

Alabama Recognizes a Workers' Compensation Claim for Negligent Assignment

Dickey v. Midstream Fuel Services, Inc., (2050645), 3/9/07

The employee in this workers' compensation case worked as a deckhand and a tankerman on tugboats that push barges containing petroleum products. In September 1998, employer hired a doctor to perform pulmonary-function tests on this employee, revealing that he had severely obstructed airways. The Employer's safety director forwarded the results to Industrial Drug Testing, Inc. ("IDT") for analysis.

The safety director then asked IDT whether the employee's medical condition prevented him from wearing protective respiratory equipment; IDT said he could *not* wear protective equipment. However, the employer's safety department did *not* inform its operations department, which controlled the employee's job assignments. In October 1998, the employee was diagnosed with chronic obstructive pulmonary disease ("COPD"), and noxious fumes such as paint or petroleum fumes had contributed to his condition.

The Employee continued to work on the tugboats without wearing protective equipment. In 2001, he was ordered to paint the engine room on one of the tugboats, subjecting him to paint and exhaust fumes. In July 2004, the employee sued his employer to recover for injuries to his lungs caused by his exposure to noxious fumes.

The Employer asserted the statute of limitations as its defense. Dickey conceded that he could not recover for injuries he sustained more than three years before he filed his action. However, he argued that he was entitled to recover for damages that he had suffered within the three years, asserting a "negligent-aggravation claim" and a negligent assignment of him to unsuitable jobs. Furthermore, he argued that he was entitled to recover for injuries he sustained during the three-year period before he filed his action against the employer by virtue of a "modified continuing tort theory."

The trial court entered a summary judgment in favor of the employer, and the employee appealed. (1) The Court affirmed the entry of summary judgment for claims the employee suffered in the three years prior to July 8, 2004. (2) Claims for negligent aggravation and negligent assignment *were* recognized by the Alabama Supreme Court in *Chatham v. CSX Transportation, Inc.*, 613 So.2d 341 (Ala. 1993).

"A claim of negligent assignment requires proof that the employer knew of its employee's injury but nevertheless assigned that employee to unsuitable work." *Id.* A claim for negligent aggravation requires proof that the:

1) employee continued to work for the employer until a date that is within the three-year period before the employee filed suit,

2) an existing injury or condition worsened because of his work environment during that period, and 3) the employer was negligent in exposing the employee to the working conditions that caused the worsening condition or injury.