Temporary Employees and Worker's Compensation: The Rivera Case

Feb 15 2018

Posted By: Scott E. Wade

Practice Area: Worker's Compensation

On January 8, 2018, the Wisconsin Court of Appeals reversed course on long-standing precedent regarding the application of the exclusive remedy provision of the Worker's Compensation Act ("the Act") by allowing a temporary employee to bring a tort claim against his temporary employer. The decision, *In re the Estate of Carlos Esterley Cerrato Rivera v. West Bend Mutual Insurance Company*, 2017AP142, allows a temporary employee injured while working for a temporary employer to pursue either worker's compensation benefits from the employment agency or to sue the temporary employer in civil court. The decision potentially exposes thousands of employers and insurance carriers to unexpected tort liability. Thankfully for employers, the Legislature is already considering legislation to fix the loophole.

The case arose out of a fatal motor vehicle accident that killed Mr. Rivera and two other individuals. At the time of the accident, Mr. Rivera was a passenger in a vehicle owned by Alpine Insulation and insured by West Bend Mutual Insurance Company. Mr. Rivera was employed by Alex Drywall, who sent him to perform work for Alpine. The driver of the vehicle, whose negligence was found to be a cause of the accident, was another temporary employee of Alpine.

Although the outcome of the case is certainly cause for concern, it is nonetheless very narrow in its application. Essentially, in order for the new rule enunciated in the decision to apply, a temporary employee must be injured in the course of his employment, choose not to bring a worker's compensation action against his employment agency, and instead decide to sue the temporary employer in tort. In fact, the Court of Appeals specifically stated that if a temporary employee attempts to make a worker's compensation claim after filing the tort claim, the employer and insurance carrier can use Wis. Stat. § 102.29(6)(b)1. as a defense to the worker's compensation claim. This statute provides that "[n]o employee of a temporary help agency who ***makes a claim*** for compensation may make a claim ... in tort against ... [a]ny employer that compensates the temporary help agency for the employee's services." (Emphasis added.) In simple terms, the trigger for the defense occurs when an employee actually makes a worker's compensation claim.

In response to the Court of Appeals' decision in *Rivera*, the Wisconsin Legislature introduced Assembly Bill 884 and companion Senate Bill 781, which legislatively overturns the Rivera decision and amends the applicable statute to bar temporary employees from bringing tort actions against their temporary employer. Specifically, this Bill changes the "makes a claim for compensation" language to "has the right to make a claim for compensation." If the legislation is adopted in its current form, Wis. Stat. § 102.29(6) would provide that any employee of a temporary help agency that "***has the right to make a claim***" for worker's compensation benefits would be prohibited from making a claim in tort against either the temporary help agency or the employer that compensates the temporary help agency for the employee's services. The Assembly Committee on Insurance has recommended adoption and the Senate Committee on Labor and Regulatory Reform is anticipated to take similar action soon.

Nonetheless, even if the Legislature fails to adopt the corrective legislation, there is still the opportunity for the decision to be reversed by the Wisconsin Supreme Court. It is commonly understood that a petition for review will be filed and that the Supreme Court is likely to examine carefully the need for the Court to provide definitive guidance.

For now, Wisconsin temporary employers and insurance carriers should be aware that they may be exposed to a tort action in the event that any temporary employee is injured while at work. We will continue to monitor the progress of the legislation and the continuing appeal.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.