

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## THE KOTECKI LIABILITY CAP IS NOT AN AUTOMATIC DEFENSE!

Oliver W. Graymatter had lost his usual self-control. "Do our clients really understand," he exclaimed, "how the Illinois Supreme Court has weakened the immunity granted the employer under the Kotecki case? The language in the construction contract may reveal that the employer, perhaps inadvertently, has chosen to relinquish the Kotecki protection."

A review of two recent Illinois Supreme Court cases reveals the weakening of the employer's limitation of civil liability granted under Kotecki. Let's start out with a review of the Kotecki holding.

In the case of Kotecki v. Cyclops Welding Corp., 146 Ill. 2d 155, 585 N.E.2d 1023 (1991), the Illinois Supreme Court created a protection for employers sued as third-party defendants for contribution. The Kotecki "liability cap" allowed the third-party defendant/employer to assert a limit on their liability for contribution; they could only be held liable up to the amount of their liability under the Workers' Compensation Act. However, this protection for employers has been greatly eroded by a number of subsequent decisions. Two recent Illinois Supreme Court decisions, Braye v. Archer-Daniels-Midland Co., No. 80383, slip op. (Ill. Feb. 6, 1997), and Ramsey v. Morrison, Nos. 80303, 80304, slip op. (Ill. Feb. 6, 1997), have further weakened the Kotecki protection as to the issues of contractual waiver and the amount for which an employer can be held liable.

In Braye, the supreme court held that an employer can waive by contract their right to assert the Kotecki cap. In doing so, the supreme court agreed with a line of three cases from different Illinois appellate districts, beginning with Herrington v. J.S. Alberici Construction Co., 266 Ill. App. 3d 489, 639 N.E.2d 907 (5th Dist. 1994), and including the appellate case below, Braye v. Archer-Daniels-Midland Co., 276 Ill. App. 3d 1066, 659 N.E.2d 430 (4th Dist. 1995); along with the most recent case, Liccardi v. Stolt Terminals, 283 Ill. App. 3d 141, 669 N.E.2d 1192 (1st Dist. 1996). The rationale behind all three of these appellate court cases is that the Kotecki liability cap is not an automatic defense, but, based upon the Illinois Supreme Court's ruling in Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (1984), it is one which must be affirmatively pleaded and proved by the employer. Herrington, 639 N.E.2d at 353. The supreme court adopted the same reasoning, finding that a "common thread" in Kotecki, Doyle, and other cases that the employer could choose to relinquish the protection, perhaps for "considerations of business judgment." Braye at \*6. Herrington took this "thread" to what the court felt was the next logical step: if the employer could waive the Kotecki cap after suit is filed then "the employer may agree to waive the defense as part of the contract bargaining process." Herrington, at 353. The supreme court applauded this reasoning:

*. . . we conclude that the appellate court in Herrington properly followed Doyle to its logical conclusion by determining that the decision to forgo the protection of the Workers' Compensation Act is within the realm of discretionary decisions made by an employer and does not violate the terms or policy of the Act. (Emphasis supplied). Braye, at \*6*

The question then is: what kind of contractual language will be held to waive this protection? In Braye, the court found that a contract paragraph stating that the employer "shall take all necessary precautions to prevent the occurrence of any injury to person . . . except to the extent that any such injury . . . is due solely and directly" to the third-party plaintiff negligence,

and that the employer "shall pay [third-party plaintiff] for all loss which may result in any way from any or omission" of the employer did not violate the Indemnity Act (which bars contracts for indemnity for one's own negligence) and was instead a valid waiver of Kotecki protection. Braye, at \*7-9. The court reversed the appellate court's holding in this issue, which had found that this was an illegal indemnity provision. By doing so, the court implicitly approved the holdings in Herrington and Liccardi, both of which went to great lengths to find that even contracts that explicitly used terms such as "indemnity", but had no mention of "contribution", were not for indemnity but instead for contribution. For this reason then, employers can expect little sympathy from the courts on this issue.

