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WHAT'S AN "ODD LOT"?

Ms. Truly M. Equal, the firm's junior associate, had been assigned her first defense case where the claim for permanent total disability benefits was complicated by questions concerning the proof necessary to establish an "odd lot" category award.

"I never quite understood this "odd lot" theory," she said to Oliver W. Graymatter, the senior partner. "I don't know exactly what the claimant must establish before my evidence becomes necessary. Frankly, until recently I always thought the "odd lot" category described my friends from college."

"That's probably correct," responded Graymatter, "but the "odd lot" classification is an important element for serious workers' compensation claims."

"Approximately twenty years ago, the supreme and appellate courts began confirming awards for permanent total disability when the claimant was still able to perform some type of work. The courts concluded that the claimant could recover because he fell into that "odd lot" category. Two "odd lot" cases were decided by the appellate court last month, and it is your assignment to read these cases and report

your opinion for our clients.” Welcoming the added responsibility, Ms. Equal headed for the law library and produced the following report.

TWO CASES THAT DID NOT MAKE THE "ODD LOT" CATEGORY

In Courier v. Industrial Commission, a 41 year old claimant was carrying suitcases up the stairs when she sustained a back injury which eventually led to two surgical procedures. Her treating physician described permanent restrictions involving lifting, bending, stooping and squatting, together with a 20-pound weight restriction and found her physically incapable of performing her prior occupational duties. The respondent's physician did not disagree with the restrictions but felt that the claimant was capable of performing work of a light-duty nature, such as a cashier, assembler of small products, ticket seller, or clerk.

Initially, she attempted to return to part-time work for the respondent, but her pain increased. She applied for jobs as a cashier, for cleaning jobs, and in clothing stores but received no job offers. Four years before the arbitration hearing, she stopped looking for work after she was robbed in St. Louis while on a job interview.

The claimant's rehabilitation consultant, without even conducting a work capacity evaluation or reviewing the prior rehabilitation records, concluded that the claimant could not be retrained because of the pain she felt after sitting more than one hour at a time. The respondent's rehabilitation consultant identified sixteen job descriptions that would fit the claimant's

restrictions and recommended a complete labor market survey. The Industrial Commission awarded 45% loss of a body, but the circuit court reversed finding a PPD. The appellate court reversed the circuit court stating that the Commission decision was not against the manifest weight of the evidence.

After referring to prior cases, the court stated:

If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

In the Courier case, the claimant had testified that she could not find a job. Is this sufficient preponderance of the evidence to permit the claimant to fall into the "odd lot" category? The court agreed with the Commission's conclusion that it was not, stating:

If the Commission finds that the nature of claimant's injury is such that claimant is not permanently totally disabled in light of claimant's age, experience, training, and capabilities, the Commission is not obligated to find PTD simply because the claimant puts on some evidence that she could not find a job.

In the other "odd-lot" opinion, Alano v. Industrial Commission, the appellate court reached a similar result. That case involved a truck driver who suffered a torn rotator cuff injury, aggravated a chronic bone disease, known as Padgett's disease, and alleged that he was permanently and totally disabled. He was 65 years of age, did not seek work, nor was he offered light duty by the employer. The Commission denied the PTD claim and added that the claimant had failed in its burden of proof to establish his inclusion into the "odd lot" category.

EDITOR'S NOTE: A SPECIAL CONCURRING OPINION, PROVIDES AN EXPLANATION OF THE "ODD LOT" THEORY:

A claimant is entitled to PTD benefits if he is obviously unemployable.

If the disability is limited in nature so that he is not "obviously unemployable," the claimant can prove by credible medical evidence that he is permanently and totally disabled. This may be disputed by the employer and the Commission will determine which medical opinion is more worthy of belief.

