Co-Worker Immunity in the Context of the Employer Controlled Commute

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Recent Case of Interest

A recent decision from the Appellate Court, First District, *Peng v. Nardi*, 2017 IL App (1st) 170155, ruled that the exclusive remedy provision of the Illinois Workers' Compensation Act (Act) barred lawsuits between co-workers involving accidental injuries arising out of and during the course of the plaintiff's employment. We provide the following discussion of *Peng* as an example of how the Act's exclusive remedy provision can impact your workers' compensation and civil cases.

Procedural History

The plaintiff, Xiao Ling Peng, an employee of a buffet restaurant owned by Royal Illinois, Inc., filed suit against her co-employee and others in Cook County Circuit Court after she was injured in a three car collision in Chicago, Illinois. At the time of the accident, the plaintiff was traveling in a vehicle owned by her employer and driven by her co-employee, Lei Guan. The employer permitted (and paid) Guan to drive himself and other employees to and from work in the company's van.

Peng filed an Illinois Workers' Compensation claim related to injuries sustained in the car accident and, at the same time, filed a civil suit against the two other drivers involved in the crash. She later amended her civil pleading to include her employer and the co-employee driver, Guan. Guan and the employer moved for dismissal based on Act's exclusive remedy provisions and the circuit court dismissed the amended complaint. On refiling, Peng only sued the three drivers, which included her co-employee Guan. Guan again sought dismissal by pleading co-employee immunity pursuant to the Act's exclusive remedy provision in Section 5(a). After initially denying Guan's motion to dismiss, the circuit court ultimately granted Guan's motion for reconsideration and dismissed him from the suit. The case was brought before the appellate court pursuant to Illinois Supreme Court Rule 304(a).

Section 5(a)

Section 5(a)'s exclusivity provision expressly bars common law suits against Illinois employers and co-employees, provided the injured employee is entitled to receive workers' compensation benefits from the employer or its insurer. 820 ILCS 305/5(a); *Ramsey v. Morrison*, 175 Ill. 2d 218, 224 (1997). The exceptions to the bar include injuries that (1) did not arise from the employment; (2) were not received during the course of the employment; (3) were not accidental or were intentionally inflicted; or (4) were otherwise not compensable under the Act. *Fredericks v. Liberty Mutual Insurance Co.*, 255 Ill. App. 3d 1029, 1031 (5th Dist. 1994).

Peng, in relying on exceptions noted above to sustain her civil claim against co-employee Guan, denied the Act's applicability to her and argued that her injury arose during her commute, and therefore, was not sustained during the course of her employment. Specifically, Peng argued that her claim was unrelated to her employment because (1) she was not being compensated for her time when she was being transported to the restaurant; (2) she was not on her job site at the time she sustained the injury; and (3) she could have chosen other means of commuting and was not required by her employer to use the van carpool. She further argued that she may proceed in circuit court under the election of remedies theory allowing her to file both a civil action and a compensation claim while she was uncertain about the proper forum. *Rhodes v. Industrial Comm'n*, 92 Ill. 2d 467, 470 (1982).

The court gave little credence to Peng's arguments and considered them irrelevant to the true issue, *i.e.*, whether or not Peng was legally entitled to recover under the Act. Though the court recognized the

general rule barring commuting employees from recovery under the traveling employee standard, it found that Peng's case was an exception to the rule. The exception, as outlined by the Illinois Supreme Court in *Hindle v. Dillbeck*, holds that injuries arising during a commute in an *employer controlled vehicle* are considered to have occurred in the course of the employee's employment. *Hindle v. Dillbeck*, 68 Ill. 2d 309, 320 (1977); *Sjostrom v. Sproule*, 49 Ill. App. 2d 451, 460 (1st Dist. 1964) ("employer-provided conveyance is a 'well recognized exception to the rule that travel to and from work is ordinarily not within the [Act]'"); *Peng*, 2017 IL App (1st) 170155, ¶ 13. The *Peng* court held that even though Peng was not compensated for her commute time and was not required to use the van to get to work, when Peng "relinquished control over the conditions of transportation [and] climbed into a vehicle owned by her employer and driven by her co-employee under the employer's direction," she came within the purview of the Act and her employer exposed itself to liability for its employees' injuries during the commute. *Id.* ¶ 25.

The *Peng* court further rejected Peng's argument that she may proceed in both forums to alleviate any concerns regarding the proper venue for recovery. It held that there was no uncertainty about the law as it applied to the plaintiff Peng and that it was clear that her right to compensation was through the Act based on the excess of cases finding that employees commuting in employer-controlled vehicles are entitled to compensation benefits.

Practical Considerations

There are two important take-aways from the appellate court's decision in *Peng*. First, when considering claims made by commuting employees, an important part of the initial investigation is to request information regarding the vehicle being driven and its owner. As indicated above, this information will often distinguish between a compensable and non-compensable claim. While employer provided transportation can be beneficial to both the employer and the employee, when an employer provides either transportation or a company vehicle, the company may be exposing itself to liability for any injury suffered by an employee during his or her commute.

Second, when assessing new claims by employees against their employers or co-employees in the circuit court, the analysis should always include the applicability of the exclusive remedy provision and co-employee immunity from negligence claims even if there is some uncertainty regarding the compensability of the underlying compensation claim. At the very least, the issue should be brought to the attention of the circuit court and a stay on the proceedings should be requested until the Illinois Workers' Compensation Commission can determine whether or not recovery is appropriate under the Act.

Please feel free to contact any of our workers' compensation lawyers should you have any questions on this case or any other workers' compensation issues.