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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Is an employee injured as a result of an assault by a non-employee on company property entitled to workers' compensation benefits?

A recurring question in workers' compensation circles concerns whether an employee who is a victim of an assault at or near his workplace is entitled to workers' compensation benefits. In addition to applying the well-established "in the course of" and "arising out of" standards set forth in the statute, appellate courts have generally focused on two factors: 1) was subject matter of the assault work-related? 2) was the claimant a victim, and not the instigator? *Meager v Complete Auto Transit, Inc.*, 1992 WL41831. Most courts have concluded that an assault can result in a compensable claim only if the answer is "yes" to both questions. Recently, the Second District Court of Appeals considered a case involving an assault that occurred in a company parking lot, and whether the incident resulted in a compensable work-related injury.

Garner v. Ohio Bur. of Workers' Comp., 2018-Ohio-3398, concerned an employee who arrived at his maintenance job at a glass factory at approximately 5:50 am for his 6:00 am shift. After pulling in to the company parking lot, he encountered a vehicle stopped in his lane of travel. After waiting for several seconds, he elected to pull around the vehicle and proceeded to park his car. After doing so, he was confronted by the other driver, who was a husband of a fellow employee. After a verbal altercation concerning the proximity of their cars, the husband punched the claimant in the nose. Later, the claimant attempted to block the husband's vehicle from exiting the lot, and was struck at low speed. The police were called, but elected not to charge the husband. The claimant was treated for a broken nose, including undergoing a surgical procedure to repair the damage. He filed a workers' compensation claim against his employer, which was denied administratively at all levels based upon the conclusion that the claimant did not sustain his injury in the course of, and that the injury did not arise out of, his employment. The claimant filed an appeal to the Montgomery County Court of Common Pleas, but a trial court agreed with the Industrial Commission of Ohio and issued an order granting summary judgment to the employer. An appeal of right was then taken to the Second District Court of Appeals.

The Second District affirmed, concluding that the injury failed the first aspect of the "assault" test because the assault was not "work-related." While the claimant was not an instigator, the incident did not arise in the actual workplace, did not occur during work time, and did not directly involve a fellow employee. This assault took place before the claimant had punched in, and there was no allegation that he was performing work duties when he suffered the injury. Also, there was no allegation that the claimant was performing work or acting within the scope of the employer's permission at the time he was assaulted. The only factor connecting the assault in any way to the claimant's employment was the location where it occurred, which is not sufficient to satisfy the "in the course of" and "arising from" tests set forth in R.C. 4123.01. Therefore, the Court found that the trial court acted correctly in granting summary judgment.

Garner is notable as it reflects the difference between assault cases and "slip and fall" incidents in the eyes of the law. Had the claimant in *Garner* fallen on an icy patch in the parking lot on his

way to punch in, it would be much more likely to be recognized as an allowed claim. Also notable was the fact that, while the employer had security in the lot, the security was not there to protect employees from assaults from other persons.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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