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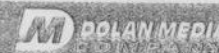
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Supreme Court Tosses Disability Presumption For Comp Claimant

FEL BERRY

Legal Editor

Although Wal-Mart paid employee temporary benefits for a back injury — and before a hearing that injury was “compensable” — didn’t create a presumption that she had a “disability” to support ongoing compensation, the Supreme Court ruled.

The case is *Clark v. Wal-Mart*. North Carolina Lawyers Weekly No. 05-06-1241, 8 Chief Justice I. Beverly

Lake Jr. wrote the opinion.

The decision reverses the Appeals Court and the Industrial Commission. Both said Wal-Mart’s actions triggered a presumption that the plaintiff, a 68-year-old greeter, was disabled by a work-related injury.

A disability presumption arises on a claimant’s behalf in only three limited situations, the justices said:

- When a Form 21 “Agreement for Compensation of Disability” has been executed.

- When a Form 26 “Supplemental Agreement as to Payment of Compensation” has been signed.

- When there has been a prior disability award by the Industrial Commission.

Because none of those scenarios applied in *Clark*, the high court tossed out the plaintiff’s total disability award and remanded the case for new findings and conclusions.

The holding is consistent with a 2004 Supreme Court

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Williams

Justices Dismiss Appeal Over Limited Driving Statute

The Supreme Court has vacated a decision striking down a statute that says the Division of Motor Vehicles can reject some court orders giving limited driving privileges to motorists convicted of drunk driving.

However, because the appeal was simply dismissed as moot, the per curiam decision will give little guidance to attorneys who represent DWI defendants. One

attorney in the case, Keith Williams of Greenville, predicts the statute will be challenged again as a violation of the separation of powers doctrine and due process.

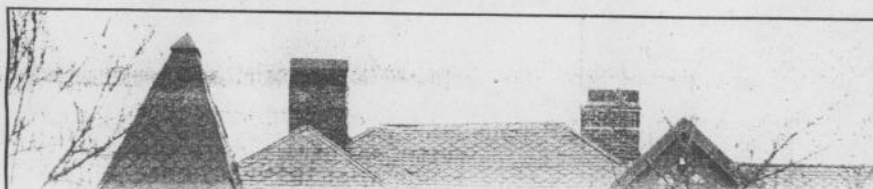
That case led the Supreme Court’s Oct. 7 list of per curiam opinions and petition actions.

In petition action, the court let stand rulings that clarified general damages in pain-and-suf-

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decision that was handed down four months after the Appeals Court issued its opinion in *Clark*.

However, the justices said the *Clark* panel had "ignored" earlier precedents on the presumption issue from both

appellate courts.

The plaintiff's attorney, Dan Deuterma of Greensboro, said the *Clark* ruling is "pretty much the end" of any claim for a disability presumption outside the three exceptions noted by the justices.

Deuterma said he had put on

enough medical evidence at the comp hearing to show his client met the test for a disability — without the benefit of a presumption.

"We don't need a presumption to win," he said. "I'm not concerned about it for Ms. Clark. But this slams other plaintiffs across the state."

Deuterma said the disability issue would now have to be litigated in more cases. The decision would also make it easier for employers to stop paying compensation "at any point," he said.

— Questions or comments may be directed to Ertel.Berry@nc.lawyersweekly.com.

Justices Dismiss Appeal Over Limited Driving Statute

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fering claims, and the right of medmal plaintiffs to question doctors about their drug use.

Here's a closer look at those cases, all of which were previously reported in *Lawyers Weekly*.

Limited Driving Order

In a one-page per curiam decision (North Carolina Lawyers Weekly No. 05-06-1250), the justices vacated the Court of Appeals 2003 ruling in *State v. Bowes*, 159 N.C. App. 18, 583 S.E.2d

294, and dismissed the appeal as moot.

At issue in *Bowes* was G.S. § 20-179.3(k), which says that if a limited driving privilege order is "invalid on its face," the DMV must notify the trial court that it considers the order "void" and will not list it on DMV records.

