



CURRENTS IN ADA / FMLA / WORKERS' COMPENSATION

• WEEKLY CASE UPDATE •

CAPEHART SCATCHARD ATTORNEYS AT LAW

January 19, 2010



John H. Geaney, Esq. is a member of the Firm's Executive Committee and a Shareholder in the Workers' Compensation Department. His practice involves the representation of employers, self-insured companies, third-party administrators and insurance carriers in workers' compensation, the Americans with Disabilities Act and the Family and Medical Leave Act. You may contact Mr. Geaney directly if interested in training in any of these areas.

Long Distance Coffee Break Found Compensable

by John H. Geaney, Esq.

In *Cooper v. Barnickel Enterprises, Inc.*, A-1813-08T3, (App. Div. January 13, 2010), the petitioner worked as a master plumber and foreman for Barnickel. He was authorized to use the company truck for work purposes and for use to and from his home. He went to a job site on Saturday, February 8, 2003, and following that he drove to a union hall in Winslow Township to discuss plans for a new job which was scheduled to commence the following Monday.

The petitioner intended to speak with one of the two union instructors at the union hall but when he got to the hall at 11:15 a.m., he learned that the instructor was teaching a class and was unavailable at that time. Petitioner decided to take a coffee break and intended to return to the union hall at lunch time to speak with the instructor about the upcoming job. He then drove the company truck to a delicatessen five miles away from the union hall. About three or four miles into the ride he was injured in a car accident.

In testimony petitioner explained that coffee was not available at the union hall on Saturdays. He said, "I was going to kill some time, go get my coffee, come back and if I had time I'd sip it and when the class was over I could talk to John [the instructor] without interrupting him."

The factual record in the appellate division opinion is sparse but there is a footnote to the effect that respondent argued petitioner was really on the way to aid a former girlfriend who had been in an unrelated accident. She testified in court that petitioner planned to take her to the emergency room. The Judge of Compensation rejected her testimony as not credible.

The Judge of Compensation noted that petitioner was simply taking his regular paid coffee break when the accident occurred. Although petitioner admittedly bypassed other places where coffee was served, the Judge accepted as credible that petitioner knew the deli had good coffee. The Judge concluded that petitioner's activities squared with the rule in *Jumpp v. City of Ventnor*, 177 N.J. 470 (2003), which held that off-premises employees should be entitled to the same covered breaks as on-premises employees.

The Appellate Division reviewed the decision in *Jumpp* and commented that the 1979 Amendments to the New Jersey Workers' Compensation Act did not eliminate the "minor deviation" rule. Under that rule, a purely personal errand is not compensable but if an employee is still engaged in the performance of job duties, the activity is compensable. In this case, the Court was persuaded that

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at worst the drive to the deli was a minor deviation and was no different than what an on-premises employee would be doing in going for a coffee break. The Court said that once petitioner could not speak with the instructor, "It cannot be expected that he would stand like a statue or remain at the union hall with nothing to do for such a period, particularly when there was no coffee available at the site. We cannot conclude in these circumstances that the injuries were not compensable merely because petitioner chose to take his authorized 'coffee break' other than at the closest location."

As for the fact that the drive was five miles to the coffee shop, the Court said, "The distance of the coffee shop from respondent's off-site jobsite was reasonable given the rural nature of the community in Winslow Township and the time petitioner had to wait to seek the counsel he sought."

Readers should note that this is a reported case, and as such it is now the leading case on off-premises coffee breaks. It is an expansive opinion because there is no indication that the break was limited to a set time period like 15 minutes. Petitioner admitted he was trying to kill time and there is no discussion on the time boundaries in this case. ■

Appellate Division Rejects Intentional Harm Suit In Garbage Collector's Death While Working For Edison Township

by John H. Geaney, Esq.

Michael LaPoint worked for the Township of Edison in the sanitation department. He fell off the back of a garbage truck that then ran him over and killed him on April 15, 2002. Plaintiff's widow brought a suit against the Township of Edison alleging that the Township's actions in modifying the truck constituted intentional harm.

LaPoint was working as a garbage picker on the back of a Formula 5000 truck manufactured by Heil Packer Company on the date of his fatal accident. The truck was delivered to the Township of Edison in 1993. The truck was delivered without a platform step across the rear but the Township retrofitted it after delivery. The Township Public Works Department had been doing this to trucks since the 1980s, adding a rear platform step and grab bar.

Plaintiff produced an expert who gave an opinion that installing the additional step and grab handles provided a substantial hazard that was certain to result in injury or death because a worker riding on the rear step was not visible to the driver. An employee of Heil Packer Company testified that the company stopped putting rear platforms on their trucks because of the potential hazard. ANSI standards in 1999 eliminated the rear platform steps.

