San Luis Obispo College of Law
Workers' Compensation Examination
Fall 2019
Prof. J. Zerboni

Question

Teena Tiny (TT) is a bartender for a living. She has a professional certificate in mixology from the Shake & Pour School of Bartending. She works for several clubs, but finally got hired by her favorite club, Ted's Exotic Drinks (TED). She signs a written contract with TED, which pays her $1,000.00 per week. It says she's an independent contractor. She tells TED she doesn't like his shakers, knives, and bar tools, and agrees to bring her own manufactured by Best Pour (BP). Teena earns $500.00 per week working other jobs besides TED's.

Teena tells Ted when she starts that she has medical issues. She has diabetes that is complicated by drinking alcohol and a prior back injury from slipping on a spilled drink at a previous club. She says to him, and gives him a note in writing, that if she ever needs treatment or medicine for any reason, he should call Dr. Adams. Being a nice guy, Ted says sure and accepts her note.

Three weeks into her employment, Teena is feeling some back pain from her long hours of standing, bending, twisting and turning, but doesn't tell Ted. She goes to see Dr. Adams who says she should stop bartending, or she will need surgery. She keeps bartending anyway.

One week later, Ted calls her before her 5:00 p.m. shift and asks if she can pick up a co-worker, Snidely who works as a bouncer, on her way into work from home. She agrees to do so.

When they arrive at the club, Snidely attempts to grab Teena inappropriately and tries to kiss her. She punches Snidely and breaks his nose and runs into the club.

She starts her regular bartending shift, but her hand hurts from punching Snidely and she has trouble using her knife to cut the lemons and limes for drinks. Her hand slips, and she cuts herself.

Ted is at first sympathetic and gives her alcohol to alleviate the pain. Then she tells Ted she wants a claim form and wants to file a workers' compensation and sexual harassment claim. Ted tells her she's an independent contractor and tells her she's fired.

Ted reports the knife injury to his workers' compensation insurance company, NoPay Assurance. NoPay sends out a denial letter even though they tell Ted that he is probably not insured because he failed to pay his last premium payment.

Teena hires Shostein law firm to represent her. Shostein demands NoPay to provide treatment. They refuse. Shostein sends Teena to Dr. Adams. Adams writes a report saying that Teena needs treatment for her back injury, medication for her diabetes, and hand plastic surgery for her serious cut. Shostein serves the report on NoPay. Forty-five (45) days later, after service, NoPay objects and gets a medical panel from the state, Dr. Straightshooter. NoPay sends Dr. Straightshooter an investigation report on the hand injury and knife cut, a personnel file, and prior medical records for the diabetes. They do not notify Shostein of the investigation report or the records.

Dr. Straightshooter then issues a report finding that Teena suffered no injuries in the course of her employment.

In addition, to her workers' compensation case, Mr. Shostein also files a civil suit against Snidely and Ted for negligence, unsafe work environment, and sexual harassment.

Discuss all of the issues presented in all of the workers' compensation cases potentially available to both Teena and Snidely. Discuss all potential civil cases and the potential rights of subrogation, if any, that TED's might have. Be sure to address the temporary disability rate at which Teena might be paid and the calculation thereof.

What are the ramifications if Ted does not have proper insurance?

Be sure to address Teena's rights, if any, to medical care.

Discuss the ramifications and chances of success of the various civil suits.

Discuss all potential defenses available to the defendants in each of the cases, including the civil suit and the workers' compensation case.

Does Snidely have a comp case? What are the potential defenses?

What are the ramifications of the termination of Teena?

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Teena Tiny (TT) v. TED, NoPay Assurance

Employee or Independent Contractor

The statutorily created Workers' Compensation (WC) scheme was created to help *employees* that were injured on the job. A threshold issue in WC cases is whether or not an injured worker is an employee or an independent contractor (IC). The state of California codified the Dynamex decision when it passed AB5 which mandates that the ABC test be used for determining whether or not an injured worker is an employee or IC. Under the ABC test the courts presume a worker is an employee unless the employer can prove all three factors: (1) the worker is free from direction and control; (2) the workers' duties fall outside the normal scope of business; and (3) they work in an independently established trade. However, the administrative courts established specifically for WC claims still uses the totality of the circumstances test that the court developed in Borello. Under Borello, the courts look to a variety of factors including supervision, who provides the tools, how worker is paid, what work the worker is engaged in, if the worker has a license, to determine if a worker is an employee or an IC.

Under these facts TED would argue TT is an IC because she signed a contract that said she was an IC, she provided her own tools, she works for multiple employers, and is certified from a bartending school. TT and her attorney Shostein would argue that TT is an employee because her duties (making drinks) are exactly the type of business that TED is enganged in and thus, TT is an integral part of the business. TT would also argue that while she chooses to bring some of her own tools based on personal preference that TED provides glasses, ice, alcohol, mixers, and everything else required to do her job. TT could also argue that she has to work the same shift every night since presumably the bar is only open during the night and has no flexibility about working in the morning or in the middle of the night after the bar closes.

