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CASE LAW UPDATE

Intoxicated Roofer's Claim Denied

Michael Gratz was employed as a roofer by Jason B. Hill. Gratz's co-worker, Oscar Plasencio, picked him up, along with a group of other workers, in a company van to bring them to the jobsite. On the way, they stopped at a convenience store for breakfast. Later, Plasencio saw Gratz in the rearview mirror "chugging away" on a beer in the van's back seat.

At the jobsite, everyone except Gratz refused to begin the day's work because the roof was steep and it was a cold and windy day. Gratz's co-workers advised him not to go onto the roof, but he ignored their warnings, climbed up a piece of equipment marked "do not climb," and began working on the roof four floors above the ground without wearing the safety equipment that was available for his use. A short time later, he lost his footing, fell and injured his left arm, pelvis, low back and both feet.

The paramedics who responded to the accident noticed the smell of alcohol on Gratz, as did the staff at the hospital where they took him. His blood alcohol level, taken 5 to 7 hours after the fall, was 0.11 percent. A toxicology expert later testified that meant the level of alcohol in his blood was likely at or above 0.22 percent when he fell.

Gratz's claim for workers' compensation benefits was denied under N.C.G.S. § 97-12, which provides that "no compensation shall be payable if the injury or death to the employee was proximately caused by ... intoxication, provided the intoxicant was not supplied by the employer or his ... [supervisor]." Gratz requested a hearing, but both the deputy commissioner and Full Commission found that he was intoxicated at the time he fell from the roof and the resulting injuries were caused by his intoxication.

On April 1, in *Gratz v. Jason B. Hill*, the Court of Appeals affirmed the Commission's denial of benefits. In doing so, it rejected Gratz's argument that the Commission erred when it found that he was intoxicated at the time of the accident. The Court noted that while in general the intent of the Workers' Compensation Act is to eliminate fault as a basis for denying recovery, N.C.G.S. § 97-12 "is an integral part of our Workers' Compensation Act and evidences the Legislature's intention to relieve an employer of the obligation to pay compensation to an employee when the accident giving rise to the employee's injuries is proximately caused by his intoxication."

The Court also noted that in 2005, the Legislature amended N.C.G.S. § 97-12 to define intoxication as when "the employee ... consumed a sufficient quantity of intoxicating beverage ... to cause [him] to lose the normal control of his ... bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury."

That same amendment also creates a rebuttable presumption of impairment when there is "a result consistent with 'intoxication' ... from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law" Because the legal standard for convicting a person of impaired driving is 0.08 or more, the Court found that defendants' evidence establishing that Gratz's blood alcohol level was 0.11 five to seven hours after he fell was sufficient support for the Commission's finding that he was intoxicated at the time.

The Court also found no merit in Gratz's argument that the Commission erred in finding a causal connection between his intoxication and the injuries he sustained. While "mere intoxication" is insufficient, "the employer is not required to come forward with evidence

disproving all possible causes other than intoxication ..., nor is he required to prove that intoxication was the *sole* . . . cause of the employee's injuries." Rather, the employer need only demonstrate "that it is more probable than not that intoxication was a cause . . . of the injury."

The Court found support for the Commission's finding that Gratz's fall was caused by intoxication in Plasencio's testimony that normally Gratz was sure-footed when working on rooftops and that he "didn't have his head straight" when he chose to work on the roof, despite the fact that all his co-workers decided it was too windy to work that day. Further support came from the toxicologist, who testified that "for the majority of the population, the level of alcohol plaintiff must have had in his system at the time of the fall would cause slowed reflexes, intermittent loss of balance and loss of coordination.

Risk Handling Hint: The presumption of impairment arising from an employee's use of alcohol or a controlled substance created by the Legislature when it amended N.C.G.S. § 97-12 in 2005 provides the defense with a useful tool in appropriate cases. At the same time, because that presumption is rebuttable, risk managers should be aware that the ultimate determination of proximate cause is a question of fact for the Commission to resolve, and if it finds that other factors caused the accident, and should that finding be supported by competent evidence, the mere fact that the employee happened to be legally intoxicated at the time he was injured will not absolve the defendants from liability.

