Lex and Verum

The National Association of Workers' Compensation Judiciary

The National Association of Workers' Compensation Judiciary is trying to reach as many workers' compensation adjudicators as possible. This newsletter was transmitted directly to over 300 Judges, Commissioners, and Hearing Officers. It was forwarded to at least 100 more. We believe we are reaching more Compensation adjudicators than any other organization. However, we need your help. Picture yourself in this poster! Please forward this edition to all workers' compensation adjudicators that you know. We are looking for you. You are "WANTED." If this was forwarded to you and you want to be part of our email list, send an email to Judge Lazzara JJL@NAWCJ.org

MRSA is Everywhere!

Dr. James McClusky, a medical doctor and professor at the Center for Environmental and Occupational Risk Analysis at the University of South Florida presented an interesting program on Methicillin Resistant infections at the October 2009 "Second Fridays Seminar."

The "Second Fridays Seminars" are provided as a "lunch and learn" educational opportunity.

Dr. McClusky explained the presence of these colonization and the dangers they present when open wounds allow entry into tissue. His frank discussion of the way these Aureus act and interact with the human body was informative and well received.

Upcoming Events:

The NAWCJ is joining with the Florida Office of Judges of Compensation Claims to sponsor a series of Lunch and Learn programs, see details on page 2.

WORKERS' COMPENSATION LAW: THREE NEW COURSE OF EMPLOYMENT PRECEDENTS OF NOTE

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I. Introduction

Courts of a number of states have produced course of employment cases the last few months that should be of interest to judges of workers' compensation claims in all jurisdictions.

Disputes over "course of employment," or the parameters of coverage, are common in all jurisdictions. Most states, in establishing the pivotal criterion, use the two-part test that an injury must "arise out of" and occur "within the course of" employment. The "arising" requirement is a test pertaining to the origin and cause of injury, and the "course" requirement addresses the time, place, and circumstances of injury.

The Texas statute, notably, provides that the injury must "arise[] out of and in the course and scope of employment," before it is compensable. The Pennsylvania statute, on the other hand, defines injury as one "arising in the course of … employment and related thereto."

Two recent cases, one from Illinois and the other from Virginia, are instructive examples of how, in arguably close cases, a course of employment proviso can be either liberally or restrictively construed. A third, equally instructive case, from New York, reveals a court interpreting one of the several state statutes that has been enacted in order to limit the parameters of coverage.

II. Personal Comfort Activity or Act of Rescue?: Coverage Found Either Way

The Illinois case is *Circuit City Stores, Inc. v. Illinois Workers' Compensation Commission*, 391 Ill. App. 3d 913, 2009 Illinois App. LEXIS 728 (Appellate Ct. Illinois 2009). There, the claimant, Dwyer, was a 20-year old man employed as an auto stereo installer for Circuit City. He had a known but asymptomatic cyst in the femoral head of his right leg that put him at risk of fracture. On March 6, 2005, he was in the midst of his work when a co-employee asked for his help. In this regard, the co-employee had sought to purchase a bag of "Frito's" from the on-premises, public vending machine. The machine was the type that featured a glass front, thus exposing the vending

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NOVEMBER 2009"Second Fridays Seminar" – Join us.

The Florida OJCC and NAWJC will co-sponsor lunch and learn seminars from 12:00 to 1:00 Eastern on the second Friday of upcoming months. Upcoming "*Second Fridays*" Lunch and Learn Opportunities for NAWJC Members:

November 13, 2009 Andy Small, "Positive Leadership for Positive Results."

Achieving consistently positive outcomes amid the constant change that is prevalent in today's challenging business environment requires the highest caliber of leadership. In this exciting and energetic session, attendees will learn practical methods for adapting organizations and work groups to new conditions, eliminating distractions and setting a positive tone for staff, while remaining focused on positive results, leadership tips essential in creating an effective safety and workers' compensation program.

These programs are offered free of charge to NAWCJ members.
For more information, email Judge Lazzara JJL@NAWCJ.org

selections. The co-employee's selection had advanced only in part, and she asked Dwyer's assistance in shaking the item loose. When mere shaking the machine did not work, Dwyer gave it a lurching bump, an action which included contact of his hip into the machine. By this act he acutely fractured the congenitally weak part of his leg, and he was taken away in an ambulance.

