



June 29th, 2009

Hi Everyone,

Matt, Jamie and I hope that all of you have had a great month this June. It has been extremely hot here in the south and we have all been seeking some relief; unlike last month with so much rain, we are begging for it now and have been searching for a pool, beach and anything to cool us off. In fact, Jamie and I and 6 kids recently spent a few days at the beach, the weather was beautiful, breezy and the ocean was nice and cool. We had a wonderful time.

We at ESW hope that all of you have had your relief this summer and that your 4th of July will be spectacular and safe.

I have several things to report this month: Updates on ESW, several Alabama Weekly News Articles you might find interesting and upcoming events. Now, let's get down to business!!

ESW HIGHLIGHTS:

SPECIAL CONGRATULATIONS TO:

WALKER MOSS: Walker recently received his results for his Georgia Bar exam and he passed with flying colors. We are very proud of Walker and we wanted to share his success and our joy for him. Congrats Walker!!!

PLEASE NOTE:

Estes, Sanders & Williams will now be available to assist you with your workers comp, liability, personal injury, trucking, claims in the states of Alabama, Georgia and Tennessee. Please call us with any questions you might have regarding our coverage.

SPECIAL THANK YOU'S:

Jamie and I were recently in Atlanta Georgia visiting our Tokio Marine office and provided a educational seminar to the entire staff. We would like to say thank you to everyone in the Tokio Marine office for having us. We had a wonderful time and we are happy that we were able to provide you with the education you were looking for. Thanks again for your hospitality.

THINGS TO REMEMBER:

Estes, Sanders and Williams, will be closed on July 3rd, should you need assistance you can contact Jamie, Matt or me; our cell and email address are provided below. We will reopen on Monday July 6th. We hope that you have a safe and fun 4th of July!!!

We are traveling again: Jamie and I will be in Atlanta providing educational seminars to several of our clients on July 15th and 16th. If you would like for us to stop by, please don't hesitate to let me know.

We will also be in Portland Oregon on July 23rd- 27th, Jamie and I will be with Grocers Insurance and several other clients. If you are in Portland or you are working with an account in Portland and you would like for us to visit, please let me know we would be happy to take the time to make that happen.

On July 30th, Matt Williams will be speaking at the Alabama State Conference in Huntsville Alabama: Matt's topic: (Pre-Existing Conditions In Light of Alamo vs PCH).

UPCOMING CONFERENCES:

ESW will be hosting events for the upcoming conferences; please let us know if you will be attending any of them. I would be happy to add you to our invitation list for each event.

July 29th –July 30th: Alabama State Conference: Huntsville Alabama, (Matt will be speaking).

August 16th-18th: ASIA Conference: Sand Destin, Florida.

August 18th-19th: Florida Work Comp Conference: Orlando, Florida.

August 30th-September 2nd: Georgia Work Comp Conference: Atlanta, Georgia.

September 9th-10th: Alabama State Conference: Birmingham, Alabama, (Jamie will be speaking).

HAPPY BIRTHDAY:

All of us at ESW would like to wish all of you that had a birthday this month, a very HAPPY BIRTHDAY!!! Especially Elaine Perkins, Robin Talbert, Stephanie Hicks and Belinda Diamond, we hope you had a wonderful day.

THINGS YOU NEED TO KNOW:

Don't forget that ESW will gladly provide your office with Alabama Educational Seminars. Please let me know if your office would benefit with one on one time learning more about handling Alabama claims. I would be happy to organize a lunch & learn or a visit.

ESW CONTACT INFORMATION:

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ALABAMA WEEKLY LAW:

WORKERS' COMPENSATION – Retaliatory Discharge

Hatch v. NTW Inc., --- So.3d --- (Ala.Civ.App. 2009).

In October of 2005, the employee injured his back and reported it to his employer. The employee filed a first report of injury and was treated by an authorized physician. He also continued to work, and the employer provided him with some light duty work to better accommodate his back injury.

In December of 2005, an area director for the employer noticed the employee struggling with his duties and told him to take a leave of absence until he recovered. The employee did so on February 26, 2006, and he continued to receive treatment for his back. He was referred to another physician who placed the employee at Maximum Medical Improvement (MMI) on May 16, 2006. The employer was never informed that the employee had reached MMI. The employee disputed this finding and requested a panel of four physicians to seek a second opinion.

The employer corporation had a company policy that stated an employee could take a three month leave of absence due to a medical disability. A few months later, the employer wrote the employee a letter stating that his leave of absence was set to expire on May 25, 2006, and he would be discharged on that date since he had not been released to work. Further, the letter stated that he could return to work once he was recovered and the discharge would not affect his workers' compensation claim.

