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WORKERS' COMPENSATION

“Arising Out Of” – Compensable Injury on Public Sidewalk

An employee's injury is compensable if it arises out of and in the course and scope of employment. Where the injury occurs is important in determining compensability. In the case of *Janet Moe v. University of Minnesota et al.*, the Minnesota Workers' Compensation Court of Appeals recently found that an employee's injury, which occurred on a public sidewalk rather than on the employer's premises, was compensable. 2009 WL 1342276 (W.C.C.A. April 27, 2009).

Janet Moe worked for the University of Minnesota as a word processing specialist. Upon driving to work, she parked her car in the campus parking lot owned and operated by the

University. She then walked toward Hodson Hall, the building in which she worked. In order to get to Hodson Hall, Ms. Moe walked on a public sidewalk located on the opposite side of the street from Hodson Hall. As she was walking on the sidewalk, Ms. Moe slipped and fell, injuring her right arm and wrist.

At hearing, the compensation judge determined that Ms. Moe's injuries did not arise out of or in the course and scope of her employment because the public sidewalk on which she slipped and fell was not part of the employer's premises, and the hazard faced by Ms. Moe (falling on ice or snow) was not unlike the hazard faced by the general public.

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EMPLOYMENT LAW

The Termination Process

This is the second in a three part series regarding potential employment law ramifications relating to the termination of employees. The last *Quarterly* discussed deciding whether it was time to terminate. This article discusses implementing the termination process.

Many employment lawsuits are brought because a discharged employee believes he or she was treated unfairly and/or disrespectfully during the termination process. Therefore, once a decision is made to terminate an employee, employers must prepare a well thought out plan.

Employers should be certain that everyone involved with the termination agrees on the reason(s) for termination and that these reasons can be explained to the employee in a concise and logical manner. Do not make matters worse by making things up. BE HONEST. Many employers, especially in the Midwest,

are afraid to be truthful with an employee out of concern for hurting the employee's feelings. As such, employers often do not accurately state the reasons for a termination. Misrepresenting the reason can come back to haunt an employer in a future lawsuit. A truthful defense is less expensive to litigate, and easier to prove.

Ordinarily, a face-to-face meeting between the employee and at least two employer representatives is the best way to inform an employee of his or her termination. The person delivering the message should be the actual decision maker, if possible. The witness should record the meeting conversations.

The discharge meeting should be held in person, unless there is a concern about a violent reaction by the employee. If there is even a remote possibility of an angry or

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Who's Who in Workers' Compensation Law



HD^BO^B partner Dave Odlaug was recently named to the list of Top 40 Workers' Compensation Attorneys in Minnesota, by *Minnesota Law and Politics*. This follows his selection to the list of workers' compensation "Super Lawyers" as voted upon by his peers. Dave has been a "Super Lawyer" every year since 1991.

Dave received his B.A. from the University of Notre Dame and the College of St. Thomas and his J.D. from the University of Minnesota Law School. He is admitted to practice in Minnesota and the U.S. District Court-District of Minnesota. He is a member of the Ramsey County and Minnesota State Bar Associations and the Minnesota Defense Lawyers Association. Dave has been practicing exclusively in workers' compensation law for over 20 years, all of them at HDBOB. Dave is widely regarded as an extremely experienced and knowledgeable workers' compensation attorney and is a perennial addition to Minnesota's "Super Lawyers."

Congratulations Dave!!

HDBOB Goes Virtual

In addition to accessing information and legal resources via the HDBOB website, www.hdbob.com, you can now link up with your favorite HDBOB attorneys on Linked In and become a fan of HDBOB on Facebook.



Slip and Fall Update: Mere-Slipperiness Rule Extended to the State of Minnesota

Winters in Minnesota are treacherous and this year is no exception. The snow, sleet, and occasional mild days followed by periods of bone-chilling sub-zero temperatures create sidewalks and parking lots that are more like skating rinks. With ice comes injury, and what is known as the "slip and fall" accident.

