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*Gillen v. State Farm,
No. 98919, decided May 19, 2005*

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EMPLOYEE'S LOST TIME DUE TO HIS CARING FOR CRITICALLY ILL DAUGHTER IS TO BE EXCLUDED FROM WEEKS USED TO CALCULATE WAGE. WAS THE EMPLOYEE'S LOST TIME FOR THIS PURPOSE ACTUALLY "CAUSED BY THE EMPLOYEE?" THE COURT STATED THAT IT WAS NOT.

Richard Farris first began working for Grieffs Exterior Service in 1997. On November 17, 2000, he injured his back while lifting a window and eventually underwent back surgery. The primary issue in the case concerns calculation of the average weekly wage.

During the 52 weeks preceding claimant's injury, he earned \$21,039.95 working only 44 weeks with the balance of the year providing care for his critically ill daughter. During the year he worked 181.25 days and dividing that by five, the Commission arrived at 36.25 weeks. The Commission derived the average weekly wage as follows: \$21,582 (total earnings) divided by 36.25 (weeks) equals \$595.37 (average weekly wage).

The employer argued that the

Commission should not have deducted as lost time those days claimant did not work because he was providing care for his critically ill daughter who required numerous hospitalizations. The employer contended that the claimant could have worked during the time he was absent caring for his daughter and that those weeks should be included in the 52 weeks from which the average weekly wage is calculated. In affirming the Commission decision, the court stated that Section 10:

*allows the *** Commission to calculate average weekly wages using a denominator of only those weeks actually worked, to the benefit of the employee. "Lost time" is synonymous with "off time," unless caused by the employee as aforesaid, or the phrase has no purpose.*

EDITOR'S NOTE: The court noted that the claimant's lost time "was not due to the fault of the claimant." Further, as indicated above, the court stated that lost time was synonymous with off time "unless caused by the employee." The employee made his decision to stay away from work and yet the court stated that the employee's lost time was not caused by him. It would seem that if the reason for taking off was personal, even if understandable, the decision as to being away from work was exclusively that of the employee. Is not every employee's decision to stay away from work because of any personal reason "caused by the employee?" In effect, the court found that the employee's average weekly wage is the same regardless of whether he worked those weeks or decided, for personal reasons, not to work. This would increase both the TTD

and PPD payable to the employee, with the employer responsible for the increase.

IF EVER AN INSURANCE COMPANY MIGHT CONCLUDE THAT IT LOST A CASE BECAUSE OF SYMPATHY FOR THE PLAINTIFF INSTEAD OF ON THE BASIS OF EXISTING LAW, THIS COULD BE THE CASE

Scott Gillen, a Chicago Fire Department paramedic, while responding to an emergency call for assistance, was struck by an uninsured motor vehicle. The City of Chicago paid Scott's medical expenses, which totaled \$76,612.10, pursuant to the Pension Code.

When Teresa Gillen, Scott's wife, made a claim to State Farm for uninsured motorist benefits in the policy amount of \$100,000, State Farm relied on a set-off provision, which states:

Any amount payable under this coverage shall be reduced by an amount paid or payable to or for the insured under any workers' compensation disability benefits, or similar law.

Using the setoff of \$76,612.10 of medical benefits paid under the Pension Code, State Farm delivered to Teresa a check for the balance of \$23,387.90. Teresa filed a Complaint for Declaratory Judgment and the court granted State Farm judgment on the pleadings, dismissing Teresa's complaint with prejudice.

The appellate court held that State

Farm was not entitled to a setoff and was liable to Teresa for the full amount of the uninsured motorist coverage. The supreme court agreed to hear the appeal.

Initially, the court noted that the Pension Code medical benefit payments were not “workers’ compensation or disability benefits.” The issue, therefore, mirrored to the interpretation of the phrase “any similar law.” State Farm pointed out that a provision of a Pension Code required the City Corporation Counsel to demand reimbursement for the amount expended by the City for the necessary medical care, thereby providing subrogation rights similar to those provided by Section 5 of the Workers’ Compensation Act.

State Farm maintained that Illinois case law established that the ordinance and code provisions are similar to the Workers’ Compensation Act and that the payments were therefore made under a “similar law.” State Farm cited a number of cases to support its position:

1. In *Mitsuuchi* the court described the Pension Code as “similar to the Workers’ Compensation Act;
2. In *Fligelman* the court stated that the legislature intended in the Pension Code “to motivate municipalities to provide their employees with protections available to other workers under the Workers’ Compensation Act;” and
3. In *Sweeney* in the context of a personal injury suit by a police officer against the city,

the court noted that the “system created for the compensation of injured police officers under the Pension Code is analogous to that established by the Workers’ Compensation Act.”

Despite the clear similarity between the Pension Code and the Workers’ Compensation Act, the court stated that the similarity was not the issue but rather the ambiguity of State Farm’s setoff clause, stating:

The phrase “workers’ compensation, disability benefits or similar law” would not convey to the average, ordinary, normal, reasonable person, an intention to include our pension statute within the setoff clause of the policy. Even if we concluded that the setoff clause, reasonably construed, could convey to the average policy holder that State Farm’s liability would be reduced by payments made under the Pension Code and municipal ordinance, at best this results in an ambiguity. Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy.

EDITOR’S NOTE: The court conceded that

State Farm's setoff clause could convey to the average policy holder that State Farm's liability would be reduced by payments made under the Pension Code and municipal ordinances but at best this resulted in an ambiguity and that the ambiguity would be resolved against the drafter of the policy. The only possible ambiguity it discussed was the impression conveyed to the "average, ordinary, normal or reasonable person," an intention to include the Pension Statute within the setoff clause of the policy. Such a described person would most probably not know what would be included in the definition of "a similar law." The court ignored the fact that previous decisions had included the Pension Code in the definition of "a similar law."

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