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Gallagher Sharp Shop Talk: Workers' Compensation

Sometimes, we try to bring your attention to interesting workers' compensation cases from other jurisdictions. One of those cases was recently decided by the Supreme Court of Montana in a claim involving marijuana and grizzly bears, and the meaning of "employment."

In *Hopkins v. Uninsured Employers' Fund* (2011), 359 Mont. 381, employer Russell Kilpatrick owned a drive-thru park that allowed visitors to experience bears in their natural habitat. While Kilpatrick did not condone marijuana use by employees, testimony established that he had smoked marijuana at the Park in the past, and had occasionally done so with the claimant, Brock Hopkins. On November 2, 2007, Hopkins smoked marijuana on the way to the Park. It was disputed whether Kilpatrick instructed Hopkins to feed the bears. (A lower court had determined that Kilpatrick never told Hopkins not to feed the bears.) After doing some other work, Hopkins mixed food for the bears and used Kilpatrick's truck to drive into the Park. Once he was inside the bears' pen, the largest bear attacked him, causing serious injuries. Hopkins filed for workers' compensation benefits, which were contested by the employer. After the claim was allowed, the employer raised four issues on appeal: (1) whether Hopkins was "employed" by Kilpatrick at the time of the injury; (2) whether Hopkins was in the "course and scope" of his employment at the time of injury; (3) whether marijuana use was a contributing cause of Hopkins' injuries; and (4) whether Hopkins was performing services for the employer in return for aid or sustenance only. (Essentially, the employer argued that Hopkins was a "volunteer" to whom he would give money to "out of the goodness of his heart.")

The court quickly disposed of the "volunteer" argument ("[t]here is a term of art used to describe the regular exchange of money for favors – it is called 'employment'.") The court similarly disposed of the "course and scope" argument by finding that even if Hopkins was not told to feed the bears, Kilpatrick "benefitted from the care and feeding of the bears that Hopkins provided since presumably customers are unwilling to pay cash to see dead and emaciated bears." Turning to the marijuana issue, the court found that drug use had not been shown to have been a contributing cause of the injuries. The court acknowledged that the "use of marijuana to kick off a day of working around grizzly bears was ill-advised to say the least and mind-bogglingly stupid to say the most." But the court concluded that grizzlies are "equal-opportunity maulers," without regard to marijuana consumption, and allowed the claim.

Putting the court's humor in *Hopkins* aside, it is likely that a similar result would be reached under Ohio law. It was clear that Kilpatrick had considerable "direction and control" over Hopkins, and while Ohio's drug policy contains a "rebuttable presumption" limitation, it is doubtful that the employer in *Hopkins* would have complied. If you have any specific questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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