Thereafter, the burden of proof remains with the claimant to show that he fits into the "odd lot" category (one who, though not altogether incapacitated to work, is so

handicapped that he will not be employed regularly in any well-known branch of the labor market). He does this by one of two ways:

- a) showing a diligent but unsuccessful attempt to find work;
- or
- b) showing that his skills do not qualify him to be regularly employed in a well-known branch of the labor market.

Once a claimant meets his burden to show that he falls into the "odd lot" category, the burden of proof shifts to the employer to produce evidence that some type of regular and continuous employment is available to the claimant.

SUICIDE CAUSALLY RELATED TO INJURIES AT WORK

In the recent case of Bocian v. Industrial Commission, the Commission's denial of compensation was reversed by the circuit and the appellate courts, thereby awarding death benefits to the widow of Ralph Bocian, a 49 year old firefighter. The appellate court concluded that the Commission's denial of benefits was contrary to the manifest weight of the evidence.

Ralph Bocian had sustained a left biceps tear on January 4, 1988, a herniated cervical disc on October 28, 1989, and committed suicide on May 21, 1990. Bocian had been a firefighter since 1965, had risen to the rank of lieutenant, and enjoyed the responsibility of his rank. The widow testified that after the second accident, Bocian exhibited significant mood changes, began to drink heavily, felt depressed

because of the continued pain, and became very distraught over his family's financial future. In the few weeks prior to his suicide, Bocian apologized to the family for "ruining their lives," because he was convinced that he was going to lose his job and, on three or four occasions, discussed suicide. In January 1990 Bocian was notified by his employer's workers' compensation insurance carrier that its examining physician had determined he was capable of returning to work. Bocian disputed this conclusion and anticipated receiving a report from his treating physician, Dr. John Shea, which would find that Bocian could never return to the duties of a firefighter because of his disability. He had filled out a disability pension application and intended to submit Dr. Shea's report with that application. Because the report merely stated that Bocian was temporarily unable to go to work and that the final decision would await further tests, Bocian became extremely distraught because he felt that report meant the financial ruin of his family.

Fellow workers supplied conflicting testimony about Bocian's condition. Mark Steinhagen, who had worked with Bocian for four years, described Bocian as becoming withdrawn, solemn and moody because of his inability to work and further described Bocian's one reference to suicide. Dennis Raleigh, a long-time friend as well as co-worker, described Bocian as having a long history of mood swings, stating that the condition did not change after the injuries, with Bocian making several references to suicide even prior to his injuries.

As might be anticipated, two contrary medical opinions were submitted. Dr.

Michael Solomon, a psychiatrist, interviewed the widow and Steinhagen, as well as the medical records and initial arbitration testimony. In his opinion, Bocian exhibited all nine diagnostic indicators of major depression and that Bocian's inability to return to work led to the onset of major depression which, in turn, led to Bocian's suicide seven months later. The doctor added that the severe depression brought on the distorted view of the financial situation to the point where he saw his financial future as "bleak" and "hopeless" causing a despair that ultimately led to his suicide.

Dr. Daniel Hardy, the respondent's psychiatrist, also reviewed the prior testimony, as well as a confidential psychological profile of Bocian prepared for the employer twelve years before when Bocian had applied for a promotion. Dr. Hardy agreed that Bocian suffered from major depression, but attributed the cause to his prior mental condition and a number of personal family problems. He concluded that the triggering event was Bocian's "misinterpretation of the effect of Dr. Shea's report," which report preceded the death by only a few days.

The Commission, in denying the claim, found that the evidence showed Bocian to be "an unhappy, explosive individual who had made statements throughout the years that if he had a gun he would shoot himself." It relied on Dr. Hardy's opinion as having more weight than that of Dr. Solomon. Finally, the Commission stated that "a decedent's suicide was causally related to his distorted view of his future and his financial situation, and it was not causally connected to his suffering from

“The [suicidal act] was an intervening act but not an intervening cause.”

physical pains as a result of the January 4, 1988, and October 28, 1989, accidents.