A municipality generally owes a duty to the public to exercise reasonable care in maintaining sidewalks and other public ways in a safe condition. This duty extends to eliminating dangerous conditions caused by accumulation of snow and ice. However, because our state's climate makes it impossible to keep all sidewalks completely clear of snow and ice during the winter, and attempting to do so would bankrupt any city, the Minnesota legislature and courts have limited this duty by imposing various restrictions on the ability to bring "slip and fall" actions against a municipality.

One of those restrictions is the "mere-slipperiness rule." Since 1890, the courts have established that the mere slipperiness of a sidewalk is not negligence for which a city can be held liable. However, failure of a city to clear a sidewalk when ice or snow has accumulated in such a way and for such a period of time as to form dangerous ridges, irregularities in height, or angles of inclination that would be likely to obstruct travel or trip pedestrians or cause them to fall, may give rise to an action for negligence. *Henkes v. City of Minneapolis*, 44 N.W. 1026 (1890).

The Minnesota Court of Appeals recently extended this "mere-slipperiness rule" from municipalities to the State of Minnesota. In *Rodenwald v. State of Minnesota Department of Natural*

Resources, 2010 WL 155549 (Minn. Ct. App. 2010), the plaintiff filed suit against the Minnesota Department of Natural Resources (DNR). While in the course and scope of his employment as an auto glass specialist, the plaintiff stepped out of his van on a driveway at a DNR garage, and slipped on ice that he had not noticed because it was "clear, slippery, and smooth." The plaintiff fell and fractured his femur. He filed suit against the DNR for negligently allowing the ice to accumulate on the driveway. The district court granted summary judgment in favor of the DNR on the basis of the century old "mere-slipperiness rule." The plaintiff argued that the mere-slipperiness rule did not apply to states. In a first-of-its-kind ruling, the Minnesota Court of Appeals extended the rule to the State of Minnesota, indicating that avoiding the "[imposition] on the government of a physically impossible or financially unreasonable burden applies with equal force to the state."

Unfortunately for the workers' compensation carrier in *Rodenwald*, a subrogation claim was negated by the Court of Appeals' decision. The workers' compensation carrier would not be able to seek reimbursement of benefits paid to Mr. Rodenwald as a result of the slip and fall accident.

Unfortunately for homeowners, the mere-slipperiness rule does not apply to private property. It is still possible, however, to successfully defend private property slip and fall cases. Recently, HDBOB partner Karen Hatfield defended and won such a case in Hennepin County. In that case, the plaintiff slipped and fell on ice in front of a friend's townhouse breaking his ankle. Prior to the fall, the home-

Who Receives the Tax Exemption in Divorce?

Whether the custodial or the non-custodial parent is allowed to claim the minor child(ren) as a dependant on income tax returns is a highly contentious issue in divorce and custody/paternity actions. Court Orders and/or Divorce Decrees typically (1) award one parent the exemption(s) permanently; (2) divide the exemptions for multiple children between the parents; or, (3) alternate the exemption(s) between the parents every other tax year.

The IRS presumes that the parent with the designation of sole physical custody is entitled to claim the minor child(ren) as exemptions unless otherwise directed in a court Order and/or Divorce Decree. Prior to July 2, 2008, the IRS allowed parents to attach to their tax returns copies of pages from their divorce decree referencing the tax exemption(s). Since July 2, 2008, regardless of what is stated in the court Order and/or Divorce Decree, a non-custodial parent **must** have an IRS 8332 form signed by the custodial parent in order to claim the minor child(ren), unless the exemption is permanently given by the Order and/or Decree to the non-custodial parent. If this IRS 8332 form is not signed and attached to the tax return, the IRS may reject the return. The IRS does allow parents to reference multiple years on one form. Due to the importance given to the 8332 form by the IRS, it is highly recommended that it be signed by the parties at the time of the original divorce agreement or Decree.