In Ramsey v. Morrison, the supreme court decided the issue of how the amount of the maximum liability of an employer under the Kotecki cap is calculated, particularly as to the 25% attorneys fees provision of Section 5(b) of the Act. The employer in Ramsey argued that, due to the mandatory 25% attorneys fee recovery by the plaintiff, it was responsible for only 75% of its workers' compensation liability in contribution to the third-party plaintiff. Ramsey, at \*31. The rationale behind this argument was that if the employer was liable for the full amount in contribution, but also still required to pay the 25% under Section 5(b) to the plaintiff, this would ultimately result in them paying 125% of their workers' compensation liability, in violation of Kotecki.

"the employer had no right to reimbursement from the proceeds of the uninsured motorist policy; the employer's right to reimbursement was against the person causing the injury."

[i]f the employer could waive the Kotecki cap after suit is filed then "the employer may agree to waive the defense as part of the contract bargaining process."

The supreme court rejected the employer's arguments because the Section 5(b) obligation was something that was specifically imposed on the employer by the Act. Ramsey, at \*32-33. The fact that the employer would have to pay these costs was "irrelevant to the determination of the employer's workers' compensation liability" and, therefore, "irrelevant to the determination of the employer's contribution liability." As well, there was no basis for shifting this burden to the third-party plaintiff. However, despite the implications of this ruling, the court specifically left as an open question the issue of whether the employer would still be responsible for the Section 5(b) fees to the plaintiff, who was not a party to the appeal. Id., at \*35-36. While this creates some potential additional exposure for a third-party defendant, the possibility of a 125% liability can be avoided by certain methods, such as, for example, waiving the workers' compensation lien.

**MICHAEL S. SIMON**

#### **WORKERS' COMPENSATION LIEN OR UNDERINSURED MOTORIST CREDIT-- WHICH TAKES PRIORITY?**

Ever since the introduction of uninsured and underinsured motorist insurance coverage, disputes have arisen regarding 1) the right of the employer to assert a lien against the proceeds of a recovery under the uninsured or underinsured motorist coverage; and 2) the right of that insurance carrier to set off from the amount due to the injured employee the recovery of that employee's workers' compensation benefits.

John Terry, a Village of Carpentersville police officer, was operating a police car which collided with that of another motorist. Terry received \$69,023.90 in workers' compensation benefits. He then filed a complaint against the other motorist and that case was settled for the \$25,000 per person liability limits of the other driver's insurance policy. This entire \$25,000 settlement (minus \$6,250 in attorney's fees and \$363 in costs) was paid directly to the Village to satisfy a portion of the workers' compensation lien.

Terry then filed an underinsured motorist claim under a State Farm policy for which the

Village paid the premiums and which contained a declaration listing the Village as the named insured. The Village requested the sum of \$44,023.90, representing the balance of its lien, but State Farm not only refused to pay the Village, but declared that it would use the amount of the compensation lien as a set off against Terry's claim.

The first issue concerned the employer's right to assert a lien against the proceeds of a claim under an employer-paid underinsured motorist insurance policy to recover benefits paid to the employee under workers' compensation. The court relied on Hartford Accident and Indemnity Company v. Cummings, 66 Ill.App.3d 704 (1978) where it was held that "the employer had no right to reimbursement from the proceeds of the uninsured motorist policy; the employer's right to reimbursement was against the person causing the injury."

