The Wonderful World of Worker's Compensation

By Debora Fajer-Smith of Counsel Joseph Greenwald and Laake, PA

Virginia teacher shot by six-year-old can go ahead with $40m lawsuit, judge rules.

This was the headline of the Associated Press on November 3, 2023, and if the decision is not reversed on appeal, the case may potentially rock the foundation of an over 100 year old principle of worker's compensation in the DMV.

In 1914, the "Grand Bargain" was created, whereby injured workers could seek immediate relief with monetary benefits and medical attention, without the burden of proving fault or bearing the onus of plaintiff litigation. In return, the employer got immunity from liability claims. Sometimes that left employers ignoring employee health and hazards.

There are differences in the Commonwealth versus the Maryland statute, but the bottom line, with the unprecedented violence in school systems in the entire DMV, is that the immunity portion of the law is going to be challenged.

Briefly, the facts in the case are as follows: Six-year-old child obtains mother's gun and shoots his first-grade teacher, seriously wounding her. Teacher alleges the school administrators ignored many warnings about the child's predisposition and that he had a gun.

The law in Virginia keeps injuries from attacks to employees strictly under worker's compensation. The only exception to the rule would be – that even though she was shot at the place of employment – it was personal. In other words, the motive was not related to the employment. That's exactly how the judge ruled and ordered the trial to go forward. The school argued that a teacher-student relationship was not personal in any sense. The court said no, and that the violence was a personal attack. What? How many acts of violence, whether shootings or assaults, go on every day? Would this open a pandora's box of litigation that would break present school systems? It all depends on whether the workers compensation statute can withhold the tide of these allegations.

Maryland is a unique and special state when it comes to making the worker's compensation statute a living breathing document. It is in part due to the legislature, in part due to the leadership of the Commission, but largely due to the individuals who make up the defense and plaintiff bar. We have organized places, like the Senate House Oversight Committee, of which I have been an appointed member for almost two decades, where we are able to discuss bills, new topics, and work together to solve them in a way that both sides can accept. I believe that Maryland is able to weave a tapestry of interests because of our ability to have discourse and conversations when new issues emerge in a way that keeps core principles of the statute in place. I urge my colleagues that it is time to have this discussion in Maryland.

We all got together when the pandemic struck, and no one knew how we were to handle worker's claims for job related covid illnesses. Some pushed bills to provide automatic presumptions for public safety, medical personnel, and teachers. Some opposed any change to the occupational statute that would remain long after the crisis abated. I personally thought some sort of sunset legislation was in order. However, you know what happened? Nothing. The Commission decided compensability of each case with the same standards of other conditions. No one was prepared to let one industry bear the cost of the entire pandemic.

Trying to hypothesize as to the claims of violence within schools or other places of employment within Maryland, we will need to examine exact provisions of our own state.

With very limited exception, an employee cannot sue the employer for negligence during a worker's compensation case. However, one can sue a co-employee in Maryland, but only for a breach that is personally owed. It is specifically held in cases such as *Athas v Hill*, that a suit cannot be brought for a "non-delegable" duty, including providing a safe workplace. If you cannot bring it against the co-employee, doubt there is any chance of making the case against the employer entity.

In 2012, Mike Winkelman and I co-counseled on the landmark case of *Prince Georges County v Marks-Sloan*, wherein our client was injured driving her motorcycle on a school bus parking lot when struck by a fellow school bus driver operating her bus in a negligent manner. Marks-Sloan filed her worker's compensation claim, but we also sued the driver of the bus. The court held that the Act's exclusivity clause did not bar the claim, and the Board had to provide the coverage for the fellow bus driver. The judgement was entered against both the employee and the employer, but the responsibility of satisfying the judgement was the Board's alone. The Board was entitled to reimbursement of the worker's compensation lien.

However, in *Suburban Hospital v Kirson*, the doctrine of dual capacity was explored. A health care worker who was injured during work, then alleged medical malpractice against the same hospital where she worked. The court held a cause of action against the employer could be brought because the medical malpractice was an allegation that the employer was liable in tort, in a second capacity, and with obligations that were unrelated and independent from being her employer. Perhaps a creative court might find some case or circumstances that show dual capacity, but currently, worker's compensation is the sole remedy for job safety.

Maryland has permitted actions for patrons of businesses, for violence in third party claims, such as in the case of negligent hiring. But with this surge of unprecedented violence against employees, could we be at a precipice?

We should address the issue proactively lest it disrupt the way we have always handled these types of cases. Obviously, this teacher has a right to go after the one who committed the shooting, but there is no realistic way to do so. Nor would a third-party case always bring about results, even if it wasn't a six-year-old child. Yet, are we to let the employer have a pass and do absolutely nothing, when, such as in this case, the plaintiff alleges the employer had prior knowledge and the opportunity to address the issue?

My humble suggestion is as follows: We maintain the statute that one cannot sue an employer or co-employee for the unsafe workplace or conditions, but depending on the facts, allow a lawsuit and permit lack of immunity, if :

(1) The employer or the co-employee had notice of a specific danger to the employee and;

(2) The employer's or the co-employee's failure to act caused the harm to the employee.

I call upon my colleagues for a conversation on this topic. We can look at the current situation through the eyes of the employee and employer and update the statute without uprooting our basic principles of the successful Grand Bargain of the past 100 years.