

Workers' Compensation Issues for the Employment Law Practitioner
CBA Labor and Employment Law Section
21 March 2008
Michael P. Serruto, Esq.

Rights and Duties in Commencing the Claim Filing Process

Duties. The employee has the duty to report the injury in writing to the employer within 4 days. The employer has the duty to report the injury in writing to the Division of Workers' Compensation, "within ten days after **notice or knowledge** of the injury". Section 8-43-101(1). "An employer is deemed notified of an injury when he has 'some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'" *Jones v. Adolph Coors*, 689 P.2d 681, 684 (Colo. App. 1984).

Failure to report by the employer has two consequences. First, it tolls the two-year statute of limitations for filing of a claim until the report is filed. Section 8-43-102(2). Second, the failure subjects the employer to a daily penalty of up to \$500. Third, insurers can/will refuse to indemnify employer for this penalty and may/might refuse to defend the claim.

Shenanigans. Employer talks injured worker out of filing a claim for the time being. Although there is no per se prohibition under the Act preventing employers from cajoling injured workers out of filing a claim, this can have a cascade of consequences. First, the employer is ignoring the duty to file a first report of injury with attendant consequence of daily penalty. The employer is exposed to unindemnified loss and to loss of defense under the policy, and to indefinite tolling of the statute of limitations.

Additionally, wage replacement agreements must be approved by the Director. Failure to have a qualifying plan could expose the company to separate and cumulative violations of the Act. Section 8-42-124(2) provides that:

Any employer who is subject to the provisions of articles 40 to 47 of this title and who, by separate agreement, working agreement, contract of hire, or any other procedure, continues to pay a sum in excess of the temporary total disability benefits prescribed by articles 40 to 47 of this title to any employee temporarily disabled as a result of any injury arising out of and in the course of such employee's

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 2

employment and has not charged the employee with any earned vacation leave, sick leave, or other similar benefits shall be reimbursed if insured by an insurance carrier or shall take credit if self-insured to the extent of all moneys that such employee may be eligible to receive as compensation or benefits for temporary partial or temporary total disability under the provisions of said articles, subject to the approval of the director.

This procedure is implemented by W.C.R.P. Section 1.8:

- (A) An employer who wishes to pay salary or wages in lieu of temporary disability benefits may apply to the Director for authorization to proceed pursuant to Section 8-42-124(2).
- (B) The application to the Director shall contain the following information:
 - (1) a reference to the contract, agreement, policy, rule or other plan under which the employer wishes to pay salary or wages in excess of the temporary disability benefits required by the Act and
 - (2) a description of the employees covered by the application and a statement that these employees will not be charged with earned vacation leave, sick leave, or other similar benefits during the period the employer is seeking a credit or reimbursement.
- (C) An employer who has received approval from the Director to proceed under Section 8-42-124(2), shall indicate on the employer's first report of injury form whether the claim is subject to Section 8-42-124(2).

Third, employer loses right to reimbursement by the insurer when the claim goes south. Fourth, fraudulent intent could be inferred from circumstances where the employer is motivated to do the injured worker out of a reasonably likely physical impairment award in order to avoid an adverse claims history.

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 3

Finally, where termination of employment follows refusal of the offer, and perhaps follows the terminations of other injured workers having rejected similar offers, the circumstances suggest discharge in violation of state public policy. *Lathrop v. Entenmann's, Inc.* 770 P.2d 1367 (Colo. App. 1989).

The Exclusivity [Sicilian] Defense

Workers' compensation systems were established to provide the exclusive remedy for workplace injuries. In return for this administrative remedy, injured workers are deprived of their civil remedies. In return for imposition of administrative liability without fault, employers are given immunity from suit. This immunity is extended to other, "constructive" employers by the concept of "statutory employer". Immunity depends on the legal nature of the relationship of the parties, its direction and upon the nature of the claims made.

Statutory Employer. Statutory employers have two contextual personae. Benefits are paid in the administrative context when the direct employer is uninsured. This potential liability confers immunity in the civil context. Liability is imposed by Section 8-41-401(1)(a).

Any **person, company, or corporation** operating or engaged in or **conducting any business by leasing or contracting out** any part of all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, **shall be construed to be an employer** as defined in articles 40 to 47 of this title **and shall be liable** as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employee's dependents,

except as otherwise provided in subsection (3) of this section [referring to independent contractors and working general partners or sole proprietors not covered by a policy and those who can opt-out]. [My emphasis.]

