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The Schedule of Benefits

Workers' Compensation Section of the Alabama Bar

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Notice and Causation

W.A. Kendall & Company Inc. v. Madison, --- So.3d ---, 2010 WL 2885955 (Ala.Civ.App. Jul. 23, 2010)

Benjamin Madison, an employee of W.A. Kendall & Co., became ill while working in Texas as a bucket operator and tree climber, where he assisted in the clean up of fallen trees after Hurricane Katrina in September 2005. Testimony showed that the employee lived in run-down conditions, including sleeping in tents, and bathing in creeks, due to a lack of power and electricity after the hurricane. During this time, the employee became ill and "noticed he had two boils under his left arm." He visited a local hospital where the boils were lanced, and he returned to work.

In December 2005, the employee returned to Alabama where he continued working for this employer. The employee developed a fever while at work in mid-December, reported to his supervisor, and was taken to a hospital later that day. The employee was suffering from diabetic ketoacidosis, and was also diagnosed with a staph infection in his bloodstream. While in the hospital, the employee also had a "nonhealing" wound on his right wrist. Although he was briefly released from the hospital, he returned on December 27, 2005, when he was further diagnosed with endocarditis in his heart. The employee was transferred to another hospital and underwent heart surgery on January 10, 2006. The employee also had a procedure performed to repair a hole in his esophagus. It was determined that the staph infection led to the endocarditis, and that the employee also suffered from "blurred vision, permanent vision loss, headaches, 'mini strokes' occurring in his eyes, congestive heart failure, and kidney damage."

On September 18, 2006, he sued his employer seeking workers' compensation benefits, citing the boils that developed during his employment as the cause of the staph infection and resulting endocarditis, esophagus, and kidney problems. The trial court found the employee to be permanently and totally disabled, and awarded both accrued and future disability benefits and medical expenses. The employer appealed, arguing that the staph infection and resulting medical complications were caused by the wrist wound, not the boils, and that the employee did not provide his employer with proper notice of the wrist wound. To show medical causation in accident cases, "an employee must show that the accident caused or was a contributing cause of the injury." Page v. Cox & Cox, Inc., 892 So.2d 413 (Ala.Civ.App.2004). The Court reviewed testimony from three physicians who treated the employee and determined that the wrist injury, and not the boils, was the cause of the staph infection. It was determined that the employer received proper notice of the boils, but because they did not contribute to the staph infection and resulting medical complications, such notice was irrelevant. The Court reversed the judgment and remanded the case for a factual finding of whether the employee gave proper notice to his employer of the wrist injury.

To the Members of the Worker's Compensation Section:

It is an honor to serve as Chairperson of the Worker's Compensation Section this year. On behalf of Vincent Swiney, Vice-Chair, Jonathan Berryhill, Secretary, and myself, we thank you for your support of this section. Vince is with the firm Wettermark Holland & Keith, L.L.C. in Birmingham. Jonathan is also in Birmingham at Wilson & Berryhill, P.C..

Many of you will remember the excellent job that Wendy Thornton did with the Benefits Bugle newsletter a few years ago. We are pleased to present the first issue of our new section newsletter, The Schedule of Benefits. If any of you have articles or items of interest you would like to include in the newsletter, please contact me at **bsw@zeanahhust.com.**

Thank you again for your membership and support of the Worker's Compensation Section. We welcome your input, ideas and suggestions.

Beverly S. Williamson, **Chairperson**
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Apportionment, Last Injurious Exposure, and Notice

Water Works Board of the City of Birmingham v. Isom, 2010 WL 3377703 (Ala.Civ.App. Aug.27, 2010)

Allan Isom began working for the Board in 1990. In 2003 he injured his left shoulder and neck in a work-related accident. He was awarded a lump-sum payment with future medical benefits remaining open and a whole body disability rating of 10%. The employee underwent two surgical procedures and was released to return to work with no restrictions.

In 2006, the employee was injured on the job and the left shoulder was again affected, as well as his left elbow and neck. The employer was closed the day the injury occurred (July 4, 2006), so the next day the employee called to notify the employer of the injury, which a supervisor confirmed was proper procedure. The employee did not, however, state that this was a new injury. The employee underwent another surgery to which the doctor noted, "[Isom] previously had a labral repair several years ago and with a recent injury this apparently retore that repair." Ultimately, the employee received a 10% impairment of the left upper extremity and a 6% impairment of the whole person. The employer's safety officer testified that he was not aware that this was a new injury until October 24, 2006.

