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Illinois Appellate Court Allows Employees to Sue Employers in Tort For Latent Disease Claims

July 14, 2014
Hinshaw Alert

Folta v. Ferro Eng. (No. 1-12-3219) (1st Dist. IL App. Ct.) (June 27, 2014) is a case of first impression in Illinois that was delivered by Justice Taylor with Justices Gordon and McBride concurring in the judgment and the opinion. The decision determines that an employee can sue his employer outside the Workers' Compensation Act (820 ILCS 305/1) and the Workers' Occupational Diseases Act (820 ILCS 310/1) (collectively, the "Act"), despite their respective 25- and three-year statutes of repose for abestos-related injuries and diseases.

From 1966 to 1970, Plaintiff James Folta—allegedly exposed to asbestos at the Ferro Engineering plant—was diagnosed with peritoneal mesothelioma in 2011. He filed an action in tort in the Circuit Court of Cook County on June 29, 2011, against Ferro Engineering and 14 other defendants. Ferro's motion to dismiss per the Code of Civil Procedure, 735 ILCS 5/2-619, initially granted at the trial court level as subject to the exclusive remedies of 820 ILCS 305/5(a) and 820 ILCS 310/11, was reversed at the appellate level on the grounds that an action is not barred where claims "are not compensable" pursuant to *Meerbrey v. Marshall Field & Co., Inc.,* 139 Ill.2d 455, 467 (1990). According to the appellate court, non-compensable was construed to mean without other remedy at law where an injury of an employee caused by an employer is not discovered during the period of limitations prescribed by the applicable statutes.

Background

Plaintiff worked as a nonunion clerk and product tester at the Ferro plant. In particular, Plaintiff performed quality control testing that involved cutting and sawing of asbestos products, which created asbestos fiber dust the plaintiff then inhaled. Plaintiff alleged that Ferro knew of the health risks but failed to inform him or provide respiratory safety equipment. Plaintiff's complaint against Ferro included negligence, premises liability, intentional misconduct, and fraud, non-inclusive of his claims against the asbestos suppliers not addressed here.

Ferro argued that all such claims were excluded by the Act, which was in effect at the time of Plaintiff's employment with Ferro and states that: "[N]o common law or statutory right to recover damages from the employer…for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." Plaintiff responded that the Act did not cover claims "not compensable under the Act," and since the statute of limitations runs out 25 years from the date of the last exposure to

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asbestos, Plaintiff argued that he could not seek a remedy under the Act and therefore their exclusions could not be applied to his situation. The trial court granted Ferro's motion to dismiss on March 23, 2012. The trial court also denied Plaintiff's motion to reconsider the court's decision on April 25, 2012.

Plaintiff subsequently filed a third amended complaint against one of the remaining defendants in the case at the time of trial on September 13, 2012, which did not include any claims against Ferro and was apparently done without written leave of the court or a court order confirming same. Plaintiff subsequently filed a timely notice of appeal to the Illinois Appellate Court on the Court's decision that granted Ferro's motion to dismiss.

Analysis

Plaintiff maintained on appeal that his claims against Ferro are subject to an exception to the exclusivity provisions of the Act, because they are not compensable. He additionally contended that barring his claim under exclusivity would violate his equal protection and due process rights.

A. Waiver

Normally, when a plaintiff files an amended complaint that does not incorporate past claims, those claims may not be raised upon appeal. However, when the court does not grant leave to file an amended complaint, the court disregards the complaint on review and refers to the prior complaint as controlling. *In re Marriage of Peoples*, 96 Ill. App. 3d 94, 96 (1981).

Ferro argued that leave to file the third amended complaint was "orally" granted by the trial court as evidenced by the trial court transcripts. However, the conversation between the Court and the parties continued ambiguously regarding that filing, which the appellate court found to be non-determinative and therefore not definitive. Moreover, a written order would still be required for a third amended complaint per Ill. S. Ct. R. 271, which states that: "When the court rules upon a motion other than in the course of trial, the attorney for the prevailing party shall prepare and present to the court the order or judgement to be entered, unless the court directs otherwise." Since no written order was ever entered showing that leave of court was granted to file the third amended complaint, the appellate court found that the second amended complaint was controlling.

