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Floyd Wilcut v. Innovative Warehousing: When Does Refusing Medical Treatment Become "Unreasonable"?

By George T. Floros and Melissa A. Flynn, Attorneys

When is a refusal of medical treatment unreasonable? What if the injury becomes life-threatening without relatively risk-free treatment? What if religious views condemned accepting the treatment? Who should bear the financial burden for decisions based on faith? These are only some of the issues Missouri courts have examined in the case of Floyd Wilcut v. Innovative Warehousing.

The facts in this case are relatively simple, though the issues are significantly more complex. Floyd Wilcut, a truck driver for Innovative Warehousing, was injured in a work-related motor vehicle accident on April 13, 2000. He arrived at the hospital with serious, though non-life-threatening injuries. Before treatment was initiated, Wilcut made it clear he would not allow a blood transfusion because doing so would violate his religious beliefs. Wilcut and his widow were practicing members of the Jehovah's Witness church, believing that to accept a blood transfusion was a gross sin that would prevent him from inheriting eternal life and might preclude resurrection. While in the hospital, he and his family repeatedly made the decision to refuse a blood transfusion, knowing that doing so would likely lead to his death.

Though upon admission to the hospital he was stable from a cardiac standpoint, over the next seven days, Wilcut's condition declined until his death on April 20, 2000. His death was the result of cardiac ischemia and severe anemia due to the blood loss. The medical records are clear that had he accepted a blood transfusion, it is abundantly likely he would have survived.

Missouri statute states that in a workers' compensation case, the employer has an obligation to provide medical treatment to cure and relieve the effects of a work injury. The injured employee has a parallel obligation to accept and cooperate with the treatment being provided. A potential conflict arises, however, if the employee does not agree to accept the medical treatment being offered. Section 287.140.5 is designed to resolve this potential impasse by giving the Division of Workers' Compensation or the Labor & Industrial Relations Commission the authority to determine whether a refusal of treatment is "unreasonable." If an employer cannot prove that the refusal was unreasonable, the employee's right to compensation is unchanged. If the employee's death or disability is caused, continued or aggravated by an unreasonable refusal to submit to medical treatment, however, no compensation is payable. Wilcut's case hinges on whether his refusal to accept a life-saving blood transfusion was "unreasonable."

The Administrative Law Judge, after reviewing evidence of Wilcut's religious beliefs and the medical consequences of his refusal to accept a blood transfusion, found that given his beliefs, his decision did not appear to be unreasonable. Death benefits were awarded to Wilcut's widow.

The case was then appealed to the Labor & Industrial Relations Commission. The Commission reversed the award for benefits, finding Wilcut's refusal to accept the life-saving blood transfusion was unreasonable and, thus, broke the medical causal link between the work-related accident and his death. Citing a California Supreme Court case, the Commission reasoned that a refusal based upon a reasonable religious belief is not per se a reasonable refusal, but rather, all of the evidence around the refusal must be considered. After reviewing all factors, including the minimal physical risk of transfusion, the age of the employee, the spiritual risk from the perspective of a Jehovah's Witness, and the Jehovah's Witnesses' belief that Jehovah forgives and that Wilcut may have been able to atone for his sin, they found Wilcut's death did not arise out of and in the course of his employment, and no benefits were awarded.

In a second appeal The Missouri Court of Appeals reversed the Commission's decision, finding the refusal was not unreasonable in light of Wilcut's beliefs. Judge Romines filed a dissenting opinion in that case, concluding the majority result violated the United States and Missouri constitutions, and requested transfer to the Missouri Supreme Court. Oral arguments were presented before the Missouri Supreme Court in November 2007. However, in an unusual turn of events the Supreme Court opted not to rule on the matter but instead retransferred the case back to the Missouri Court of Appeals. The Court of Appeals must now decide whether to adopt its prior ruling or issue a new opinion.

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Recent Developments in the Interpretation of What Constitutes the Proof of an Accidental Injury under the 2005 Amendments

By: James B. Kennedy, Attorney

Almost two full years after the effective date of the 2005 amendments to the Workers' Compensation Act, the Industrial Commission has finally had the opportunity to provide some insight into what now constitutes the proof of the occurrence of an injury by accident under the new definitions that appear in Section 287.020.