The trial court entered a final judgment awarding the employer a permanent-partial-disability and ordered the employer to be responsible for future medical treatment of the injured body parts.

On appeal, the employer argued that the employee did not provide written notice of the injury until October 24, 2006, after the doctor determined that the employee had experienced another tear. The Court of Civil Appeals held that written notice to the employer is not required when the employer has received notice of injury. (In this case oral notification was made.) Testimony of the employee and the employer's safety officer confirmed that sufficient notice to the employer of the injury had been provided and thus written notice was not required. The Court ruled that the employer did not demonstrate that the employee failed to provide adequate notification of the injury.

The employer also argued that the trial court was in error by granting the employee permanent-partial-disability benefits since the employee was assigned a 6% whole-body impairment for the 2006 injury. This is less than the 10% whole-body impairment found by the court after the 2003 injury. The Court held that "if the employee is working normally at the time of the second accident, the law presumes the employee had no pre-existing disability or injury." Because the employee was able to work normally and without disablement after the 2003 injury, the Court stated that the trial court's judgment was due to be affirmed.

The employer also asserted that the employee's injury was simply a recurrence of the previous injury and relied on the "last injurious-exposure rule." The employer reasoned that since the employee had already been compensated for the initial injury, he was not due further compensation. The basis for this claim was the doctor's note stating that the employee re-tore the previous repair and that the 2003 medical impairment rating was greater than the 2006 medical impairment rating. The Court noted that generally the last injurious exposure rule is applied to determine which of multiple employers is liable for a subsequent injury sustained by a worker. The Court upheld the trial court's conclusion that the 2006 injury was not a recurrence of the 2003 injury, but rather a new injury, or at the very least, an aggravation of the previous tear from the 2003 injury.

Causation

White v. HB & G Building Products, Inc., --- So.3d ---, 2010 WL 3290979 (Ala.Civ.App. Aug. 20, 2010)

Jeff White, employed by HB & G Building Products, Inc., injured his knee after a slip-and-fall accident in his workplace on January 22, 2007. The employer selected a treating physician, who diagnosed the employee with patella dislocation. He was ordered to wear a brace and perform exercises to strengthen his knee. He continued treatment with this physician through the spring of 2007, and returned to regular duty at work on April 10, 2007, after the physician determined his knee was sufficiently healed. During a May 7, 2007 appointment, the employee told his physician that he was having pain and swelling in his knee, but his physician refused to operate.

He began a new job at Cutt's Restaurant in May or June of 2007, where he continued to experience pain and swelling in his knee. In July 2007, he selected a new physician from a panel of four and saw his new physician for the first time on October 2, 2007. The employee and attributed his knee problems to the fall sustained on January 22, 2007, since he had not had any other accidents since that fall. An MRI showed swelling in the soft tissue

Save the Date

There are some excellent CLE opportunities coming up in the next few months. On November 5, 2010, Cumberland School of Law will host its 24th Annual Worker's Compensation Seminar, which our section co-sponsors. This year, the seminar will be held at The Embassy Suites in Birmingham.

To get a jump start on your CLE hours for 2011, the University of Alabama will sponsor its annual Worker's Compensation Seminar on February 25, 2011 at the McWane Center in Birmingham. The seminar is also another wonderful opportunity to hear from your peers who practice worker's compensation law on a regular basis, to network and to earn your CLE credits.

around the
White cont'd.

knee and a loose piece of cartilage or bone floating above the kneecap. This physician believed the employee was a candidate for knee surgery, but testified that he did not know whether the knee problem "was an old injury, a new injury, an aggravation, or a recurrence."

The trial court determined that the new physician's findings indicated a new injury that was not present when the employee left his original employer. Under the "last-injurious-exposure rule," the trial court determined that the Employee's activities at the restaurant had aggravated a preexisting condition in his knee, and as such, the employer was no longer required to pay the employee's workers' compensation benefits.

