

INDIANA SELF-INSURERS ASSOCIATION, INC.

Seminar - Friday, June 1, 2012

Case Law Update

Michael S. Huntine, Due Doyle Fanning LLP

mhuntine@duedoyle.com

With the Assistance of Robert A. Fanning

CAUSATION-APPLYING RISK ANALYSIS

For a claim to be compensable, there must have been a personal injury or death arising out of and in the course of the employment. The arising out of test requires a causal connection between the employment and the injury and that causal connection is established or defeated by a consideration of the various risks involved. The case law generally identifies classes of risks, as follows:

1. Personal Risk – Injuries which are caused by personal risks only are not compensable.
2. Employment Risk – Injuries which are caused by employment risks only are compensable.
3. Neutral Risk – Injuries which are proven to have no particular relationship to either a personal risk or an employment risk, but are in the course of the employment, are compensable pursuant to the positional risk doctrine.
4. Combined Risk – Injuries which contain elements of risk referable to both the employee and the employer are compensable, provided that the employment risk contributes to the injury.

Burdette v. Perlman-Rocque Company (Personal Risk)

Burdette fell, hit his head and died. There was evidence that Burdette suffered from a disease known as Menieres Vertigo which caused him to be dizzy and unbalanced. There was no evidence of an employment related risk such as a wet floor or working on a ladder. The Board found that the personal risk was the cause for the death and that the case was not compensable. The Court of Appeals affirmed that finding.

Waters v. Indiana State University (Combined Risk)

Waters was overweight and was attempting to get out of a booth following a work related luncheon. She had to rock back and forth and when she twisted to leave the booth, she

felt a pain in her leg which turned out to be broken. The Board found that the injury was due to her personal risk, but the Court of Appeals reversed, holding that the injury was due to a combination of her weight and the configuration of the booth and that the injury was at least partially attributable to her exit from the booth (a work related risk) and was thus compensable.

THIRD PARTY CLAIMS

Section 13 of the Worker's Compensation Act gives to the employee the right to sue negligent third parties who caused the injury and gives to the employer the right to recover the worker's compensation payments made for that injury. The obligation to pay worker's compensation benefits ends when there has been a settlement or a paid judgment. There has been a lot of litigation regarding who is a third party and when the worker's compensation benefits may be terminated.

Taylor v. Ford Motor Company

Taylor had been a Ford employee who became a Visteon employee and was leased to Automotive Components Holding, LLC (ACH). The contract between Visteon and ACH stated that Taylor was not an ACH employee. When Taylor was injured, he received worker's compensation benefits from Visteon and filed a third party suit against Ford and ACH. The trial Court dismissed the suit. In defining the term employer, the worker's compensation statute states that a parent company and its subsidiary companies are joint employers of their employees and that a lessor and a lessee of an employee are joint employers of the leased employee. Based on such definition, the Court of Appeals affirmed the trial Court's decision that Taylor was an employee of Ford and of ACH and that they were not third parties despite the language of the contract to the contrary.

Kornelik v. Mittal Steel

Kornelik was an employee of Lafarge and was injured while working at Mittal Steel. Lafarge paid worker's compensation benefits and, without Lafarge's approval, Kornelik settled his case with Mittal. Kornelik then filed a declaratory judgment action against Lafarge in an effort to force Lafarge to reduce its lien and the trial Court dismissed that action. The Court of Appeals agreed with the trial Court and held that since Kornelik had not obtained the consent of Lafarge with regard to the Mittal settlement, he was not entitled to a prorata lien reduction and that pursuant to Smith v. Champion Trucking Company, Kornelik's right to receive additional worker's compensation benefits had terminated by virtue of the unauthorized settlement.

PALLIATIVE MEDICAL CARE

The obligation to pay medical expenses after a determination of permanent partial impairment exists where the need for palliative or other future medical care is proven to be necessary to limit or reduce the impairment.

Reeves v. Citizens Financial Services

Five or six of Reeves' doctors were recommending some form of additional treatment. But Reeves failed to prove that such treatment was necessary to limit or reduce his impairment. The Board found that the additional medical care was not compensable and the Court of Appeals upheld that finding.

Albright v. Four Winds International

Albright's doctors prescribed Cymbalta after the adjudication of her impairment for a spinal injury. The Board held that the prescription was for a condition (anxiety and depression) which had not been proven to be related to the spinal injury. The Court of Appeals reversed that finding based on evidence in the medical records that the Cymbalta had improved Albright's pain 60 to 70%, had improved her quality of life and that the parties had stipulated that the Cymbalta had been prescribed to control upper extremity parasthesia which was a condition related to the spinal injury.

Perkins v. Jayco

Perkins had a compensable worker's compensation claim and filed for palliative medical care. There were five doctors that indicated that Perkins was at MMI status and the Board inferred from that, that no additional medical care was needed. Perkins' family doctor indicated he needed occasional epidural steroid injections for palliative care. Other doctors stated that the care was not causally related to the accident but it was due to claimant's anxiety. The Board denied the palliative medical care. Ultimately, the Court of Appeals found it was improper to draw an inference that no additional medical care is needed based upon a MMI finding. Palliative care is treatment to reduce the effects of an impairment, not to cure the condition causing the impairment. But, that error was considered harmless because other findings supported the decision denying palliative medical care.

