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ATTORNEYS AT LAW

Your Editor will occasionally supplement the quarterly newsletter if the issue of a recent decision warrants immediate attention. The appellate court has just addressed *the rights of an employer to discipline the workers' compensation claimant* when a videotape surveillance would suggest that the claimant is malingering. The court has also interpreted Section 10, *which provides the basis for the calculation of average weekly wage*.

EMPLOYER IS SUBJECT TO CIVIL DAMAGES WHEN TERMINATING EMPLOYEE BASED ON VIDEOTAPE

Not infrequently, employers are convinced that an employee, presently receiving TTD benefits, should be working. Videotape surveillance may disclose the employee performing physical activities inconsistent with his claim of disability. Should the employer immediately cease making TTD payments or should he take more drastic action? The recent appellate court case of Clark v. Owens-Brockway makes it quite clear that firing of the employee may not be the best way to proceed.

On March 3, 1992, Gloria Clark injured her back at work. When the Owens-Brockway's physician corroborated the position of Clark's

treating physician that Clark should not be at work, the employer began paying TTD. During the following months, Clark was placed into a physical therapy/work-hardening program, which was intended to facilitate Clark's return to work.

Because the employer suspected that Clark was malingering, it hired an investigator to monitor Clark's daily activities, and on May 22, 1992, the investigator videotaped Clark mowing her lawn. Several days later, David Bailey, the Industrial Relations Director, reviewed the surveillance tape. On June 1, Bailey wrote Clark that she was suspended pending termination for "fraudulent misrepresentation and conduct" in connection with her claim for workers' compensation. On June 3, a discharge hearing was held and Clark was fired.

Clark brought an action to recover damages for retaliatory discharge. The trial court granted summary judgment in favor of Clark on the issue of liability. Only the question of damages remained for the jury. Clark alleged future lost income for a 16 year period. She also claimed emotional distress stating that she was compelled to seek community assistance to feed her family. The jury awarded Clark an amount in excess of \$150,000.

On appeal, the employer argued that Clark had lied about or exaggerated her injuries, thus providing the employer with a valid, permissible basis for the discharge. The court disagreed, pointing out that, while under Illinois law, an at-will employee can be discharged for any reason or no reason at all, one of the exceptions to this general rule is a discharge in retaliation for filing a workers' compensation claim. In other words, the employer was not compelled to give any reason for termination but, when it chose to base the termination on the filing of a workers' compensation claim, the employer became liable for damages.

Section 4(h) of the Act provides:

It shall be unlawful for any employer ... to discharge ... an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

In its decision upholding Clark's claim for retaliatory discharge, the appellate court stated:

The undisputed fact is that Clark filed for and was collecting workers' compensation benefits prior to her discharge. The undisputed fact is that she was discharged because her employer believed that her claim for benefits was exaggerated. Her employer admits that her discharge was connected to her workers' compensation filing and her collection of benefits since Bailey, the industrial relations director, thought she was malingering and collecting benefits to which she was not entitled. He used this as a basis to claim she was guilty of fraudulent acts justifying the termination of her employment. Therefore, her discharge was, as a matter of law, 'causally related' to the filing of a claim under the Workers' Compensation Act. ... The entry of summary judgment in favor of Clark was proper because her discharge was directly and proximately related to her claim for benefits. This does not mean that an employer may never discharge an employee who has filed for benefits under the Act. An employer may discharge an injured employee who has filed a workers' compensation claim as long as the reason for the discharge is wholly unrelated to

the employee's claim for benefits under the Workers' Compensation Act...

We wish to be clear on this point. An employer may not discharge an employee on the basis of a dispute about the extent or duration of a compensable injury. An employer that fails to heed this rule subjects itself to a retaliatory discharge action under Kelsay.

Up to this case, a general feeling existed that this statutory provision was intended to apply to the discharge of an employer who filed a claim or who requested medical and disability benefits. In this instance, the court extended the protection to an employee, who appeared to be malingering, because the video surveillance concerning this perceived malingering, resulted from the employee's "exercise of her rights or remedies granted to her by this Act."

EDITOR'S NOTE: WHAT SHOULD THE EMPLOYER DO? BENEFITS CAN BE TERMINATED WITH A WRITTEN NOTICE EXPLAINING GENERALLY THE REASON FOR THE TERMINATION OF BENEFITS. THEORETICALLY, THE EMPLOYEE MAY HAVE AN ACTION EVEN IF HE IS DISCHARGED BECAUSE HE COMMITTED PERJURY WHILE TESTIFYING IN HIS WORKERS' COMPENSATION CASE. A PETITION FOR REHEARING IS PENDING.