The employee argued that the last-injurious-exposure rule is not applicable in this case because he suffered from a recurrence of his knee problems, rather than an aggravation of a preexisting condition. A recurrence is found when "the second [injury] does not contribute even slightly to the causation of the [disability]." 4 A. Larson, *The Law of Workmen's Compensation*, § 95.23 at 17-142 (1989). An aggravation is found "when the second [injury] contributed independently to the final disability." 4 A. Larson, § 95.23 at 17-141. If an injury is characterized as a recurrence of a prior injury, the first insurer or employer is responsible for the medical bills; if an injury is characterized as an aggravation of a prior injury, it constitutes a new injury, and the employer at the time of the aggravating injury is responsible for payments. North River Insurance Co. v. Purser, 608 So.2d 1379 (Ala.Civ.App.1992). The Court found that there was no evidence to show that the employee sustained a second injury to his right knee from his new job at the restaurant, or that he had aggravated his prior injury. Rather, the continued pain and swelling in the employee's knee indicated a recurrence of the injury he sustained on January 22, 2007. Thus, the Court reversed the judgment of the trial court, and remanded this cause for an entry of judgment consistent with this opinion.

Carolyn Williams v. Valley View Health and Rehabilitation, LLC, __ So. 3d__, 2010 WL 3518734 (Ala.Civ.App. Sep.10, 2010)

The Alabama Court of Civil Appeals reviewed a summary judgment in favor of the employer.

A nurse working for Valley View Health and Rehabilitation, LLC suffered an asthma attack in reaction to chemicals used by the employer to strip and wax its floors. The employee argued that she was entitled to worker's compensation benefits stemming from "injuries" related to her employment with the employer.

The employer filed a motion for a summary judgment and contended that the employee could not substantiate claims of contracting an occupational disease. The trial court granted the motion for summary judgment "without entering any findings of fact or conclusions of law." The employee filed a "motion to reconsider" and argued that she never claimed contraction of an occupational disease. This motion was denied. The Court of Civil Appeals reversed the judgment due to lack of findings of fact and conclusions of law. The trial court then entered a summary judgment in favor of the employer which complied with Rules of Civil Procedure. The employee filed another post-judgment motion which extended the argument that the employee's injury was the result of an accident. The trial court denied this motion.

On appeal, the employee argues that the trial court was in error for entering a summary judgment in favor of the employer and which disregarded her accidental injury claim (Article 3 of the Alabama Workers' Compensation Act). The Court of Civil Appeals agreed and held that the courts had long upheld that asthmatic episodes and other unfavorable reactions to a "one-time work-related chemical exposure" as accidental injuries. The employee did not contend that she had developed asthma due to long-term exposure.

In the motion for summary judgment, the employer had the burden to negate the employee's claim of accidental injury. However, the employer argued exclusively that she could not recover benefits due to contraction of an occupational disease. This was not even a claim averred by the employee. Therefore, no burden was placed upon the employee to substantiate "compensability of her asthmatic condition as an accidental injury." The employee responded to the summary-judgment motion by arguing that even if the trial court granted employer's summary judgment based on occupational disease, she still held her accidental injury claim.

The Court of Civil Appeals held that the trial court exceeded its discretion by refusing to contemplate the employee's claim of accidental injury, a claim that was the exclusive contention for recovering benefits. The employee never altered her accidental-injury claim and the employer never "proved its right to a judgment on that claim." The employer therefore only received a partial summary judgment and furthermore left room for judgment on the accidental injury claim.

There were approximately 3,277,700 workplace injuries in the U.S. in 2009, resulting in almost 1,000,000 disabling injuries and 4,340 deaths. This is the lowest number of injuries since 2003.

Source: Bureau of Labor Statistics Website, 2009 data

THE $220.00 CAP AND ITS EFFECT ON INJURED ALABAMA WORKERS: AN EMPLOYERS' AND EMPLOYE ES' PERSPECTIVE

By J. Vincent Swiney II and Karen D. Farley

The goal of the Alabama Workers' Compensation Act was to reduce business costs, minimize future insurance rate increases and deliver higher benefits to injured workers. Ala. Code ' 25-5-68 caps recovery of permanent partial disability benefits to injured workers to a maximum of $220.00 per week. The cap has been in effect since the Alabama Legislature passed the 1984 amendments to the Alabama Workers' Compensation Act and it has not been increased since then. Currently the $220.00 cap is about half of the Federal minimum wage.

Alabama's workers' compensation system was set up as a trade-off between employers and employees. Employees give up their rights to be made whole under the tort system. Therefore, Employees are eligible only for limited benefits under the Act. Under the Act, employees are to receive immediate and certain medical care and immediate limited compensation for disability. Employers have liability determined without regard to fault. In exchange, employers receive the protection of the exclusivity provisions of the Act. The Alabama Workers' Compensation Act was constructed to balance the employers' and employees' interests. The Act limits compensation to injured workers by establishing maximum and minimal benefit levels.

