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Florida -- New Line of Attack Seeks to Sidestep Exclusive Remedy: *Top* [07/12/10]
By Greg Jones, Correspondent

Claimants' attorneys in Florida have been able to sidestep the exclusive nature of the state's work comp system by successfully filing tort claims when an employer alleges that an injury did not arise out of employment.

A South Florida employer agreed to a seven-figure settlement in light of a number of recent cases in which workers have been allowed to seek damages in circuit court after their employer denied an alleged injury on the basis it was not work-related.

Appellate courts held on several occasions that once an employer claims that an injury did not occur in the scope of a workers' employment, the employer is no longer able to invoke the exclusivity protections of the state's workers' compensation system.

Following the most recent appellate court decision, Kraft Foods agreed to pay a worker $2.2 million in exchange for a general release of all claims against the company. Senior Judge Michael Genden of the circuit court in Miami-Dade County approved the settlement July 6 in the case Wendy Larson v. Kraft Foods. In addition to the $2 million payout, the settlement also waived medical liens totaling about $250,000 for care provided by the group insurer.

Larson was a manager for Kraft Foods whose job involved visiting a number of retail stores throughout Florida to ensure that Kraft products were properly displayed. She was supposed to have helpers, employed by Kraft, to assist with building special displays, stocking shelves, unloading trucks and other labor. As more and more of the laborer positions were eliminated, Larson was doing more pushing, pulling and lifting work. This, she alleged, caused repetitive trauma leading to a cervical disc and bilateral thoracic outlet syndrome.

Mark Zientz, a claimant's attorney who represented Larson, said she reported the condition to her employer, but nothing was done. She was told to use her group insurance rather than file a workers' compensation claim and use short-term disability to replace her lost wages, which she did. Larson had surgery for thoracic outlet syndrome and Zientz filed a claim for workers' compensation on her behalf shortly thereafter.

Kraft Foods disputed the claim saying that Larson didn't report the injury in a timely manner and that her condition didn't arise from her employment with the company.

Zientz then withdrew the workers' compensation claim and filed an ordinary negligence suit in circuit court. Kraft moved for summary judgment under the exclusivity clause of the state's workers' compensation laws. The motion was denied.

As Kraft was preparing to present the issue of immunity to a jury, the 3rd District Court of Appeals issued in February its decision in Coastal Masonry v. Gutierrez. The 3rd DCA ruled that "an employer may be equitably estopped from raising a workers' compensation exclusivity defense if the employer denies the employee's claim by asserting that the injury did not occur in the course and scope of his or her employment."

The court explained that its decision rested in part on the 1999 5th District Court of Appeals decision in Byerley v Citrus Publishing, in which the court found, "The employer created a Hobson's choice for Byerley: the employer, through its insurance carrier, denied her claim for workers' compensation, and then, when Byerley elected to proceed in a tort action, argued that she could not sue because her exclusive remedy was workers' compensation."

After release of the Gutierrez decision, Kraft began negotiating a settlement with Larson.

Harold Knetch, Jr., of Knetch and Knetch, represented Coastal Masonry in the Gutierrez suit. He applied to the Florida Supreme Court for discretionary review two months ago, but hasn't heard whether the court will take up the case. He said the 5th DCA's decision isn't compatible with state laws or other decisions from the high court.

"The rule has been when workers' compensation coverage is provided by an employer, the only way you can sidestep the administrative work comp system is to allege and prove that the employer intentionally injured you," he said. "What this decision does is it bypasses the longstanding Supreme Court law and laws passed by the

Legislature and gives a different shot at the apple, so to speak."

While Florida law states workers' compensation "shall be exclusive and in place of all other liability," the high court in Travelers Indemnity v. PCR Inc. and Turner v. PCR Inc., affirmed "the existence of an intentional-tort exception to the otherwise exclusive nature of the statutory remedy provided by workers' compensation law."

The court didn't expressly say that this is the only exception, and it hasn't issued a ruling on the recent line of cases finding another exception in cases where an employer denies an injury is work-related. Without such a ruling, tort actions against employers could become a more common remedy for attorneys facing employers who oppose a claim.

In fact, the Gutierrez court stated that Byerley went so far as to say that once the employer takes the position that an injury is not work-related, it is estopped from claiming exclusivity in circuit court even if the case could have been adjudicated in the workers' compensation arena.

Knetch said he didn't understand how the court reached this decision.

Zientz said in the Larson case, the claim might have been accepted as repetitive trauma, and as such medical costs would have been less costly and for settlement purposes it would have been worth $300,000 or less. By moving the case into circuit court, however, the limits on what can be collected for damages and attorney fees and other costs that are established in the state's workers' compensation statutes no longer apply.

Moving the case into circuit court also changes how employers and their insurance carriers pay for the claims. While Coverage A is the schedule of benefits payable to an employee without regard to liability, Coverage B would cover any award assessed against the employer in cases where an employee is found liable for a workplace injury under common law as opposed to workers' compensation law.

Because this is a relatively new field of attack for claimants' attorneys, the impact is difficult to assess.

The National Council on Compensation Insurance is not currently anticipating a significant impact on what employers have to pay in premiums. Lori Lovgren, a state relations executive for NCCI who handles Florida, said that rates in the state continue to drop—a total of 65% since 2003—and the agency isn't seeing any pressure on rates because of Coverage B payouts.

"We haven't looked at it recently, but those (Coverage B payouts) are less than 1% of the claims and don't have a big impact on premiums in Florida," said Lovgren. "We haven't done a study to see how much that has changed, but even if it went from 1% to 2%, it won't have much impact on rates."

Zientz said that as the Legislature removes coverage for certain conditions or makes it more difficult to prove causation in certain situations, such as occupational illness caused by exposure to a hazardous substance, more tort claims will follow.

"Once you legislate stuff out of the workers' compensation arena, there is another door that opens and that is what these Coverage B cases are all about," Zientz said.

The Florida Supreme Court said essentially the same thing in a 1990 decision, Scanlon v. Martinez. In that case the court held amendments to Florida's workers' compensation laws in 1990 removing from coverage conditions that were previously included were not unconstitutional because the injured worker could still seek relief through tort litigation.

While he admitted that in many cases the standards of proof are less onerous in circuit court than they are in the workers' compensation system, he hopes that cases like Larson will show that limiting the rights of injured workers is not beneficial to employers, either.

"If cases such as the Larson case, with the seven-figure recovery out there, the employers may go running back to the Legislature saying, 'We have asked for too much. We may have taken too big a chunk out of injured workers' benefits,'" he said. "That's what I hope will be the end result."

To read the Coastal Masonry opinion, click on the case title in the sidebar.

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