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LABOR: The Ohio Supreme Court Sides with ABC Contractor Over the Application of Bid Criteria

by Nick A. Nykulak

On March 25, the Supreme Court of Ohio held that the Franklin County Board of Commissioners “failed to exercise sound discretion” in disqualifying a contractor painting company’s bid for a painting contract for the Huntington Park Baseball Stadium project, because 14 prevailing wage complaints had been filed against the painting company in prior years.

In 2002, Franklin County enacted a resolution establishing “Qualitative Contracting Standards” that allowed it, among other things, to disqualify any bidders who have been debarred from a public project or found by the State of Ohio to have violated the State’s prevailing wage laws more than three times in a two-year period within the last ten years.

On this particular project, only two contractors had submitted bids for the painting contract. The painting company, which is non-union, submitted a bid for the project that was \$46,000 lower than the only other bid, submitted by a union contractor.

In holding that Franklin County failed to exercise sound discretion in rejecting the painting company’s bid, the Supreme Court stated that the 14 prevailing wage complaints filed against the painting company resulted in findings of unintentional violations, were settled with the Department of Commerce with disclaimers of any wrongdoing, or the complaints were closed with no findings of liability. The Supreme Court held that although bid criteria which would take into account a contractor’s prevailing

wage compliance would be permissible, Franklin County failed to properly apply its prevailing wage bid criteria to the painting company when rejecting its low bid for the project.

In rendering its ruling, the Supreme Court found that neither Ohio’s Prevailing Wage Law, nor Franklin County’s bid criteria, provides a definition for the term “violated.” The Supreme Court reasoned that under the resolution, a contractor’s mere non-compliance with prevailing wage laws would not constitute a “violation,” as restitution could be made by the contractor and any non-compliance issues remedied under the Ohio Revised Code. More so, the Supreme Court stated that a settlement agreement is not evidence of a “violation,” as a settlement is, by its very terms, a negotiated conclusion to a dispute. As such, the Court concluded that “violated,” as used in the resolution, must refer to the situation in which the director of the Department of Commerce has made a formal finding that a contractor has intentionally violated prevailing wage laws and all appeals are exhausted. Because the painting company was never found to have intentionally violated Ohio’s Prevailing Wage Law, Franklin County abused its discretion in rejecting the contractor’s low bid for the project.

The Supreme Court also noted that Franklin County failed to exercise sound discretion when failing to apply its other bid criteria to the painting company to determine whether to reject or accept its bid, ignored the painting company’s record of successful

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This Publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney relationship.

LABOR: The Ohio Supreme Court Sides with ABC Contractor Over the Application of Bid Criteria *(CONTINUED)*

performance on similar projects, and ignored without reason Franklin County's construction manager's recommendation that the painting company receive the contract.

Due to the state of the economy and the deteriorating private construction market in Ohio, more and more contractors are

starting to bid on public projects in order to sustain their businesses and keep their workers employed. Under Ohio law, public authorities are required to award public construction contracts to the lowest and responsible bidder or to the lowest and best bidder. However, with increased competition for public projects comes the inclusion of bid criteria or other onerous

requirements which may be specifically designed to exclude an otherwise qualified contractor from bidding. If you have any questions regarding any bid criteria on public projects, or feel that certain bid criteria may be unfair or is being applied in an unlawful manner, please feel free to call Alan Ross or Nick Nykulak to discuss.

WORKERS' COMPENSATION: The Supreme Court of Ohio Addresses "Right to Participate" Issue

by Chad A. Fine

The Supreme Court of Ohio recently held that a court of common pleas does not have jurisdiction to hear an appeal from an Industrial Commission decision wherein the Industrial Commission refused to exercise continuing jurisdiction to make a finding of fraud.

By way of background, the Ohio Revised Code specifically grants jurisdictional review to courts of common pleas for decisions involving an injured worker's "right to participate" in the Ohio Bureau of

The Supreme Court of Ohio's recent decision in Benton held that a decision by the Industrial Commission which refused to exercise continuing jurisdiction to make a finding of fraud is not a "right to participate" issue. Consequently, the Supreme Court held that decisions regarding fraud may not be appealed to the courts of common pleas.

In the Benton case, the injured worker was injured in a motor vehicle accident. Apparently, the injured worker was driving for the employer to pick up medical forms from a client. The injured worker then filed for workers' compensation benefits and the claim was allowed. The employer did not appeal the allowance of the claim to the court of common pleas within the required sixty-day limitation period.