B. Exclusive Remedy Provisions of the Act

The purpose of the Act is to: 1) provide financial protection to employees for work-related injuries; 2) impose liability without employer fault; 3) prohibit employees from bringing common-law actions against their employer; and 4) prevent double-recovery and excessive litigation. *Meerbrey*, 139 Ill. 2d at 462; *Collier v. Wagner Castings Co*., No 1-12-3219. The appellate court acknowledges that "so far as persons within the industry are concerned, the Workmen's Compensation Act eliminated fault as a basis of liability." *James v. Caterpillar Inc*., 242 Ill. App. 3d 538, 549-50 (1993), *quoting Rylander v. Chicago Short Line Ry. Co*., 17 Ill. 2d 618, 628 (1959). However, exceptions to the exclusivity bar apply where an injury is not accidental, did not arise from employment, was not received during the course of work, or is "not compensable under the Act." *Meerbrey*, 139 Ill. 2d at 463; Collier, 81 Ill. 2d at 237.

Plaintiff solely argued on appeal that for an injury to be not compensable, a common-law suit is viable. No previous case in Illinois has ever ruled upon whether a time-barred worker's compensation case is "not compensable" under *Meerbrey*, making this a case of first impression.

The court held that "not compensable" means that Plaintiff cannot seek recovery under the Act through no fault of his own and therefore held that the *Meerbrey* exception applies, allowing plaintiff to bring a common-law suit against his employer. *Toothman*, 304 Ill. App. 3d 520; *Shusse v. Pace Suburban Bus Division of the Regional Transportation Authority*, 334 Ill. App. 3d 960 (2002).

The reason the exclusivity bar exists is to prevent double recovery and excess litigation. Therefore, permitting a suit where an employee could not seek recovery otherwise does not exacerbate the intent of the Act and is consistent with *Collier*, 81 Ill. 2d 229. Unlike *Collier*, where the plaintiff exchanged a no-liability release with a lump-sum settlement from his employer, Plaintiff here, according to the Court, was affirmatively barred from compensation by no fault of his own.

The Court further insisted that *Sjostrom v. Sproule*, 33 Illl. 2d 40 (1965) and *Unger v. Continental Assurance Co.*, 107 Ill. 2d 79 (1985) do not stand for the proposition that a compensable injury is only one arising out of the course of employment as Ferro suggested, but rather are compatible with *Meerbrey*'s idea of compensable injuries as different from line-of-duty injuries. Unlike *Sjostrom* and *Unger*, *Meerbrey* addressed that employees may bring common-law suits against their employers for injuries non-compensable under the Act. The decision stated that only where an injured employee is time-barred from bringing suit under the Act is a common-law suit permissible. Hence, it was not the case that any claim denied by the Industrial Commission would be subject to a common-law suit.

The State of Montana allows common-law actions otherwise barred by statute under specialized circumstances. In *Gidley v. W.R. & Grace Co.*, 717 P.2d 21 (Mont. 1986), the court held that an employee not eligible under the Montana Occupational Disease Act due to an expired statute of limitations prior to his awareness of his injury could sue at common-law. See also *Nelson v. Cenex, Inc.* 2008 MT 108, ¶33, 342 Mont. 371, 181 P.3d 619. Similarly, Pennsylvania allows employee claims for occupational disease manifesting outside of the statute of limitations to be subject to common-law claims against employers. *Tooey v. AK Steel Corp*., 81 A.3d 851, 855 (Pa. 2013). The Illinois Appellate Court found these Montana and Pennsylvania precedents to be persuasive. Despite the statutory language employed by each, which differs from that of the Illinois statutes, both states' precedents give injured employees a remedy when claims are time-barred, because the disease or illness had not yet manifested until after the statute of limitations had passed.

Notably, the appellate court did not consider the constitutional claim, since the court holds that the claim is not barred. Where a case is decided on other grounds, the Illinois Appellate Court is not required to address constitutional claims. *People v. Alcozer*, 241 Ill. 2d 248, 253 (2011). The *Folta* decision will be appealed to the Illinois Supreme Court.

For more information, please contact Craig T. Liljestrand or your regular Hinshaw attorney.

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