

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 6 ISSUE 2

April 1996

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ATTORNEYS AT LAW

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DOES THE COMMISSION IGNORE THE OPINION OF RESPONDENT'S EXAMINING PHYSICIAN?

At the firm's regular monthly meeting, Oliver Wendell Graymatter, the senior partner, was lecturing his young associate, Ms. Truly M. Equal, about her handling of a workers' compensation defense claim. "I note," he said, "that you were prepared to cave in on a case where the company's IME report contradicted the opinion of the claimant's treating physician as to causal relationship. Why didn't you have more faith in your own examining doctor?"

"You must understand," Ms. Equal replied, "that the Commission constantly favors the opinion of the treating physician and I am getting a little gun shy. The arbitrators and commissioners constantly refer to the Edgcomb case where the appellate court found the decision of the Commission to be against the manifest weight of the evidence. Why? Because the Commission improperly relied on the opinion of the employer's examining physician, where it should have accepted the testimony of the claimant's treating physician as controlling."

"Well, I don't believe the Edgcomb case went as far as people think. The newly decided Prairie Farms Dairy case, I believe, bears me out."

In Prairie Farms Dairy v. Industrial Commission, the arbitrator found that a significant portion of the claimant's disability was unrelated to the accident based on numerous medical records introduced and the report of Dr. Holder, a non-treating physician who was called into consultation by Dr. Jacobs, the treating physician. Based on a report of Dr. Holder, as well as the report of Dr. Horenstein, the respondent's examining physician, the Commission found that "the considerable part of the medical points

to unnecessary surgery for conditions of ill-being that were not related to an isolated traumatic event" and awarded the claimant 15% loss of use of a man.

However, the circuit court reversed and remanded the case back to the Commission stating:

In Edgcomb v. Industrial Commission, (citation), the Appellate Court ruled that the treating surgeon's opinions ought to be given greater weight than the conclusions of examining doctors. As in Edgcomb, the treating doctor's findings were obtained from extensive examination, objective tests and an internal inspection of petitioner's low back. (Citation.) It was error for the Industrial Commission to disregard Dr. Jacobs' testimony in favor of the cursory conclusions of the respondent's examining doctors.

Acting on the circuit court's instructions, the Commission now found the claimant to be permanently and totally disabled. As might be expected, this same circuit court now affirmed. The respondent appealed contending that the court should not have reversed the initial award of 15% of a man. The appellate court, now getting the case for the first time, agreed, thereby reversing the total disability award and affirming the initial finding of 15% loss of a man.

To differentiate the Prairie Farms Dairy from Edgcomb, it's important to examine the participation of the non-treating physician. In Prairie Farms Dairy, the plaintiff had a back injury from a slip and fall. He suffered from a number of pre-existing conditions, including degenerative disc disease, diabetes, and peripheral neuropathy. Dr. Jacobs, the treating physician, performed a laminectomy on what he described as a newly herniated L3-L4 disc. After returning to work, the claimant suffered a stroke, for which he received one year of rehabilitation. Dr. Jacobs re-hospitalized the claimant for all of his conditions, including the partial paralysis from the stroke. During this time, Dr. Jacobs consulted with Dr. Holder, who performed an extensive record

review and evaluation. Despite Dr. Holder's recommendation against additional back surgery, Dr.

Jacobs performed an additional laminectomy, which he believed to be necessary because of the original accident. Respondent also obtained its examination from Dr. Horenstein, who stated that the claimant's surgery was unrelated to the original accident and that the claimant was totally disabled, but from the stroke not the back injury.

Why did the court rely on the opinion of non-treating physicians in Prairie Farms Dairy when it did the contrary in Edgcomb? In

Edgcomb, the employer's examining physician completed his examination in seven minutes and failed to perform any tests. In Prairie Farms Dairy, Dr. Holder, in evaluating claimant, performed as many tests as he could and reviewed the medical evidence in the record. Dr. Horenstein added the conclusion that the claimant's condition was due to the unrelated stroke. In Edgcomb, the respondent's IME was almost superficial while in Prairie Farms Dairy, the respondent relied on a non-treating physician who had performed a thorough examination, testing and record review. The court stated:

Our research has not revealed any case where this court, or the Illinois Supreme Court, has said that, as a matter of law, the Commission must give more weight to a treating physician's testimony than to that of an examining physician. Certainly

Edgcomb does not state that. In Edgcomb, we simply found that a balance of all the evidence, including that of (the treating physician), which the Commission disregarded, supported a finding of causal connection. Although we have said numerous times that the Commission may give more weight to a treating physician's opinion, we have never stated that it is obligated

“If the theory be sound that the trier of fact is bound by unrebutted testimony, then an arbitrator would be forced to find that the earth is flat if such testimony were presented.”