On another tax note, older Divorce Decrees should be reviewed regarding the claiming of the tax exemption(s). In years past, the Court often awarded the exemption(s) to the custodial parent and if the exemption(s) did not "benefit" him or her, the custodial parent was

then required to give the tax exemptions to the non-custodial parent. Recently, with the addition of various tax incentive programs, including rebates, Child Tax Credit and Additional Child Tax Credit, a custodial parent who would otherwise have no tax obligation, would have no taxes withheld from his or her paycheck, or would otherwise not "benefit" from claiming the child(ren), could still receive a distribution from the IRS for qualified child(ren). These programs are now providing a "benefit" to the custodial parent and, therefore, there is no requirement that the custodial parent give the tax exemption(s) to the non-custodial parent.

With the many changes in Minnesota child support laws and current trends, more and more divorcing parents are agreeing to joint physical custody. Unfortunately, the Federal income tax laws have not changed to reflect this joint custody trend. Joint physical custody creates difficult issues in determining dependants, heads of households, and who receives childcare deductions, the Child Tax Credit and Economic Stimulus payments. Divorce decrees should clearly address these issues to avoid future questions and arguments.

Please feel free to contact us to discuss this or other family law issues including divorce, post-divorce or custody issues. Remedies may be available to you if you are able to claim a child and the other parent either refuses to sign the IRS 8332 form, the other parent claims the child against a Court Order, or the IRS rejects your return based upon the conduct of your ex-spouse.



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Average Weekly Wage: Court of Appeals Determines That Company Used Vehicle is Excluded

There are numerous factors to consider in computing average weekly wage, i.e. tips and gratuities, overtime, board or other allowance, sick leave pay, vacation and holiday pay, bonuses, etc. In cases involving any of these factors, the court analyzes the value of the benefit being provided to the employee.

In *Runge v. Pointe Pest Control*, No. WC08-259 (W.C.C.A. May 7, 2009), the Workers' Compensation Court of Appeals decided not to include the use of a company vehicle in the computation of the employee's average weekly wage.

In *Runge*, the employee worked as a technician servicing customers' homes for pest and rodent control purposes. His job involved traveling to 10 to 16 customer homes per day. About two days per week he began his day driving directly from his home to the home of his first customer. At the time of hire, the employee was provided with a company truck. According to the driving agreement governing the employee's use of that truck, the employee could bring the vehicle home each evening but could use it "ONLY for work purposes," not for "short errands or any other personal needs." The agreement also obligated the employee to keep the vehicle clean, to secure the chemicals and tools, and to refer the vehicle for necessary maintenance. The employer gave the employee a debit card to use for gasoline, servicing, and repairs. Violation of the driving agreement was grounds for termination.

The employee testified that this company car was an important benefit of significant value to him. He testified that he would not have accepted a position with the employer had he not been allowed to use the company vehicle for

Don't Let the 2010 Tax Changes Negatively Impact Your Estate Plan

Effective January 1, 2010, the federal estate tax and generation-skipping tax have been repealed for individuals dying during 2010 and for generation-skipping transfers made in 2010. Please note that gift tax laws have not changed except as to certain specialized trusts.

It was expected that Congress would amend the Internal Revenue Code ("Code") before the end of 2009 to prevent the repeal. However, because Congress did not take such action, it is now necessary to determine whether your estate plan ("will and/or trust") should be modified. All wills and trusts should be reviewed to see whether they contain tax sensitive language. Wills or trusts which refer to the "marital deduction," the "federal estate tax," the "unified credit," the "estate tax exclusion amount," and/or the "generation-skipping transfer tax" should be reviewed promptly. If any of your documents contain tax oriented language either identical or similar to the language mentioned above, you are encouraged to contact either the attorney who drafted the original documents or HDBOB estate planning attorneys Randall Sayers or Trisha Vicario to discuss whether the documents should be modified.