Attorneys who represent both employees and defendants have recently become involved in the fight surrounding the $220.00 cap. The Alabama Legislature has recognized the importance of the $220.00 cap to both employers and employees across the state. Recently, Representative Joseph Mitchell (D) of Mobile sponsored House Bill 21, which would remove the $220.00 cap on weekly workers' compensation benefits. HB 21 died in the House Commerce Committee.

The actions of the Alabama Legislature come upon the heels of an Order issued by Judge J. Scott Vowell denying a employee's motion seeking to have the $220.00 cap deemed unconstitutional. Despite denying the motion, in the case styled Robinson v. Mid-South Control Systems, Inc., CV-2007-1791, Judge Vowell deemed the cap unfair, but not unconstitutional and called upon the Alabama Legislature to make a change.

Employers across Alabama oppose change to the $220.00 cap. Employers believe that the current benefits package under the Act is the by-product of a carefully constructed compromise. The Act balances the no-fault benefit to injured employees with a guarantee to employers that they would not be sued for extensive money awards to punish businesses for employees' pain and suffering or mental anguish. A statutory increase would serve to punish employers across the state by unraveling the carefully constructed system that has been in place for the past 25 years.

However, there are two sides to every coin. AThe current benefits for injured workers under the Alabama Workers' Compensation Act are inadequate to sustain an injured worker and his family. [T]his $220 cap provision of the Act is manifestly inadequate and unfair. [T]he issue of inadequate compensation for (injured) workers is something that desperately needs to be addressed by the Alabama Legislature. These were the words of The Honorable J. Scott Vowell, Presiding Judge of the 10th Judicial Circuit in the State of Alabama, in an Order entered in the case of Robinson v. Mid-South Control Systems, Inc., CV-2007-1791.

From the injured employees' perspective, the fundamental unfairness of the $220.00 cap found in Ala. Code ' 25-5-68 cannot be fully expressed in this short article. In this state, thousands of employees are injured within the line and scope of their employment every year.[1] If any of those employees suffer a permanent partial injury under the law, he or she can expect to receive no more than $220.00 per week for typically no more than six years.

To put this into perspective, assume a 34 year old man with a wife and three children is involved in an industrial accident and he loses both hands. This same man will be entitled to $220.00 per week for 400 weeks under Alabama law. Said another way, assuming his spouse did not work, the family of four would be expected to live on $220.00 per week for approximately seven and a half years which would bring the injured employee just shy of his 42nd birthday. He would receive no further compensation after that. Now assume the same man, instead of losing both hands, simply lost one eye and one leg. Under Alabama law, he would receive $220.00 per week for 350 weeks, a little over six and a half years. Period.

On July 24, 2009, the federal minimum wage was increased to $7.25 per hour. Based on a forty (40) hour work week, that calculates to $290.00 per week. As such, compensation for a permanent partial disability under Alabama law is roughly 76% of what a worker could earn at a minimum wage job working forty hours a week. By contrast, the federal minimum wage was $3.35 per hour the year the $220.00 cap went into effect. Back then, a worker earning minimum wage, who worked forty hours per week, earned $134.00 per week. At least in 1985 the $220.00 cap exceeded the minimum wage.

As of 2009, according to the United States Department of Health & Human Services, a family of four lives below the poverty level when the household income is less than $22,050.00.[1] An injured worker who has a permanent partial injury and receives the $220.00 cap would receive approximately $11,440.00 in one year. That is just shy of 51% of the poverty level. By contrast, the poverty level for a family of four in 1985, the year the $220.00 cap went into effect, was $10,650.00.[1] At least 25 years ago the $220.00 cap was higher than the poverty level for a family of four, unlike today.

This is not the first article to address this issue and it will undoubtedly not be the last. Suffice it to say, from the employees' perspective, the $220.00 cap "is something that desperately needs to be addressed by the Alabama Legislature," and is an issue that should be at the forefront of every legislative session until this matter is resolved.

[1] From 2002-2006, between 18,848 and 21,972 First Reports of Injury were filed by employers per year according to Trevor Perry, Administrative Analyst for the Alabama Department of Industrial Relations.

