on which the Court provided little guidance.

BUT IT MAY BE MORE DIFFICULT TO RECOVER OUTSIDE OF THE SCHEDULE DUE TO PAIN

More recently, the Alabama Court of Civil Appeals released *G.UB.MK Constructors v. Davis*, 2011 WL 3633561 (Ala. Civ. App. August 19, 2011), involving an employee who injured his left hand. He experienced severe pain extending up his arm and into his shoulder, neck and upper back, which affected his ability to perform his job as a machinist. Due to the pain and symptoms, the trial court found that the employee was permanently and totally disabled, awarding benefits outside of the schedule. The Court of Civil Appeals reversed and remanded, concluding that the employee had failed to present sufficient evidence indicating that the effects of his injury extended to other parts of his body and interfered with their efficiency. On remand, the trial court entered an order finding the employee's pain to be "debilitating" and again ordered the employer to pay permanent total disability benefits and to pay the cost any necessary treatment for pain.

The employer again appealed to the Court of Civil Appeals which found that:

> In order for pain in a scheduled member to be totally, or virtually totally, debilitating to the body as a whole, that pain must be such that it completely, or almost completely, prevents the worker from engaging in physical activities with the uninjured parts of his or her body. After carefully reviewing the record, we conclude that the employee did not present substantial evidence to meet that "exceedingly high standard."

Id. at *4. The Court of Civil Appeals noted the employee's testimony that, five or six weeks after his injury, the employer reassigned him to work as a quality assurance inspector with restrictions against using his left hand, that he performed that job for over a year, and that he remained able to do that job at the time of trial. Though the pain from his left hand limited him in certain jobs and non-employment functions, the employee did not testify that the pain from his left hand prevented him in any way from otherwise fully using the uninjured parts of his body, including his dominant right hand. Therefore, the Court reversed and remanded, instructing the trial court to determine the appropriate amount of scheduled benefits due the employee under § 25-5-57(a)(3)a.

This case reinforces the notion that injuries to scheduled members should result in concomitant scheduled injury benefits as opposed to benefits outside of the schedule. Only in exceptional circumstances should such injuries fall outside the schedule, when such pain completely or almost completely prevents the worker from engaging in physical activities with the uninjured parts of his or her body.

MSAs WITH THIRD PARTY SETTLEMENTS – EMPLOYER'S MUST BE VERY CAREFUL

In *Arvinmeritor v. Johnson,* 2011 WL 751925 (Ala. Civ. App. Feb. 25, 2011), an employee was declared 100% permanently and totally disabled as a result of an occupational disease. The employee then filed a third-party claim which resulted in a settlement in excess of the indemnity and medical benefits paid by the employer. Thereafter, the employer and employee negotiated a settlement under Ala. Code (1975), § 25-5-11, and the employer agreed to waive its right to a credit or reimbursement under § 25-5-11 and to contribute up to $65,000 for the establishment of a Medicare set aside (MSA) trust in exchange for the termination of all further medical and indemnity payments due to the employee. The settlement revealed that the cost of the MSA would be $83,936.17, the balance of which ($18,936.17) would be paid by the employee.

Five months later, the employee filed a petition with the court asserting that no MSA had been established, yet the employer had ceased paying his medical expenses. The employee requested to interplead his portion of the cost to fund the MSA ($18,936.17), and requested that the court order the employer to pay his accruing medical expenses. In response, the employer asserted that after the settlement was approved, CMS revealed that the cost of establishing an MSA would be substantially higher than the estimated $83,936.17, and that because the employee received funds from the third-party settlement exceeding the employer's liability for medical expenses, it had no obligation to pay for accruing expenses. The trial court ruled for the employee, requiring the employer to pay the difference over and above $83,936.17 to fund the MSA and to continue to pay the employee's medical expenses until the MSA was established.

On appeal, the Court of Civil Appeals held it "cannot unilaterally modify or supplement the essential terms of a workers' compensation settlement agreement that has been incorporated into a judgment," because this would create a new contract that did not reflect the intentions of the parties. Therefore, neither party could be required to pay an amount greater than that to which it agreed. Since the holding amounted to an impasse, the Court stated, "it is not the province of the court to advise the parties on the appropriate manner to settle their dispute; we may only hold the trial court in error for imposing a legally incorrect remedy." *Id.* at *4.

On the second issue, the Court noted that to withhold payment of future medical expenses, an employer must first prove the amount an employee recovered from the third-party settlement that was attributable to his or her future medical expenses. The trial court did not make any finding as to the total amount of the employee's confidential third-party settlement, and the employer did not request a hearing for that purpose as required by Alabama case law. Therefore, the employer remained obligated by the former judgment to continue paying those expenses unless and until it was expressly relieved of that obligation by the trial court.

In light of this ruling, parties must ensure that settlement agreements involving the implementation of an MSA have some contingency to address the shortcomings of preliminary MSA estimates. Further, in the event an MSA is not consummated as envisioned by a settlement agreement, an employer must take affirmative steps to justify cutting off medical expenses under §25-5-11.

RELIANCE IS NOT AN ELEMENT OF THE WILLFUL MISREPRESENTATION DEFENSE

In *Cascaden v. Winn-Dixie Montgomery, LLC*, 2011 WL 3375652, at *4 (Ala. Civ. App. Aug. 5, 2011), the court extended the reach of the willful misrepresentation defense when it held that employer reliance is not an element of the defense. Section 25-5-51 of the Workers' Compensation Act provides:

> No compensation shall be allowed if, at the time of or in the course of entering into employment or at the time of receiving notice of the removal of conditions from a conditional offer of employment, the employee knowingly and falsely misrepresents in writing his or her physical or mental condition and the condition is aggravated or reinjured in an accident arising out of and in the course of his or her employment.

Importantly, to assert this defense, the employer must provide the following warning language to the employee in bold print at the time of hire: "Misrepresentations as to preexisting physical or mental conditions may void your workers' compensation benefits." Though the statute does not expressly require an employer to establish that it relied on an employee's misrepresentation to assert the defense, some courts previously required employer reliance. In *Cascaden*, the Court of Civil Appeals held that an employer's reliance on a misrepresentation is not an element of the willful misrepresentation defense. Here, an employee failed to disclose a pre-existing back injury when applying for a job at Winn-Dixie. When he re-injured his back and made a workers' compensation claim, Winn-Dixie asserted the willful misrepresentation defense. Plaintiff argued that, because Winn-Dixie was aware of his previous injury, Winn-Dixie did not rely on the misrepresentation when it hired him. The Court rejected this argument and held the employee was barred from recovering workers' compensation benefits based on his failure to disclose a pre-existing injury. Winn-Dixie's awareness of the pre-existing condition did not bar it from asserting the defense.

As the Court noted, in laying out the willful misrepresentation defense, § 25-5-51 of the Act contains no explicit requirement of reliance. Additionally, the Legislature drafted § 25-5-51 to include the specific elements of the willful misrepresentation defense. Consequently, the Court determined that the Legislature intentionally excluded the requirement of reliance from the defense.

This decision is important for employers for several reasons. First, *Cascaden* broadens the range of situations in which the willful misrepresentation applies. Second, *Cascaden* should reinforce to employers how critical it is to include the statutory "magic warning language" quoted above. Finally, to increase the chances of the defense becoming available, employers should ensure that their hiring documents contain questions regarding medical and psychological conditions that commonly occur in their industry.

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