Thereafter, however, the employer filed a motion that alleged the injured worker had misrepresented her purpose for driving, and that she was not in the course and scope of employment when she was injured. The motion further asked the Industrial Commission to find fraud and terminate the injured worker's participation in the fund. The Industrial Commission found no evidence of fraud and thus declined to exercise continuing jurisdiction to reconsider the allowance of the injured worker's claim. As a result, the employer appealed the motion to the Hamilton County Court of Common Pleas. The injured worker filed a motion to dismiss the appeal and alleged that common law fraud does not fall under the "right to participate" provisions of the Ohio Revised Code. The motion

to dismiss was granted. The employer appealed to the First District Court of Appeals which reversed the trial court's decision to dismiss the appeal and held that the Hamilton County Court of Common Pleas did have subject matter jurisdiction to hear appeals from Industrial Commission decisions that refuse to exercise continuing jurisdiction to make a finding of fraud. This decision was subsequently appealed to the Supreme Court of Ohio.

The Supreme Court of Ohio ultimately applied the Nicholls decision which held that the Industrial Commission may exercise continuing jurisdiction over cases of new and changed circumstances, fraud, clear mistake of fact, clear mistake of law, or error by an inferior tribunal. Further, the Supreme Court applied relevant portions of the Ohio Revised Code, which grant subject matter jurisdiction to the courts of common pleas to hear cases involving the "right to participate" in the fund. The Supreme Court held that a decision by the Industrial Commission not to exercise continuing jurisdiction when fraud is alleged is not a "right to participate" issue. Therefore, the Supreme Court held that the Hamilton County Court of Common Pleas did not have jurisdiction to hear the appeal from the Industrial Commission decision that refused to exercise continuing jurisdiction where fraud was alleged.

Feel free to contact Chad Fine or any of the workers' compensation attorneys at RBS with any further questions regarding The Supreme Court of Ohio's decision in Benton.



Workers' Compensation fund. However, the Ohio Revised Code does not grant jurisdictional review for decisions that relate to the extent of an injury. In other words, the Industrial Commission's decision to either grant or deny additional benefits under an already existing claim is not subject to an appeal to a court of common pleas.

WORKERS' COMPENSATION: Employers Win Big as the Supreme Court of Ohio Upholds the Constitutionality of the Employer Intentional Tort Statute

by Scott W. Gedeon

The Supreme Court of Ohio, in a pair of recent cases, upheld the constitutionality of the employer intentional tort statute. The statute applies to all workplace injuries sustained on or after April 7, 2005 and is the sole exception to the rule that workplace injuries are compensated through the workers' compensation system rather than through private court action. Many legal commentators expected the Supreme Court to strike down this statute as the Supreme Court had found a prior version of the statute to be unconstitutional.

The employer intentional tort statute was passed with the intention of making an employer intentional tort more difficult to establish than under the prior common law standard.

Under the statute, an employer could only be liable for an intentional act

committed by the employer, if the employer committed the act with "the intent to injure another or with the belief that the injury was substantially certain to occur." Furthermore, the statute defined "substantially certain" as when "an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." This was a departure from the prior common law standard, set forth by the Supreme Court of Ohio, which did not require the employer to act with "deliberate intent."

The statute also provides that the deliberate removal by an employer of an "equipment safety guard" or the deliberate misrepresentation of a toxic or hazardous substance results in a "rebuttable presumption" that the removal or misrepresentation was committed with intent to injure. Most likely, the plaintiff's

bar will seek to utilize the benefit of this rebuttable presumption in order to advance cases beyond summary judgment and to attempt to gain leverage for settlement.

In the coming months and years, employers may benefit from seeing fewer intentional tort filings and fewer cases moving beyond summary judgment. What remains unseen, however, is whether insurance carriers will provide indemnification for claims brought under the employer intentional tort statute, now that its constitutionality has been upheld.

If your company has questions concerning the employer intentional tort statute or workers' compensation litigation, please do not hesitate to contact Scott Gedeon.

WORKERS' COMPENSATION: The Medicare Set-Aside Arrangement: When is One Needed for Settlement?

by Carol D. Strassman

The Medicare Secondary Payer (MSP) statute has been in place since 1980. The concept of a Medicare Set-Aside Arrangement (MSA) was not adopted by the Centers for Medicare and Medicaid Services (CMS) until 1995. Medicare is federal health insurance for those over age 65 and for certain disabled persons receiving Social Security disability.

The basic premise is that Medicare will remain a "secondary payer" if a primary payer, i.e., workers' compensation, exists. CMS expects to be put on notice of workers' compensation claims where the claimant is or will soon be a Medicare beneficiary.