The appellate court compared the situation to that in Harper where, in addressing the issue of causation, the court held that there existed "an unbroken chain" from the work-related injury to the suicide such that "without the injury there would have been no suicide." In quoting Professor Larson's treatise on Workers' Compensation Law, the Harper court had further noted:

The [suicidal act] was an intervening act but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is the cause of that result.

The court criticized the Commission decision, which had suggested that the claimant needed to prove "that unbearable physical pain alone drove (Bocian) to suicide." The court disagreed with that standard of proof and found the Commission's requirement of unbearable pain erroneous as a matter of law. What about the Commission's other reason, i.e. that the cause was Bocian's distorted view regarding his future and financial situation?

We believe that the record clearly establishes that an unbroken chain of events began with Ralph's work-related injuries, which led to the completely unprecedented manifestation of a psychological illness known as major depression, which in turn led to Ralph's suicide, triggered by his reaction to Dr. Shea's letter regarding the

current state of his work-related injuries. Thus, the claimant satisfied a burden of proving that Ralph's suicide was causally connected to his work-related injuries.

EDITOR'S NOTE: IN FINDING A BASIS FOR CONCLUDING THAT THE DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THE COURT SUGGESTED THAT THE RESPONDENT'S PHYSICIAN HAD ACTUALLY SUPPORTED THE CLAIM WHEN HE TESTIFIED THAT THE REPORT FROM DR. SHEA WAS A "TRIGGERING EVENT" WHICH LED TO THE SUICIDE. SINCE DR. SHEA'S REPORT CONCERNED THE STATUS OF THE INJURY, THEN "IT MUST BE CONCLUDED THAT THE "UNBROKEN" CHAIN OF CAUSATION CONNECTED HIS WORK-RELATED INJURIES TO HIS SUICIDE." YOUR EDITOR QUESTIONS WHETHER THE

CLAIMANT'S CONCERN ABOUT A DOCTOR'S MEDICAL REPORT SHOULD BE A FACTOR TO BE CONSIDERED IN THE DETERMINATION OF COMPENSABILITY. WHILE DR. SHEA'S LETTER DID IMPACT THE WORKERS'

COMPENSATION CLAIM, BOCIAN INTENDED TO UTILIZE THIS LETTER FOR HIS PENSION BOARD CLAIM AND HE WAS DISTRAUGHT BECAUSE IT DID NOT CONTAIN A STATEMENT THAT HE WAS UNABLE TO PERFORM THE DUTIES OF A FIREFIGHTER DUE TO A DISABILITY. CLAIMANTS OFTEN RECEIVE MANY DISAPPOINTMENTS DURING A CLAIM BUT THE CLAIMANT'S CONCERN ABOUT HIS FINANCIAL RETURN SHOULD NOT BE AN ELEMENT TO DETERMINE COMPENSABILITY.

CIVIL CASE AGAINST EMPLOYER DISMISSED BECAUSE OF

EMPLOYEE'S RECEIPT OF

It is often difficult to determine the point at which the employee has committed himself to the pursuit of a workers' compensation claim so that he has waived any rights to a civil action against his possible employer. In Zurowska v. Berlin Industries, the circuit court dismissed the claimant's civil action because of the exclusive remedy under the Workers' Compensation Act. The injury occurred on August 23, 1992, when the claimant, a "laborer", was placing items into a strapping machine, when the plunger activated and crushed her right hand. The claimant had filed an Application for Adjustment of Claim with the Commission, and had accepted TTD benefits amounting to \$25,653.37, as well as medical benefits totaling \$57,514.09. As a part of its motion to dismiss, the employer asserted its liability under the Act, which the judge believed constituted a binding judicial admission of liability. In affirming the dismissal, the appellate court reviewed a number of cases that had resulted in contrary decisions.

"Generally, profits from a business, whether commercial or farm, are not considered as wages for purposes of establishing average wage."

