

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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ATTORNEYS AT LAW**

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WHEN IS INTOXICATION A

DEFENSE?

In the past, the Supreme Court has denied compensation when the claimant was so intoxicated that his injuries did not arise out of and in the course of his employment but resulted from his drunken condition. The court noted that the intoxication defense will prevent a finding of compensability when an employee's intoxication is the sole cause of his injuries or the employee's excessive intoxication renders him incapable or performing work and constitutes a departure from the course of employment. As a practical matter, the court has been more inclined to deny compensation when the intoxicated claimant was operating a motor vehicle. This may have been due to the strong social policy as well as effectiveness of organizations against drunken driving and followed by the legislature in its increasingly stringent enforcement of the criminal DUI statutes. In a number of non-driving cases, the courts have concluded that the intoxication had failed to incapacitate the employee from performing his employment duties and the intoxication did not defeat the claim, although it may have been a contributing cause of the injury.

We now have two new cases on intoxication. It comes as somewhat a surprise, therefore, that the Supreme Court denied compensation when the intoxication led to a stairway fall. Less surprising is the decision in an Appellate Court case where the claimant was driving an automobile while intoxicated.

In Parro v. Industrial Commission, Sup. No. 78332, the claimant was a restaurant bartender who contended that she had only two sips from a bottle of beer while

celebrating a customer's announcement that he was becoming a father. After the restaurant closed and she completed her duties, she changed into pumps having 1½-inch heels, put on a rain coat, and descended a flight of stairs in the basement to use a restroom. As she did so, her heel became caught in the hem of her coat and she tripped and fell. She walked these stairs, which also led to the kitchen and storage areas, perhaps a dozen times a day. The steps were slippery and poorly lighted. Several patrons, including several lawyers and a judge, testified that they did not see the claimant drink, nor did she appear to be intoxicated. Nevertheless, a blood sample taken at the hospital shortly after admission revealed a blood alcohol level of 0.288 which, according to the treating physician, would

The case of Beattie v. Industrial Commission, 205 Ill.Dec. 156, is more predictable because it involved the combination of drinking and driving.

Beattie, the general sales manager at an automobile dealership, had been informed that the dealership's finance manager, Richard Madonia, intended to resign. In an attempt to change Madonia's mind, Beattie, Madonia, and the general manager, Richard Fisher, met after work at a restaurant where they had several drinks. Thereafter, Fisher left for home, and Beattie and Madonia drove to another restaurant, where Beattie had several more drinks. The parties differed as to whether Madonia's decision to postpone his resignation was reached at either the first or second restaurant. On his way home, Beattie was killed in an automobile accident with a coroner's report finding that Beattie's blood level was .197%. The Commission denied compensation, accepting Fisher's

“Where the decedent was himself driving the vehicle, we must take into account the legal intoxication standard,”

result in motor impairment. The Commission concluded that intoxication was a sole cause of the accident. The Appellate Court, in a split decision, reversed, and the Supreme Court reversed the Appellate Court and denied compensation, primarily because it felt that the Commission had a right to draw inferences from the evidence with reference to the facts and that the Commission finding should not be disturbed by a court. Most likely, if the Commission had found the case compensable, the court would not have disagreed with the result. Basically, the Court would not disturb a Commission finding which was based on inferences as to the credibility of the witnesses.

testimony that the employment question had been resolved by the time the parties left the first restaurant. Thereafter, the time spent at the second restaurant was purely

social.

Despite the general rule that travel to and from employment is not compensable, this case fell within an exception because the employer permitted the employee to drive a dealership-owned demonstrator car with the use of the car being for the employer's advertisement purposes. The issue in dispute concerned Beattie's leaving the scope of his employment when he stopped at the second restaurant, where he remained for 1 to 1½ hours. Was he then acting outside the course of his employment when driving while intoxicated? The court stated: *Where the decedent was himself driving the vehicle, we must take into account the legal intoxication standard, which is itself based*

on a medical standard correlating blood alcohol levels with a normal human being's ability to perform the necessary cognitive E and motor tasks required to drive.

