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Recent Developments: The May Dep't Stores Company v. Harryman: "Business Premises" under Workmen's Compensation Extended

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Hodges v. Evisea Maritime Co.: DUTY TO CORRECT OR WARN OF CONDITIONS IN LONGSHOREMAN'S ACT

In *Hodges v. Evisea Maritime Co.*, 801 F.2d 678 1986), the U.S. Court of Appeals for the Fourth Circuit has held that under the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. § 905(b) (1982), before a shipowner can be said to have a duty to correct or warn of a condition arising during cargo operations, the shipowner must be chargeable both with knowledge of the condition and with knowledge that despite the danger, the stevedore is continuing its operations.

On July 26, 1977, the M/V Concordia Sky, owned by Evisea, was engaged in cargo operations in Virginia when an unidentified and semiconscious man was discovered in the No. 3 tween deck. The man, unable to communicate and initially mistaken for a stowaway, was eventually taken to a hospital. Several days later he was identified as Gary Hodges, a longshoreman who had worked on the Concordia Sky during its loading in Baltimore on July 25th.

An investigation was subsequently conducted by Liberty Mutual, the compensation carrier for the stevedore employing Hodges, Robert C. Herd & Co. No eyewitnesses to Hodges' injury were found. Hodges had suffered serious head injuries, leading him to claim a retrograde memory loss and an inability to recall anything immediately prior to or following his apparent accident. Because Liberty Mutual could not satisfy its statutory burden to show that Hodges' injury was not work related, Hodges was awarded disability benefits paid by Liberty Mutual pursuant to the Act.

Hodges subsequently sued Evisea and the charterer of the Concordia Sky, Concordia Line, alleging that the ship's negligence caused his injuries. Liberty Mutual intervened as a plaintiff to protect its interest. A directed verdict was subsequently entered in favor of Concordia Line.

Hodges' theory of negligence turned primarily on his assertion that prior to his injuries he was working in the ship's No. 2 hold, that he returned to the previously loaded No. 3 hold to obtain additional dunnage, and fell through an open hatch on the No. 3 upper tween deck. Hodges claimed that the vessel's owners were negligent both in leaving the hatch open and in failing to provide adequate lighting or other safety measures that would have prevented the fall.

The 1972 amendments to the Act eliminated the right of longshoremen to recover from a shipowner for acts caused by unseaworthiness, and further limited the right to recover to those injuries caused by the shipowner's negligence. *Id.* at 683. Under the amendments, the determination of the applicable standard of negligence was left to the courts.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the Supreme Court clarified the relative duties of shipowners and stevedores, under the Longshore and Harbor Workers' Compensation Act. The *Scindia* Court concluded:

> Section 905(b) of the LHWCA does not impose upon the shipowner a continuing duty to inspect the cargo operations once the stevedore has begun work. Rather, prior to the commencement of stevedoring operations, the shipowner must "at least" exercise ordinary care under the circumstances to have the ship in such a condition that an experienced stevedore, with the exercise of reasonable care, can carry out its operations. The shipowner must warn the stevedore of hazards that are or should be known to the vessel, if the hazards are not known or should be known to the stevedore. The vessel is also liable, after the stevedoring work has begun, if it actively involves itself in the cargo operations and its negligence causes an injury, or if it fails to exercise due care to intervene to protect longshoremen from hazards under the active control of the vessel during the stevedoring operation.

Id. at 166-168.

The *Hodges* court determined that there was evidence from which the jury could conclude that under *Scindia*, the owner's or crew of the vessel had a duty to intervene and exercise their control over the No. 3 hold to eliminate the dangerous conditions of the open hatch and poor lighting. The court also concluded that there was sufficient evidence of a breach of this duty by the vessel.

Having held that the jury instructions relating to the allocation of duties of care with respect to dangerous conditions between the vessel and stevedore during ongoing stevedoring operations were inadequate under *Scindia*, the *Hodges* court found it necessary to reverse and remand the case for a new trial. The sole jury instruction given by the trial court addressing the relative duties of stevedores and shipowners once stevedoring operations are under way was the following: "It is not contended by the plaintiffs that the shipowner had a duty to superintend or oversee the operations of the stevedoring company or its employees, and the shipowner in fact had no such duty under the facts of this case." *Hodges* 801 F.2d at 686. The court stated that the evidence required a more detailed instruction delineating the limits of the shipowner's duty to intervene during cargo operations with respect to the dangers posed by the open hatch and unlit hold.

Prior to the *Hodges* decision, the Fourth Circuit had yet to give effect to the 1972 amendments to the Act. The *Hodges* court adopted the holding of the Supreme Court in *Scindia* with respect to the standard of negligence applicable to shipowners under the Act.

This decision places a heavy burden on stevedores to avoid injuries caused by obvious hazards. The high standard of care now placed on stevedores is apparent from the fact that the duty of shipowners exists only as a supplement to the duty of stevedores in supervising its longshoremen so that injuries will not result from obvious or warned of defects of the vessel. Thus, under the Longshore and Harbor Workers' Compensation Act., 33 U.S.C. § 905 (1982), the duties of the shipowner are now limited, and the primary burden to avoid injuries is now placed upon the stevedore.

—Jennifer Crump

The May Dep't Stores Company v. Harryman: "BUSINESS PREMISES" UNDER WORKMEN'S COMPENSATION EXTENDED

The Court of Appeals of Maryland in *May Dep't Stores Co. v. Harryman*, 307 Md. 692, 517 A.2d 71 (1986), has concluded that an employee who was injured on an assigned parking lot, while she was proceeding directly to her workplace, is entitled to an award under the Workers' Compensation Act, Md. Ann. Code art. 101, §§ 15 and 67(6), (the Act). The decision extends, under certain circumstances, to situations where the lot is not directly owned by the employer.