COMPUTATION OF AVERAGE WEEKLY WAGE

Every workers' compensation claim requires the computation of the employee's average weekly wage. Claims representatives are aware of the fact that the law interpreting Section 10 keeps changing.

In the 1993 Ricketts case, the claimant worked only four days over a three-week period at an hourly rate of \$14.85. The court took the four days wage of \$475.20 and divided it by the three weeks, thereby arriving at an average weekly wage of \$158.40. If the court had only used the four days and divided the total wages by .8, the average weekly wage would have been \$594.

The Ricketts method of calculation has been utilized since that time. Even if the employee worked only one day during any week, that one day's wage was considered to be his average weekly wage. Obviously, this resulted in a much lower calculation.

Now, in the D.J. Masonry Co. case, decided March 24, 1998, the appellate court has returned to the calculation method utilized prior to Ricketts. In D.J.

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Masonry, the employee earned \$23,496.80 during the year preceding the accident. He worked 204 days out of the entire year. 204 days was calculated to be 40.8 weeks and the court divided the total annual compensation by 40.8 weeks, even though the missing weeks were due to inclement weather and work being unavailable. The court arrived at an average weekly wage of \$575.90, whereas, if the annual wage was divided by 52 weeks, the wage would have been \$451.86.

In addressing the D.J. Masonry's argument concerning the claimant's windfall, the court stated:

D.J. Masonry repeatedly emphasized in its brief that the Commission's award is wrong because it results in a windfall, an outcome that is contrary to law, and, in effect, unconstitutional. We disagree. First, we note that, in his treatise on worker's compensation law, Professor Larson acknowledges that the computation of an employee's average weekly wage may be higher or lower than the employee's actual wage. Professor Larson adds, however, that such a result is not unreasonable or unfair unless the wages for the period are abnormally high or abnormally low. 2 A. Larson, Workmen's Compensation Law, §60.11(d), at 10-632-33 (1996).

Second, this court addressed the issue of an employee's receiving such a windfall in Illinois-Iowa Blacktop v. Industrial Comm'n, 180 Ill.App. 3d 885 (1989). In Illinois-Iowa Blacktop, the Commission divided the claimant's earnings by the 20 weeks

the claimant actually worked instead of by 52 weeks because the claimant missed more than 5 days of work during the 52-week period preceding his injury. The claimant's employer appealed, arguing that the Commission should have used 52 weeks in its division, because the use of 20 weeks resulted in a windfall. Illinois-Iowa Blacktop, 180 Ill.App.3d at 890....

Similarly, in this case, Botta's possibly receiving a windfall is not fatal to the Commission's wage determination. Moreover, we note that any windfall Botta is to receive is minor to nonexistent. Certainly, D.J. Masonry's argument that Botta will receive \$6,000 more a year due to the Commission's average weekly wage figure is misleading. In its calculation, D.J. Masonry multiplies \$575.90 by 52 weeks to obtain its \$29,946.80 figure. In actuality, however, Botta only receives two-thirds of the average weekly wage amount for TTD benefits, or \$383.93. See 820 ILCS 305/10. This figure's being multiplied by 52 weeks yields a result of \$19,964.36, which is \$3,532.52 lower than Botta's earnings the year preceding his injury. Consequently, unlike the claimant in Illinois-Iowa Blacktop, Botta is not obtaining a windfall. See Illinois-Iowa Blacktop, 180 Ill.App.3d 886, 893 (amount claimant received weekly multiplied by 52 weeks resulted in windfall). Instead, Botta will earn approximately what he earned in the year preceding his injury, and the Commission's wage determination reasonably represents Botta's earning potential. See Hines Lumber Co. v. Industrial Comm'n, 215 Ill.App.3d 659 (1990); 2 A. Larson, Workmen's Compensation Law §60.21(c), at 10-667 (1996)(purpose of wage calculation is to make a realistic judgment on what claimant's future loss will be).

EDITOR'S NOTE: THE ABOVE CALCULATION MAY FREQUENTLY BE USED, UNLESS THE WAGES FOR THE PERIOD ARE ABNORMALLY HIGH OR ABNORMALLY LOW.

FRANK J. WIEDNER, Editor