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## Recent Case Dismissal Challenges "Geographic Presumption"

A recent decision from the Occupational Safety and Health Review Commission provides employers who must log workplace injuries and report workplace fatalities some latitude as to when an injury or fatality is "work-related." Specifically, in a matter in which Haynes and Boone represented the employer/respondent, the Commission clarified that simply because a fatality or injury occurs while at work, this is insufficient to presume the cause was work-related to trigger OSHA reporting or presumably injury-log recording duties.

On September 16, 2009, the Commission reversed an Administrative Law Judge's decision upholding a citation of a retail store that did not alert OSHA within eight hours after an employee died under mysterious circumstances. (*Secretary of Labor v. The Home Depot #6512*, OSHRC, No. 07-0359). In doing so, the Commission appears to be testing the presumption that injuries and deaths that occur at work must therefore be work-related.

At the trial level, the employer presented evidence that the employee worked as a Lot Associate at a retail location in Tomball, Texas. Shortly after he arrived to work on August 17, 2006, a customer found him lying by a car in the store parking lot. Company personnel called emergency services and, when they arrived, the paramedics informed management that the Associate suffered from what appeared to be a diabetic-type episode. The ambulance transported him to a nearby hospital. He died two days later. The employer did not report the fatality because it was not deemed to be work-related.

Under 29 C.F.R. § 1904.39(a), employers are required to report the death of any employee stemming from a work-related incident within eight hours of the fatality. In § 1904.5(a), the recordkeeping/reporting regulations define "work-related" and create a "geographic presumption" of work-relatedness where events or exposures in the work environment cause the fatality. The geographic presumption may be applied only where the illness resulted from an event or exposure at the workplace.

In a decision issued September 7, 2007, Administrative Law Judge Benjamin R. Loye concluded that the employee's presumed fall was work-related. According to the ALJ, "[T]he evidence suggests that the Associate fell in the [store] parking lot, sustaining the head injuries to which he eventually succumbed. That the cause of his fall cannot be established is not relevant."

In its appeal to the Commission, the employer argued that "there is simply no evidence but conjecture and speculation by the Secretary that a work-related event or exposure caused or contributed to the employee's condition" when the customer found him.

The position the Secretary of Labor advanced in the appeal fundamentally altered the plain language and requirements of 29 C.F.R. § 1904.5(a) to transform the 29 C.F.R. § 1904.39(a) reporting requirement into something that it is not, namely, a rule that makes all injuries or illnesses reportable/recordable solely if they occur in the "work environment," unless subject to one of the limited exceptions.

In rejecting the Secretary's reasoning, the Commission reversed the ALJ, explaining that the Secretary of Labor's interpretation swept too broadly. The Commission reached this conclusion by reviewing the history of the § 1904 standard. When promulgated, the Secretary of Labor had considered identifying an injury as work-related if a "worker ever experienced a workplace event . . . that had any possibility of playing a role in the case."

The final rule, however, departed from this proposed language by providing that, “injuries and illnesses are work-related if events or exposures at work either caused or contributed to the problem.” According to the Commission, “pure speculation” that an event at work may have caused or contributed to an injury or illness cannot be enough to trigger a violation of the § 1904 reporting rule.

Based on the Commission’s decision, employers appear better positioned to refute the Department of Labor’s attempts in OSHA citations to remove from § 1904.5(a) the ultimate question of whether a *workplace event or exposure* caused or contributed to the injury or illness. Simply because an injury or fatality happened at work does not mean that the cause was “work-related” and would require Section 1904 compliance.

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