Robinson v. Hooker

Civil Liability for Injuries Caused by Co-Employees?

By: Elizabeth Shocklee, Partner

The Facts

On Oct. 23, 2007, Richard Robinson and Cheryl Hooker, co-employees of the City of Kansas City, MO, were cleaning streets as part of their jobs. Ms. Hooker lost grip on a high pressure hose that struck Mr. Robinson in the right eye, causing blindness. Mr. Robinson filed his workers' compensation claim, received benefits and settled his case against the City of Kansas City on 1/30/09. Two months later he filed a Petition in Circuit Court against Ms. Hooker, alleging her negligence while operating the hose resulted in his injuries.

Exclusive Remedy

Prior to the 2005 changes to the Act, an exclusive remedy provision found in Section 287.120, was applied to employers and extended liberally through case law to include co-employees. Under the law, a negligent co-employee could not be sued in tort absent a showing of "something more" than ordinary negligence. The "something more" test was created by the judiciary in *State ex rel Badami v. Gaertner*, 630 S.W.2d 175 (Mo.App. 1982).

However, in 2005, the legislature added Section 287.800, which now mandates the provisions of the Workers' Compensation Act be construed strictly. Mr. Robinson brought his petition to circuit court under the premise that the liberal extension of the exclusive remedy provision to co-employees no longer applied under strict construction.

The Circuit Court

Ms. Hooker filed a Motion to Dismiss the Petition claiming, in relevant part, the circuit court lacked jurisdiction because the Workers' Compensation Act provided his exclusive remedy for his injury against a co-employee. Without explanation, the Circuit Court granted the Motion to Dismiss and Mr. Robinson appealed.

The Appellate Court

On Aug. 3, 2010, the Western District Missouri Court of Appeals reversed the dismissal in *Richard Robinson, et at. v. Cheryl Hooker* (WD71207). The Court, applying the strict construction provision, held the prior law limiting civil liability against co-employees was no longer valid, thus opening the door for civil claims against co-employees for injuries sustained on the job.

The Court reasoned the plain language of the Act simply did not provide co-employees with protection against civil claims. It held Section 287.120, when strictly construed, only provided an employer with protection against civil liability. As it currently stands, it is now possible to file a civil action against a co-employee for a work related injury caused by a co-employee's negligence.

Is An Employer Still Protected?

Assuming this becomes settled law, it is fair to assume an employer would not be liable for an employee's negligence since the exclusive remedy provision of the Workers' Compensation Act has consistently been interpreted to protect employers from civil liability arising out of their actions or the actions of their employees. However, questions remain as to whether an employer's general liability policy could be interpreted to cover portions of these types of claims. It is safe to assume plaintiff's attorneys will attempt to access these policies.

Is a Co-Employee Insured Against these Claims?

Probably not. Obviously each potential policy would have to be reviewed to answer this question definitively. However, employer's coverage under their commercial general liability policies generally excludes co-employees. Most commercial liability policies, such as auto insurance or home owner's insurance policies, exclude coverage for claims arising out of employment. Therefore, employees who negligently cause injury to a co-employee most likely won't even have insurance to cover such claims.

What's Next?

This is a new decision. We anticipate there will be a motion for rehearing on transfer to the Missouri Supreme Court. If so, the Supreme Court can refuse to hear the case or affirm the decision, making this settled law. In the alternative, the Supreme Court can overturn the decision, thereby protecting co-employees once again.

If this becomes settled law, the Missouri Legislature could add co-employee protection by changing the statute. If this is the outcome, this change would not apply retroactively and any case from 2005 to the time of the potential change would not include co-employee protection.

Evans & Dixon has heard, from various plaintiff attorneys, that they intend on reviewing all their cases from the last 5 years to determine whether such potential suits exist against co-employees involved in their clients' injuries. Stay tuned.