In the instant case, Terry v. State Farm Mutual, App. Ct. (2d Dist.) 94-MR-473, the appellate court stated:

*We conclude that the language of section 5(b) of the Act which refers to a legal liability to pay damages refers to liability in tort, not contractual liability under an underinsured motorist policy. We hold that an employer or its workers' compensation carrier may not assert a lien pursuant to section 5(b) of the Act against the proceeds of an underinsured motorist claim to recover benefits paid to the employee pursuant to a workers' compensation plan.*

\* \* \*

*Section 5(b) of the Act allows a lien only for actions in tort. The action is not converted to a tort action merely because the employer paid the insurance premiums.*

The second issue concerned the right of State Farm to set off from the amount due Terry the amount of the workers' compensation benefits paid to him. The relevant provision of the State Farm policy provides:

1. *Any amount payable under these coverages shall be reduced by any*

amount paid or payable to or for the insured:

\* \* \*

- c. under any workers' compensation, disability benefits, or similar law.

This court noted that in Sulser v. Country Mutual Insurance, 147 Ill. 2d 548 (1992), our Supreme Court had held that such a set off is valid and rejected an argument that enforcement of the set off is against public policy. The Village then argued that the purpose of the policy was to protect the Village and that, under any circumstances, the policy should be construed against State Farm because it was ambiguous. The court disagreed.

*Although the parties agreed that the declarations page lists the Village as the named insured, it is clear that the insured for the purpose of this case is plaintiff. The policy states in relevant part:*

*Insured - means the person or persons covered by uninsured motor vehicle or underinsured motor vehicle coverages.*

*With respect to bodily injury, this is:*

1. the first person named in the declarations;
2. his or her spouse;
3. their relatives; and
4. any other person while occupying:

- a. your car \*\*\*. Such vehicle has to be used within the scope of the consent of you or your spouse[.]

*Because plaintiff was occupying the Village's car within the scope of the Village's consent, plaintiff was the insured under the underinsured motorist coverage for bodily injury. The policy is not ambiguous; rather, who is insured under each provision is*

*dependent on the particular circumstances of each case.*

The law seems to be quite clear 1) the employer or its workers' compensation insurance policy may not assert a lien against the proceeds of an unusual or underinsured motorist claim as the Act allows a lien only for tort; and 2) the uninsured or underinsured motorist carrier may set off from the amount due plaintiff the amount of the workers' compensation benefits paid to plaintiff.

**PAUL W. WIEDNER**

**IS THE EMPLOYEE ENTITLED TO TTD BENEFITS WHILE DISABLED FROM HIS FULL-TIME REGULAR EMPLOYMENT IF HE IS ABLE TO CONTINUE WORKING IN HIS PART-TIME SEDENTARY EMPLOYMENT?**

On September 14, 1987, Michael Dolce, a "keg helper" for Southwest Beer Distributors, injured his knee and was disabled from work at Southwest for a total of 86-5/7 weeks between 1987 and 1990, for which he was paid TTD benefits. In addition to his job at Southwest, Dolce had, since 1985, sold real estate on weekends as an independent contractor. In 1987 (before his injury) Dolce completed nine sales. While temporarily disabled from Southwest, Dolce's real estate sales record indicated the following:

1988 - 14 sales for earnings of \$22,155.00  
 1989 - 26 sales for earnings of \$36,534.09  
 1st 6 mos. 1990 - 19 sales for earnings of \$28,220.18

. . . who is insured under each provision is dependent on the particular circumstances of each case.

. . . simply because he is not an employee for the purposes of coverage does not mean that he automatically is not considered to be employed in a competitive labor market.

After being released from work in 1990, Dolce chose not to return to Southwest and continued his occupation as a real estate salesman.

The arbitrator awarded PPD of 60% of the right leg and allowed Southwest a credit for all TTD paid based upon the finding "that Dolce worked regularly and continuously during the entire claimed period of disability." The Commission and circuit court agreed that Dolce was not entitled to TTD benefits during the time of his claimed disability.

On appeal, Dolce contended that his real estate sales do not bar his TTD benefits because his sales were merely occasional income, which is allowed by the Act. Dolce pointed out three cases which supported his position but the court felt that each case was factually dissimilar.