On balance, it is likely the WCAB will determine that TT is an employee.

AOE/COE

As another threshold issue, TT will have the burden of proving is whether or not her injury arose out of her employment and in the course and scope of her employment. TT would be able to prove

AOE/COE based on the medical reports of Dr. Adams, any witnesses at the bar that witnessed the knife accident, and her boss Ted who saw her injured finger right after it happened. TED will argue that the report of Dr. Straightshooter (Dr. SS) is substantial evidence that unequivocally states no work injury. If this case goes to trial, the Workers' Compensation Judge (WCJ) can determine which medical evidence is more substantial. Moreover, Shoestein should object to Dr. SS's report, take his deposition and ask the Administrative Director to issue a panel of 3 QME doctors to further develop the medical evidence.

Defenses to AOE/COE

Employers have several defenses to disprove AOE/COE including horseplay, intoxication, initial aggressor and self-inflicted injuries. TED will likely argue that TT was engaged in horseplay when she punched Snidely (S) in the nose or that it was a self-inflicted injury because TT chose to punch S or that TT was the initial aggressor because she was the first to escalate the confrontation to physical violence. These arguments will likely fail because S was sexually assaulting TT and the punch was a reasonable response in order to protect herself. TED may also argue that TT was intoxicated at work because she drank alcohol after the incident. This argument is likely to fail because TED, the employer, was the one that provided the alcohol and TT drank the alcohol after the accident so the alcohol could not have been a cause of the injury. Moreover, an injured worker must be intoxicated for this defense to work and the facts just state that TT took alcohol to alleviate the pain; there are no facts to support how much she drank and if she was actually considered intoxicated.

TED may also argue that the injury occurred in the parking lot, outside the club premises and thus should not be compensable because it happened outside of work before TT's shift started. However, WCABs have found that parking lots are considered curtilege of the premises and therefore, compensable. Moreover, it benefits the employer to have employees show up a few minutes before their shift so they have time to put away their things and actually be behind the bar at the start of their shift. The fact that this injury occurred a few minutes before her shift in the parking lot of the club will not bar TT's WC claim.

Coming & Going Rule

As a general rule, injuries that occur during a regular commute to and from work are not compensable. However, this rule has been chipped away and the courts have found several exceptions to the general rule (eg special mission doctrine). Under these facts, TED asks TT to pick up S on her way into work from home. This trip from home to work would be considered a normal

commute. However, TED requested this detour and it was presumably a benefit to the employer to have its bouncer brought into work that night. For these reasons, the court is likely to find an exception to the coming & going rule and find TT's injury compensable.

Temporary Disability

Once the insurance company or the WCJ determine that TT's injury is compensable then TT will be entitled to payment of Temporary Disability (TD) while she is off of work recovering from her injury. TD is calculated at 2/3 of the injured worker's average weekly wage. Here, TT earned $1,000/week at TEDs and $500/week working other jobs. Even though the injury occurred at TEDs, TED will be liable for compensating TT for the lost wages at her other jobs. As a result, her TD rate will be 2/3 of $1,500 per week or $1,000/week.

TT will receive TD until she is released to go back to work, offered a modified position that complies with any work restrictions, receives TD for the maximum 104 weeks allowed, or is deemed permanent and stationary by a medical doctor. If TT is offered a modified position that pays her less than her previous wage, the insurance company will pay her 2/3 of the difference between her old wage and her new wage.

Medical Treatment

Once the insurance company or the WCJ determine that TT's injury are compensable then TT will be entitled to all reasonable and necessary medical care as determined by a medical doctor, Utilization Review and Independent Medical Review per California Labor Code Section 4600. TT must choose a doctor that is within No Pay Assurance's medical provider network unless she pre-designated a physician or the medical provider network is inadequate (less than 3 doctors in a given specialty). Here, TT predesignated her physician when she gave Ted a nite in writing that Dr. Adams should provide TT treatment or medicine. NoPay should continue paying for TT to see Dr. Adams for treatment. Once Dr. Adams requests treatment (on a formal RFA form) then insurance company must send the request to utilization review to review the request. Utilization Review only has 14 days to approve, deny or modify treatment. Here, NoPay denies the requested treatment 45 days after they receive it. If after 14 days the insurance company has not denied or modified the request, then it is presumed to be accepted.

Dr. Adams wrote a report requesting that TT get treatment for her back and medication for her diabetes. TED will point out that both of these injuries were not caused by her employment at TEDs and existed prior to her employment. However, medical treatment cannot be apportioned (see

discussion below) so TED will be required to provide treatment for her back even though it was initially injured at a prior job. Moreover, if TT can prove that treatment of her diabetes is necessary before she can move forward with treatment for her back and hand then NoPay will be liable for treatment of the non-industrial diabetes.