The first case, Kristen Norman v. Phelps County Regional Medical Center, is currently on appeal to the Southern District of the Missouri Court of Appeals. The three remaining cases, Randy Johnson v. Town & Country Supermarkets, Inc., Joyce Bivins v. St. John's Regional Health Center, and Jason Gamet v. Dollar General Corporation, were all decided in November 2007 and are likely to be appealed.

The Norman case, involved the Industrial Commission's reversing a decision denying compensation, while Gamet involved the Industrial Commission's affirming an award of compensation. The other two, Johnson and Bivins, involved denials which the majority of the Commission voted to affirm. In all but one case, Gamet, the Commission wrote a separate decision.

Kristen Norman v. Phelps County Regional Medical Center

The employee in Norman worked as a hospital housekeeper and had to periodically clean operating rooms. In order to do so, she was required to cover her normal work shoes with surgical booties. While attempting to put on a bootie her left knee suddenly popped and dislocated. In finding the case compensable, the Industrial Commission found that the bodily position which the employee had to adopt to carry out the requirements of her job subjected her left knee to unusual and unexpected forces which constituted an unexpected traumatic event which resulted in an injury. The majority concluded that the injury resulted from some risk or hazard related to her employment. Notably the decision does not contain a discussion of whether the risk was greater than or equal to the risk of the injury occurring in non-work related circumstances.

Jason Gamet v. Dollar General Corporation

Gamet involved an employee whose job required him to bend and lift only 50% of the time. One day he was sent to the packing department, where production had fallen behind, to do a job where he had to bend and lift 90% of the time. While he was bending down to pick up a pallet which he had just emptied, he had an onset of back pain which was later attributed to a herniated disc. The Administrative Law Judge ruled, and the Industrial Commission agreed, that the temporary job assignment subjected him to an increased amount of lifting at an increased rate of speed than he was usually exposed to in his normal job or to which he would have been subjected in his non-employment life. These facts constituted the proof of the occurrence of a compensable accident where supported by medical testimony that established that these activities were the prevailing factor in causing his back injury.

James B. Kennedy, Attorney

Randy Johnson v. Town & Country Supermarkets, Inc.

In Johnson, the employee, a grocery clerk, was walking at an increased pace down a smooth, clean, dry uncluttered store isle in a good state of repair when his foot rolled to the outside resulting in a fracture of his 5th metatarsal. The only medical witness testified that the injury resulted from an inadvertent misstep which could have taken place anywhere, at anytime and to anyone who happened to place their foot on the floor in an incorrect anatomical position. The Industrial Commission observed that of the three possible theories of recovery on these facts, the increased risk doctrine, the actual risk doctrine and the positional risk doctrine, that under the 2005 amendments, a claimant has to prove that the injury resulted from an actual risk related to the employment that was greater than the risk or hazard that they face in non-employment life. Here the evidence did not identify any work related risk or hazard but only established that the injury was due to a hazard unrelated to the employment.

Joyce Bivins v. St. John's Regional Health Center

The Bivins case presented a more challenging set of facts since the employee's back injury resulted from a fall that occurred while she was walking down a hospital corridor. At trial, she testified that she fell as the result of her foot having stuck to the floor although other evidence indicated that the cause of her fall was unknown. The Administrative Law Judge denied compensation and the Industrial Commission affirmed, emphasizing they also believed that the evidence indicated that the fall was of unknown cause. Since there was no showing that the fall resulted from some risk or hazard related to her employment, she failed to meet the burden of proof imposed by the 2005 amendments.

Since all of these cases involve issues only of law, or the application of the law to the facts, all are subject to de novo review by the Court of Appeals. In the meantime, it appears clear that the Industrial Commission is going to be looking for the presence of a very specific work related risk or hazard in any case brought under the new law that involves an issue of what constitutes proof of an accidental injury post August 28, 2005. ■

Floyd Wilcut v. Innovative Warehousing... cont. from page 1

This case is unique not only in the array of legal issues, but also for the implications to employers and insurers. Instead of being obligated to pay the permanent partial disability that would have been owed had Wilcut accepted the treatment and recovered, the employer in this case now faces a claim for payment of weekly death benefits for the life of Wilcut's widow. The Commission noted that this case is not about an individual's freedom to exercise his religion, but about who should bear the consequences resultant from an exercise of one's religion. While the Commission sided with the employer and found the employee's dependent must bear the consequences of his decision to strictly observe a tenet of his religion, the case is now back to the Missouri Court of Appeals for a final decision. This is certainly a case to keep an eye on as it has implications not only in death cases but any case involving a refusal of treatment. ■

"This case is unique not only in the array of legal issues, but also for the implications to employers and insurers."