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to. (Emphasis supplied.)

EDITOR'S NOTE: WHAT STEPS SHOULD ALL OF US TAKE TO PROVIDE CREDIBILITY FOR OUR OWN INDEPENDENT MEDICAL EXAMINER, ESPECIALLY IN CASES INVOLVING CAUSAL RELATIONSHIP? ONE, PROVIDE THE PHYSICIAN WITH YOUR VERSION OF THE HISTORY; OTHERWISE HE CAN ONLY RELY ON THE INFORMATION PROVIDED BY THE CLAIMANT; TWO, PROVIDE YOUR PHYSICIAN WITH COPIES OF ALL MEDICAL AND HOSPITAL RECORDS, REPORTS AND TESTS AVAILABLE AND AUTHORIZE HIM, IF NECESSARY, TO UNDERTAKE WHATEVER ADDITIONAL TESTS HE WOULD RECOMMEND; AND THREE, MAKE A SPECIFIC REQUEST UPON HIM TO ADDRESS YOUR QUESTIONS CONCERNING CAUSAL RELATIONSHIP, INCLUDING HIS COMMENTS ON THE VALIDITY OF THE OPINION SUPPLIED BY THE CLAIMANT'S TREATING PHYSICIAN.

Remember, the more thorough and detailed, the greater acceptance your medical examiner's opinion will have. AVOID THE INFAMOUS SEVEN MINUTE EXAM.

**MUST PETITIONER'S
MEDICAL CAUSATION
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REBUTTED BY SIMILAR
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RESPONDENT?**

In a similar situation concerning medical opinions, the appellate court decided to eliminate another apparent misconception regarding the weight to be given to medical opinion. The problem began with the Dean v. Industrial Commission case, decided ten years ago, where the appellate court reversed a Commission decision for the respondent stating that the Commission should not have discounted the testimony of the sole medical expert on causation. This witness had testified that the petitioner suffered a heart attack as a result of a work-related condition. Because this expert's testimony was based on a possible misinterpretation of the facts and because of the admissions elicited during cross examination, the respondent felt that the petitioner had not proved a case and that no rebuttal testimony was necessary. To the respondent's great surprise and chagrin, the appellate court, in effect, suggested that the respondent must utilize its own medical opinion to overcome the petitioner's medical opinion, no matter how weak the petitioner's medical opinion might be. In that Dean

case, the court majority stated:

Therefore, the Commission legally erred by arbitrarily discounting the testimony of the sole medical expert on causation. [Citation.]

The company failed to rebut the occurrence facts and medical conclusions which indicated that the petitioner's pre-infarction syndrome was a compensable injury. Thus, the facts supporting causation were susceptible of only one inference. Therefore, the issue became one of law.

The court added that "[t]he uncontroverted medical evidence indicates that the petitioner succumbed to the stress and physical activities of his employment."

However, in the recent case of Sorenson v. Industrial Commission, the court, in effect, changed the rules. In Sorenson, the only causal relationship opinion was supplied by Dr. Barnett, the petitioner's treating physician. The Commission held for the respondent and the appellate court affirmed, despite the similarity to the Dean case. Instead, the appellate court now relied on the dissenting opinion in Dean, which stated:

“Although we have said numerous times that the Commission may give more weight to a treating physician's opinion, we have never stated that it is obligated to.”

What is more important is a basic legal doctrine that a trier of fact, whether a jury, court, arbitrator, or Commission, is always free to disbelieve any witness. If the theory be sound that the trier of fact is bound by unrebutted testimony, then an arbitrator would be forced to find that the earth is flat if such testimony were presented. [Citation.] (Webber, P.J., dissenting).

