

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 7 ISSUE 1

January 1997

WIEDNER & McAULIFFE, LTD.  
ATTORNEYS AT LAW

## CONTENTS

### 1 HOW DOES THE EMPLOYER AND INSURANCE CARRIER DEAL WITH THE FRAUDULENT CLAIM?

*Roadside Auto Body, Inc. and Liberty Mutual Insurance Co. v. Miller*  
App. No. 2-95-1233 (Ill. App. 12/3/96)

### 3 HOW VALID IS SINGLE STATE COVERAGE?

*Ohio Casualty v. Mitchell Southwell*  
App. No. 1-95-4298 (Ill. App. 11/12/96)

### 4 EMPLOYER'S SUBROGATION LIEN AGAIN UNDER ATTACK.

*Swets v. Village of Lansing*  
App. No. 1-95-0192 (Ill. App. 11/4/96)

*American States v. Bailey and Hartford*  
App. No. 1-95-3264 (Ill. App. 11/27/96)

## ADA AND EMPLOYER'S LIABILITY CORNER

Wiedner & McAuliffe, Ltd.  
One North Franklin, Suite 1900  
Chicago, Illinois 60602  
(312) 855-1105

### HOW DOES THE EMPLOYER AND INSURANCE CARRIER DEAL WITH THE FRAUDULENT CLAIM?

Employers and insurance carriers have consistently expressed their concerns about possible fraud in workers' compensation cases. The claims representative receives the report of an unwitnessed accident resulting in an injury to an employee with a pre-existing physical condition. Unlike a civil case, where a defendant has the opportunity to utilize an extensive discovery procedure, the respondent-employer must make an immediate decision, often based on an incomplete set of facts. Should the claims representative give the claimant the benefit of the doubt in a questionable case or should he deny the claim until an additional investigation is conducted? The request for TTD is immediate and the failure to make a prompt payment can result in significant penalties.

In the absence of substantive proof of fraud, the claims representative will accept the claim as compensable. Even if further investigation raises some question about the claim, the employer, being hesitant to risk a substantial award with penalties, arrives at a "compromise" settlement. Most experienced claims representatives can recall situations where, after the approval of a settlement contract, additional information becomes available. The tendency is to close a file without any further action. After all, didn't the settlement contract purport to "resolve all matters in dispute?"

On what basis, then, does the employer have any remedy? In *Roadside Auto Body, Inc.*

*and Liberty Mutual Insurance Co. v. Miller*, the Appellate Court addressed the issue when a defrauded employer filed a circuit court action to void a settlement contract and, as a further action, to enter an order for monetary damages based on an employee's fraud.

Scott Miller claims to have injured his back on March 26, 1990 while working on a customer's truck. The accident was not reported until May of 1990. Jim Best, the owner of Roadside, notified Liberty Mutual, Roadside's workers' compensation carrier, that he felt that Miller's back injury was due to a pre-existing condition. Best was told by Liberty Mutual that an aggravation of a pre-existing injury would still be compensable under the Workers' Compensation Act. All TTD and medical benefits were paid.

On March 4, 1992, a claim specialist for Liberty Mutual settled this case with Miller's attorney. Upon learning of the settlement, Best again contacted Liberty Mutual to express his concern about the legitimacy of the case. At that time he spoke with a claim specialist and an attorney for Liberty Mutual. Based on the information that the employer had provided, both representatives at Liberty Mutual felt the case was compensable. On March 11, 1996, the attorney for Liberty Mutual signed the Lump Sum Settlement Contract.

On March 13 and March 18, a fraud investigator for Liberty Mutual met with Best and spoke with several co-employees. Based on those interviews, the Liberty Mutual investigator concluded that Miller had fabricated his workers' compensation claim. He contacted the attorney for Liberty Mutual to learn that the settlement contract had already been approved by the Industrial Commission.

Roadside and Liberty Mutual then filed a declaratory judgment action against Miller and the Industrial Commission seeking to vacate the settlement contract. It also requested reimbursement for the temporary total disability and medical benefits paid. After hearing the testimony of numerous witnesses, the circuit court vacated the settlement contract and the

order for penalties and entered an order in favor of the employer in the amount of \$56,465.78.

Miller filed an appeal from that decision. On appeal, Miller alleged:

1. The plaintiffs waived their right to allege fraud by signing the contract which contained language stating that it was "to resolve the dispute about the benefits to which the petitioner is entitled to";
2. The proper forum to dispute the issue of a work-related accident was before the Commission and the plaintiffs waived any claim for reimbursement by settling the case with knowledge of unresolved issues of fact;
3. The plaintiffs waived their right to claim fraud by closing their eyes to the fraud; and
4. The Commission had primary jurisdiction over the case because it possessed specialized expertise to determine whether Miller was injured at work.

Citing the language of Section 19(f), the appellate court found the circuit court empowered to set aside fraudulently obtained judgment rendered by the Industrial Commission. It further found that the fraud perpetrated by Miller was the basis for the settlement and as such not the basis for a waiver argument.

At trial the Court heard testimony from Ron Hinde, one of Miller's co-employees. Miller told Hinde that he was going to report an on-the-job injury so he could get medical treatment for his back that he had injured while in the Military.

Hinde did not provide this information until March 18, 1992 when he met with the Liberty Mutual investigator. Hinde also claimed that Miller had pressured him to verify his story of a compensable injury. At one point Hinde was even threatened by Miller. Michael Nitti, another co-employee, testified that he had worked with Miller from March 26, 1990 and did not observe Miller having any limitations. He further testified that the job that Miller claims to have been

performing on the date of the injury could not have been accomplished without the assistance of a fellow worker. Finally, the owner of the truck in which Miller was working testified that he did not assist Miller with the work nor did he witness any injury on the date alleged.