In citing the analysis by Professor Larson, the court said:

. . . [I]t would seem that an employer raising the defense of intoxication could prevail on either of two separate grounds. First, an employee, though in the course of his employment, will be denied recovery if his intoxication is the cause of the injury -- that is, if the injury arose out of the intoxication rather than out of the employment. Second, excessive intoxication may constitute a departure from the course of employment, and an employee who is injured in that

In the intoxication cases, the Appellate and the Supreme Court placed much emphasis on the right of the Industrial Commission to judge credibility and draw inferences from the facts. Despite these admonitions, the Appellate Court reversed the Commission for doing just that.

condition does not sustain an injury in the course of his employment. Under the latter rationale, intoxication of a sufficient degree is viewed as an abandonment of employment, or a departure from employment.

EDITOR'S NOTE: THE FINDING THAT THE CLAIMANT HAD REACHED THE LEGAL OBLIGATION STANDARD SHOULD BE A GOOD DEFENSE IN MOST DRIVING CASES, BUT NOT NECESSARILY IN OTHER ON-THE-JOB INJURIES.

**EMPLOYEE INJURED WHILE
RESISTING ARREST**
Case Found Compensable

In Kochilas v. Industrial Commission, 211 Ill.Dec. 106, the claimant was a painting supervisor for a crew of four whose job it was to paint CTA subway stations. The crew worked at night. Because he and his crew previously had been attacked and robbed, the claimant regularly brought his Labrador Retriever to the work site. One night, two men dressed like bums approached him with one of the men describing himself as a police officer and instructing him to get the dog out of there. The facts are in dispute as to whether the claimant complied with the police request but, in any event, he was handcuffed and while resisting the arrest, he did wrestle with the police officers and sustained an injury. The Arbitrator concluded that the claimant's arrest was work-related, as he was authorized to have his dog on the platform for protection and that the risk of injury arose out of that authorized activity. The Commission reversed stating that the claimant had stepped outside of his employment in deliberately defying a lawful request from the police officers, thereby subjecting himself to a risk which was beyond his employment. In reversing the Industrial Commission in order to find for the claimant, the Court stated:

Claimant certainly was not the aggressor in this situation, and more importantly, the dispute was not purely personal. Under such circumstances, claimant is entitled to compensation. Violation of the law in performing one's duties does not automatically remove an employee from the

In the County of Cook case, a court employee was sitting in her car in the court's parking lot when she was stabbed during a

“Violation of the law in performing one's duties does not automatically remove an employee from the course of his employment.”

course of his employment. We conclude claimant did not step outside the scope of his employment in this instance. While we are reluctant to set aside a decision of the Commission on a factual question, we must do so when the weight of the evidence compels an opposite conclusion.

EDITOR'S NOTE: THIS UNUSUAL REVERSAL OF THE COMMISSION IN A DISPUTED FACT CASE WAS BY A 3 TO 2 VOTE AND SHOULD NOT BE REGARDED AS A CHANGE IN THE COURT'S PHILOSOPHY.

POLICE OFFICER COULD NOT SUE CITY BECAUSE INJURY WAS WORK-RELATED

In Fligelman v. City of Chicago, App. No. 1-94-2801, the claimant was a city police officer, who, when reporting for duty, parked in the police headquarters' lot. As he walked through the lot, a chunk of concrete from the overhead Roosevelt Road bridge fell, struck him and fractured his arm. The claimant filed a negligence action because of the dangerous condition of the bridge, but the city defended on the ground that the claimant was "engaged in the line of his duty," and was, therefore, limited to compensation under the Pension Code. In finding that the officer's exclusive remedy was under the Pension Code, the Court referred to the County of Cook and the Eisner Food Stores cases.

robbery attempt. In Eisner, a supermarket sign fell on an employee as he walked on the sidewalk in front of the store during a severe

wind storm. In both cases, the court found that the injury was work-related because of the "increased risk." In the instant case, the Court concluded:

The parking lot for police headquarters here similarly subjected the officers to an increased risk of harm, because the lot sat under a dilapidated bridge. Members of the public could at times expose themselves to the same risk by walking under the bridge, just as the public could use the risky parking lot in County of Cook and the sidewalk in Eisner. But the public did not need to pass under the bridge as regularly as did those police officers who used the headquarters' parking lot. Just like regular use of the parking lot in County of Cook and the sidewalk in Eisner exposed those employees to increased risk, regular use of the parking lot here "would result in a degree of exposure to the common risk beyond that to which the general public would be subjected."

