

Temporary Employees in Wisconsin Now Able to Bring Tort Suits for Work Injuries Despite Worker's Compensation Act's Exclusive Remedy Provision

2 min read

Feb 5, 2018

In a [game-changing decision](#), the Wisconsin Court of Appeals recently ruled that temporary employees who have not filed a compensation claim under Wisconsin's Worker's Compensation Act may sue their temporary employer in tort. In other words, they may choose to file a worker's compensation claim or file a lawsuit seeking damages not available under the Act. The decision is likely to cause shock waves among employers who use temporary employees--until this decision, employers were previously immune from tort claims by all employees, temporary or permanent, under the Act's exclusive remedy provision.

Let's examine how the court reached its decision. Carlos Esterley Cerrato Rivera was an employee of Alex Drywall, assigned to a project at Alpine Insulation. While traveling as a passenger between worksites, Mr. Rivera died in single-car accident caused by the negligence of the driver. Although his estate could have filed a worker's compensation claim, it chose to file a wrongful death action against Alpine Insulation and its insurer in state court. At summary judgment, the trial court dismissed the action pursuant to the Act's exclusive remedy provision, because the Act provides the exclusive remedy for work injuries against an employer and its insurer, even when the injury is caused by the employer's negligence.

The appellate court disagreed, holding the exclusive remedy provision does not apply to temporary workers. In so holding, the court employed a plain meaning reading of the statute, rejecting the defendants' contextual arguments premised on the longstanding rule that employees cannot sue their employers in tort for work injuries.

The court began its analysis with the Act's definition of "employer," which provides that "[a] temporary help agency is the employer of an employee whom the temporary help agency has placed with or leased to another employer that compensates the temporary help agency for the employee's services." Based on that definition, the court concluded the Estate could not sue the temporary help agency (Alex Drywall), Rivera's employer. However, nothing barred the Estate from suing Alpine Insulation and its insurer.

The court's analysis did not end there. Next, it visited the Act's exclusive remedy provision. That provision "expressly prohibits an employee of a temporary help agency 'who makes a claim for compensation' from maintaining an action in tort against any employer that compensates the temporary help agency for the employee's services." According to the court, the necessary implication of those words is that a temporary employee who does not make a claim for compensation under the Act may choose to sue in tort instead.

Until the Rivera decision, courts, employers, insurers and the like treated temporary and permanent employees the same way under the exclusive remedy provision. As a result of this decision, temporary employees now enjoy greater rights than their permanent peers. And more importantly for employers and their insurers, the court's decision exposes both to tort liability no one foresaw, e.g., pain and suffering, emotional distress, loss of society and companionship, and the like. Unless and until the decision is overturned on appeal or the statute is revised by the legislature, employers will face tort liability for its negligent acts causing workplace injuries to its temporary workforce.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

Workers' Compensation, Exclusive Remedy, Temporary Workers, Workplace Injury, Wisconsin Court Of Appeals, Wis. Stat. Ch. 102, Tort Liability, Temporary Help Agency, Leased Employee, Claim For Compensation, Negligence