Medicare is concerned that liability for work-related injury medical expenses should not be shifted to Medicare. This is because most settlements forever close the claimant's right to future medical treatment through a workers' compensation claim. Thus, a portion of the workers' compensation settlement must be set aside to pay for the claimant's future work-related medical expenses. Medicare will not pay for work-related medical expenses until the set-aside amount is exhausted.

An MSA is an account which allocates a portion of the workers' compensation settlement for future medical expenses. Medicare's interests must always be considered when settling any workers' compensation claim. The following is the CMS review threshold for an MSA:

- The claimant is currently a Medicare beneficiary and the total settlement is greater than \$25,000; or
- The claimant has a "reasonable expectation" of Medicare enrollment within 30 months of the settlement date and the settlement is greater than \$250,000.

We must consider Medicare's interests in all workers' compensation settlements. The formation of an MSA can be a complex and involved issue. The MSA proposal must be approved by CMS. This process can take one to six months, or even longer.

The MSA funds must be placed in an interest-bearing account separate from the claimant's personal savings or checking account. The funds shall be used solely for

medical expenses related to the work injury which otherwise would be reimbursable or paid by Medicare. Failure to abide by the regulations, including approval from CMS, can expose the BWC, employer, claimant, and counsel to double damages.



The bottom line is to remember that Medicare's interests must be considered when settling any workers' compensation claim. The CMS review threshold should be reviewed to determine if an MSA is required in a settlement. Do not hesitate to contact Carol Strassman or any of the workers' compensation attorneys at RBS with any questions or concerns regarding an MSA, or for assistance in structuring the settlement of a workers' compensation claim.

EMPLOYMENT: Health Care Reform Bill Amends Fair Labor Standards Act to Mandate Breaks for New Mothers

by Ryan T. Neumeyer

An amendment to the Fair Labor Standards Act included in the health care reform bill requires employers to provide nursing mothers with “reasonable break time” to express breast milk, for up to one year after the birth of a child. The amendment provides that the employer must provide a place, other than a bathroom, that is shielded from view and “free from intrusion” from co-workers and the public, which may be used by an employee to express breast milk. The break time is not required to be compensated.

Employers with less than fifty employees shall not be subject to the requirements of the amendment if such requirements “would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” The meaning of “undue hardship” has not been defined. However, experience with other employment-related laws suggests that the burden will ultimately rest with employers and may be difficult to prove.

Also uncertain is what constitutes a “reasonable” break time, or what penalties will be imposed for violations. In general,

mothers breastfeeding their infant need to express breast milk approximately two to three times during the work day for approximately 15-20 minutes per session, but this varies by individual and time of day. In establishing a reasonable amount of break time, employers should consider



the time it will take mothers to travel to the designated area for pumping breast milk.

It is unclear what penalties will apply for noncompliance. The amendment became effective when the health care reform bill was signed on March 23,

2010. The Department of Labor will hopefully issue regulations or guidance on this amendment in the near future. In the meantime, employers should begin to comply with the new amendment by analyzing where such breaks should be given, and if any work to a break room (such as adding locks or blocking windows) is needed. Employers who receive a request from nursing mothers should communicate with the employee to resolve any problems and should not deny such employees break time. Moreover, employers should not assume exemption from the requirements, but should consult with counsel regarding the “undue hardship” standard.

As always, the employment attorneys at Ross, Brittain and Schonberg will be sure to advise you regarding any and all obligations under the FLSA. Please do not hesitate to contact Lynn Schonberg or Ryan Neumeyer with any questions you may have regarding the FLSA and the recent amendment concerning reasonable break time for nursing mothers.

FIRM NEWS

Meredith Ullman joins the firm as an associate who focuses her practice on the defense of workers' compensation matters for both state fund and self-insured employers. She has represented employers since 2004 in all phases of the workers' compensation process, including administrative hearings, appeals in the Court of Common Pleas and mandamus actions in the Court of Appeals.

Meredith has also practiced in the areas of labor and employment law, representing employers in both the public and private sector.