"nor did the employer have an affirmative duty to advise the claimant when the limitations period would run,"

EDITOR'S NOTE: (ALTHOUGH THE DECISION WAS BASED ON THE PENSION CODE, THE RESULT SHOULD BE THE SAME IN A WORKERS' COMPENSATION CLAIM.)

WHEN IS THE EMPLOYER ESTOPPED FROM USING THE LIMITATIONS DEFENSE?

Insurance carriers and employers are usually very cautious in communicating with the claimant who is approaching the end of the three year limitations period without having filed a claim with the Commission. Carriers have been burnt in

several prior cases. Let's take a quick look at three instances where the insurer was unsuccessful in a limitations defense.

1. In Molex, Inc. v. Industrial Commission, 338 N.E.2d 390, the claims representative made an offer which was rejected. She then suggested a re-evaluation by the insurer's physician to determine whether the amount of the offer could be increased. Thereafter, the claims representative failed to make the appointment for the examination and further ignored the claimant's correspondence and telephone calls. Finally, the claimant was advised by another claims representative that the limitations period had run.

2. In Kaskaskia Constructors v. Industrial Commission, 337 N.E.2d 713, the claimant advised the insured that his doctor had recommended further surgery. Shortly before the limitations period expired, two representatives of the insurer came to the claimant's home to discuss the matter with him. Nothing was said about any kind of time limitation period. The day the limitations period expired, the insurer sent the claimant a denial letter.

3. In Herlihy Mid-Continent Co. v. Industrial Commission, the insurer had arranged to have the claimant examined by one of its physicians after the Statute of Limitations had run.

The claimant argued that the insurer should be estopped from using a limitations defense because (1) no time limitation had been placed on the offer and (2) the claimant had never received the booklet containing the workers' compensation rules. The Appellate Court affirmed the Commission's denial of the claim because (1) there was no evidence of any promise or representation by the insurer that could have lulled the claimant into a false sense of security or cause him to delay the assertion of rights, nor did the employer have an affirmative duty to advise the claimant when the limitations period would run; and (2) although the Commission's regulations required that the booklet be supplied, the claimant cited no authority which holds that an employer's non-compliance will estop the employer from asserting the limitations defense.

EDITOR'S NOTE: ONE JUSTICE DISSENTED, STATING THE EMPLOYER'S FAILURE TO COMPLY WITH SECTION 7110.60, WHICH REQUIRES THE DISTRIBUTION OF THE BOOKLET, SHOULD ESTOP IT FROM RAISING THE LIMITATIONS DEFENSE. BUT, WHAT ABOUT ALL THOSE INSTANCES WHEN THE COMMISSION BOOKLET IS OUT OF PRINT?

COLLATERAL ESTOPPEL
When Can the Decision of the Industrial Commission be used to Bar a Civil Claim Against Persons Other than the Employer?

Occasionally, when a causal relationship issue exists in the workers' compensation claim, the denial of liability
 The first and third portions of the test

can be utilized as a defense in the civil case. However, the employer in the case of Arnett v. Environmental Science, App. No. 3-94-0707, did not satisfy the strict requirements to utilize the defense of "collateral estoppel."

Arnett filed suit against the asbestos project manager and air sampling professional, contending that he was injured by exposure to fumes from mastic removers and chemical solvents while working on an asbestos abatement project. The workers' compensation claim against the employer had previously been denied on the basis that the claimant had failed to establish that his condition of ill-being was caused by exposure to fumes. The Commission affirmed, as did the Circuit Court.

Thereafter, the compensation case was dismissed with prejudice because "the cause of action was satisfied."

"The purpose of collateral estoppel is to prevent re-litigation of previously adjudicated claims."

The purpose of collateral estoppel is to prevent re-litigation of previously adjudicated claims. In other words, if an issue was already decided, judicial economy would preclude it from being heard again. The Court must consider three questions when deciding the issues of:

- (1) Was the issue previously decided identical?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom estoppel is asserted a party to the prior adjudication?

were clearly met. However, the claimant

stated there had not been a final judgment on the merits. Why? When the language of the dismissal order stated that the cause of action was "satisfied," it suggested a "settlement of the parties' rather than a mere affirmation of the Industrial Commission decision."