Other provisions of the statute say that limited privileges may only be given if a person's license is revoked "solely" for a DWI under G.S. § 20-17(a)(2). If the license is revoked under any other provision, the limited driving privilege is "invalid," according to the statute.

In *Bowes*, a 19-year-old defendant pled guilty to driving while impaired and was sentenced to 12 months of unsupervised probation, a fine, substance abuse treatment and community service. He also had to surrender his driver's license.

The defendant was granted limited driving privileges but DMV notified him the privileges were void and refused to change its records to reflect them. DMV's position was that the defendant didn't qualify for limited privileges because his license was revoked under two provisions: impaired driving under G.S. § 20-17(a)(2); and impaired driving by a person under the age of 21, a violation of G.S. § 20-13.2(b).

A District Court judge held DMV's unilateral rejection of the limited privileges order, without notice and a hearing, violated the separation of powers doctrine and due process.

In a 2-1 opinion handed down July 15, 2003, the Appeals Court affirmed, saying the DMV had to honor the defendant's limited privileges.

The defendant wasn't eligible for

didn't participate in the case, according to Williams.

"I do expect the same issues will be raised again, either by myself or other lawyers around the state," Williams said. Advising under-21 DWI clients who receive limited driving privileges could be a "risky proposition" since DMV's stance means the client could be charged with driving while license revoked, he said.

Petitions Denied

In action from the latest petitions list, the justices turned down requests for discretionary review in these cases.

• **General damages standard different from NIED.** The justices denied a physician's petition for discretionary review in *Iadanza v. Harper* (North Carolina Lawyers Weekly No. 05-07-0493, 12 pages).

In that case, the Appeals Court held that a patient who claimed she was harmed emotionally by her doctor's alleged sexual advances didn't have to offer proof of physical pain and suffering — or severe mental distress — to recover general damages for personal injury (see April 25, 2005 *Lawyers Weekly*).

The plaintiff did not allege any special damages, such as medical bills, and her request for general compensatory damages was dismissed by a trial judge.

In reversing, the *Iadanza* panel said pain and suffering, standing alone, may be a discrete basis for recovery and covered a wide range of injuries, from physical pain to anxiety, depression and an impaired lifestyle.

The level of proof required for

In *Armstrong*, an appeals panel held that a medmal plaintiff could depose a doctor on details of his substance abuse and treatment — even though statutory privileges shielded his participation in a drug rehab program and the hospital proceedings to get his credentials back.

The physician, not the confidential programs, was the "original source" for the information being sought, the *Armstrong* panel said (see July 11, 2005 *Lawyers Weekly*).

Statutory prohibitions on discovery weren't triggered merely because the same information had been disclosed to the North Carolina Physicians Health Program or presented to a medical review committee, the court said.

Although the panel limited the scope of the doctor's privileges, it remanded a discovery order that failed to specifically address what was excluded by virtue of the doctor's participation in the PHP.

• **CEO's sex remark not grounds for distress claim.** The Supreme Court turned down discretionary review in an unpublished case, *Coremin v. Sherrill Furniture Company* (North Carolina Lawyers Weekly No. 05-16-0719, 11 pages).

That lets stand the Appeals Court's holding that a CEO wasn't liable for intentional infliction of emotional distress where his behavior toward a female employee didn't involve sexual advances, sexual touching or — aside from an oral sex reference — obscene remarks.