Illinois News

Illinois Supreme Court Resolves Critical Subrogation Lien Issue

By: Carl Kessinger, Attorney

According to section 5(b) of the Illinois Workers' Compensation Act, when an employee receives workers' compensation benefits, receives additional recovery from a third party, "the employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from such third party."

In 2005, the Illinois Fourth District Court of Appeals issued a chilling decision addressing subrogation. In that case, Borrowman v. Prastein, 292 Ill.Dec. 459, 826 N.E.2d 600 (Ill.App. 4 Dist. 2005), the court found that the employer essentially waived its subrogation lien because it did not specifically reserve it in the workers' compensation settlement contract.

The Borrowman decision had a significant impact on all pending and past workers' compensation settlements involving the potential for third party recovery. Clearly, there were countless settlement contracts failing to contain specific language reserving section 5(b) rights that had been approved and in which the employer was expecting to receive reimbursement from a third party recovery. Based on Borrowman, that third party recovery was gone.

The First District Court of Appeals later reached the opposite result, and that case ultimately ended up before the Illinois Supreme Court: Gallagher v. Lenart, 226 Ill.2d 208, 874 N.E.2d 43 (2007). Fortunately, in Gallagher, the Supreme Court found that "the waiver of a workers' compensation lien must be explicitly stated." In sharp contrast to the Borrowman decision, the Supreme Court's ruling in Gallagher resulted in sending a collective sigh of relief of gigantic proportions among all Illinois employers and their counsel. The subrogation liens that had been taken away by the Borrowman ruling had been returned in Gallagher.

The requirement that settlement contracts contain language specifically waiving section 5(b) rights was affirmed in the recent Fifth District Appellate Court case of Burgess v. Brooks, 2007 WL 3276103 (Ill.App. 5 Dist). In that case, the court found that the following language was not sufficient to constitute a waiver of the subrogation lien: "'Each party waives any right to ever reopen this claim under any section of the [Workers' Compensation] Act.'"

While the current case law appears to make it clear that Illinois subrogation liens remain intact following settlement of the workers' compensation cases unless the settlement contract contains specific language waiving the section 5(b) rights, I would suggest leaving nothing to chance and that language specifically preserving the employer's lien be included in all contracts where there is the potential for third party recovery. ■

Kansas News

Bilateral Extremity Injuries No Longer Automatically Create Body As A Whole Disability

By: Brian J. Fowler, Attorney

The long-held rule in Kansas is that bilateral extremity injuries, i.e., injury to both wrists, both shoulders or both knees, automatically created the body as a whole disability. The distinction is that with a body as a whole disability, the claimant also could pursue a work disability claim. For example, an individual suffering bilateral carpal might be rated at 10 percent of each wrist. However, under the American Medical Association Guidelines, that would compute to 12 percent whole body disability. With a whole body disability, that same individual could then pursue a work disability claim, which is often higher than the scheduled disability of 10 percent of each wrist or even 12 percent functional impairment.

However, in Casco v. Armour Swift-Eckrich, the Kansas Supreme Court changed the procedure for compensating individuals for bilateral extremity injuries. This case is arguably one of the most significant workers' compensation cases that Kansas has seen in the past decade. The claimant worked in sausage production for Armour and was required to perform repetitive work with both of his upper extremities. His duties included looping and tying sausages, hanging sausages above the shoulder level on a chain, filling boxes with meat, carrying 30 to 40-pound boxes, and placing them on pallets. The claimant first reported pain in his left shoulder on June 8, 2000. The employer provided treatment for the claimant, and he was eventually diagnosed as having a rotator cuff tear by Larry F. Frevert, M.D. He eventually underwent surgery, continued with physical therapy and was placed on weight restrictions.