[2]http://aspe.hhs.gov/poverty/09poverty.shtml

[3]http://aspe.hhs.gov/poverty/figures-fed-reg.shtml

Causation and Benefits

Grund v. American Trim, LLC, --- So.3d ---, 2010 WL 3611953 (Ala.Civ.App. Sep. 17, 2010)

Cynthia Grund, an employee of American Trim, appealed a judgment in favor of her employer on her claim for workers' compensation benefits, and her employer's claim for reimbursement of insurance premiums it paid while she was on leave from her job. On November 28, 2006, she was working when she felt a sudden burning and tingling pain in her right shoulder while racking door handles. After seeking treatment from her physician, the employee was diagnosed with carpal tunnel syndrome and a tear in her rotator cuff. Surgery was performed on March 14, 2007 to repair both conditions. After the surgeries, the employee remained off work and sought short-term disability benefits. Her application for benefits did not indicate that she had suffered a work-related injury, and her physician was unable to determine whether her injuries had resulted from the workplace. Further, the employee indicated that she did not intend to file a workers' compensation claim. The employee returned to work on July 10, 2007 after being cleared by her physician, and remained at American Trim until August 6, 2007. The employee visited her physician again on August 7, August 22, and September 7, 2007 complaining of continuing pain and grinding in her shoulder. An MRI showed a rotator cuff tear in the same general location, and a second surgery was performed on October 1, 2007. Again, the physician was unsure of whether the shoulder injury was caused by workplace activities. The employee sought short-term disability benefits for the second time in August 2007, and again indicated that the condition was not workplace related and that she did not intend to file a workers' compensation claim. While on leave from work, the employer paid portions of her "dental-, medical-, long-term disability-, and life-insurance premiums" following company protocol. Upon her return to work, the employee was to reimburse her employer for these payments.

The employee filed a workers' compensation claim with her employer in May 2007, alleging that her shoulder injury arose during the course of her employment. The employer answered alleging that it had not received proper notice of her injury, and counterclaimed seeking reimbursement for the insurance premiums it had paid on the employee's behalf. The trial court entered judgment denying her claim for benefits and awarded her employer a $7,176.49 judgment. The employee's appeal followed.

On appeal, the Court first assessed whether the employee provided sufficient evidence to conclude that both of the rotator cuff tears occurred during the course of her employment. "For an injury to be compensable, it must be caused by an accident arising out of and in the course of the employee's employment." § 25-5-51, Ala.Code 1975. The employee's physician could not confirm that the shoulder injury was related to her course of employment, and neither application for disability benefits filed by the employee indicated that her injury was work related. Thus, the Court found that the trial court did not err in finding a lack of causal connection between the workplace accident and shoulder injury, and affirmed the first part of the trial court's judgment. The Court also considered whether the employer was entitled to the $7,176.49 judgment awarded by the trial court under the Family and Medical Leave Act (FMLA). The Act provides that "an employer is required to maintain group-health-insurance benefits for an employee on FMLA leave," 29 C.F.R. § 825.209(a), and that "[i]f an employee fails to make the premium payments, the employer is entitled to recover the employee's share of the premium payments the employee failed to make, provided that the employer maintained the employee's health-insurance coverage by paying the employee's share of the premium." 29 C.F.R. § 825.212(b). Here, the employer paid the employee's insurance premiums when she failed to do so while on leave from her employment. Therefore, the employer was entitled to reimbursement under the FMLA, and the trial court did not err in awarding the employer a $7,176.49 judgment. The Court affirmed the decision of the trial court in whole.

Return-to-Work-Statute

Grace v. Standard Furniture Manufacturing Company, Inc., --- So.3d ---, 2010 WL 2888907 (Ala.Civ.App. Jul. 23, 2010)

Joseph Grace, an employee of Standard Furniture Manufacturing Company, injured his neck and shoulder on November 8, 2005, while working as a forklift operator. He sought medical treatment from his own physician, as well as a physician and surgeon who were approved by his employer. The surgeon diagnosed the employee with "cervical degenerative disk disease, cervical radiculopathy (herniated or slipped disk), impingement syndrome of the left shoulder, and arthritis of the left shoulder." He underwent surgery in April 2006 to repair some tears in his shoulder, and the surgeon noted that there were some preexisting conditions in the employee's neck and shoulder that were not caused by the workplace accident.