The employer opposed Dwyer's claim on the grounds that the injury did not arise out of and was not suffered within the course of employment. The judge (in Illinois referred to as the "Arbitrator") and Commission, however, granted benefits. They concluded that the "personal comfort" doctrine applied. Under that doctrine, a worker does not leave the course of his employment while ministering to acts of personal comfort, unless the "method chosen is so unusual and unreasonable" that it cannot be said to be an "incident of the employment." The county court thereafter disallowed benefits, but the appellate court restored the award.

The court did so, however, on somewhat different grounds. In the court's view, the injury *arose* out of Dwyer's employment, as the machine was on the premises for the workers' use, the machine had malfunctioned, and this in turn "precipitated Dwyer's injury by creating a need for action …. [This was] a risk incidental to his employment …." However, the court rejected the idea that the injury occurred in the *course* of his employment. In this regard, the court reasoned that the personal comfort doctrine "does not apply … to injuries sustained by an employee while assisting a coworker who is seeking personal comfort."

Still, benefits were not to be denied. The court applied the Illinois "good Samaritan doctrine." Under the cases creating that rule, an employee may still recover when he leaves his work duties to render aid to a third party and in the course of doing so is himself injured. This is so, in any event, if the departure is foreseeable. Under the facts of the present case, such foreseeability was evident, as the record showed that the machine was often in need of shaking for its proper operation. True, the facts did not show some dire emergency, but "[w]hat the instant case lacks in urgency … it makes up for in collegiality." The court added that the manner in which Dwyer dealt with the snack machine was not so radical that he took himself out of the "scope" of his employment.

III. <u>Against the Trend: Coverage Denied to Innocent Victim of Horseplay</u>

The Virginia case is *Simms v. Ruby Tuesdays, Inc.*, 679 S.E.2d 555 (Ct. Appeals Virginia 2009). Whereas the Illinois court's approach was fairly liberal (though hardly exotic), the Virginia court's approach was remarkably restrictive. The court ultimately held that the innocent victim of horseplay has not suffered an injury arising out of and in the course of employment. It is worth noting at the outset that in so holding, the Virginia court goes against what is likely the trend of allowing such claims. *See Coleman v. Armour*

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Meet Your Board:

Judge Lazzara is a native Floridian. He was initially appointed Judge of Compensation Claims (JCC) for the Tampa District in 1990 by Governor Bob Martinez, and was reassigned to the Tallahassee District in 1993. Since then he has been reappointed four times, twice each by Governors Lawton Chiles and Jeb Bush. In November 2005 he was appointed Interim Deputy Chief Judge and served in that capacity until May 2006.

Prior to his appointment as Judge, Judge Lazzara was engaged in the private practice of law in Tampa for 23 years. In addition to practicing civil law, he served as a Hearing Officer for the Hillsborough County Environmental Commission and the Property Appraisal Adjustment Board. He was also an Arbitrator with the Florida New Motor Vehicle Arbitration Board; the U.S. District Court, Middle District of Florida; the 13th Judicial Circuit; and the American Arbitration Association. Judge Lazzara is a Certified Circuit Civil Mediator.

Judge Lazzara received his B.A. and J.D. Degrees from the University of Florida. He is a frequent lecturer on workers' compensation trial, appellate and procedural topics, and has testified before committees of the Florida Legislature. Judge Lazzara has co-authored chapters in the Florida Bar's Alternative Dispute Resolution in Florida, and in the Florida Workers' Compensation Practice, 4th & 5th Editions, practice publications and supplements.

COURSE OF EMPLOYMENT, *cont. from P.3*

Swift-Eckrich, 130 P.3d 111 (S. Ct. Kansas 2006) (court, overruling precedent, joins what it characterized as majority rule: *i.e.*, that the *victim* of horseplay has suffered injury arising in course of employment).