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WORKERS' COMPENSATION: Voluntary Abandonment and the Light-Duty

Employee

by Anthony A. Bauccho

Consider this workers' compensation scenario:

Joe injures his lower back while working for Acme Construction. Joe immediately seeks treatment with Dr. Wright and is diagnosed with a lumbar sprain. Dr. Wright is also of the opinion that Joe is temporarily and totally disabled. The condition of Joe's lower back improves after a month off work and a course of physical therapy. Although Joe's condition has improved, Dr. Wright still doesn't feel Joe is ready to resume his normal work duties with Acme. Dr. Wright issues Joe work restrictions, and tells Joe that he can return to light-duty work, within his restrictions, if Acme has anything available. In an effort to get Joe back to work (and limit the amount of temporary total disability compensation paid in Joe's claim), Acme comes up with a light-duty position for Joe that is within Dr. Wright's restrictions. Acme makes Joe a written, light-duty job offer and Joe accepts. Joe returns to light-duty work with Acme, while continuing his treatment with Dr. Wright.

After being employed in the light-duty position with Acme for several weeks, Joe doesn't show up for work on a Monday. Acme calls Joe and the calls are unanswered and unreturned. Joe is written up for a no call/no show. Joe then misses work on both Tuesday and Wednesday. Again, Acme attempts to contact Joe, but to no avail. Joe is written up for no call/no shows on both Tuesday and Wednesday. As per company policy, three consecutive no call/no shows are grounds for termination. Joe finally shows up to work on Thursday. He's disheveled and reeks of stale beer. After Acme confronts Joe about the serious violation of company policy, he casually explains that he got carried away on a weekend trip to Atlantic City. Joe says he hit it big playing the slots and stayed to party for a few extra days. Joe also tries to downplay his light-duty job, arguing that it's not really an important job and Acme didn't miss a beat by him not being there. After hearing Joe's sorry excuses, Acme decides to terminate



him for his three consecutive no call/no shows.

After his termination, Joe visits Dr. Wright for a scheduled appointment. Joe tells Dr. Wright that he is no longer working in a light-duty capacity because he was fired. Dr. Wright examines Joe and still does not feel he is capable of working without restrictions. Dr. Wright indicates that Joe is still temporarily and totally disabled.

Joe requests that his temporary total disability benefits resume as of his termination date, as per the opinion of Dr. Wright. Acme is understandably upset. Acme doesn't feel Joe should be entitled to temporary total disability compensation since he was terminated from employment.

Is Joe entitled to temporary total disability compensation?

Acme's attorney will argue that Joe was terminated under circumstances that amount to a "voluntary abandonment" of his employment and that Joe is legally precluded from receipt of temporary total disability benefits. Under the Louisiana-Pacific decision, termination constitutes voluntary abandonment of employment when an employee violated a written work rule that clearly defined the prohibited conduct, had previously been identified by the employer as a dischargeable offense, and was known or should have been known to the employee.

Joe's attorney, however, is quite clever. Joe's attorney will cite the Pretty Products and OmniSource decisions, which provide that an injured worker can only abandon his former position of employment if he was physically capable of doing that job at the time of the alleged abandonment. Joe's attorney will point out that Joe was only working in a light-duty capacity at the time of his termination. As per Dr. Wright's opinion, Joe's attorney will argue that Joe was simply not physically capable of working in his former position of employment and was temporarily and totally

disabled from said position of employment when he was terminated. Therefore, Joe's attorney will argue that Joe could not have voluntarily abandoned his former position of employment with Acme because he was undisputedly unable to return to his former position of employment with Acme due to his industrial injury at the time he was terminated. Accordingly, Joe's attorney will argue that temporary total disability compensation should be granted.

So, is Joe entitled to temporary total disability compensation? Fortunately for employers, a recent decision out of the Tenth Appellate District has further solidified the proposition that when an injured worker is capable of performing work in a light-duty position, he can abandon that position. In the Apostolic Christian Home decision from October 2009, the Tenth Appellate District relied upon their prior decision in Adkins and found that an injured worker's return to light-duty work did not, as a matter of law, preclude a voluntary abandonment of employment for violation of a written work rule during the period of the light-duty employment. The focus should be on the injured worker's light-duty position and not the position he held when he sustained his industrial injury. It was determined that it was possible for an injured worker to have abandoned a light-duty position if he was physically capable of performing it at the time of his alleged voluntary abandonment.

Accordingly, based upon the decisions in Apostolic Christian Home and Adkins, Acme's attorney will have a strong argument that Louisiana-Pacific still controls in this matter, and that Joe voluntarily abandoned all employment at Acme as a result of his violation of company policy and subsequent termination. The fact that Joe was not working in his former position of employment when he was terminated is no longer dispositive. Joe's temporary total disability compensation should not be reinstated.

Questions or concerns about the scope of the "voluntary abandonment" defense? Please do not hesitate to contact Anthony Bauccho or any of the workers' compensation attorneys at RBS to discuss this defense or any other workers' compensation matter that's on your mind.