In conclusion, Justice Webber stated that “the arbitrator was thoroughly at liberty to disregard [the physician's] statement that the petitioner was totally disabled on May 20. Otherwise, every infarct could be retroactively related to the workplace no matter how remote in time it might occur.” [Citation.] (Webber, P.J., dissenting).

Thus, although we do not disagree with the finding in Dean that the Commission's decision was against the manifest weight of the evidence, we disagree with that language which stated that the Commission must accept unrebutted testimony.

EDITOR'S NOTE: IN PRAIRIE VIEW DAIRY AND SORENSON, THE COURT IS SUGGESTING THAT THE COMMISSION REVIEW ALL OF THE TESTIMONY, EVEN THOUGH A PARTICULAR SPECIFIC OPINION SEEMS TO BE "UNREBUTTED" or comes from a non-treating physician.

DOES A WORKERS' COMPENSATION LIEN IN A DEATH CASE INCLUDE THE MEDICAL AND TEMPORARY TOTAL DISABILITY BENEFITS PAID WHILE THE EMPLOYEE WAS ALIVE?

James Borden, a maintenance engineer for New Trier High School, was severely burned by a surge of steam from a pipe. The injury occurred on January 7, 1992 and the claimant lived one week, during which time the employer paid \$92,185.12 in hospital expenses, \$557.71 in TTD and, eventually, \$1,750 in burial expense. The 20-year projection of death benefits at \$488, per week, amounted to \$509,262.84. The widow, as administrator of the estate, brought a wrongful death action to recover the pecuniary loss and loss of society and companionship that she and her two adult sons suffered as a result of her husband's death. She accepted a settlement offer of \$3.2 million. New Trier intervened in the civil action to the extent of its lien.

The widow and New Trier disagreed, however, as to whether New Trier's reimbursement should be limited to the death benefits or whether it should include the expenses incurred while the husband was still alive, as well as the burial expense. New Trier conceded that the plaintiff had recovered only wrongful death damages and no survival damages, but asserted that, under the current language of Section 5(b), an employer's lien attached to any recovery by a personal representative in an action against the third party, regardless of the manner in which the damages were allocated. The court stated:

There is no way plaintiff can avoid the clear and unambiguous statutory language of Section 5(b). The fact that plaintiff has not recovered any survival

damages does not change this result. Under our reading of Section 5(b), whenever an action is brought against a third party by an injured employee or his personal representative, and the employer asserts a lien on the proceeds of that action, there is no statutory requirement that the damages recovered by the employee or his personal representative "match up" with the workers' compensation benefits paid on behalf of the employee by the employer. Despite the fact that plaintiff and ServiceMaster have allocated the settlement proceeds solely as wrongful death damages, we find that New Trier is entitled to full reimbursement for all of the expenses it incurred, including those incurred between the time of the accident and James Borden's death.

See Borden v. ServiceMaster.

EDITOR'S NOTE: THE WORKERS' COMPENSATION LIEN, HOWEVER, WILL NOT ATTACH TO THAT PORTION OF ANY SETTLEMENT ALLOCATED TO A SPOUSE'S LOSS OF CONSORTIUM CLAIM.

ALIENS, ILLEGAL OR OTHERWISE

In Jarabe v. Industrial Commission, the plaintiffs, who were non-resident aliens from the Philippines, claimed workers' compensation benefits following the death of their daughter, who was killed while working as a baggage handler for American

Airlines. The arbitrator found that the parents were totally dependent on their daughter but limited the recovery under Section 7(i), which provides in pertinent part:

(i) Whenever the dependents of a deceased employee are aliens not residing in the United States, Mexico or Canada, the amount of compensation payable is limited to the beneficiaries described in paragraphs (a), (b) and (c) of this Section and is 50% of the compensation provided in paragraphs (a), (b) and (c) of this Section, except as otherwise provided by treaty.

The plaintiffs were awarded \$148.75 each week for life, representing 50% of the \$297.51 per week which plaintiffs would have been entitled to in the absence of Section 7(i). The plaintiffs appealed, stating that the Workers' Compensation Act violated the United States and State Constitutions. The Fourteenth Amendment to the Federal Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV.