Under the Code as it now stands, on January 1, 2011, the estate tax and generation-skipping tax will again be effective with rates up to 55% and an exemption amount of \$1,000,000 per individual, which was the exemption amount in effect in 2001.

Another change effective as of January 1, 2010, relates to the income tax basis of inherited assets. Income tax basis is the value from which gain or loss on assets sold is measured. Under the law prior to January 1, 2010, the income tax basis of an asset was changed to its current value when its owner died (the so-called "basis step-up" rule). Effective January 1, 2010, the basis step-up rule will no longer occur. Instead, the deceased owner's income tax basis and assets will "carry over" to the persons who inherit the assets. Depending upon how long the deceased person owned the assets, it may be very difficult to determine the basis of the inherited assets. We suggest that everyone maintain their financial records indefinitely. Factual investigations necessary to determine the cost basis of property held for many years will be impossible without such records.

Congress may well amend these tax laws during 2010, and it is possible that any such amendment will be retroactive to January 1, 2010. However, it is impossible to predict what action, if any, Congress will take. Accordingly, we advise a thorough review of your estate plan to determine if revisions are necessary based upon current law.



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AVERAGE WEEKLY WAGE CONTINUED FROM FRONT OF INSERT

commuting purposes because he was close to reaching the mileage limit applicable to his leased personal vehicle. The employer admitted that allowing workers to drive the company vehicle from home directly to a job site often saved the employer mileage expenses. The value of this commuting fringe benefit to both the employee and employer was not included on the W-2 form prepared by the employer, and the employee did not claim such a benefit when filing his income taxes.

On October 24, 2007, the employee sustained a work-related injury. When he returned to a light duty work assignment with the employer, he was not allowed to use the company vehicle and

the employee consequently had to drive his own vehicle to work. The employee filed a claim for underpayment of wage loss benefits, alleging that the use of the vehicle constituted an "allowance" or wage within the meaning of Minnesota Statute § 176.011, subd. 3. The employee argued that this value was appropriately calculated by applying the IRS mileage reimbursement rate to the round-trip commute between the employee's home and the employer's office. The employer argued that, based on case law precedent, the value of the employee's use of the vehicle was simply not includable.

The court recognized that the employee's ability to use the company vehicle

was of "some value" to the employee. However, the court found that the "value" in question did not constitute an includable allowance under applicable case law. The court distinguished this case from others where the employee was allowed unlimited use of the company vehicle, and the employer and employee accounted for the use of the vehicle for income tax purposes.



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THE TERMINATION PROCESS CONTINUED FROM PAGE 1

violent employees, be sure to notify security in advance of the meeting. The meeting should be scheduled to minimize the employee's contact with other employees when coming to the meeting or after leaving the meeting. Scheduling the meeting at the end of the day is best. Just prior to the meeting, or immediately after if more appropriate, advise others in management and key supervisory positions of the termination.

In delivering the termination message, employers should be decisive, honest, and brief. Generally, the more an employer says in a termination meeting, the more issues he or she is creating if a future lawsuit develops. A well-prepared and rehearsed termination message should not last more than a few minutes. Do not enter into an argument with the employee regarding the reasons for termination. Let the employee speak his or her peace regarding the termination and then move on. Do not give any indication that the termination decision is reversible or negotiable. Make sure the employee understands that the decision is final. Similarly, do not apologize or blame someone else for the termination decision. The reasons for termination should be documented, signed, dated, and placed in the employee's personnel file.

Provide the employee with his or her last paycheck and any accrued PTO in accordance with company policy. Minnesota Statute § 181.13 requires that an employer must pay a discharged employee within 24 hours of the employee's demand, with some limited exceptions. Also, remember that Minnesota law generally prohibits deductions from an employee's paycheck unless the employee gave written authorization for the deduction after the debt arose. Minnesota Statute § 181.79. The employee's COBRA rights with respect to continued group medical, dental and life

insurance should also be discussed at the termination meeting. If the employee asks about applying for unemployment, indicate that he or she is free to apply and the state will decide whether they receive the benefits. Any company property, such as keys, ID cards, credit cards, computers or phones that are in the employee's possession should be collected at the time of termination.