The surgeon assigned physical impairment ratings to the the employee after he had reached "maximum medical improvement" for both injuries. After factoring in the preexisting conditions, it was determined that the employee had suffered a physical impairment rating of 7% to his body as a whole from his injuries. The surgeon placed the employee under physical restrictions, and as a result, could not continue working as a forklift operator. When the employee resumed working after his accident, he was assigned a position on an assembly line. He filed an action against his employer seeking workers' compensation benefits related to his November 2005 accident. The trial court entered judgment in favor of the employer, and the employee appealed. This Court reversed the trial court's judgment for lacking conclusions of fact and law as required by Ala.Code 1975, § 25-5-88. The trial court entered a judgment in compliance with § 25-5-88 on remand, after which the employee appealed.

The employer argued that the return-to-work statute § 25-5-57(a)(3)i), Code of Alabama, was applicable and would limit the employee's benefits, since he suffered nonscheduled injuries. The Court discussed the statute and corresponding case law at length, ultimately determining that the statute provides that, "when an employee returns to work

Grace cont'd.

after reaching maximum medical improvement and the employee is earning the same or higher wages, loss of earning capacity shall not be considered in assessing the compensation due the employee for any permanent disability." In doing so, the Court overruled its previous determination that a rebuttable presumption was created that "an employee who returns to work earning the same or a greater wage suffered no loss of earning capacity." Lanthrip v. Wal-Mart Stores, Inc., 864 So.2d 1079 (Ala.Civ.App.2002). Thus, the Court did not need to consider whether the employee had provided sufficient evidence to rebut the presumption.

The employee argued that the trial court compared the wrong wage in concluding that his "post-injury wages were higher than his pre-injury wages." Testimony showed that the employee was earning $.15 more per hour on the assembly line as compared to working as a forklift operator. This Court determined that the trial court had substantial evidence to conclude that the return-to-work statute "precluded consideration of any vocational disability," and thus did not err.

The employee next contended that the trial court erred in determining that his disability rating was 7%, relying in part on § 25-5-58, Code of Alabama, which allows "the apportionment of disability between disability caused by a work-related accident and disability resulting from preexisting conditions." The Court noted that the statute has been construed to permit apportionment "only when the preexisting condition or infirmity prevented the employee from performing the duties of his or her employment before the work-related accident or injury." The employee's testimony showed that he was not limited or affected by his preexisting medical conditions while working as forklift operator. As a result, he argued that the trial court "erred by adopting the 7% physical impairment rating assigned by [the surgeon] based solely on the disability resulting from the work-related accident."

Although the trial court is permitted to make its own disability determination in light of the evidence presented, this Court reasoned that the only conclusion the trial court could have reached regarding the employee's physical impairment was a disability rating of 5%. The surgeon determined his physical impairment rating to be 14%, which included his preexisting conditions. After discounting the preexisting conditions, the surgeon assigned a 7% disability rating, which was also adopted by the trial court. Therefore, "the trial court adopted physical-impairment ratings that excluded from consideration preexisting conditions that had not affected [employee's] ability to perform his position as a forklift operator… [and] improperly applied § 25-5-58." Thus, this Court reversed the portion of the trial court's judgment regarding the 7% physical impairment rating, and remanded the cause for further proceedings to determine the physical impairment rating "without apportionment between [employee's] preexisting conditions and those injuries resulting from his work-related accident."

Kids Chance Scholarship

- Thank you to the Workers Compensation Association of West Alabama for its generous donation of $2,500.00 to Kids Chance. Alyce Spruill, President of the State Bar, and Beverly Williamson accepted the check at the WCAWA luncheon on October 26, 2010 in Tuscaloosa.
- Kids Chance Scholarships were awarded to 15 students for the 2010-11 school year. The scholarships ranged from $1,500 to $2,500, for a total of $25,000 in scholarships.

Course of Employment

McDaniel v. Helmerich & Payne International Drilling Company, --- So.3d ---, 2010 WL 2983123 (Ala.Civ.App. Jul. 30, 2010)

Michael McDaniel, an employee of Helmerich & Payne, was injured in an early morning motor vehicle accident on January 10, 2008. Employee had traveled from Louisiana to Mobile County to assist in moving an oil rig from Creola to Chunchula. After "rigging down" the oil rig that was to be assembled after transportation, the employees spent the night in Chunchula in a crew trailer provided by the employer. The employee attended a mandatory safety meeting in the morning of January 10, 2008. After the meeting, the employee drove his personal vehicle to the Creola worksite, where he was scheduled to work that day. It was during this trip that his car collided with a tractor trailer. The employee appealed the summary judgment decision of the trial court that the accident did not occur in the course of employment.