In the new Virginia case, the claimant, Simms, was a server for his employer, Ruby Tuesdays, at its Manassas, Virginia location. While in the midst of his work, operating a computer in the restaurant's kitchen, co-employees began to throw ice at his head and chest. To block the ice from hitting his face, he "threw up" his left arm and thereby suffered a serious injury to the shoulder, ultimately requiring surgery. The employer opposed his claim but the judge (in Virginia called the "Deputy Commissioner"), granted the petition. The judge relied on a Virginia precedent holding that the innocent victim of horseplay is covered under the critical arising out of and in the course of employment test.

The Workers' Compensation Commission and Court of Appeals, however, reversed. In this regard, shortly after the Deputy Commissioner had made his favorable ruling, the state Supreme Court seemingly *changed* the law. In this regard, the court had decided the appeal of a dramatic tort action, *Hilton v. Martin*, 654 S.E.2d 572 (S. Ct. Virginia 2008). There, the plaintiff was the estate of a deceased worker, Hilton, which had sued Hilton's co-worker, Martin, in a wrongful death action. The two workers were employed by an ambulance company, and Martin had shocked Hilton with charged defibrillator paddles. This act of horseplay caused Hilton's tragic death. The defendants raised the immunity of workers' compensation and the trial court agreed, dismissing the case summarily. The Supreme Court, however, reversed. It rejected the proposition that Hilton's death arose out of and in the course of employment.

In so ruling, the *Hilton* court, considering the "arising" criterion, held that only "actual risks" of the employment will be considered to have arisen from the same. An injury arises out of the employment "only if there is a causal connection between the employee's injury and the conditions under which the employer requires the work to be done." In the realm of assaults, the court added, this test is satisfied only when the assault has been "directed at the victim *as an employee*"; whether the assault was "playful … or hostile," furthermore, is irrelevant to the critical analysis.

Given this ruling, the Appeals Court in *Simms* was convinced that the victim-of-horseplay rule was "called into serious question." While the court seemed to stop short of explicitly overthrowing the doctrine, it concluded that in Simms' case, "the commission [the ultimate fact-finder] could properly find that the incident was personal in nature to claimant, and was not directed at him in his status as an employee or because of his employment…. [I]ce-throwing was not a risk of employment …."

IV. "Recreational" Injury: Coverage Found Despite Restrictive Statute

The New York case is *Torre v. Logic Technology, Inc*., 881 N.Y.S.2d 675 (S. Ct. New York, Appellate Div. 2009). This new decision required the Workers' Compensation Law Judge to consider whether a worker injured while participating in an exercise class at his employer's fitness center suffered an injury arising out of and in the course of his employment. With regard to this gray area of the course of employment analysis, some preliminary thoughts bear mention.

Under liberal course of employment regimes, a worker's participation in an employer-sponsored sporting event, such as a playing on the company softball team, constitutes furtherance of the employer's business, and an injury suffered in the course of such activity is compensable. The theory is that the worker's participation is meant to

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UPCOMING "Second Fridays" – Join us.

The Florida OJCC and NAWJC will co-sponsor lunch and learn seminars from 12:00 to 1:00 Eastern on the second Friday of upcoming months. Upcoming "*Second Fridays*" Lunch and Learn Opportunities for NAWJC Members:

December 11, 2009 Dr. Raymond Harbison, "Not Every Workplace Exposure is Toxic."

January 8, 2010 Jerry Fogel, "Medicine, Disability, & Liability."

February 12, 2010 Rafael Gonzalez, "Living with Medicare Set-Aside Requirements and Settling Cases."

These programs are offered ***free of charge*** to NAWCJ members
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bolster morale and foster teamwork among employees. In the same spirit, an employee's exercising, in advancement of an employer interest – such as good health, relief of stress, refining of needed skills – may well be likewise considered to be in the course of employment.