In the sex harassment context, the types of behavior that show sufficiently outrageous conduct are: an unfair power relationship between the parties; explic-

North Carolina Lawyers Weekly Raleigh, NC

David Blackwell, Esq., Publisher ext 12

Michael J. Dayton, Esq., Editor in Chief . . . ext 13

Teresa Bruno, Esq., Opinion Editor

Ertel Berry, Esq., Legal Editor ext 20

Gregory A. Froom, Esq., News Writer . . . ext 21

Bob Dixon, Advertising Director ext 17

bob.dixon@nc.lawyersweekly.com

Janine M. Gutierrez, Account Executive . . . ext 16

janine.gutierrez@nc.lawyersweekly.com

Sharon L. Lipps, Classified Manager ext 11

sharon.lipps@nc.lawyersweekly.com

Rhonda S. Wall, Account Executive ext 10

rhonda.wall@nc.lawyersweekly.com

Nell Franke, Administration Assistant . . . ext 19

Jim Sleeper, Production Manager ext 22

janine.gutierrez@nc.lawyersweekly.com

Sharon L. Lipps, Classified Manager ... ext 11
sharon.lipps@nc.lawyersweekly.com

Rhonda S. Wall, Account Executive ... ext 10
rhonda.wall@nc.lawyersweekly.com

Nell Franke, Administration Assistant ... ext 19

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unilateral rejection of the limited privileges order, without notice and a hearing, violated the separation of powers doctrine and due process.

In a 2-1 opinion handed down July 15, 2003, the Appeals Court affirmed, saying the DMV had to honor the defendant's limited privileges.

The defendant wasn't eligible for limited privileges under the statute because his license had been revoked under two provisions, the appeals panel said — but that defect only made the judicial order voidable, not void.

Subsection (k) of G.S. § 20-179.3 authorized DMV to invalidate the trial court's judgment "without the court itself taking any action," the appeals panel said. That violated separation of powers by giving DMV the power to reverse the District Court, the panel said (see July 21, 2003 Lawyers Weekly).

Mootness

In so ruling, the Appeals Court majority noted the appeal was arguably moot because the defendant's limited privileges had already expired and his license revocation had run. However, the majority said it could still consider the issue under an exception to the mootness doctrine because it was reasonably likely that DMV could repeat the action at issue and would face similar challenges.

Although the justices addressed the merits of the case during oral argument, and even asked for additional briefing, they wound up dismissing the appeal due to the mootness issue.

Williams, a lawyer for the defendant, said he was "surprised we got the opinion we did.

"I will tell you that DMV asked the court at oral argument to resolve the substantive issue whether persons under 21 were entitled to limited driving privileges," Williams said. "DMV said it was a statewide issue and needed statewide resolution. At oral argument, at least, the Supreme Court seemed interested in doing that. I guess other concerns may have come up that we'll never know about."

Justices Mark Martin and George Wainwright recused themselves and

and her request for general compensatory damages was dismissed by a trial judge.

In reversing, the *Iadanza* panel said pain and suffering, standing alone, may be a discrete basis for recovery and covered a wide range of injuries, from physical pain to anxiety, depression and an impaired lifestyle.

The level of proof required for general damages in a personal injury claim was not the same as that needed to recover for negligent or intentional infliction of emotional distress — which requires proof of "severe" distress, the court said.

The appeals panel affirmed dismissal of the doctor's counterclaim for slander per se against the patient, saying the suit was barred by the statute of limitations.

• **Questions on doctor's drug use not barred by privilege.** The high court also denied discretionary review in *Armstrong v. Barnes* (North Carolina Lawyers Weekly No. 05-07-0788, 15 pages).

emotional infliction of emotional distress where his behavior toward a female employee didn't involve sexual advances, sexual touching or — aside from an oral sex reference — obscene remarks.

In the sex harassment context, the types of behavior that show sufficiently outrageous conduct are: an unfair power relationship between the parties; explicitly obscene, X-rated language; sexual advances; statements of desire to have sex with the plaintiff; touching the plaintiff's private parts; or touching any part of the plaintiff's body with the defendant's private parts.

None of those scenarios applied in *Coremin*, according to the Appeals Court.

Although the defendant allegedly said to the plaintiff's husband that "you never told me [the plaintiff] gave blow jobs," that comment wasn't egregious enough to exceed "all possible bounds of decency," the panel said (see June 20, 2005 Lawyers Weekly).

— Questions or comments may be directed to Eriel.Berry@nc.lawyersweekly.com.

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