The Illinois Constitution provides that "No person shall be deprived of live, liberty or property without due process of law nor be denied the equal protection of the laws." Ill.Const. 1970, Art. I, §2.

Our Illinois Supreme Court upheld the limitations on the parents' recovery stating that "the equal protection clause and the due process clause of the United States Constitution apply solely to citizens and resident aliens."

ARE ILLEGAL ALIENS ENTITLED TO THE BENEFITS OF THE WORKERS' COMPENSATION ACT?

Section 1(b)2 of the Workers' Compensation Act defines an employee as including the following:

Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made, and including aliens, and minors who, for the purpose of this Act are

considered the same and have the same power to contract, receive payments and give quittances therefor, as adult employees.

Under this section, an alien can be either legal or illegal and still be covered. As pointed out in the Jarabe case, the Act includes all persons within the territorial jurisdiction, whether they be citizens or aliens, legal or illegal. This conclusion is supported in the old 1916 case entitled Victor Chemical Works v. Industrial Board of Illinois, wherein the Court stated:

The general welfare of the people of the State or citizens of the State, might well be promoted by providing compensation for accident injuries or death suffered by aliens, as well as citizens, in the course of employment within the State. There are many alien employees within the State to whom the Act should apply, and we can perceive no reason why it should not apply to them as well as to citizens.

“There are many alien employees within the State to whom the Act should apply, and we can perceive no reason why it should not apply to them as well as to citizens.”

EDITOR'S NOTE: IT SHOULD BE NOTED, HOWEVER, THAT THE EMPLOYER COULD NOT PROVIDE RE-EMPLOYMENT EVEN WHEN THE ILLEGAL ALIEN IS ABLE TO RETURN TO WORK BECAUSE THE EMPLOYEE WOULD HAVE NO CAPACITY TO OBTAIN ANY JOB LEGALLY AFTER THE INJURY.

SPOUSAL SUPPORT CLAIM ON LUMP SUM SETTLEMENT

Jim Stevenson of our office addressed the question of the employer's obligation to withhold a portion of compensation benefits because of a spousal court order when the compensation act states that those benefits should not be subject to lien. This issue was addressed in the case of Nancy Dodds v. Terry Dodds.

Nancy and Terry Dodds were married with three children. Nancy filed a Petition for Dissolution of Marriage and a judgment was entered granting a divorce and ordering Terry to pay weekly child support. Terry thereafter remarried and acquired three stepchildren.

Terry then suffered a work-related injury, which was settled for a lump sum payment of considerable proportion. Because of his injury Terry also became eligible to receive social security disability income which was divided between his current wife,

stepchildren and his own children by his prior marriage to Nancy.

The trial court held that Terry's workers' compensation settlement was income by virtue of the Illinois Marriage and Dissolution of marriage act. The court noted that the marriage act defines income as, "*any form of periodic payment to an individual, regardless of source, including, but not limited to: wages, salary . . . [and] workers' compensation.*" The trial court noted that Terry could have elected to receive weekly disability benefits under the workers' compensation system, but forewent that right when he chose to settle his claim for a lump sum present day cash value.

Terry appealed. Terry freely admitted that a percentage of his income should go to child support, but he did not believe that his workers' compensation settlement constituted income because, specifically, it did not take the form of periodic payments.

The appellate court disagreed. The Court stated that the Marriage Act does create parental obligations for child support by utilizing various guidelines, one of which is net income. The Court reasoned that net income is defined by the Marriage Act as, "the total of all income for all sources, minus specific deductions."

The appellate court also reasoned that to exclude one time settlements would differentiate unfairly between a parent who elects to receive a workers' compensation award in the form of weekly or periodic payments while at the same time would benefit another parent who elected to receive a lump sum workers' compensation award and escaped the duty of applying the award to any child support obligations.

EDITOR'S NOTE: AT LEAST ONE APPELLATE COURT DECISION HAS REACHED A SOMEWHAT DIFFERENT RESULT, THAT BEING THE 1994 WAGONER CASE. AS A RESULT OF THE CONFLICT, THE SUPREME COURT RECENTLY AGREED TO HEAR THE DEROSSET CASE, WHERE THE WIFE WAS AWARDED 30% OF A \$112,000 LUMP SUM SETTLEMENT. THE SUPREME COURT DECISION SHOULD CLARIFY THIS SITUATION.