Civil Action Permitted

1. In Copass, the employer in a death claim began making compensation payments to the widow and had already paid \$21,000 when the civil action alleged that the death resulted from an intentional tort. The court noted that the widow never filed a claim or otherwise asserted that her husband's death was compensable under the Act.

COMPENSATION BENEFITS

2. In Cashmore, the employer denied compensability before the Commission. The arbitrator awarded benefits under the Act to the claimant but the award also concluded that the injury was not compensable, certainly a confusing, inconsistent decision.

Civil Action Dismissed

1. In Fregeau, where the claimant had filed before the Commission and the employer admitted liability under the Act and only disputed the amount of compensation.

2. In James, the claimant filed before the Industrial Commission and received compensation.

EDITOR'S NOTE: IN EACH CASE, THE COURT WILL DETERMINE IF THE CLAIMANT HAS TAKEN THE EXPRESS POSITION THAT THE INJURY IS COMPENSABLE UNDER THE ACT, SUCH THAT

HE IS BARRED FROM TAKING THE MUTUALLY EXCLUSIVE POSITION THAT THE INJURY WAS INTENTIONAL.

ARE THE PROFITS FROM THE CLAIMANT'S SECONDARY OCCUPATION TO BE INCLUDED IN THE AVERAGE WEEKLY WAGE?

In Paoletti v. Industrial Commission, the claimant sustained an injury when he picked up a bag of garbage while working as a refuse scavenger for the Village of Winnetka Public Works Department. The claimant

was also the president and sole shareholder of a landscaping business operating as a Subchapter S corporation, which elected to be covered under the Workers' Compensation Act. The village knew of the landscaping business as the claimant had bid on several jobs with the village. The claimant took no wages from his landscaping business but the net profit of the company during the year preceding the injury was \$16,775. Was this a wage? The court denied that it was and quoted Professor Larson's treatise:

Generally, profits from a business, whether commercial or farm, are not considered as wages for purposes of establishing average wage. But close questions have arisen in connection with corporate officers, who may be stockholders, whose remuneration is not fixed but depends to some extent on the fortunes of the business. One court has held (citing a Tennessee case) the employee's share of profits was not the correct measure, but that the test should be the wage of another employee performing similar duties.

EDITOR'S NOTE: MANY ENTREPRENEURS ATTEMPTING TO BUILD A BUSINESS TAKE ONLY NOMINAL WAGES AND, SURPRISINGLY,

MANY CLAIMANT'S ATTORNEYS FAIL TO AVAIL THEMSELVES OF THE OPPORTUNITY TO PRESENT EVIDENCE OF WHAT THE WAGE WOULD BE OF ANOTHER EMPLOYEE PERFORMING SIMILAR DUTIES AS CLAIMANT.

IS THE PHYSICAL THERAPY CLINIC LIABLE FOR AN INJURY AGGRAVATION DURING THE FUNCTIONAL CAPACITY EVALUATION?

In Greenberg v. Orthosport, Inc., the claimant filed a medical malpractice action against Orthosport, Inc., a well-known physical therapy center which performs functional capacity evaluations at the request of employers and their carriers. Barbara Greenberg, injured while working for Catholic Charities, was referred by the respondent's examining physician to Orthosport. Ms. Greenberg contended that while a machine was testing her lumbar spine, she sustained a severe injury to her neck, a body part not previously injured. According to the appellate court opinion, the arbitrator awarded Ms. Greenberg compensation for some of her medical expenses for the neck injury but expressly found no causal relationship between the first and second injury. Actually, the arbitrator had found a causal relationship between the two.

Section 5(a) of the Act provides in pertinent part:

No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker, to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this

Act. . . . (Emphasis supplied)

Based on the foregoing, the circuit court agreed with Orthosport's motion to dismiss. The appellate court reversed, believing that Orthosport did not have immunity, interpreting the statutory language as follows:

For injury or death sustained by any employee while engaged in the line of his duty as such employee
. (Emphasis added.) In other words, the plain language of section 5(a) limits its applicability to work-related injuries. However, the facts alleged in this case clearly state a separate and distinct injury that was not sustained

while she was engaged in the line of her duty as an employee of Catholic Charities. Thus, it was error for the circuit court to have concluded that section 5(a) somehow ex-tended its coverage to defendant and, accordingly, summary judgment was improperly entered.