The employee filed a retaliatory discharge claim pursuant to *Ala. Code* 1975, § 25-5-11.1. The employer moved for summary judgment which was granted and the employee appealed.

The employee argued that he produced substantial evidence tending to show that the sole reason he was discharged was in response to his workers' compensation claim. However, the Alabama Court of Civil Appeals did not agree with him. They affirmed the lower court and agreed that the evidence showed that the employee was discharged because his leave of absence expired. Further, the employee failed to produce any evidence showing that this reason for discharge was just a pretext.

The Court of Appeals relied on other evidence derived from the record. The employee was discharged seven months following the filing of his claim, and the management department of the employer was unaware that the employee reached MMI when he was discharged.

In affirming the lower court, the Appeals Court ultimately held that the evidence proved a legitimate reason for the employee to be discharged, and no evidence was introduced that showed that the employee was fired solely because he filed the workers' compensation claim. Furthermore, the employee was unable to create a genuine issue of material fact concerning whether the employer's stated reason for his discharge was merely a pretext. Therefore, the summary judgment in favor of the employer was affirmed.

DATE: 06/18/09

RE: Revised recent decisions on premises liability, work comp, summary judgments, and review of benefits review board:

Premises Liability Cases:

Cotten v. St. Bernhard Preparatory School, 2009 WL 962522 (Ala.Civ.App.)

Plaintiff, Shirley Cotten, sued St. Bernard Preparatory School for injuries she sustained resulting from tripping over an uneven portion of a sidewalk. St. Bernard held an arts-and-crafts festival on its campus which Cotten paid a vendor fee to the defendant that allowed her to sell her crafts at the festival. Cotten crossed the sidewalk several times, from her car to her booth, without incident before tripping and fracturing her left arm.

St. Bernard moved for summary judgment on three theories. First, St. Bernard argued that it owed no duty to Cotten because she was a licensee rather than an invitee. Second, they argued that the uneven sidewalk was open and obvious. Third, St. Bernhard argued that Cotten was contributory negligent. The trial court granted Defendant's summary judgment motion and stated that Cotten was a licensee and not an invitee as a matter of law and therefore there was no duty owed to Cotten. Cotten appealed, and the Alabama Court of Civil Appeals reversed.

In reversing the trial court, the court of appeals held that there were genuine issues of material fact. Statements from the President of St. Bernhard led the court of appeals to conclude that the trial court erred in ruling that as a matter of law that Cotten was a licensee. The Defendant used the vending fees to pay for advertising. Further, they encouraged

donations from those attending and sold raffle tickets and food to the public. The next issue was the question of whether the sidewalk was an obvious hazard. Once again the court of appeals held that the trial court erred in finding that the uneven sidewalk was an open and obvious danger. Cotten's statements that she failed to see the crack coupled with the maintenance supervisor's statements that he would have repaired the uneven sidewalk if he had discovered it, created a genuine issue of material fact of whether the crack was open and obvious. Finally, there is also a question of whether Cotten was contributory negligent. The defendant failed to produce evidence that the plaintiff had a conscious appreciation of the danger when the incident occurred. Therefore, the ruling granting St. Bernhard's summary judgment must be reversed.

Hale v. Kroger Limited Partnership I, 2009 WL 565547 (Ala.Civ.App.) Shirley Hale brought suit alleging wantonness and negligence against Kroger for injuries he sustained after slipping and falling on spilled baby food. Kroger moved for summary judgment based largely on the testimony of Jason Perry, the Kroger manager on duty at the time of Hale's fall. The trial court granted Kroger's motion and Hale appealed. On appeal, Hale only contests the ruling as to his negligence claim. He argues that there was ample evidence that Kroger had constructive or actual knowledge of the spill, or that they were delinquent in not discovering the spill. The court of appeals disagreed and affirmed the trial court.

The relevant testimony given by the manager, Jason Perry, was that he was the manager at the time of the accident, and he was familiar with Kroger's sweep/spot mop procedure. The procedure was performed every hour. Perry confirmed that employees carried out a sweep of the store at 6:00 p.m., and the area around the automatic checkout lane was clean. Soon thereafter, Hale fell in the area of the automatic checkout. Hale was wearing boat shoes which appeared worn on the bottom. Hale contends that since two Kroger employees were in the area, they should have known of the spill. However, in his deposition he states that he had no actual knowledge that any employee or customer knew of the spill preceding his fall.

The appeals court relied on the testimony of Perry who stated that Kroger employees performed a sweep at 6:00 p.m. just prior to Hale's fall. Hale further testified that the spill appeared fresh. Also, Kroger had no knowledge of the spill until Hale slipped in it. Hale misunderstood an employee's statement that the mop squad had been called. He believed that they had been called before he fell, but in reality they were not called until after he fell. Furthermore, the evidence of the 6:00 sweep killed any claim that Kroger was delinquent in learning of the spill. Finally, Hale claims the mere existence of a spill creates a genuine issue of fact. However, Alabama law states that the mere presence of an offending substance does not automatically give rise to liability. Trial court is affirmed.