BEWARE OF PENALTIES ON WAGE DIFFERENTIAL CLAIMS

An Industrial Commission decision obviously does not have the same impact as an expression from the appellate court. However, occasionally the Commission will suggest a new solution to an old problem, and even though the Commission decision is being appealed, the matter deserves comment.

In the recent Industrial Commission case of Diskin v. Lyn Den, Inc., the claimant was a tile setter, who, on December 13, 1989, sustained a back injury which ultimately required two surgical procedures. On August 22, 1994, after the claimant was released for light duty, he began working as a security guard because of a referral from the vocational rehabilitation counselor.

The security guard's average weekly wage was \$297.50, whereas that of a tile setter was \$920.40.

Because of the \$622.90 per week differential, the claimant was clearly entitled to the maximum weekly wage differential of \$329.75.

Up to this point, the facts are not unusual. The significance of this case results from the 19(k) petition which requested penalties to be imposed from September 26, 1994 to the date of the arbitration hearing. That date of September 26, 1994,

became significant because it was then that the parties met, through counsel, and petitioner advised that he had elected to proceed under the wage loss provision. The Commission held that "subsequent to that meeting, respondent had no reasonable basis for denying petitioner benefits under Section 8(d)1."

In justifying the imposition of penalties prior to the award, the Commission referred to "the analogous situation in which penalties are assessed for an employer's failure to pay a statutory amputation."

This may be the first case where a respondent has been assessed a penalty for failure to pay a wage differential prior to the award. The amputation analogy is questionable because that obligation results from the statute and not from an election. The Commission refers to other 19(k) penalties prior to an award but none of these involved a wage differential.

Several other questions come to mind. A statement made by counsel at a settlement meeting that

“This may be the first case where a respondent has been assessed a penalty for failure to pay a wage differential prior to the award.”

the petitioner would proceed under Section 8(d)1 is not binding on the petitioner, particularly if the wage differential disappeared. The petitioner could then request benefits under 8(d)2, which pertains to percentage of a body, or 8(e), which pertains to a percentage of a member. Finally, while Section 8(d)2 clearly permits the petitioner to waive his right to recover under 8(d)1 and accept the benefits under Section 8(d)2, it does not specifically permit the reverse. On that basis, the Commission would have a right to determine whether 8(d)2 or 8(e) would apply.

EDITOR'S NOTE: YOU CAN NOW EXPECT WRITTEN DEMANDS FROM PETITIONERS' ATTORNEYS WHENEVER SECTION 8(D)1 MAY BE APPLICABLE. I SUGGEST THAT YOU DO NOT IGNORE THESE REQUESTS BUT PROVIDE A RESPONSE, AFTER REVIEWING THE MATTER WITH YOUR COUNSEL.

COMMISSION NOTES

Commissioner Robert Malooly has announced his resignation, effective June 1. Reportedly, he is leaving government service and entering a private business relationship concerning computers. No information is, as yet, available as to his replacement.

The Workers' Compensation Reform legislation, which was passed by the Illinois Senate last fall, was not submitted to the Illinois House during its spring session. The fate of the bill should depend, to some extent, on the results of the November election.

Your editor delayed the newsletter edition until noon of the last legislative day. Governor Edgar supported passage of a bill to terminate civil service protection for all of the I.C. arbitrators. Passage in the Senate seemed certain, but, after extensive deliberation, failed in the House. While the present arbitration panel might be improved, this legislation could have had a drastic effect on the operation of the Industrial Commission.

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FRANK J. WIEDNER

Out of town hearing locations and attorneys responsible for each call

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Workers' Compensation and Employer Liability Quarterly is published on a quarterly basis to summarize and comment upon current legal developments in Illinois Workers' Compensation Law and Employment Liability. Other related topics may also be addressed from time to time. The Workers' Compensation and Employment Liability Quarterly is not intended to provide an exhaustive discussion of the topics presented and the reader should not rely upon the legal commentary without the advice of counsel. The Workers' Compensation and Employment Liability Quarterly may not be reproduced in whole or in part without prior written permission.
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