Communication between the parties and Dr. SS

Any communications between the parties and a QME doctor must be served on the other party or risk the penalties of ex parte communications. Here, NoPay sends Dr. SS an investigation report on the hand injury and knife cut, a personnel file, and prior medical records for the diabetes. They do not notify Shostein of the investigation report or the records. If Shostein had been given prior knowledge of NoPays plans to send these records he could have objected within 20 days. Shostein can ask the WCJ order Dr. SS not to consider any inappropriate records or ask for Dr. SS to be stricken and a new doctor appointed.

132(a) Claim

California Labor Code section 132 (a) protects an injured worker from discrimination after they file a WC claim. The penalties for violating Labor Code section 132 (a) is up to $10,000. Here, TT tells Ted she wants a claim form and wants to file a WC claim and Ted tells her she is fired. Without further evidence of a good faith personnel action, it is likely the courts will find Ted fired TT because she wanted to file a WC claim and that he violated Labor Code section 132 (a).

Apportionment

When TT is permanent and stationary and has reached maximum medical improvement a doctor will give her a whole person impairment rating and TT will be eligible for permanent disability payments. Under the labor code, employers are only liable for the portion of permanent disability that was caused by the injury at their workplace. This is referred to as apportionment. The doctors are required to specify in painstaking detail which percentage of the injury was caused by the workplace accident and what was caused by pre-existing or prior injuries.

Here, TED will point out that TT had a prior back injury from slipping on a spilled drink at a previous club. A portion of TT's PD will likely be apportioned to this prior injury so TED will only be liable for the percentage of disability actually caused by the injury at TEDs. If TT had a prior WC injury and a finding of PD was made then there will be a conclusive presumption that some level of PD was present when she was injured while working at TEDs

Civil Suit and the Exclusive Remedy Rule

Generally, filing an adjudication of claim with the appropriate WCAB is the exclusive remedy for workers injured on the job. Part of the legislative scheme was providing a system for injured workers to get treatment and compensation quickly but in exchange the injured worker is barred from bringing a civil suit against the employer for their injuries. However, there are some exceptions. The courts have found in cases of third party negligence, sexual harassment or FEHA claims that the injuries are so egregious they fall outside the typical employment bargain and allow the injured workers to sue their employers civilly. Under these facts, TT has a valid sexual harassment claim against S because S tried to grab her inappropriately and tried to kiss her. As a result, TT will also be allowed to pursue a WC claim and a claim for sexual harassment in civil court.

Penalties for failing to carry WC insurance

It is a requirement of all California business to carry WC insurance. The state incentivizes businesses to carry the expensive insurance with threats of steep fines and other penalties if they're found not to have WC coverage. Here, NoPay tells Ted that he is probably not insured because he failed to pay his last premium payment. If the WCJ finds that Ted is an uninsured employer then Ted may have to pay for TT's attorney fees in addition to the compensation owed to TT when normally the 12%-15% attorneys fees are taken from the injured worker's award. Furthermore, the courts may place a lien on Ted's house, may close his business, and may ask him to repay any insurance premiums he would have owed had he been insured.

Subrogation

Subrogation is an insurance company's right to seek reimbursement from any wrong-doer to help satisfy the the money they have already expended on the injured worker's behalf. Here, if TEDs or S is personally liable for TT for her workplace injuries then NoPay may seek reimbursement from them.

Snidely (S) v. TEDS, NoPay Assurance

S was punched and suffered a broken nose after TT punched him.

Defenses to AOE/COE

As TED argued in TT's case, the injury occurred in the parking lot, outside the club premises and thus should not be compensable because it happened outside of work before S's shift started. However, WCABs have found that parking lots are considered curtilege of the premises and therefore, compensable. Moreover, it benefits the employer to have employees show up a few minutes before their shift so they have time to put away their things and actually be behind the bar at the start of their shift. The fact that this injury occurred a few minutes before his shift in the parking lot of the club will not bar S's WC claim.

Serious and Willful

If the WCJ finds that the employee's serious and willful misconduct was the cause of the injury, then whatever compensation he may otherwise be entitled to will be reduced by half. Here, S attempted to grab TT inappropriately and tried to kiss her against her wishes. Under these facts it is likely the WCJ will reduce any compensation owed to S by half as a result of his serious and willful misconduct.

Compensation owed to S

Under the WC scheme, compensation is awarded if employees miss time from work as a result of the industrial injury (TD) or if they have permanent disability after they have healed. It is unlikely S will miss time from work due to a minor broken nose and a broken nose will probably not results in any permanent disability so S may not be entitled to any compensation as a result of this injury.

END OF EXAM