The specific rationale is that the employee, in engaging in such exertional efforts at the behest of the employer, furthers the interests of the latter in some tangible way. Thus, it is fair that the employer is liable for any injury that ensues. Members of the Pennsylvania workers' compensation community are familiar with this principle given the memorable precedents *Stanner v. WCAB (Westinghouse Electric Co.)*, 604 A.2d 1167 (1992) (where employee's workout was routine and specifically developed for him by staff of fitness center, owned and operated by employer, employee was actually engaged in activities in furtherance of employer's business or affairs at the time of cardiac death, and was hence in course of his employment); and *Southeastern Pennsylvania Transp. Authority v. WCAB (McDowell)*, 730 A.2d 562 (Pa.Cmwlth.1999) (transit officer jogging for required fitness at time of his knee injury – off the premises, off the clock, in public park – was in course of employment).

Legislatures in some states have been cognizant of this liberal thinking and have "tightened up" their statutes to limit the compensability of "recreational" injuries. New York is such a state. Under the New York statute, a claimant cannot recover benefits "for an injury arising out of his or her 'voluntary participation in an off-duty athletic activity not constituting part of the employee's work related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity.'" *Workers' Compensation Law*, § 10[1].

This statute was at issue in the new New York case. There, the claimant, Torre, was employed by a firm that performed on-site contracting for the General Electric Company. He suffered a spinal cord injury while participating in an exercise class at the G.E. Fitness Center. The accident apparently occurred during work hours, but the court seems to indicate that the claimant was "off duty" at the time of the class, and that he was "neither compensated for nor required to participate in it."

The employer contested his claim, but the WCLJ, Workers' Compensation Board, and court all awarded benefits. Despite the voluntary nature of the activity, the court found that the statute did not restrict claimant from recovery. According to the court, "Claimant was encouraged by the employer to have a gym membership. Indeed, the employer offers reimbursement to its employees for half of their G.E. Fitness Center membership fees, although claimant elected not to seek that reimbursement. Moreover, claimant's position required him to develop contacts with current and prospective clients, and both he and the employer's president stated that participating in the circuit class furthered that function."

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Workers' Compensation Resources

National Association of Workers' Compensation Judiciary
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GENERAL RELEASE TAKEN IN CONNECTION WITH COMPROMISE SETTLEMENT OF WORKERS' COMPENSATION CASE HELD SUFFICIENT TO BAR DISCRIMINATION ACTION, EVEN WITHOUT ADDITIONAL CONSIDERATION

David B. Torrey*,
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In a fairly remarkable case, the Rhode Island Supreme court, in *Young v. Warwick Rollermagic Skating Center, Inc.*, 973 A.2d 553 (S. Ct. Rhode Island 2009), has held that a general release and waiver, taken in conjunction with the compromise settlement of a workers' compensation claim, was valid and binding and barred a plaintiff's post-settlement handicapped discrimination action. The court held the release binding on the plaintiff, even though no additional consideration, beyond the workers' compensation settlement lump sum, was tendered in exchange for the release.

Most workers' compensation laws in the present day allow the compromise settlement of cases. In most states, written agency approval of some sort is required, usually consisting of document review and/or hearing undertaken by a judge, hearing officer, or similar official. In rendering such approval, the agency is typically *only* approving the release of workers' compensation rights, and it is not approving release of other rights that may have had their genesis in the work injury. The workers' compensation authorities, after all, have jurisdiction only over matters arising under the workers' compensation law.

Still, by custom and practice, many employers and carriers, throughout the country, demand a general release, and resignation as well, at time of compromise settlement. The process of employers demanding final release and resignation is said to be standard among states. Indeed, the complexities attending the securing of such releases was the lead topic at the American Bar Association Workers' Compensation Sections seminar in New Orleans in March 2009.

In the new Rhode Island case referenced above, a claimant gave such a release/resignation in connection with her workers' compensation settlement. Later, she sued her employer for discrimination and wrongful termination, and the employer, predictably, set up the release as a defense. The employee insisted that she only understood that the release had to do with her workers' compensation claim, but the trial court and state Supreme Court rejected this assertion and enforced the release.

The claimant, Young, was the manager of a bowling alley. She was injured on July 11, 1996, when she was struck in the shoulder by a patron's automobile in the employer's parking lot. She missed some time from work, but did return to full duty. She filed what was apparently an original claim petition which was "still pending" some four years later. At that time, in 2000, she was terminated from employment. About a year later, in March, 2001, she filed a discrimination claim with the state Human Relations Commission. Yet another year later, in March 2002, she "settled her workers' compensation claim." The opinion does not reference the approval process, but defense counsel has told this writer (Torrey) that the Rhode Island workers' compensation authorities convened a hearing and thereafter approved the settlement. The lump sum was $38,038.00.