EXCLUSIVE REMEDY

The Estate of Donald Eugene Smith v. Joshua Stutzman, d/b/a/ Keystone Builders

Smith fell 20 ft. off of a ladder breaking his neck and died. Smith's widow agreed to a lump sum settlement of \$100,000.00 and the Board approved a settlement agreement directing payment to her. Later, the estate filed a Complaint for Damages against the employer in civil court, alleging that Smith was working as an independent contractor and that the employer was negligent in maintaining safe work premises. Ultimately, the court dismissed the action indicating that by accepting the settlement under the Worker's Compensation Act, the plaintiff concedes that the injury arose out of and in the course of

employment. Since compensation was accepted under the Act, the estate may not later claim that the injuries arose outside the scope of employment. Thus, the exclusivity provision of the Act bars a court from hearing any common law action brought by the employee for the same injuries.

Curry v. D.A.L.L. Anointed, Inc.

Curry was employed by a fast food restaurant and on her day off she went in to attend an employee meeting. She arrived early and ordered food. She tripped while throwing away her trash. No evidence as to whether she was required to attend the meeting or was paid for attending. The employer directed her medical treatment and paid benefits, treating it as if it was a compensable claim. When the plaintiff filed a civil court action for tort damages, the court ultimately dismissed it and the Court of Appeals agreed that this injury was compensable under the Worker's Compensation Act and the exclusive remedy barred the civil action.

INTERVENING ACTS

Moorehead Electric Co. v. Payne

Payne injured his shoulder and after a couple of surgeries was required to wear a bulky shoulder brace that obscured his vision. While he was walking at a wedding reception, he sought to avoid being struck by another individual, when he stepped into a raised grate and fell, requiring an additional surgery and extending his medical care. The employer resisted paying for the additional care and extension of disability benefits, arguing that his fall was due to his own negligence and that of an intervening cause. The Board ruled that the additional injury was compensable and the Court of Appeals agreed. Payne had testified that the bulk of the brace impaired his ability to see his feet and the grate on the ground, and the court found that he did not act negligently as a matter of law when he stepped to the right to remove himself from an approaching individual's path. Consequently, the subsequent injury was a proximate result of the original shoulder injury that undisputedly arose out of and in the course of his employment.

WAIVER OF FULL BOARD'S DECISION

Stewart v. Richmond Community Schools

Stewart worked for the school as a Phys Ed teacher. She broke her leg at work and over a year later she fell at home and broke her hip. She claims it was because of continuing problems with the compensable leg injury. The Single Hearing Member and the Full Board Worker's Compensation Board agreed that the hip injury was related to her work related leg injury. The Single Hearing Member found plaintiff to be permanently and totally disabled, the Full Board reversed that determination and remanded the case for a

finding on impairment. Neither party appealed that decision by the Full Worker's Compensation Board. The Hearing Member awarded her a 39% PPI rating. Stewart then appealed that decision onto the Court of Appeals. The court ultimately ruled that Stewart waived her claim of permanent and total disability because she did not appeal the Board's determination that she was not PTD. That award of the Full Board was a final award subject to appellate review.

RETALIATORY DISCHARGE

Beth Myers v. Rising Sun – Ohio Co. Community School Corp.

Myers was a special education teacher and she sustained an injury on the job. After missing intermittent days from work, she was fired from her job a few months later. Plaintiff filed a civil complaint against the school alleging that she was wrongfully discharged in retaliation for her worker's compensation claim. The court dismissed the civil action, and the Court of Appeals agreed. Plaintiff failed to establish a retaliatory discharge claim as a matter of law. The employer articulated several reasons why Myers' work was insufficient, and the reason for her termination. The court concluded that the employer articulated a legitimate non-discriminatory reason for the discharge and that Myers failed to establish that the reasons were factually baseless or not the actual motivation for her discharge. In other words, she failed to establish pretext.

CREDIBILITY OF PLAINTIFF

Diana Bible v. St. Vincent Hospital

Bible claims that she injured her arm at work. She initially did not report the claimed injury, and failed to mention it in her initial medical evaluations. In fact, she initially reported that she did not injure it at work. At hearing, she was judged to not be a credible witness and her claim was denied. The Full Board agreed, and plaintiff appealed to the Court of Appeals indicating that it was in error to judge her credibility of testimony at her hearing because of her anxiety disorder. The Hearing Judge had deemed her testimony to be "nervous and agitated" and that her "testimony was rambling and inconsistent." The court stated that there was no evidence in their record that someone in Bible's condition would be physically or mentally incapable of giving non-rambling, consistent testimony that could be acceptable to a fact finder. The court declined to second guess the weighing of Bible's credibility and the determination that she failed to establish her elbow pain was the result of a work injury.

INGRESS AND EGRESS

Arnold v. Rose Acre Farms, Inc.

Plaintiff was driving into work and was involved in a motor vehicle accident. Arnold was turning left on a public street onto a gravel road owned by the employer. The Single Hearing Member concluded that the accident was on a public road and Arnold was subject to the same risk as the general public. This was upheld by the Full Board as well as the Court of Appeals. The general rule is that most injuries sustained on route to or from the work place are not covered. This case was unique in that the public road existed on a right away on property owned by the employer. Arnold argued that it should be considered an extension of the employer's premises. The court noted that although Rose Acre technically owned the soil beneath the public road, it had no control over the use of the road as a public thoroughfare. The Board and court declined to further extend the employer's premises to include this situation.