Immunity is conferred by Section 8-41-401(2).

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 4

If **said** lessee, sublessee, **contractor**, or **subcontractor** is also an employer in the doing of such work and, before commencing such work, insured and keeps insured its liability for compensation as provided in articles 40 to 47 of this title, **neither** said lessee, sublessee, contractor, subcontractor, **its employees** or its insurer **shall have any right of contribution or action of any kind**, including actions under Section 8-41-203 [subrogation], **against** the person, company, or **corporation operating or engaged in or conduction any business by leasing or contracting out** any part or all of the work thereof, or against its employees, servants, or agents.

“The general test ... is whether the work contracted out is part of the regular business of the constructive employer.” “Regular business” is broadly defined to include functions that are “an integral part of the operation” of the facility itself [janitorial services}, provided “on a routine and regular basis”. *Finlay v. Storage Technology Corp.* 733 P.2d 322 (Colo. App. 1986). Statutory employer entitled to immunity even though the company to whom the work is contracted out insured its liability under The Act and paid benefits. *Curtiss v. GSX Corp. of Colorado*, 774 P.2d 873 (Colo. 1989)

The United States Government was the statutory employer of its nuclear weapons plant operator, Rockwell International, and was thereby immune from suit. *Stewart v. U.S.*, 716 F.2d 765 (10th Cir. 1982).

Management company hired exterior painting contractor, painting contractor's employee injured; management company was statutory employer the injured worker. *M & M Management Company v. ICAO*, 979 P.2d 574 (Colo. App. 1998).

Employees can sue down. Employees of the general contractor may, sue subcontractors and their employees. *Froehlick Crane Service v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973). Employees can sue sideways. Employees of a subcontractor may sue other subcontractors and their employees. *Krueger v. Merriman Electric*, 29 Colo. App. 492, 488 P.2d 228 (1971).

Principals in joint enterprise. Unlicensed cement contractor teamed up with unlicensed cement contractor to install sidewalks, both were “jointly responsible” as employers for benefits. *Snyder v. Indus. Com'n.*, 138 Colo. 523, 335 P.2d 543 (1959).

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 5

Employee "loaned" by direct employer to the "special" employer is the employee of the "special" employer, therefore co-employee immunity exists there and for the loaning employer. *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d 848 (Colo. App. 1995).

Subsidiaries. The rule is that the parent corporation is not entitled to share the immunity of the subsidiary, absent a strong showing that alter ego doctrine applies. *Peterson v. Trailways*, 555 F.Supp. 827 (D. Colo. 1983). In *Gaber v. Franchise Services*, 680 P.2d 1345 (Colo. App. 1984). Gaber was employed by a Pizza Hut restaurant. Franchise Services delivered food and supplies to the restaurant; both were wholly owned subsidiaries of parent Pizza Hut. Gaber was injured when a stack of cartons fell on him, his suit against Franchise Services was not barred. Common ownership and interrelationship of business operations was insufficient to defeat their separate nature here.

Rowan v. Vail Holdings, Inc. 31 F.Supp. 2d 889 (D.Colo. 1998). Skier, employed by subsidiary, was killed while glide testing skis. Parent corporation found to be statutory employer based on implied contract for glide testing, rather than testing being the consequence of "functional dependency" between them. A functional relationship is not a contract. The existence of a contract between the two proposed entities will not necessarily create immunity where the relationship between the parent and the subsidiary is functional rather than contractual.

Nature of Claim. The injured worker surrenders "any cause of action ... for or on account of **personal injuries**". Section 8-41-104. [My emphasis.]

Intentional Torts. *Schwindt v. Hershey Foods*, 81 P.3d 1144 (Colo. App. 2003). Although intentional torts of a co-employee are barred, "an employer may be held liable to an employee for common law damage claims for intentional torts committed by the employer or the employer's alter ego, "if the employer deliberately intended to cause the injury and acted directly, rather than constructively through an agent." Citing: *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1992). The employer must intend to cause the injury; willful or wanton disregard is insufficient. Gross negligence is insufficient.