The employee, Muriel Harryman, was employed by The May Department Stores Company, T/A The Hecht Company (Hecht's). The store in question was one of many tenants at a county mall, which is surrounded by a parking lot. On November 28, 1983, Ms. Harryman parked her car in the designated parking area, pursuant to a lease agreement between the employer and the owner of the lot. As she approached the mall entrance (about two car lengths from her vehicle), a person came

behind her, grabbed her purse, and in so doing, caught it on her coat. Then, in an attempt to disentangle the bag and escape, the assailant threw Ms. Harryman to the pavement.

Claiming an injury as a result of this incident, Ms. Harryman brought her case before the Workers' Compensation Commission. She prevailed, and her employer subsequently appealed to the Circuit Court for Baltimore County. After summary judgment was granted Ms. Harryman, the employer turned to the Court of Special Appeals of Maryland for relief. It, in turn, affirmed the circuit court's decision. On certiorari, the court of appeals considered the important public issue presented by this case.

Hecht's alleged that because the parking lots surrounding the mall were not owned by the store, the lots should not be viewed as part of the premises, within the meaning of the Act. The employer urged that the court invaded legislative territory by extending the statute to include such areas and that this intrusion entitled it to a de novo circuit court trial.

The court of appeals initially turned to the requirements of the Act that must be satisfied to award an injured employee. The court noted that the statute specifies an injury must arise out of and in the course of the employment and emphasized that the statutory definition of "injury" includes any purposeful or negligent act by a third party against the employee, while that employee is in the course of his or her employment. The court found support for this interpretation in *Giant Food, Inc. v. Gooch*, 245 Md. 160, 225 A.2d 431 (1967). There, a compensable injury was found when an employee was shot while on his employer's parking lot. The court was persuaded by the reasoning in *Giant Food*, and agreed that third party actions against an employee, while on the premises, that result in harm to the employee, are within the intentions of the Act.

Having overcome this threshold point, the court proceeded to the question of whether the injury was sustained in the course of employment. The query in this case was confounded by the fact that the employee had not begun performance of her work duties. But, the ruling in *Department of Correction v. Harris*, 232 Md. 180, 192 A.2d 479 (1963), was that a compensable injury occurs when the employee is "fulfilling those duties or engaged in something incident thereto." *Id.* at 184, 192 A.2d at 481. The court accepted this to embrace the period of time when an employee has arrived at the place of employment and is preparing to enter the workplace.

The court next addressed the problematic issue of the non-employer owned parking lot. The court referred to its ruling in *Proctor-Silex v. DeBrick*, 253 Md. 477, 252 A.2d 800 (1969), where it noted therein the absurdity of allowing recovery when the injury is directly on employer-owned property, but refusing recovery when the injury occurs on the employee's uninterrupted path to the workplace, but not on the employer's property. The court there concluded that "the injuries sustained by the plaintiff to have arisen out of and in the course of her employment." *Id.* at 489, 252 A.2d at 803. The injuries in *Proctor-Silex* occurred on the pedestrian sidewalk abutting the employer's office, as Mrs. DeBrick was arriving for work. The court of appeals chose, however, not to immediately analogize this decision to the unique situation of mall parking lots, and turned instead to 1 A. Larson, *The Law of Workmen's Compensation*, § 15.42 (a) (1985), which states that most jurisdictions consider parking lots part of the premises, and is not limited to

> parking lots owned, controlled or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's special permission, or just used, by the employees of this employer. Thus, . . . if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable.

Id. at 4-87 to 4-101.

Several cases in other jurisdictions have followed the reasoning set forth in Larson. Particularly germane is the Ohio case of *Frishkorn v. Flowers*, 26 Ohio App.2d 165, 270 N.E.2d 366 (1971). In overturning the traditional holding that the premises must be owned or controlled by the employer, the court said that this concept was too narrow in the special circumstances of the shopping center workplace. It further noted that

> [T]he employer and the other tenants of the [shopping center], having reciprocal rental rights and privileges, were also accorded the common use and access of the parking area . . . for the purpose of adequately serving and furthering their business interests. It follows that the appellant-employee, as well as the employees of the other tenants, derived their similar rights and privileges from the shopping center by virtue of a vested privity in the objectives of their employers.

Id. at 168-169, 270 N.E.2d at 369.

In consideration of the uniqueness of this employment situation, the *Frishkorn* court developed a test to assist in establishing the boundaries of the premises. It decided that the statutory definition was meant to be dynamic and thus adaptable to different circumstances. The meaning of the premises must be determined "from the logical and close association of the surrounding area to the premises of employment, together with the peculiar circumstances . . ." *Id.* at 169, 270 N.E.2d at 369. It further elucidated that if a worker sustains an injury resulting from those circumstances and "while discharging a duty to the employer as a necessary incident to his work, he is entitled to compensation, notwithstanding the fact that the surrounding areas are neither owned nor controlled by the employer." *Id.*

The Court of Appeals of Maryland noted that other jurisdictions have held that injuries received on parking lots such as the one in issue in this case are not compensable. However, the court concluded that this interpretation is too narrow, and adopted instead the broader construction. It viewed this as consistent with its holding in *Proctor-Silex*, and as not overstepping its jurisdiction into the legislative arena.

In attempting to define the limits of business premises, the holding in *May Dep't Stores* perhaps raises more questions than it resolves. If an employee, for instance, arriving at work and parking in a non-employer owned but designated for-the-employee lot, trips in a pothole and sustains an injury, is the employer then liable? If so, must he then assume the maintenance and upkeep of the lot to shield himself from such liability? Does this then absolve the owner from such responsibility as to the employer's employees? Or, may the employer proceed against the owner on a negligence theory? These and other issues remain to be addressed in a more precise manner.

—Margaret E. Swain