*In J.M. Jones Co. v. Industrial Comm'n*, 71 Ill.2d 368, 372-73 (1978), the supreme court held that the claimant's driving a school bus an hour in the morning and an hour in the afternoon for seven months while he was unable to work did not preclude a finding that he was temporarily and totally disabled. Then, in *Firestone Tire & Rubber Co. v. Industrial Comm'n*, 76 Ill.2d 197, 202 (1979), the supreme court held that a claimant's spending two days painting a house did not bar the award for temporary and total disability. Finally, in *Zenith Co. v. Industrial Comm'n*, 91 Ill.2d 278, 286 (1982), the supreme court held that a claimant's selling hot dogs from a truck with his family for a few hours a day for six months out of a year did not amount to self-employment that barred his TTD benefits.

We find that the present case is distinguishable from each of these cases. In *J.M. Jones*, *Firestone*, and *Zenith*, the claimants worked for only a few hours a day, and for only part of the period that they were disabled. In this case, however, Dolce regularly completed sales throughout the year, and throughout the entire period that he was unable to work at Southwest.

Dolce then contended he was not employed in a competitive labor market because his independent contractor status as a real estate sales associate did not support an employer-employee relationship and would, therefore, not be considered employment that barred his TTD benefits. The court disagreed stating:

Stone finally contended that his employer, in terminating his payments, violated Stone's right to free exercise of his religion.

Stone presented himself in a dirty, unshaven manner, with dirty clothes, greasy hair and body odor.

Section 10 of the Act states the provisions for concurrent employment. Accordingly, the Act does protect persons who earn income from more than one job -- as long as both jobs meet the definition of employer/employee under the Act. In the present case, Dolce, because of his independent contractor status with Post, is not considered an employee under the Act. See, *Paoletti v. Industrial Commission* where the employer was the sole employee and stockholder of a corporation, and the profits could not be considered as wages from concurrent employment (W & M Newsletter July, 1996). However, simply because he is not an employee for the purposes of coverage does not mean that he automatically is not considered to be employed in a competitive labor market. The Act's definition of employee applies when determining whether coverage is available. There is nothing in the Act that suggests that this definition should be used to determine whether a person is an employee in a competitive labor market for the purpose of TTD benefits.

...

In his treatise on workers' compensation laws, Professor Larson discusses the amount and character of work a person is able to do without forfeiting totally disabled status. Professor Larson notes:

The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps. A. Larson, *Workmen's Compensation Law*, sec. 57.51(a), at 10-288-329 (1996).

This explanation reveals that the definition of 'employee' is immaterial when determining whether a person is employed in a competitive labor market for the purpose of receiving TTD benefits. Instead, the test concerns the circumstances surrounding the disabled person's

*ability to work at a particular job.*

The court concluded that Dolce's real estate sales constituted employment within a stable labor market, and not occasional income.

*In the present case, Dolce did not rely on friends or business booms for his income. Further, his employment as a real estate broker was not dependent on good luck or his superhuman efforts. On the contrary, Dolce earned income for three years by selling real estate. The number of his sales progressed yearly, as did his income. Finally, the real estate market can even be considered competitive because brokers compete with each other to sell houses. As a result, the evidence in the record shows that Dolce worked consistently and regularly in a stable, competitive labor market. Thus, we find that the Commission's decision was not against the manifest weight of the evidence. (See, Dolce v. Industrial Commission, No. 1-96-0650WC).*

**EDITOR'S NOTE:** BECAUSE DOLCE WAS AN INDEPENDENT CONTRACTOR, HIS REAL ESTATE SALES POSITION WOULD NOT QUALIFY AS CONCURRENT EMPLOYMENT UNDER SECTION 10. IN CASES OF CONCURRENT EMPLOYMENT, IS AN EMPLOYEE ENTITLED TO ADDITIONAL TTD BENEFITS WHEN THE EMPLOYEE IS PHYSICALLY ABLE TO RETURN TO ONE OF HIS POSITIONS BECAUSE OF ITS SEDENTARY NATURE BUT NOT TO THE EMPLOYMENT WHERE HE WAS INJURED? REMEMBER, HE IS NO LONGER TEMPORARILY TOTALLY DISABLED!