Medical Opinion Regarding Causation Found Speculative

Emilio Davis, who was an employee of the City of New Bern, fell head first into a sewer pit and suffered a lumbosacral strain. Diagnostic testing, including an MRI, revealed no significant pathology in his back. But, he continued to complain of pain, so the City referred him to an orthopaedist, Dr. Kasselt, who recommended an FCE, an MRI of his hips, and a psychological evaluation.

Davis sustained another injury at work about nine months after the first, when he slipped while working in a ditch, fell on his back and struck his head. The City admitted liability on a Form 60 and referred him to Dr. Virginia Ward, who noted an extreme pain response when she palpated his back and found that he over-reacted to touch and movement. She ordered a work hardening program because

of his poor physical conditioning, but also authorized a return to light duty work, which the City provided.

Davis went on his own to a neurologist, Dr. Michael Apostolou, who performed electrodiagnostic testing, which did not reveal a clear indication as to the cause of Davis' symptoms. When he continued to complain of worsening pain, Dr. Apostolou indicated that he was puzzled and he questioned whether the pain was related his patient's injury at work.

When Davis' case was heard by the Industrial Commission, Dr. Ward testified that his symptoms created a "very puzzling picture." Dr. Apostolou testified that it was "possible" they were related to the injury, but they might also have been created by a chronic process. A third doctor testified that Davis' complaints were of "uncertain etiology," while a fourth could only testify that Davis' injury "could" or "might" be work-related. His psychologist testified that Davis suffered from a conversion disorder and could be malingering, while his psychiatrist testified that Davis needed to return to work. Despite the uncertainty of this testimony, the Commission awarded compensation to Davis, and in the process it struck the testimony of Dr. Kasselt on the grounds that he had engaged in non-consensual, *ex parte* communications with the defendants' adjuster.

On April 15, in *Davis v. City of New Bern*, the Court of Appeals upheld the Commission's ruling regarding Dr. Kasselt's testimony, but it reversed the Commission's award of benefits.

The City did not dispute the fact that its adjuster had a conversation with Dr. Kasselt during which he suggested that surveillance ought to be conducted to determine the validity of claimant's complaints. Rather, it contended that the "*Salaam*" prohibition of "non-consensual, *ex parte* communications" between defendants and treating physicians did not apply in this case because the City had not solicited any information from Dr. Kasselt, who made his recommendation regarding surveillance without any communication or suggestion from the defendants. However, the Court found other evidence of a two-way conversation in Dr. Kasselt's notes which supported the Commission's determination that defendants' "non-consensual *ex parte* communication" necessitated the striking of his testimony.

At the same time, the Court agreed with the defendants on the merits of the claim, holding that the Commission erred when it awarded benefits to claimant because the medical

evidence was too speculative to establish medical causation. The Court held that "expert testimony that a work-related injury 'could' or 'might' have caused further injury is insufficient to prove causation when other evidence shows the testimony to be 'a guess or mere speculation.'"

Claimant conceded that his medical evidence consisted of "could or might" testimony, but argued that the record was devoid of evidence indicating that the evidence he offered in support of his claim was speculative. The Court rejected that contention, noting that there was "ample evidence that the doctors treating plaintiff were uncertain as to the issue of causation." That being so, claimant's causation evidence did not rise above "a guess or mere speculation." Therefore, it was inadequate support for the Commission's findings regarding the cause of claimant's condition.

Risk Handling Hint: The Court's discussion of the *Salaam* issue in *Davis* serves as a useful reminder to risk managers that *ex parte* communications with treating physicians can and will result in the doctor's testimony being stricken from the record, even if the physician initiated the contact. While the Legislature amended the Workers' Compensation Act in September 2005 so as to allow "reasonable access to medical information," that "access" is limited. Defendants paying for an employee's medical treatment may obtain records generated as a result of that treatment without the employee's express authorization and, in addition, with written notice to the employee, any medical reports which are related to the condition for which the employee is seeking compensation. In addition, a list of "specific questions promulgated by the Commission" is also available for use by defendants paying compensation without prejudice or in cases of admitted liability. Further details regarding the kinds of medical records and other information that are available to defendants by virtue of this recent amendment to the Workers' Compensation Act and the circumstances under which they may be obtained can be found in the statute itself, N.C.G.S. § 97-25.6, or by contacting the attorneys at TCDG.

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