The claimant testified that after his first surgery on his left arm, he returned to work and performed his duties primarily with his right arm due to discomfort in the left arm. After discomfort continued in his left shoulder, a second surgery was performed in February 2002. The claimant testified that he first began experiencing pain in his right shoulder in August 2002, and reported the pain to Dr. Frevert in September 2002. Frevert suggested a right shoulder MRI, but this test was not authorized by the employer.

In February 2003, the claimant filed an application for a preliminary hearing with the Kansas Division of Workers' Compensation. After the hearing, the Administrative Law Judge ordered the employer to pay for treatment of the claimant's right shoulder. In May 2003, Dr. Frervert performed surgery on his right shoulder and ordered him to stay off work for approximately six months. On Oct. 16, 2003, Frevert released the claimant to work with restrictions. His restrictions included no overhead activity, no lifting greater than 5-10 pounds, and no exposure to temperatures below 40 degrees. At that point, the employer told the claimant that no employment was available.

The claimant then pursued a work disability claim since the employer could not bring him back into the workforce. However, the Kansas Supreme Court held that the claimant could not pursue a work disability claim. Rather, his

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CASE VERDICTS

■ ***Amanda Ketchem, deceased v. Westran R-1 School District***

FACTS: In this Missouri workers' compensation case, the claimant was a first grade teacher at Western R-1 School District. She often took work home with her. On the morning of Sept. 18, 2002, the claimant was on her way to school for an early meeting when she was killed in a head-on collision. Her spouse filed for death benefits under the Workers' Compensation Act, claiming that his wife's fatal car accident was within the scope and course of her employment.

Another teacher testified that the "contract hours" for teachers in the Western district were from 8 a.m. to "3:30-ish." The teacher testified it was possible for teachers to get their jobs done without having to take work home with them. At hearing, the Administrative Law Judge awarded death benefits of $433.09 to be paid weekly for an indefinite period of time. Western appealed to the Labor and Industrial Relations Commission, which reversed the award of the Administrative Law Judge.

FINDINGS: In general, an employee does not suffer injury arising out of and in the course of his employment if the employee is injured while going to or returning from his place of work.

An exception to this rule is the "dual purpose doctrine." The "dual purpose doctrine" provides that if the employee's work necessitates the travel, the employee is in the course of employment, even if he may be serving a personal purpose. The journey must have been necessary even in the absence of a personal purpose. This doctrine does not apply here, because the teacher's main purpose was to get to work, not to attend the early meeting or drop off her graded papers.

Another exception is the "mutual benefit doctrine." This doctrine applies if an employee is injured while engaging in an act that benefits both the employer and the employee, and the employer gains some advantage from the employee's actions. This condition would be applicable if the employer provided transportation continually for the employee to travel to and from work. However, this doctrine does not apply in this situation, as the claimant could have finished her work at school and was driving her own vehicle. There was no evidence that Western benefited from the claimant taking her work home with her instead of finishing it at the school.

The claimant's spouse also argued that the Commission's decision to deny benefits was in error and improper since one of the commissioners was previously a partner in the firm representing the employer. The court stated that the rule of necessity was properly used and that the commissioner was allowed to cast a tie-breaking vote. After reviewing the evidence, the court did not find any prejudice or bias on part of the commissioner.

The court affirmed the commission's findings and denied death benefits to the claimant's survivors.

Brian J. Fowler represented employer Western R-1 School District.

■ ***Paul Becker v. Bi-State Development Agency (Metro)***

FACTS: In this Illinois case, the claimant was a bus driver in East St. Louis, Ill. On July 4, 2000, the claimant picked up three passengers. A dispute ensued between claimant and the passengers over the passengers' fares, since their transfer passes were not valid. The passengers paid the fare and rode the bus to Venice, Ill. The claimant testified that as the passengers disembarked the bus, one of the passengers involved in the earlier dispute spit on his face and hit him in his right shoulder. The passenger then left the bus and began to walk away. The claimant parked the bus with other passengers remaining aboard and pursued the alleged assailant on foot. He tried to detain her physically and then became involved in an altercation with a number of individuals. The claimant testified that he twisted his left knee during this altercation and sustained lacerations to his face and chest. He returned to the bus and resumed his route.

