From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can the failure to provide a face mask constitute the removal of an "equipment safety guard" under Ohio's intentional tort statute?

Ohio Rev. Code § 2745.01 was enacted to permit recovery by employees in situations where an employer acts with specific intent to cause an injury, typically where employers subject employees to dangerous conditions or remove safety mechanisms. Recently, the Ohio Court of Appeals, Sixth Appellate District, was presented with the question of whether an employee may maintain a cause of action for "intentional tort" by demonstrating that his employer's failure to provide protective face masks constituted the removal of an "equipment safety guard," as referenced in R.C. 2745.01(A).

Beyer v. Rieter Automotive North American, Inc., 2012-Ohio-2807, involved an employee who developed silicosis, a progressive lung disease, over 30 years as a result of breathing in particles of silica while working in the employer's plant. The employee brought suit, arguing that protective face masks were at times not available to prevent the employee from breathing in silica dust, and that the face masks should be construed as "equipment safety guards" as referenced in R.C. 2745.01(A). The employer moved for summary judgment, arguing that the employee could not maintain a claim for intentional tort because face masks were not "equipment safety guards" and failing to provide them did not establish "specific intent to injure" as a matter of law under R.C. 2745.01(B) and (C). The trial court agreed and granted summary judgment in favor of the employer, and the employee appealed.

The Sixth District reversed, finding that because the General Assembly did not define the term "equipment safety guard" in R.C. 2745.01, the term must be read in context and given its plain, ordinary meaning. While the Court acknowledged that it previously held "equipment safety guard" should be interpreted strictly as a device for protecting a machine operator, it acknowledged that this interpretation was too narrow. The Court stated that "to exclude all protective equipment simply because it is not attached to a machine is to produce an absurd result." The Court concluded that "equipment safety guards" could include free-standing equipment, such as personal safety equipment, and that the employee had provided sufficient evidence to establish a rebuttable presumption of the employer's "deliberate attempt to injure" due to the removal of an equipment safety guard.

While consistent with other decisions concluding that safety equipment can constitute a "guard," the *Beyer* decision can be seen as an expansion of this cause of action. For employers, particularly those that provide safety equipment to employees, *Beyer* should prompt an evaluation of equipment policies. If you would like to submit a question to Shop Talk, 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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