## **NON-COOPERATION WITH REHABILITATION**

One of the most frustrating experiences in claim handling involves providing vocational rehabilitation, together with a job search, for an uncooperative claimant. At what point does the claimant's conduct justify the termination of benefits? This issue was discussed in the recent case of Stone v. Industrial Commission, No. 2-96-0052WC. The court was further asked to determine the obligation of the claimant to accept employment which required the claimant's working on a Saturday, in violation of his religious beliefs.

On April 2, 1990, Daniel Stone sustained a back injury which necessitated surgery in June of 1992. On March 9, 1993, he was released to work with lifting restrictions but did not actually return until July 6, 1993. Although Stone admitted that

the job demands were within his restrictions, he voluntarily left his employment on August 17, 1993.

During the next few months, Stone unsuccessfully contacted 14 to 15 employers. He was hampered by the fact that he had only a tenth grade education, did not have a GED, and possessed no special skills or training. Six months prior to the accident, Stone became active in the Worldwide Church of God, which restricted him from working certain Holy Days and Saturdays.

At the request of his employer, Stone met on at least two occasions with James Boyd, a vocational rehabilitation specialist, who gathered background information, conducted aptitude tests to evaluate Stone's skills and explained his role. Boyd further suggested that Stone obtain his GED, recommended library resource books to assist Stone in determining vocational interests and assisted Stone in filling out a sample master application to bring to future interviews. Boyd further instructed Stone on basic job skills, including how to dress, how to answer questions, and how to present himself in general. Instead, Stone presented himself in a dirty, unshaven manner, with dirty clothes, greasy hair and body odor. Stone was very unresponsive to questions during job interviews and provided a minimum of information.

With reference to Stone's vocational interests, he expressed an interest only in becoming a game or fish warden, despite his test results. No effort had been made to obtain the GED or utilize the resource books. Stone never advised Boyd of a prior criminal conviction nor did he discuss his religion and work restrictions.

Despite Stone's marked lack of cooperation, the efforts towards rehabilitation continued until January, 1994. Initially, Stone refused an interview on January 5, because he had not received 48 hours notice. On the date of the interview, January 10, 1994, Stone was unshaven, dirty and inappropriately dressed. He failed to bring his master application, as had been requested, and Boyd's assistant helped him fill out the application. For the first time, Stone advised that he had been convicted of a felony. After a few minutes, Stone advised the prospective employer that, due to his religion, he was unable to work on Saturdays, when Saturday work was mandatory for

the prospective position. Immediately after the interview, Stone advised Boyd that he had not contacted any other employer, had done nothing to obtain his GED and had not researched other interests. Stone's religion was discussed for the first time. Based on a report submitted by Boyd, the employer terminated TTD benefits.

The Commission affirmed the denial of additional benefits and the circuit court affirmed. The appellate court, after noting that the specific question of whether the claimant reasonably cooperated with rehabilitation efforts is generally a question of fact to be determined by the Commission. The court stated:

*After a careful review of the facts, we conclude that the Commission's decision to terminate claimant's TTD benefits as of January 20, 1994, because he failed to cooperate reasonably with rehabilitation is not against the manifest weight of the evidence. Over the three-month period claimant received rehabilitative counseling, he failed to take any steps to obtain his GED, and he failed to visit the library to research vocational interests, despite directions to do both. According to Boyd, claimant failed to "give any indication whatsoever that he was interested in vocational rehabilitation services." Claimant also forced an interview to be rescheduled because he was not given 48 hours' notice. When claimant did appear for the interview, he was unshaven and dirty and had failed to dress properly. Boyd had specifically told claimant how to dress and appear; nonetheless, claimant ignored this advice. In rendering its decision, the Commission relied on all of these reasons.*

Stone finally contended that his employer, in terminating his payments, violated Stone's right to free exercise of his religion. The court noted that the arbitrator, after reciting at least six factors on which Stone failed to cooperate reasonably with rehabilitation, concluded that the arbitrator made no reference to Stone's religion in rendering the decision.