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 6

Clement v. Sears, Roebuck and Co., 2005 WL 2453101 (D.Colo. 2005). Outrageous conduct claim failed where the "conduct is that of a district in-store marketing manager, and the general manager of a branch store. Although in management positions, [they] by no stretch of the imagination are the 'alter ego' of the Sears Corporation, nor can their actions be construed as Sears acting directly."

Luna v. City and County of Denver, 537 F.Supp. 798 (D.Colo. 1982). Intentional infliction of emotional distress proceeds where compensable claim for physical suffering and pain is peripheral to uncompensable mental pain and suffering and humiliation.

Indemnification. *Serna v. Kingston Enterprises*, 72 P.3d 376 (Colo. App. 2002). Claims for losses related to economic liability or recovery of impaired economic interests are not "personal injuries" and are not barred. "Personal injuries" are job-related physical or mental injuries of an employee".

United Cable Television v. Montgomery, 942 P.2d 1230 (Colo. App 1996). The immunity of employers extends to common-law indemnity claims but not to express contractual indemnification. Employee sued employer for failure to adequately "assist and support" her in obtaining permanent resident status.

Breach of Fiduciary Duty. *Derkevorkian v. Lionbridge Technologies, Inc.*, 2007 WL 638717 (D.Colo 2007); 2006 WL 197320 (D.Colo. 2006). "The emotional distress incurred by Plaintiff and related damages awarded as compensation therefor, were a result of Defendant's breach of its fiduciary duty; it was not a mental injury incurred as a result of or arising out of a work-related accident, injury or occupational disease".

Horodyskyj v. Karanian, 32 P.3d 470 (Colo. 2001). Sexually harassing assaults are "highly personal", "inherently private", "specifically targeted" actions which defeat the nexus between the employment and the injury and are consequently not compensable injuries under The Act. The Workers' Compensation Act makes no provision for recovery of such injuries. Sexual-harassment claims are moreover the subject of specific antidiscrimination statutes.

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 7

Modified Duty and Terminations for Cause in Return to Work Context.

Section 8-42-105(3) authorizes termination of temporary disability when the injured worker returns to modified work or refuses a legally sufficient offer of modified work. W.C.R.P. 6-1 (A)(4) requires:

... a letter to the claimant or copy of a written offer delivered to the claimant with a signed certificate indicating service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions. A copy of the written inquiry to the treating physician shall be provided to the claimant by the insurer or the insured at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty. The claimant is allowed a period of 3 business days for return to work in response to an offer of modified duty. The 3 business days runs from the date of receipt of the job offer. Such admission of liability shall admit for temporary partial disability benefits, if any.

The modified position is temporary in duration, available usually until the injured worker achieves Maximum Medical Improvement.

TTD also terminates under such circumstances where the "employee is responsible for termination of employment". The "resulting wage loss shall not be attributable to the on-the-job injury". Section 8-42-105(4).

To implement this provision, the administrative law judges adopted the standard from unemployment compensation law for disqualifying discharges from employment: a injured workers are responsible for their own wage loss when they perform "some volitional act or have exercised some control over the circumstances resulting in the discharge of employment". *Gonzales v. Industrial Com'n.*, 740 P.2d 999 (Colo. 1987).

**Workers' Comp. Issues for the
Employment Law Practitioner
CBA Labor and Employment Law Section**

By: Michael P. Serruto, Esq.

March 21, 2008

Page 8

Issues Arising in the Negotiation and Settlement of Claims.

The Approval Process. All settlement agreements must be submitted for approval either to an administrative law judge or to the Director of the Division of Workers' Compensation. Section 8-43-204(3). The injured worker can rescind an agreement to settle up to the moment the agreement is approved. Approval of agreements with *pro se* injured workers must be done in person before a prehearing or merits judge. The approval hearing is recorded on a digital cassette.

Employers commonly include a waiver of all claims arising from the employment relationship. Since the Division of Workers' Compensation has no jurisdiction over claims other than for workers' compensation, neither the Director nor a judge has jurisdiction to approve waiver of such claims. *Lawson v. Provenant Health Partners*, W. C. No. 4-140-309 (ICAO January 19, 1995). Most settlement agreements provide for severability and for enforcement in contract if the agreement is not approved or is later set aside. The better practice is to provide separate consideration in addition to that paid by the insurer and a separate release. Some insurers insist that the employers do so. In those cases, execution of the employment release should be referred to in the workers' compensation settlement and made a condition precedent to approval of it.

MPS:mms