Several Township employees were deposed and said that there had been injuries while employees worked on the rear platform steps, such as banging a knee against the truck. No injury involved falling off the truck. One employee allegedly told a superior that the rear platform steps were illegal. Township officials indicated that they were unaware of the retrofitting program.

The Township had never been cited prior to this fatal accident for violations of state or federal laws related to trucks that had been retrofitted by the Township.

The Township moved for summary judgment, which was granted by the trial judge. The Appellate Division affirmed the dismissal of plaintiff's count for intentional harm.

This update is written by John H. Geaney, Esq., a member of Capehart Scatchard's Executive Committee. Should you have any questions or would like more information, please contact Mr. Geaney at 856.914.2063, by fax 856.235.2786, or by email at jgeaney@capehart.com.

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The Court did that plaintiff's proofs failed for the following reasons:

1) There was no similar prior claim of falling off the back of a truck while in reverse;

2) No regulatory body had warned or fined the Township for retrofitting its trucks;

3) There was a clear warning which alerted employees not to ride on the rear platform step when it was in reverse. The decedent's co-employee indicated that the decedent was attempting to urinate into the rear hopper of the truck while the truck was in reverse, notwithstanding all warnings on the truck about not riding while in reverse.

4) Prior court decisions have made clear that to prove an intentional harm claim, the plaintiff must show conduct which was substantially certain to cause death

or injury, and the Court believed no such evidence existed in this case.

The Court said, ". . . the mere act of retrofitting sanitation trucks with a rear platform step, even if part of a longstanding practice, does not establish a per se intentional wrong on the part of the Township. There must be a virtual certainty that a resulting injury or death will occur as a result of the Township's conduct. The record here does not present a genuine issue that such a virtual certainty existed."

This decision is consistent with the overwhelming number of opinions dealing with intentional harm claims during the past decade. The standard for proof of intentional harm claims in New Jersey remains extremely high.

This case may be found at *Mann v. Heil Packer, et. al.*, A-1293-08T2, (App. Div. January 13, 2010). 

Geaney's 2009 Workers' Compensation Manual Now Available

The 2009 Manual is a compilation of six prior editions with particular emphasis on cases and legislation decided in 2008. The year 2008 will be remembered for the highly publicized reform legislation of October 1, 2008. In addition, the Supreme Court and Appellate Division authored many important decisions on workers' compensation.

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Some of the 2009 Edition highlights are as follows:

Summary of 2008 Workers' Compensation Reform Legislation

Analysis of New Provisions on Emergent Motions for Medical Benefits

Analysis of New Enhanced Penalty Statute

The Critical Provisions of the New Jersey Paid Leave Law

Medicare's New Mandatory Insurer Reporting Requirements

New Chapter on Social Security Disability for Compensation Practitioners

Highlights of the 2008 FMLA Regulations Impacting Workers' Compensation

Highlights of the 2008 ADA Amendments Act

Expanded Discussion of Cases Construing the New Jersey Fraud Act

Analysis of "Odd-Lot Doctrine" and Case Law

Analysis of Key Supreme Court Decisions

Sroczyński v. John Milek (cancellation of coverage)

Cruz v. Central Jersey (non-retroactivity of dependency statute amendments)

Basil v. Frank A. Wolf (suits against IME doctors and carriers)

Richardson v. Bd of Trustees (relaxes accidental disability standards)

Analysis of Key Appellate Division Decisions

Scott v. Foodarama (paid travel time rules)

Dorsey v. First Atlantic (temporary disability benefits post-termination)


Mechetti v. Palermo Supply (bona fide offer rules)

Sexton v. County of Cumberland (occupational exposure to perfume)

Alvarado v. J&J Snack Foods (fees in dependency cases)

Flores v. Paragon Construction (casual employment)

Serpa v. New Jersey Transit (indemnification and Section 40)

For more information, including pricing, please contact either New Jersey Institute for Continuing Legal Education at 732-214-8500 or visit the website at www.njicle.com or contact John Geaney at jgeaney@capehart.com or Carol Wright at cwright@capehart.com. 

Upcoming Seminars

January 27, 2010

The undersigned will be presenting a seminar on Workers' Compensation Fraud to the South Jersey Claims Association at their monthly meeting. The presentation will address how to handle fraud in workers' compensation cases, how to recognize fraud when it occurs and what remedies are available. For more information, please contact the South Jersey Claims Association at info@sjclaims.com or visit their website at www.sjclaims.com.

April 22, 2010

The undersigned will be moderating a full-day seminar for Millennium Seminars at the Holiday Inn of East Windsor, New Jersey. More information to follow shortly.

May 6-7, 2010

The New Jersey Self-Insurers Association Spring Meeting will be held at Harrah's Resort and Casino in Atlantic City, New Jersey. More information to follow shortly. 