EDITOR'S NOTE: THE COURT DID SUGGEST THAT THE DEFENDANTS COULD RE-OPEN THIS MATTER AT THE TIME OF TRIAL, BUT THAT SUMMARY JUDGEMENT WAS NOT PROPER AT THIS TIME. AS YOU CAN SEE, THE LANGUAGE OF THE ORDER MUST NOT CONTAIN ANY SUGGESTION THAT THE EMPLOYER HAD COMPROMISED ITS DECISION AT THE TIME OF THE FINAL ORDER. THE ORDER MUST SHOW THAT THE DISPUTED ISSUE WAS DECIDED, NOT THAT THE "CAUSE OF ACTION WAS SATISFIED."

RECENT INDUSTRIAL COMMISSION DECISIONS

Although Industrial Commission decisions do not have the same impact as that of an Appellate Court, we always examine any philosophical approach that either of the Commission panels may take on a commonly disputed issue. Our office has recently been involved in decisions concerning two significant areas of dispute, those being parking lot injuries and jurisdiction.

PARKING LOT

In Horace v. Healthcare Excellence, I.C. No. 95 IIC 1335, the claimant, Costella Horace, had worked overtime, was leaving work to go home and slipped and fell on ice

in the parking lot. As she left the building, she crossed a snowy "island," which was actually a grassy area covered with snow separating the different areas of the parking lot. She reached the side of her automobile and slipped on the icy pavement injuring her leg. The building was new and although the employer utilized only one floor, it was the only tenant in the building at that time. While the claimant was instructed by her employer to park in either the north or west parking lots, these were the only lots adjacent to the building. There were no assigned parking places within the so-called designated area and the parking area in question was open to members of the general public as well as customers or clients of the employer. By virtue of the lease, the landlord had retained certain rights

"the petitioner was not subjected to a danger or increased risk, i.e., icy pavement, beyond that to which the general public was exposed."

with respect to the building and premises, including "driving and parking signs and regulations." The Industrial Commission held that "the petitioner was not subjected to a danger or increased risk, i.e., icy pavement, beyond that to which the general public was exposed."

EDITOR'S NOTE: AS JOHN SANDBERG POINTED OUT TO THE COMMISSION, (1) THE CLAIMANT MAY HAVE INCREASED THEIR RISK BY CROSSING THE SNOWY AREA, (2) THE CLAIMANT FAILED TO PROVE THAT SHE WAS REQUIRED TO PARK IN A DESIGNATED PARKING SPOT AND (3) THE LANDLORD KEPT CONTROL OF THE PARKING LOT.

JURISDICTION

At one time, the Industrial Commission would accept any claim where the original contract of hire had its signing in Illinois. But, several years ago, in the case of Carroll v. Industrial Commission, 563 N.E.2d 890, the Court had held that "the employment contract is but one factor that must be weighed in determining whether Illinois jurisdiction is proper and does not lead to an automatic finding of jurisdiction."

This doctrine was followed in the recent case of Richard Wangsness v. United Airlines, I.C. No. 96 IIC 0004. The claimant was hired in Chicago in 1978 and worked at O'Hare until 1986, at which time he voluntarily transferred to Denver. At that time, he submitted no new employment application, nor was he re-interviewed or required to submit to another physical examination. He was married in Colorado in 1988, paid Colorado State income taxes, had a Colorado driver's license and had two children enrolled in the Colorado school system. When he had his accident in Denver in 1993, the claimant was treated in Colorado, paid under the Colorado statute and returned to his regular job several months later. The Commission held that the claimant had not presented any "significant contacts" with Illinois since his departure in 1986, but that he had maintained exclusive contacts with the State of Colorado.

EDITOR'S NOTE: PAUL WIEDNER, WHO HANDLED THIS CLAIM, TELLS ME THAT THE CLAIMANT IS APPEALING TO THE CIRCUIT COURT.

The leadership of both the Illinois House and the Senate are reluctant to consider any Workers' Compensation legislation during an election year. The subject is much too controversial. Amendments to the Act are most likely to be proposed in 1997. The nature of this legislation will depend greatly on the results of this November's elections.

FRANK J. WIEDNER

LEGISLATION

COMING NEXT ISSUE...

n Fraud at the Industrial Commission - Do We Really Need New Legislative Initiative or Are the Current Statutes Sufficient?

n Is Fraud Being Used as a Marketing Tool by Certain Insurance Carriers?