Workers' Compensation Case: Causation—Permanent Disability:

Waters Bros. Contractors, Inc. v. Wimberly, 2009 WL 565419 (Ala.Civ.App.)

On February 22, 2002, an employee injured his shoulder while working as a heavy equipment mechanic. He continued to work for a few days but complained of pain in the days following. The employer sent him to a doctor who diagnosed the employee with a torn rotator cuff. He was then sent to an orthopedic surgeon. The surgeon ordered an MRI on the employee and found numerous problems and damage to his shoulder. The surgeon also stated that all these injuries stemmed from his accident on February 22nd. The employee had surgery in April of 2002, and he later returned to work full time in July of 2002. Later in October, the employee went to his first doctor who believed that his strenuous work was further complicating his shoulder injuries. He continued to complain of pain and saw the doctor again

in early 2003. The doctor told him it was going to continue to get worse if he continued at his job. The employee continued because he didn't fall into any of his employer's retirement plan.

In 2004, employee complained of pain in his neck and left arm. The doctor imposed work restrictions of no lifting of over twenty pounds and no repetitive use of the left arm. In December of 2004, the employer sent him to a different orthopedic surgeon who stated that it might be unreasonable for him to continue work. However, he sent him back to work with more work restrictions. When the employee returned, he was not allowed to continue working. The surgeon's diagnosis was gout and arthritis. He performed surgery and following the surgery, the employee still felt pain in the shoulder when he moved or lifted his arm. The surgeon placed restrictions on his work which he later modified. In August of 2005, the employee reached maximum medical improvement. The surgeon assigned an 18% permanent impairment rating to the left upper extremity.

The employee applied for Social Security disability benefits, and the employer terminated his employment because they were no longer able to accommodate his work restrictions. The employee filed a complaint seeking worker's compensation benefits. At trial, there was deposition testimony of the orthopedic surgeon who stated that most of the shoulder complications are directly related to the employee's 2002 accident. However, he also gave his opinion that the 2002 injury did not medically cause the employee's gout, cervical problems, or degenerative arthritis. The employee, now 62 testified how his quality of life had changed and he could no longer sleep. A vocational expert for the employee found that he had no transferable skills to jobs within his capacity and assigned him 100% vocational disability rating. However, a vocational expert for the employer assigned him a 30% vocational disability rating and stated that the employee remains capable of working a variety of light-duty jobs. The trial court held that the pain and limitations from the injury rendered the employee permanently and totally disabled. The employer appealed.

The court of appeals in affirming the trial court held that taking into account the totality of the circumstances, that the trial court did not abuse its discretion by concluding and agreeing with the employee's original doctor that he had full use of his shoulder prior to the 2002 accident. Secondly, the appeals court concluded that the employee presented substantial evidence, that as a result of 2002 injury, the employee was left with little use of his left arm and shoulder. Finally, the court agreed with the trial court that there was evidence that it would be highly unlikely that the employee would be able to re-enter the workforce. The judgment is affirmed.

Civil Procedure Case: Summary Judgment:

Jones-Lowe Co. v. Southern Land and Exploration Co., Inc., 2009 WL 567036 (Ala.)

Southern Land and Exploration Company (SOLEXCO) filed an action to quiet title to mineral rights in certain property against Jones-Lowe Company. The dispute involved several complex chains of title. SOLEXCO filed a single document, namely, a motion for summary judgment which included a section of "statements of material undisputed facts." The lower court granted SOLEXCO's motion and Jones-Lowe appealed. Jones-Lowe argued that SOLEXCO failed to satisfy its burden on the summary judgment, so therefore, Jones-Lowe's summary judgment should be granted.

The Court held that SOLEXCO did not meet its burden required when presenting a motion for summary judgment. They relied on statements and deeds that were never filed with the lower court. Therefore, SOLEXCO's sole statements were not facts before the court and the granting of their summary judgment motion was improper.

Next, the Court turned to Jones-Lowe motion for summary judgment. They are not

entitled to a judgment simply because SOLEXCO failed to meet its burden. Instead, they must affirmatively show that they are entitled to a judgment as a matter of law. The court concludes that Jones-Lowe has failed to meet their burden as well. On the issue of who has possession of the land, Jones-Lowe introduced only a few conclusory assertions which fall short of what is required to meet their burden.

Finally, the Court denied consideration of an argument put forth by Jones-Lowe for the first time on appeal. It is established that on an appeal from a summary judgment, this Court cannot hold the trial court in error on the basis of arguments made for the first time on appeal. The granting of the summary judgment in favor of SOLEXCO is reversed, and Jones-Lowe's motion for summary judgment is denied.

