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## COURT OF APPEALS GIVES THUMBS UP TO RESTRICTIVE INTERPRETATION OF "GRAVE INJURY" STATUTE

In 1996, Section 11 of the Workers' Compensation Law was amended to preclude common law indemnification claims against employers, unless the person seeking indemnification proves, through competent medical evidence, that the employee sustained a "grave injury."<sup>1</sup> A "grave injury" is defined as:

death; permanent and total loss of use or amputation of an arm, leg, hand or foot; loss of multiple fingers; loss of multiple toes; paraplegia or quadriplegia; total and permanent blindness; total and permanent deafness; loss of ear; permanent and severe facial disfigurement; loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.<sup>2</sup>

The purpose of the statute is to "abolish most third-party actions so as to enhance the exclusivity of the Workers' Compensation Law, thereby reducing insurance premiums and decreasing the cost of doing business in New York."<sup>3</sup>

Consistent with this purpose, the Appellate Division for the Second Department interpreted the statute in a restrictive manner. For example, in Ibarra v. Equipment Control,<sup>4</sup> the plaintiff sustained a total loss of vision in his right eye. However, his left eye was not injured. The Appellate Division for the Second Department held that "the plaintiff's loss of vision in only one eye, even if total, does not constitute "total and permanent blindness."<sup>5</sup> In so holding, the Court emphasized that "the term "grave injury" has been defined as a "statutorily defined threshold for catastrophic injuries."<sup>6</sup>

Similarly, in Castro v. United Container Machinery Group,<sup>7</sup> the Second Department concluded that the loss of five finger-tips did not constitute a "loss of multiple fingers" included in the statute. This decision was affirmed by the Court of Appeals.<sup>8</sup>

Initially, the Appellate Division for the First Department also adopted a restrictive view of the statute. For instance, in Barbieri v. Mt. Sinai Hosp.,<sup>9</sup> the plaintiff sustained facial scars and neurological injuries. In his Bill of Particulars, the plaintiff alleged that these injuries were permanent, but did not allege that his injuries were total. Given this omission coupled by the plain language of the statute, the Court found that the plaintiff's injuries did not qualify as "grave injuries."

Likewise, in Hussein v. Pacific Handy Cutter, Inc.,<sup>10</sup> the First Department held that partial blindness in one eye did not constitute a "grave injury."

However, in Meis v. ELO Organization,<sup>11</sup> the First Department reversed this trend. In that case, the plaintiff, a plumber, sustained a total amputation of his thumb. On behalf of the third-party defendant/employer, our firm argued, as other third-party defendants had before, that the plain language of the statute and well established rules of statutory construction mandated a reversal of the trial court's denial of the third-party defendant's motion for summary judgment. We also noted that although it seemed odd that the loss of an index finger was included in the statute, but a loss of a thumb was not, "it [was] for the Legislature and not the courts to remedy the omission."<sup>12</sup>

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Despite the fact that the plaintiff did not allege a total or permanent loss of use of his hand in his Bill of Particulars, the Appellate Division for the First Department found that the loss of plaintiff's thumb "may" constitute a grave injury under that category of the statute. The Court reasoned that "the statute does not require the total loss of a hand; it requires instead the loss of the hand's use."<sup>13</sup> Since the plaintiff asserted that because of the loss of his prehensile ability, he could no longer grasp items with his dominant hand or engage in his usual occupation, the Court concluded that a jury could find that this was sufficient to constitute a "grave injury." In so holding, the court noted that "one of the more interesting and useful anatomical features of man and other primates is the opposable thumb, which allows objects to be grasped and picked up. Except for primates, no other animals have this ability."<sup>14</sup> The Court further opined that the amendment of Section 11 was not intended to change the overall remedial nature of the workers' compensation law.

The sole dissenter, Justice Tom, wrote that the majority's decision turned the "exclusive legislative delineation into an illustrative and merely descriptive listing" and improperly expanded "the scope of recoverable injuries into the very domain the Legislature wanted to seal off."<sup>15</sup> In Justice Tom's view, the majority exceeded its power by re-writing the statute to include an injury that the Legislature deliberately intended to exclude.

On our application, the Appellate Division for the First Department granted leave to the Court of Appeals.

On February 13, 2002, the Court of Appeals in a Memorandum decision reversed the First Department.<sup>16</sup> The court initially noted that the thumb is not listed as a "grave injury." The Court also found that the "plaintiff's argument that the loss of his thumb automatically rendered his hand totally useless is unavailing."<sup>17</sup> The Court emphasized that "injuries qualifying as grave are narrowly defined and the words in the statute are to be given their plain meaning without resort to forced or unnatural interpretations."<sup>18</sup>

Thus, the Meis case along with the Castro decision makes it unequivocally clear that a third-party action against an employer will not stand unless the plaintiff's injuries coincide with the plain language of the statute. Indeed, the brevity of the Meis decision (two paragraphs) and the strong language employed by the Court indicates that judicial interpretation of the statute is not even needed. Rather, the plain language of the statute should be accorded total deference.

The Meis decision also makes clear that a determination as to whether a plaintiff has sustained a "grave injury" should be determined as a matter of law.

In light of the foregoing, third-party defendants/employers should interpose motions for summary judgment in any case where there are no contractual indemnification claims and the plaintiffs have not sustained injuries specifically referred to in the statute. Conversely, general contractors and owners should ensure that they obtain a written contract with the plaintiff's employer, which contains a specific and express indemnification and hold harmless clause so as to avoid the sometimes harsh application of the statute.

<sup>1</sup> The amendment has no effect on contractual indemnification claims.

<sup>2</sup> L. 1996, ch. 635, para. 2

<sup>3</sup> Morales v. Gross, 657 N.Y.S.2d 711 (2d Dep't 1997).

<sup>4</sup> 707 N.Y.S.2d 208 (2d Dep't 2000).

<sup>5</sup> *Id.* at 211-212.

<sup>6</sup> *Id.* at 211.

<sup>7</sup> 710 N.Y.S.2d 90 (2d Dep't 2000)

<sup>8</sup> 96 N.Y.2d 398 (2001)

<sup>9</sup> 706 N.Y.S.2d 8 (1st Dep't 2000)

<sup>10</sup> 708 N.Y.S.2d 74 (1st Dep't 2000)

<sup>11</sup> 723 N.Y.S.2d 170 (1st Dep't 2001)

<sup>12</sup> Preferred Mutual Ins. Co. v. State of NY, 609 N.Y.S.2d 701, 703 (3rd Dep't 1994)

<sup>13</sup> Meis, *supra*, at 171.

<sup>14</sup> *Id.* at 173 (citing Encyclopedia Americana).

<sup>15</sup> *Id.* at 174-175.

<sup>16</sup> 2002 N.Y. LEXIS 156 (February 13, 2002).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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