**EDITOR'S NOTE:** MOST CASES ARE NOT THIS CLEAR CUT. STONE PLACED NUMEROUS "ROADBLOCKS" IN THE REHABILITATION EFFORTS AND MADE LITTLE EFFORT TO SEEK EMPLOYMENT ON HIS OWN. THE RELIGIOUS ISSUE SEEMS TO BECOME SIGNIFICANT ONLY BECAUSE STONE NEVER MENTIONED IT IN THE PAST AND APPEARED TO BRING IT UP IN HIS

FINAL INTERVIEW IN ORDER TO MAKE HIMSELF UNEMPLOYABLE.

### **IS A PRIVATE DUTY NURSE RETAINED BY THE PATIENT'S FAMILY AN EMPLOYEE OF THE NURSING HOME WHERE THE PATIENT IS CONFINED?**

Debra Netzel, a private duty nurse working out of the Altru Nurse Registry, was retained by the family to care exclusively for one patient at Presbyterian Nursing Home. After suffering a back injury while lifting the patient, Ms. Netzel filed a workers' compensation claim against the Presbyterian Nursing Home alleging that she was an employee of that nursing home. Both the arbitrator and Industrial Commission found that claimant was employed on a contractual basis by the patient for whom she was caring, not the respondent, Presbyterian Nursing Home. The Commission specifically cited a number of factors to support their decision, noting 1) that claimant was paid by the patient's family for whom she was caring; 2) that no taxes were withheld from her paycheck; 3) that group insurance was not provided by respondent; 4) that claimant performed her duties exclusively for one patient; 5) that respondent did not direct claimant to attend any other patients or perform other duties at the nursing home; 6) that claimant was responsible for procuring her own replacement in the event of her inability to work; and 7) that claimant provided her own uniform and claimant was required to follow a set of rules and regulations issued by the nursing home but these were also required by the code and statutes of the City of Chicago and State of Illinois to ensure the health, safety and welfare of the nursing home residents.

Claimant appealed to the circuit court. The circuit court determined that the Industrial Commission's decision was, as a matter of law, incorrect. In the alternative, the circuit court also ruled the Commission's decision was against the manifest weight of the evidence. The court ordered the matter remanded to the Industrial Commission with specific instructions to reverse their original ruling and the Industrial Commission followed those instructions.

The appellate court, in a three to two decision, found for the claimant, stating that the circuit court was incorrect when it reversed the

claim as a matter of law, but agreed that the Industrial Commission's decision was against the manifest weight of the evidence. Nonetheless, the appellate court conceded in the body of its opinion that claimant's job as an unlicensed private duty nurse at respondent's nursing home contained elements of both an independent contractor and an employee relationship.

Presiding Justice McCullough, joined by Justice Holdridge, filed a strong dissent. The dissent argued that the majority erred in reversing the Industrial Commission's decision as against the manifest weight of the evidence. The dissent correctly noted that there was ample evidence supporting the original Industrial Commission decision. The dissent correctly pointed out that assigning weight to evidence is not the function of a reviewing court, and in this instance, the original Industrial Commission's decision should have been confirmed. The dissent correctly noted that the majority, by judicial edict, expanded the coverage of the Act to a new segment of the work force which, if this conduct is to be appropriate, it is better done by legislative enactment.

A petition for rehearing was denied, but both Justices McCullough and Holdridge filed a statement that the case involved a substantial question which warranted consideration by the supreme court. A Petition for Leave to Appeal is now pending in the supreme court.