The claimant acknowledged that he violated company policy by leaving the bus with passengers still aboard and that his duties did not include detaining or apprehending disorderly passengers.

The claimant sought medical treatment on July 5, 2000, giving a consistent history of the events. His doctor found a small joint effusion and diagnosed a knee sprain. He remained off work until July 17, 2000. He returned to his doctor in October 2000 with continuing complaints of knee pain. He was sent to a specialist and an MRI revealed a complex tear of the horn of the medial meniscus with a probable centrally displaced flap component, patellofemoral chondromalacia and joint effusion. Surgery was recommended. The employer denied the request for medical care and the claimant did not seek any further treatment.

FINDINGS: The arbitrator denied the claim and found that the claimant failed to prove his injuries arose out of and in the course of his employment. The arbitrator also determined that the claimant sustained his injuries as a direct result of his violation of procedures and his role as an aggressor in an altercation.

James A. Thoenen represented the employer, Bi-State Development (Metro).

■ ***Robert M. Thornsberry vs. Thornsberry Investments, Inc./Lebanon Livestock Auction, LLC***

FACTS: In this Missouri workers' compensation case, the petitioner sustained an accident on the grounds of Lebanon Livestock Auction, LLC while performing veterinary services through his company, Thornsberry Investments, Inc. The accident resulted in amputation of several fingers of his left hand. Petitioner brought a claim against Thornsberry Investments, Inc. The attorney for Thornsberry Investments, Inc. and the workers' compensation insurance carrier posed the argument that petitioner was not acting within the scope of his employment with Thornsberry Investments, Inc. at the time of his injury. In addition the attorney for Thornsberry Investments, Inc. argued that petitioner was actually an employee of Lebanon Livestock Auction or in the alternative, a statutory employee of the Auction. Finally, Thornsberry Investments, Inc. felt they were entitled to contribution and/or indemnification from the Auction. As a result of these arguments, the claim was amended to include a claim against Lebanon Livestock Auction, LLC.

FINDINGS: The Administrative Law Judge found that petitioner was an employee of Thornsberry Investments, Inc. at the time of the injury and that he was acting in the scope of that employment. The Judge further found the petitioner was not an employee of Lebanon Livestock Auction, LLC nor was he a statutory employee of the Auction and that there was no right of indemnification or contribution. An appeal to the Labor and Industrial Relations Commission is pending.

Karen L. Johnson represented the client, Lebanon Livestock Auction, LLC and AIG.

Bilateral Extremity Injuries... continued from page 3

disability should be based upon scheduled injury to each shoulder. Such an analysis drastically reduced the monetary award Casco could receive.

The court held that the presumption is that an individual is permanently and totally disabled if he has bilateral extremity injury. If the evidence shows that the worker is capable of engaging in any type of substantial gainful employment, then the compensation is based on two separate scheduled injuries. This decision should significantly reduce awards and settlements entered into with individuals presenting with bilateral carpal tunnel, bilateral shoulders, bilateral knees, etc.

From a practical standpoint, this will be a very good case to use in settlement negotiations on claims that previously would have been viewed as work disability exposures. We have already seen cases where settlement value has been greatly reduced due to this decision. However, keep in mind it is our burden to prove that a claimant is not totally disabled as a result of a bilateral injury and that compensation should be based on the schedule only. ■

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To Our Readers:

In 2007 Missouri businesses saw a reduction in workers' compensation claims. According to an article on the Missouri Chamber of Commerce website, employers could soon see a more than 10 percent decrease in workers' compensation rates. The article attributes this decrease to the 2005 workers' compensation reform legislation. At Evans & Dixon, L.L.C. we remain committed to doing our part in continuing Missouri's pro-business trend through 2008.

We determine our success by the success of your business and the relationships we have created. We understand our clients unique and individual needs. We strive to be responsive so we can cost effectively handle your legal needs. Although we have the resources of a large firm, our goal is to provide personalized service to everyone on your team.

It is important to us that you receive the attention you deserve. As the new Workers' Compensation Practice Group Leader, I want to thank you for your business in 2007 and look forward to continuing our relationship through 2008 and beyond. Please contact me if we can improve our service to you in any way.

Sincerely,

Timothy M. Tierney, Member

Workers' Compensation Practice Group Leader