Almost always explain to the employee that he or she must leave the building: i.e. "We understand that you are probably taking this all in right now, and so we ask that you go home now and not go back to your office." Explain to the employee that you will provide an opportunity for them to come to the office to pick up their belongings. This should be done in a manner that is not humiliating or embarrassing to the employee.

Be sensitive to the emotions of the employee. If possible, try to end the meeting on a good note. It is often helpful to suggest some options and offer help to the employee. For example, if there are any career counseling services the employer can offer, it should be communicated at this time. If it is appropriate, show appreciation for the employee's service with the organization and thank him or her.

Termination will never be risk-free. But, an employer that has a well thought out termination process that treats the employee fairly and respectfully will increase its chance of avoiding litigation.

Up next: How to Reduce Employer Risks After Termination



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ARISING OUT OF CONTINUED FROM PAGE 1

The Minnesota Workers' Compensation Court of Appeals reversed the compensation judge's decision and found that the employee's injury did arise out of and in the course and scope of her employment because she was traveling between two parts of the employer's premises when she was injured. According to the court, "[a]n injury sustained in reaching the main premises from the employer's parking lot remains compensable despite its occurrence on a public way or on other property not owned by the employer, where traversing that property was reasonable or was the customary route between the employer's parking lot and the main premises."

Although most "arising out of" cases are fact specific and decided on a case-by-case basis, this case is likely to have precedential value in future cases involving injuries where the employee regularly travels between portions of an employer's premises that are separated by public property.



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SLIP AND FALL CONTINUED FROM PAGE 2

owner had moved out so the plaintiff could live in the townhouse. Karen argued on behalf of the homeowner that the icy condition on the sidewalk was open and obvious and the plaintiff was in the best position to rid the walkway of ice. The case went to the jury and the jury found the homeowner not liable and the plaintiff 100% negligent in causing his slip and fall.

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Provided by the law firm of Hansen, Dordell, Bradt, Odlaug & Bradt, P.L.L.P. Quarterly is only a general summary of the topics discussed here and is not a substitute for legal advice. If you have any questions regarding these topics, please call us at (651) 482-8900.

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JOIN US FOR OUR ANNUAL Mid-Winter Seminar

Friday, March 19, 2010

HDBOB's 2010 Mid-Winter Seminar is fast approaching.

The 2010 Mid-Winter seminar will again be held at the Sheraton Bloomington Hotel, with registration and continental breakfast beginning at 7:45 a.m.

Guest Speaker, Susan Isernhagen, PT, a noted developer and practitioner in the fields of work injury management and prevention, will speak on Functional Capacity Evaluations and their quality, usefulness, purposes, & guidelines. Ms. Isernhagen developed the first functional capacity assessment, functional job description, and functional prework screen processes. Her published peer-reviewed research includes reliability of assessing functional capacity performance and identifying predictors for return to work. She is editor/author of two textbooks used worldwide and speaks nationally.

Craig Nichols, Fred Kaiser, Joe Twomey, Colleen Kaufenberg, Stacey Sorenson, and Nick Micheletti will provide insight into recent W.C.C.A. decisions.

Jamie Schaps and QRC Julie McDonough will discuss recurrent rehabilitation issues and disputes.

Julie La Fleur will speak on Child Support: What You Need to Know.

Trisha Vicario will speak on The Deceased Employee: The Effect of Probate on Permanency Payments.

A delicious lunch and friendly conversation will follow the Seminar.

Also, our attorneys will be available to answer questions.

HDBOB will be applying for approval of CLE credits.

RSVP as soon as possible: (651-332-8749) or spitts@hdbob.com

We look forward to seeing you on March 19, 2010!