In justifying the finding of compensability against the nursing home, the court majority stated:

*It is conceded that claimant's job as an unlicensed private duty nurse at respondent's Home contained elements of both an independent contractor and an employee relationship. The weight of the evidence in this instance, however, supports the conclusion claimant was an employee and, as such, was entitled to benefits under the Act. As clearly outlined in respondent's private duty nurse instruction sheet, respondent not only had the theoretical right to control, it did in fact control claimant's activities and the method and manner in which she performed her duties. Claimant was not just subject to regulations for the orderly administration of the Home, the entire scope of her work and day were controlled by*

*respondent. In essence, respondent regulated claimant's movement from the time she entered its doors. Respondent provided claimant with all equipment necessary to perform her duties, and the head nurse gave claimant regular instructions pertaining to the care and condition of her patient. Claimant also required supervision for the more complex tasks necessary to care for her patient and was instructed to provide a verbal report to the nurse in charge whenever she left duty. Equally important is the fact that respondent had the right to discharge claimant for any violations of its rules and regulations or for unprofessional conduct or improper patient care. We also note claimant's work was directly related to respondent's business. Such factors support a finding of an employee-employer relationship in this instance.*

The court minority that dissented felt quite strongly that the majority decision, when admitting that there existed elements of both an independent contractor and an employee relationship, should not have found the Industrial Commission denial of liability as being against the manifest weight. The dissenting opinion stated:

As the majority states, this unlicensed person performed a job for the patient at respondent's nursing home which contained elements of both independent contractor and an employee relationship.

*As the majority states, this unlicensed person performed a job for the patient at respondent's nursing home which contained elements of both independent contractor and an employee relationship. According to the majority, factors 'such as the method of payment, point to independent contractor status. The evidence is clear that respondent had the ultimate responsibility for the care of the elderly patient. Claimant was hired by the family to attend only this patient. She had no responsibilities with regard to respondent's operation,*

*and respondent rightfully restricted her movements to being with this patient. Claimant testified these restrictions were similar in the various nursing homes and hospitals in which she attended patients on a private-duty basis. Marilyn Schultz, respondent's director of nursing, testified that there were duties imposed on respondent in the care of patients by regulations of the State and City. Claimant had the right to refuse to take a position offered through the registry, she provided her own uniform, and was paid directly by the patient's family. She in turn paid the registry (Altru) 7% of her income. Respondent had no control over her work schedule, her pay rate, or fringe benefits. If claimant needed a day off, she called the registry*

*to arrange a replacement, then simply notified respondent that a replacement would be coming. Although the respondent could refuse to allow claimant to work on its premises, there was no evidence that the family was prevented from moving the patient and having claimant continue in attendance. Respondent did not pay claimant, withhold social security or income taxes, or provide group insurance for claimant. Instead of considering these factors as supporting the Commission decision, the majority reweighs the evidence and finds the balance of factors in favor of finding an employee relationship. (See Netzel v. Industrial Commission, 1-96-157WC).*

**JAMES W. STEVENSON, JR. and  
JANET D. PALLARDY**

**EDITOR'S NOTE:** THE DECISION IS SOMEWHAT PUZZLING BECAUSE OF THE MAJORITY'S SEEMINGLY CONTRADICTIONARY STATEMENTS THAT ELEMENTS OF BOTH AN EMPLOYEE AND AN INDEPENDENT CONTRACTOR RELATIONSHIP EXISTED BUT, YET, THE DECISION OF THE INDUSTRIAL COMMISSION WAS TO BE HELD AS AGAINST THE MANIFEST WEIGHT. THE COURT HAS REPEATEDLY STATED THAT A CASE SHOULD NOT BE REVERSED AS BEING AGAINST THE MANIFEST WEIGHT UNLESS NO RATIONAL PERSON COULD REACH ANY OTHER RESULT. ADMITTEDLY, A RATIONAL PERSON COULD REACH ANY RESULT IN THIS CASE AND, HOPEFULLY, THE SUPREME COURT WILL ACCEPT THIS CASE FOR CONSIDERATION.

FRANK J. WIEDNER, Editor

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