The employee argued that the "going and coming rule" was inapplicable. Under this rule, "accidents occurring while a worker is traveling on a public road while going to or coming from work generally fall outside the course of employment." Citing Kewish v. Alabama Home Builders Self Insurers Fund, 664 So.2d 917 (Ala.Civ.App.1995), the Court noted that, "in order to be compensable, injuries from a motor vehicle accident occurring on a public road must arise out of and in the course of the employment." The employee maintains that this employer encouraged its employees to attend all safety meetings, and would pay additional compensation for doing so. Therefore, the employee reasoned that his workday began with the safety meeting, and thus argued that he was within the course of employment while driving to the Creola worksite.

The Court found that the employee's argument raised at least one issue of material fact, which made summary judgment improper, and thus reversed the decision of the trial court, and remanded the case for further proceedings.

Death Benefits

Harris v. Russell Petroleum Corporation, -- So. 3d --, 2010 WL 3075261 (Ala.Civ.App. Aug. 6, 2010)

An employee worked for the employer as a fuel-delivery driver from the late 1908s until 2008, at the time of his death. Through the course of his employment, he injured both knees (separate injuries, 2001 and 2002, respectively) as the results of work-related accidents. The employee received benefits for both of these injuries that required surgeries. He also suffered another, unspecified work-related knee injury. In 2008, the employee underwent a bilateral knee replacement surgery, suffered a stroke the next day and ultimately died.

The employee's dependant filed a complaint seeking death benefits and funeral expenses, claiming that aggregate stress from performing job duties obliged the knee replacement surgery. The dependant further claimed that the knee replacement surgery caused the employee's stroke that resulted in the employee's death. The employer denied both of these claims and averred that the employee had failed to provide proper notice of the injury that culminated with the knee replacement surgery.

The trial court held that there was no clear and convincing evidence that established a causal link between the surgeries and the employee's death and that none of the medical testimony could say with a degree of medical certainty that the surgery caused his death. The court did not make any findings regarding whether the employee's knee injury was work related or whether the employee had properly notified the employer of the injury. The dependant filed a post-judgment motion which the trial court denied and she appealed.

The Court of Civil Appeals recognized two issues that the dependant raised: (1) whether the trial court erred by requiring her to prove by clear and convincing evidence that the employee's stroke was caused by his knee replacement surgery and (2) whether the trial court erred by requiring her to prove to a reasonable degree of medical certainty that the knee replacement surgery caused the employee's stroke.

The Court held that the bilateral knee injuries suffered by the employee led to a "sudden, traumatic injury that caused the death of the employee," and therefore was not encompassed by the class of claims governed by the clear-and-convincing-evidence standard. The Court also held it is the overall effect of the entire evidence (lay and expert) that tests for medical causation and that physician testimony did not have to explicitly state, "reasonable degree of medical certainty" to imply that the knee replacement surgery caused the employer's stroke. The dependent simply needed to show that the resulting stroke was more than just a mere possibility resulting from the knee replacement surgery to show medical causation. The trail court's judgment was reversed and remanded with specific instructions to the trial court to utilize the preponderance-of-the-evidence standard and to make appropriate findings to determine if the dependant adequately proved her claim.

Rehabilitation

Shadescrest Health Care Center v. Holloway, -- So. 3d -- 2010 WL 3075244 (Ala.Civ.App. Aug. 6, 2010)

A certified nursing assistant at Shadescrest Health Care Center slipped in a puddle, fell, and injured her back. She notified her employer but did not seek medical treatment until more than a year and a half later. At that time, she consulted with an employer-selected physician who referred her to another physician for pain management. She ultimately underwent a lumbar-fusion surgery which resolved her leg pain but her back pain persisted.

Two years to the month of her accident, the employee sued the employer seeking workers' compensation benefits. The trial court's judgment was that the employee was permanently and totally disabled and awarded benefits. The employer appealed stating that the employee is not entitled to receive benefits because she refused "reasonable accommodation and vocational rehabilitation" provided by the employer. The employer also contended that the trial court's decision of permanent and total disability was not substantiated by the evidence.