The defense of the Greenberg workers' compensation case was handled by our office. The arbitrator found that a causal relationship existed between the conservative treatment of the cervical spine after the Orthosport incident and awarded TTD for the period following the functional capacity evaluation. In effect, the arbitrator accepted

the causal relationship between the original accident and any cervical symptoms (which did not exist before the FCE). One might, therefore, question the appellate court's statement that "the arbitrator . . . expressly found no causal

relationship between the first and second injury." Actually, the arbitrator denied some of the treating doctor's bills. The defendant has filed a petition for rehearing based on this reasoning.

Actually, the arbitrator had denied the treating doctor's bills on the basis that the surgery was unnecessary, not that the cervical injury was unrelated.

EDITOR'S NOTE: THE COURT DID NOT MAKE ANY REFERENCE TO THE LAGERSTROM V. DUPRE CASE WHERE THE APPELLATE COURT HAD PROVIDED THE IMMUNITY TO DR. JAMES DUPRE, WHO HAD CONDUCTED AN EVALUATION EXAMINATION FOR THE RESPONDENT IN THE WORKERS' COMPENSATION CLAIM. IN THE DUPRE CASE, THE CLAIMANT CONTENDED THAT THE DOCTOR'S CONCLU-

SION THAT THE CLAIMANT COULD WORK WITHOUT RESTRICTIONS RESULTED IN A FINANCIAL HARDSHIP TO THE CLAIMANT AND ALSO CAUSED HIM TO AGGRAVATE HIS INJURY WHEN HE RETURNED TO WORK. THE SUPREME COURT STATED THAT DR. DUPRE WAS AN AGENT OF THE INSURANCE CARRIER AND THAT ANY INJURIES RESULTING FROM DR. DUPRE'S ALLEGED NEGLIGENCE WAS COMPENSABLE TO THE CLAIMANT AS A PART OF HIS WORKERS' COMPENSATION CLAIM.

RECENT COMMISSION CASES

Occasionally, we run into the rather surprising situations where the president of a business corporation will place on the corporate payroll an employee who performs services only at the president's residence. Some bookkeeping advantages are apparent. However, it is rather surprising when the employee attempts to collect workers' compensation from the corporation. Cathy Mafee of our office recently completed an arbitration hearing in such a case.

Ira Epstein is the president of the Ira Epstein Company, an Illinois corporation operating as a discount brokerage firm. The claimant testified that she had been hired as a live-in housekeeper by Mrs. Ira Epstein after an interview at the Epstein's apartment. The claimant had admitted that she had never been to the company and was not aware of the nature of the business performed by the company. Her only ties with the company involved the receipt of paychecks directly from the company payroll. Epstein attempted to persuade the arbitrator that his company was built on a "persona" image and that the success of his company was built on whether the public

viewed him as a success. The hiring of a live-in housekeeper allegedly was intended to accomplish that result. The arbitrator found that no employer-employee relationship existed between the corporation and the claimant, noting that the claimant was clearly a domestic servant who rendered her services exclusively for Epstein and his wife.

EDITOR'S NOTE: NO REVIEW TO THE COMMISSION WAS FILED.

CONGRATULATIONS!

As we reported in our last newsletter, Chairman Robert Malooly resigned from the Industrial Commission effective June 1, 1996. Governor Edgar appointed Commissioner John Hallock as temporary chairman. That assignment has now been made permanent. Thus far, Chairman Hallock has been given high marks on his managerial skills. We congratulate Governor Edgar on his selection and Chairman Hallock on his appointment.

FRANK J. WIEDNER

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