Review of Benefits Review Board Case:

***Del Monte Fresh Produce v. Director, OWCP, et al.*, 563 F.3d 1216 (11th Cir. 2009)**

William Gates was injured twice within eight months while on the job working for Del Monte. The first injury occurred when another forklift ran into the back of his forklift causing injuries to his hands. The second injury occurred when he was hit by a forklift and further complicated when a heavy pallet was lowered on to his heel. This second accident left him with injuries to his neck, back, shoulder, and foot. Gates was unable to perform his forklift/warehouse duties after the injuries, and he was given a lighter job until the plant closed a year later. He then found work as a security guard.

Gates' disability benefits were calculated according to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(21), which entitled him to 2/3 the difference between his pre-injury wages at Del Monte and his post-injury wage earning capacity. His wages and hours he worked as a security guard were used to calculate his earning capacity. Gates was transferred from one security job to another that decreased his pay. Then, following a four month period where his work hours were cut from forty to twenty a week, Gates asked for an increase in his disability award from Del Monte on the theory that his wage earning capacity had been reduced. An administrative law judge granted the request and Labor Benefits Review Board affirmed. Del Monte appealed, but the Eleventh Circuit Court of Appeals affirmed.

First, Del Monte argued that Gates is not eligible for a modification because he was transferred from one security job to another because of misconduct. They presented testimony of another employee that stated Gates was transferred because of insubordination. However, there was nothing in Gates personal record that reported an official reason for his transfer. Also, it is undisputed that he was promoted within a week of the transfer. The ALJ didn't give credit to the employee's testimony because of the lack of an official record and Gates promotion. The ALJ did not abuse its discretion in holding the transfer was not due to misconduct because there was substantial evidence.

Second, Del Monte argued that Gates failed to meet his burden of showing a decrease in his wage-earning capacity based on his disability. However, Gates satisfied his burden by showing reduction in his wages and hours as well as remaining physically unable to perform his former job. Further, Del Monte failed to offer any labor market studies or vocational evidence to prove there were suitable alternative jobs for Gates. Therefore, Gates proved a reduction his of wage earning capacity.

Third, Del Monte argued that the ALJ erred by basing the award modification on changes in Gate's actual wages instead of making a new finding about his wage earning capacity. The ALJ considered Gates military background, experience, supervisory skills, and education. Del Monte claimed the ALJ erred by not considering his age, education, physical condition, and availability of jobs. However, Del Monte's argument is flawed because these factors were

considered in Gate's initial hearing. The issue is about modification, not his initial wage earning capacity. As discussed earlier, Del Monte failed to prove the availability of alternate jobs.

Finally, Del Monte claimed that they were owed a credit from wages that Gate's earned properly raised by Del Monte. It was within the discretion of the ALJ to refuse to hear those issues that were above his normal hourly wage. The ALJ refused to address this issue claiming it was not when not properly raised. Affirmed. AL Law Weekly - 06/12/2009

Workers' Compensation: Scope of Settlement

Matthew's Masonry Co. v. Aldridge, — So.3d— (Ala.Civ.App. 2009).

The employee sustained injuries to his cervical and lumbar spine while on the job in 1998. Two years later he complained of weakness in his lower left extremity stemming from altering his gait. The employee moved to amend his complaint to add the new injuries but before a court could rule on that issue the parties reached a settlement. The employer agreed to pay \$80,000, with future medicals open, and the employee agreed to waive any claim to future medical treatment or expenses in connection with his knees. The trial court approved the settlement.

Later, the employee sought a motion to compel the employer to pay for medical treatment relating to his right knee. The trial court then held that the right knee injury was related to the original back injury and ordered the employer to pay for necessary treatment and expenses. The court of appeals remanded citing that the trial court failed to consider the previous settlement agreement between the parties. On remand, the trial court found the employer responsible for expenses and treatment of the employee's right knee because there was a latent ambiguity in the settlement agreement. The employer appealed, and the court of appeals reversed and remanded.

The terms of the settlement agreement between the employee and employer were clear and unambiguous. The employee agreed to waive any claim for medical expenses or treatment related to his knees. Prior to the settlement the employer knew that the employee was experiencing pain in his knees which could be related to his previous back injury. The employee understood that he was waiving a claim for injuries he believed and maintained were compensable solely because of their relationship to his back injury. The judgment of the trial court is reversed and remanded.

I know that is a large amount of information; however, I hope that all of you have found it beneficial.

As always, please remember to let us know if you have any questions regarding the information in our newsletter.

Once again, we hope you have a great 4th of July and we are here if you need us.

Take care,
Lisa, Matt and Jamie