At appeal, it was determined that at trial, the employer never asserted that the employee had refused to undergo "physical or vocational rehabilitation or to accept reasonable accommodation." Rather, the employer merely held that the employee was a candidate for vocational rehabilitation. Therefore, the Court did not consider this argument.

The employer also argued that the only apparent evidence that the employee was unable to work was the employee's testimony. The employer also averred that sufficient evidence to the contrary had been provided. The Court of Civil Appeals reasoned that the simple existence of evidence that could serve to undermine the employee's testimony did not warrant a reversal of the trial court's judgment. It is the job of the trial court, as the "finder of fact" to weigh the credibility of the employee's testimony. The Court held that the trial court's judgment was supported by sufficient evidence and was affirmed.

Money spent on workers' compensation claims in Alabama in 2007 totaled $680,000,000.00.

This figure includes compensation, medical payments, court-approved settlements and employer's administrative costs.

Source: Ala. Dept. of Industrial Relations

Judgment

Johnson v. Lowe's Home Center, Inc., --- So.3d ---, 2010 WL 3937941 (Ala.Civ.App. Oct. 8, 2010)

Dorrian Johnson, a part-time employee of Lowe's Home Center, alleged that he had sustained injury arising out of the course of his employment on May 14, 2008. The employer admitted that the employee was an employee and that he was covered by the Workers' Compensation Act, but denied that the injury arose out of the course of employment. The only issue presented to the trial court was that of compensability. Upon the trial court's finding that the injury was not compensable, the employee filed a postjudgment motion to alter, amend, or vacate, or, in the alternative, for the trial court to amend its judgment and include specific findings of fact. The postjudgment motion was denied, and an appeal followed.

In disputed claims arising under the Workers' Compensation Act, courts must comply with the procedure set out in § 25-5-88, Ala. Code 1975. The statute "requires that a judgment in a worker's compensation case contain findings of fact and conclusions of law." Dale Motels, Inc. v. Crittenden, 268 So.2d 834 (Ala.Civ.App. 1972). In this case, the trial court failed to include factual findings in response to the issues presented, as required by § 25-5-88. Thus, the trial court's judgment was reversed and remanded for the trial court to include the necessary findings to support its judgment.

During 2009, there were 1,933 voluntary mediations, and of those, 1,598 were resolved (approx. 83%).

Kids Chance…How Can Your Donation Make a Difference?

The Worker's Compensation Section is a sponsor of the Kids Chance Scholarship fund. This scholarship fund was created in 1992 to fund scholarships for children of Alabama workers who were killed or suffered permanent debilitating injuries as a result of work related accidents. This past year, our section donated $7,500 to Kids' Chance and our goal is to continue to support this worthwhile scholarship fund.

Let me share with you "Tommy's" story. Tommy (not his real name) applied for a Kids Chance Scholarship for the 2010 school year and has been awarded a $2,500 scholarship. Tommy lives with his mother in a household of eight, five of whom are under the age of nineteen. Tommy's father died as a result of a work-related injury in 1991 when Tommy was only 2 ½ years old. Tommy's dad worked for a contractor on a construction site. He stepped backward into an elevator shaft and plunged down 30 feet, suffering a severe brain injury. He died a few days later.

Tommy attends a University near his home and is majoring in pre-med and biology. His goal is to attend medical school and to return to his hometown to practice medicine. Tommy's mother is not financially able to help with his education, so Tommy has been working part-time jobs such as cutting grass, hauling hay and doing maintenance work at his dorm. As Tommy put it, "anything to help make ends meet." Tommy has maintained a cumulative GPA of nearly 3.7 and has made the Dean's List and President's List several semesters.

It was an honor for the scholarship committee to award a scholarship to Tommy, but his story is only one of many. We need your help to continue to award scholarships. Please consider making a generous donation to Kids Chance so kids like Tommy will get a chance. To make donations, simply go to the Alabama Law Foundations website at www.alfinc.org. Thank you.

Beverly S. Williamson, Chairperson

Zeanah, Hust, Summerford & Williamson

Tuscaloosa, Alabam

During 2009, there were 155 Court-Ordered mediations, and of those, 105 were resolved (approx. 67%).

During 2009, there were 14,328 First Reports of Injury filed in the State of Alabama.

Source: Ala. Dept. of Industrial Relations

A special thank-you to Priscilla Williams at our firm who worked tirelessly to make this newsletter a reality.

-Beverly S. Williamson