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VOLUME 15 ISSUE 4

May, 2005

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### **EMPLOYER IS ENTITLED TO A SECTION 12 IME EVEN WHEN REFUSING TO PAY TTD BENEFITS**

In our January, 2003 Newsletter, we reviewed the Industrial Commission decision involving the case of *Scott Hunter v. R.D. Masonry*, wherein the employee refused to comply with the employer's request for a Section 12 examination with an independent medical examiner. Section 12 of the Workers' Compensation Act states:

*An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer...for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of the Act.*

*...If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be*

*temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period.*

Section 12 examinations are typically used when employers dispute the causal connection of the claimed condition of ill-being with the workplace activities or dispute the extent of the claimant's disability as assessed by the treating physician. Prior to *Hunter v. R.D. Masonry*, a March 2002 decision of the panel majority, an employer's Section 12 rights were virtually unrestricted, other than the caveat that such examinations could not be used to harass the claimant.

Scott Hunter allegedly sustained accidental injuries to the low back on August 21, 1998 while moving a load of bricks. Hunter's treating physician opined a causal connection while the claimant's IME physician disputed the causal connection (after initially concurring with the treating physician). The parties proceeded to a 19(b) immediate hearing and the arbitrator found for the claimant, awarding TTD benefits from the date of accident through the date of arbitration.

While the 19(b) order was being reviewed, the employer scheduled a repeat Section 12 examination two months after the initial hearing. The claimant's attorney instructed his client not to attend the examination stating the employer had not paid any disability benefits as ordered by the arbitrator (even though that decision was still under review by the Commission). When the appellate court finally upheld the arbitrator's decision, the employer proceeded to pay the TTD award and

additional benefits through the date of the scheduled Section 12 examination that the petitioner failed to attend.

After a subsequent 19(b) hearing, the Commission majority, in a seeming departure from the legislative intent of Section 12 examinations, held that the claimant was not required to attend the evaluation because the employer was not paying TTD benefits. The Commission stated that the employer was not precluded from paying benefits to encourage attendance because Section 8(b) is clear that the payment of compensation may not be construed as an admission of liability. Thus, there would be no apparent prejudice in the payment of benefits.

The circuit court affirmed the Commission decision but the appellate court reversed, stating that the Commission had misconstrued Section 12 of the Act, noting as follows:

*According to the Commission, at the time that [Masonry] requested the examination, it had not agreed to pay benefits to the claimant, was appealing the arbitrator's finding as to liability and was withholding the payment of TTD benefits pending the outcome of that appeal and, as a consequence, the claimant "did not know whether he was 'entitled to receive benefits.'" The Commission seems to imply that, before a claimant is required to submit to a section 12 examination, he must know*

*that he is entitled to receive benefits. However, we find no authority for such a conclusion either in the language of section 12 or any reported case.*

The claimant appealed to the State supreme court, which affirmed the decision of the appellate court, thereby terminating the claimant's TTD benefits on the date the claimant refused to comply with the Section 12 examination request, stating that the right to request a Section 12 examination is not limited to situations where an employer is paying compensation payments.

The court distinguished the *Fencl-Tufo* case where the employer had requested a second examination only two months after the first examination had been conducted, even when the first physician had advised the claimant to stay off work for six months. The court found that the employer was proceeding in a manner that did not warrant compliance.

**EDITOR'S NOTE:** The court emphasized that R.D. Masonry was legitimately seeking a medical examination to determine if the claimant's temporary condition had improved or stabilized. The court added:

*In such cases, an injured employee can easily avoid any question as to his right to further TTD by complying with the request for the exam. If an employee refuses to submit to a proper request for a medical exam under section 12, his "right to compensation payments shall be temporarily suspended*

*until such examination shall have taken place, and no compensation shall be payable under [the] Act for such period."*

It should be noted that R.D. Masonry had failed to tender travel expenses at the time it requested the Section 12 IME. However, this argument was deemed waived because it was not raised in argument before the Commission. All claims personnel should know that the failure to forward these expenses eliminates any possibility of terminating TTD when the employee fails to show up for an exam.

### **CLAIMANT'S ABSENCE FROM WORK DUE TO DAUGHTER'S ILLNESS DOES NOT REDUCE THE AVERAGE WEEKLY WAGE**

The issue in this case is as follows: did the Commission properly calculate the claimant's average weekly wage when it deducted as lost time those days claimant did not work because he was providing care for his critically ill daughter? The deduction would reduce the number of weeks worked, thereby increasing the average weekly wage.

Richard Farris, who had been employed as a laborer since 1997, injured his back on November 17, 2000, while lifting a window. The claimant testified that he worked "five days a week, 40 hours a week." During the 52 weeks prior to the accident, he was laid off "occasionally" and he did not work various weeks and parts thereof "because his infant daughter was critically ill and required numerous hospitalizations."

The arbitrator found that the claimant worked 181.25 days and divided that number by five to arrive at 36.25 weeks and by adding 7.75 weeks for the daughter's care arrived at 44 as the number of weeks in which claimant "was available to work and during which time work was available with (the employer)." The arbitrator then arrived at an average weekly wage of \$478.18.

On review, the Commission did not use 44 weeks but limited the number of claimant's work to 36.25 weeks of the 52 weeks preceding the injury, thereby arriving at the higher weekly wage of \$595.37.

Section 10 of the Act provides in relevant part as follows:

*The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and part thereof remaining after the time so lost has been*

*deducted.*

In the *Illinois-Iowa Blacktop* case, the court noted that "section 10 plainly states that in all cases where the employee lost five or more days of work during the 52 weeks prior to the injury, the lost time (to the extent not due to the fault of the employee) should be deducted from the wage calculation denominator." In our instant case, the employer argued that the claimant made "a personal decision" and "time lost ... does not encompass time off for reasons of personal choice." The court disagreed stating that the time lost because of the daughter's illness "was not due to the fault of the claimant." Therefore, the additional weeks lost because of that illness should not be used to increase the denominator, which should be based only on those weeks actually worked.

**EDITOR'S NOTE:** Employer's reliance on the claimant's lost time was not considered a matter of "personal choice" because the time lost was not due to the "fault" of claimant. Is the court suggesting that the reason for the claimant's decision to decline available work should be determined before calculating the average weekly rate?

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