Concurrently with this settlement, claimant also executed a general release that contained broad language purporting to release the employer from "all claims and demands" (including claims for property damage) "in any way

Cont. P.7.

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* The author previously reported on the *Young* case in the Pennsylvania Bar Association Workers' Compensation Law Section *Newsletter*, Vol. VII, No. 101 (August 2009). He has since interviewed counsel for both appellant and appellee.

WE NEED *YOU*, YOUR *WRITINGS*, YOUR *IDEAS*

Do you write about topics that would be of interest to our members? Have you entered a decision in which Judges around the country would be interested? The NAWCJ communicates monthly with more than 400 workers' compensation adjudicators and appellate review officials across the country. If you have ideas for articles or would like to submit a case note or article, contact Hon. John Lazzara at JJL@NAWCJ.org

GENERAL RELEASE, *cont. from P.6*

growing out of any personal injuries …." The sole consideration for this release was the one and the same $38,038.00 noted above.

In September 2002, claimant, having received a right to sue letter, sued the employer alleging various violations of anti-discrimination statutes. The critical allegation was that she was fired because she had a physical handicap from the work injury. The employer set up the release as a defense, and the trial court granted summary judgment. As foreshadowed above, the Supreme Court affirmed. In so doing, the court, having reproduced and reviewed the broad release language in its entirety, rejected claimant's argument

> that the release did not apply to her employment discrimination claims because her workers' compensation claim was separate and distinct from those claims and that, therefore, the language in the release should be read as applying only to her workers' compensation claim and not as barring her discrimination claims. The plaintiff contends that the March 27, 2002 release is ambiguous because it does not explicitly refer to her physical handicap discrimination claim despite the fact that the discrimination claim was pending at the time that the release was signed. On that basis, plaintiff contends that, pursuant to [precedent], her discrimination claims are not barred by the terms of the above-quoted release.

The Supreme Court rejected this analysis:

> We are struck by the sweeping and comprehensive nature of the language that the release document contains. It is replete with such straightforward English words as "any" and "all." We are quite unable to read the document other than as an all-encompassing release, whereby plaintiff released, acquitted, and forever discharged defendants from "*all* claims and demands, actions and causes of action * * * on account of, or in *any* way growing out of *any* personal injuries * * * resulting or to result from *any* and *all* incidents or injuries occurring during my employment * * *." (Emphasis added.)
>
> The phrase "in any way growing out of any personal injuries" which we have italicized in the release document that we quoted in the Facts … is of special significance. It is clear to us that plaintiff's physical handicap discrimination claim came into being *as a result of* the personal injury that she sustained at the workplace; in other words, the physical handicap discrimination claim came into being *as a result of* the workplace injury.

The court, notably, utilized a Pennsylvania case in its analysis. The court, remarking that "[i]t would be difficult to improve upon the articulation by the Supreme Court of Pennsylvania of this crucially important principle of contract law," agreed that "It is firmly settled that the intent of the parties to a written contract is contained in the writing itself. … When the words of a contract are clear and unambiguous, the intent is to be found only in the express language of the agreement." The court in this regard quoted *Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board*, 739 A.2d 133 (Pa. 1999).

Editor's note: Judge Torrey is well known for his scholarship and writings. He is the editor and often writes for the Pennsylvania Bar Association Workers' Compensation Law Section *Newsletter*. Learn more at www.davetorrey.info.

Membership in the National Association of Workers' Compensation Judiciary is open to any person whose responsibility is the adjudication of workers' compensation claims. Throughout the nation, there are a variety of titles that are used to describe us, "Judge," "Commissioner," "Deputy Commissioner," "Referee," and "Hearing Officer" are a few. The NAWJC also has Associate Membership for those interested in supporting the education of workers' compensation adjudicators. The NAWJC is thankful to the concerned professionals that have contributed their time and resources to support our efforts. We recognize them here.

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