

RISK/ALERT

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CASE LAW UPDATE

Disability from Sexual Assault Found Non-Compensable

Christina Sisk was a shift supervisor at a Wendy's restaurant whose anti-harassment policy provided a procedure for employees to follow if they became victims of any form of harassment. After James Johnson became general manager and took disciplinary action against Sisk, she alleged that he had made sexually suggestive comments to her, touched her in inappropriate places, pulled her onto his lap, and placed his hand down her shirt.

Sisk quit her job, stating in her resignation letter, which was the first notice she gave of Johnson's conduct, that she could no longer take his harassment. At the same time, she acknowledged to the director of human resources that she had not followed the company's anti-harassment procedures.

The day after she resigned, Sisk saw her family doctor complaining of panic attacks. She later underwent psychiatric treatment and was diagnosed with post-traumatic stress disorder. Eventually, she filed a Form 18 and requested a hearing, alleging that her PTSD, which she attributed to Johnson's sexual assaults and harassment, had made her unable to work.

The deputy commissioner who heard the claim found it compensable, concluding that Sisk had sustained an injury by accident and was entitled to TTD until she returned to work. However, the Full Commission reversed, finding that although Sisk had suffered an injury by accident, it did not arise out of her employment because "sexual assaults are not ... incident to or a natural and probable consequence of the employment under current law."

On October 19, in *Sisk v. Tar Heel Capital Corp.*, the Court of Appeals agreed, holding that emotional injuries resulting from sexual harassment are neither the natural and probable consequence of employment, nor incident to it. Rather, just as it had done in *Hogan v. Forsyth Country Club Co.*, the Court held that sexual harassment is "a risk the public generally is exposed to" and, therefore, not compensable under the Workers' Compensation Act.

In reaching that conclusion, the Court rejected claimant's assertion that since her condition was caused by a supervisor's "intentional assault," it should be covered under the Act. Rather, it held that for an assault to be compensable, it must arise from a risk particular to the employee's work, not one common to everyday life. Here, claimant failed to prove that the harassment she experienced had arisen out of dangers peculiar to her job. Instead, the evidence suggested that both Johnson's motive and conduct were entirely personal in nature. Thus, while it was "foul behavior," his actions were "separate from their common employment interests" and not incident to claimant's employment.

Risk Handling Hint: The *Sisk* case provides risk managers with a useful reminder that, even when an injury by accident is shown to have occurred, an additional inquiry should be made before compensability is conceded, to determine whether claimant's injury arose out of and in the course of her employment. An injury "arises out of" the employment when it is a natural and probable consequence of the employee's work. That is, there must be a causal connection between the injury and claimant's job. And, the "in the course of" component of the test of compensability is met only when claimant proves that her injury occurred while she was doing something reasonably expected of her, and at a time, in a place and under circumstances which can be reasonably linked to her work.

Thus, while an argument can be made in cases like *Sisk* that claimant was the victim of an “accident” in the course of her employment, since the conduct in question occurred on site and during work hours, there was nothing unique about her job which made it more likely that she would be the victim of a sexual assault while at work, as compared to anywhere else. Therefore, the resulting injury, if any, did not “arise out of” her employment.

Similarly, risk managers should carefully analyze any claim which involves a dispute between co-workers to determine whether its origin was personal or had some connection to the employment. Compensable disputes include those which occur over work schedules or duties, while the non-compensable category includes assaults originating outside work, such as marital disputes or disagreements over money matters.

Award of Benefits Reversed for Lack of Sufficient Medical Causation Testimony

John Alexander’s left foot was injured when it was run over while he was working for Wal-Mart. He received treatment from several physicians, including Dr. Toni Harris. After an epidural injection caused severe back pain, Dr. Harris discovered a ruptured disc at L5-S1. Wanting to investigate whether her patient’s back problem was related to his foot injury, she referred him to a neurosurgeon, but Wal-Mart refused to authorize the appointment. Instead, it set up an IME with Dr. Robert Fletcher, who concluded that claimant’s back problem was unrelated to his accident at work.

At that point, Alexander filed a claim, requested a hearing, and obtained a ruling from both Chief Deputy Commissioner Gheen and the Full Commission that his foot injury and back problem were related. On October 19, however, in *Alexander v. Wal-Mart Stores*, a 2-to-1 majority of the Court of Appeals disagreed, finding that the testimony given by Dr. Harris was insufficient to support the Commission’s award of benefits.

Dr. Harris had testified that it was her “suspicion” Alexander had fallen backward as his

foot was run over and she “suspect[ed]” he injured his back at the time. But, when asked whether she could say to a reasonable degree of medical probability that his herniated disc had occurred then, she responded “I don’t know.” And, when asked on cross examination whether she was basing her opinion on an assumption that claimant had injured his back at the time he fell, Dr. Harris testified “[t]he chances are likely, ... [y]ou can’t tell.”

The Court of Appeals’ majority concluded Dr. Harris’ testimony was inadequate to support a finding that claimant’s accident and back injury were related. While acknowledging that expert testimony regarding the possible causes of a medical condition is *admissible*, the Court found it insufficient to establish causation, particularly when the remainder of the doctor’s testimony had shown her opinion to be no more than “a guess or mere speculation.” And, although Dr. Harris had used the word “likely” in response to one of counsel’s medical causation questions, viewing that answer in context established that she was describing a *possible* relationship between claimant’s foot injury and back problem, rather than a *probable* connection between them.

In her dissent, Judge Robin Hudson accused the majority of combing through the testimony of the expert witnesses and viewing it in the light most favorable to the defense. To Judge Hudson, Dr. Harris’ testimony, when taken as a whole, supported the Commission’s finding that it was “likely” claimant had ruptured his L5-S1 disc when he injured his foot. Consequently, she would have affirmed the Commission’s award of benefits.

Risk Handling Hint: The decision in *Alexander* follows a line of cases which culminated in the Supreme Court’s ruling on June 13, 2003 in *Holley v. Acts, Inc.* (see *Risk/Alert*, June 2003), which spells out the stringent requirements a claimant must satisfy to prove medical causation in those cases which involve injuries raising “complicated medical questions,” such as the origin of a back condition. A doctor’s opinion that claimant’s accident “could or might” have caused it is insufficient if the totality of his testimony establishes that he was testifying about possibilities as opposed to probabilities.