Testimony on Miller's behalf was provided by Dr. Berglund. Dr. Berglund found that Miller was suffering from a herniated disc rather than a long term chronic back injury. However, Dr. Berglund admitted that Miller never told him about his history of back problems. Although this testimony may have favored Miller, considering all the evidence, the trial court's finding that Miller had filed a fraudulent claim was not against the manifest weight of the evidence.

Miller argued that the circuit court should have vacated the settlement and remanded the case to the Industrial Commission. In rejecting this conclusion, the appellate court stated:

*[I]t is axiomatic that damages are recoverable in a fraud case and that the measure of damages is determined by assessing the laws to the plaintiff. A remand to the Commission is not proper since it has no jurisdiction to hear a common law fraud case, and therefore, no jurisdiction to assess damages in this case.*

EDITOR'S NOTE: THIS CAUSE OF ACTION AROSE PRIOR TO THE 1993 AMENDMENT TO 720 ILCS 5/46-5 ENTITLED AS "CIVIL DAMAGES FOR INSURANCE FRAUD" WHICH PROVIDES THAT A PERSON WHO MAKES A FALSE CLAIM "SHALL BE CIVILLY LIABLE TO THE INSURANCE COMPANY THAT PAID THE CLAIM OR AGAINST WHOM THE CLAIM WAS MADE OR TO THE SUBROGEE OF THAT INSURANCE COMPANY IN AN AMOUNT EQUAL TO 3 TIMES THE VALUE OF THE PROPERTY WRONGFULLY OBTAINED OR TWICE THE VALUE OF THE PROPERTY ATTEMPTED TO BE OBTAINED, PLUS REASONABLE ATTORNEYS FEES." ANY FUTURE CLAIM MIGHT BE BROUGHT UNDER THIS SECTION.

## HOW VALID IS SINGLE STATE COVERAGE?

A less frequent insurance problem concerns the question of coverage, and in the *Ohio Casualty v. Southwell* case, the issue of out-of-state coverage. In this case, the employer, Maple Leaf Marketing, obtained a workers' compensation policy with Ohio Casualty, which policy applied "to the workers' compensation law of the state listed here: California." Under "Other States Insurance," the word "None" was typed.

On January 6, 1989, Mitchell Southwell, while on a business trip, was injured in an automobile accident in Illinois. When he filed his claim in Illinois, Ohio Casualty refused to accept it, and on June 10, 1994, filed a declaratory judgment action, asking the Circuit Court of Cook County to rule that Ohio was not obligated to pay Southwell's compensation benefits. On July 21, 1994, shortly after this action was filed, the president of Maple Leaf wrote to Ohio Casualty, stating that he had fully explained to Ohio that his employees operated in states other than California and that he had requested and thought he had received coverage adequate to protect him against claims by anyone entitled to benefits.

In the meantime, the Industrial Commission claim proceeded, and on February 10, 1995, the arbitrator found that Maple Leaf "was covered by workers' compensation insurance issued by Ohio Casualty Insurance Company." The trial court granted Ohio Casualty's motion for summary judgment and Southwell appealed. Southwell's argument and the court's response were as follows:

- 1)Argument: The public policy of Illinois prohibits any limitation on workers' compensation liability, including any limitation on territorial liability. Court: Nothing in the policy "operates to 'limit or modify' Ohio Casualty's liability--because no such liability has arisen in the first place."
- 2)Argument: Ohio is estopped from arguing and has waived its argument, because it failed

to participate in the Industrial Commission proceedings where the award became res adjudicata. Court: Ohio had a right to pursue its declaratory judgment action in lieu of defending the claim, and, further, would not be bound by an Industrial Commission decision in which the cause of action was different and Ohio was not named as a party.

EDITOR'S NOTE: WOULD THE RESULT HAVE BEEN ANY DIFFERENT IF OHIO CASUALTY HAD BEEN NAMED AS A PARTY IN THE WORKERS' COMPENSATION CLAIM? PROBABLY NOT, BECAUSE REASON NO. 1 WOULD STILL BE VALID.

**EMPLOYER'S SUBROGATION LIEN AGAIN UNDER ATTACK.**

As we all know, the compensation subrogation lien remains under attack by plaintiffs' lawyers. Understandably, the lawyer feels no fiduciary obligation to the employer and its carrier despite his receipt of a 25% fee. Since 25% is less than the lawyer's customary fee, and, because his first duty is to his client, the lawyer will attempt to increase the fee and reduce the lien. Two recent cases reveal how innovative the lawyers can be.

In *Swets v. Village of Lansing*, Viola Swets, while performing services as a crossing guard, was struck by an automobile. She sustained a head injury causing partial paralysis, and the Village paid over \$270,000 in workers' compensation benefits. As is often the case, neither the employee or her civil attorney notified the Village of the filing of a lawsuit until after the settlement of the case and the dismissal of the lawsuit. Unfortunately, for both the Village and Ms. Swets, the settlement amount was limited by the defendant's policy limits of \$100,000.

The Village filed a motion to intervene and vacate the dismissal. The plaintiff's lawyer had deposited the entire settlement into an escrow fund. The trial court issued a very

surprising order of distribution.

- (1) Payment of plaintiff's attorney's one-third contingent fee \$33,333.33
- (2) Reimbursement of costs to plaintiff's attorney.....425.67
- (3) Reimbursement of the Village's workers' compensation lien (\$100,000 - \$33,333.33 - \$425.67) x .75.....49,680.75
- (4) Additional attorney fees to plaintiff's attorney (\$100,000 - \$333,333.33 - \$425.67) x .25.....\$16,560.25
- TOTAL.....\$100,000.00

In effect, after reimbursement for costs, the plaintiff's lawyer was receiving approximately one half of the recovery, the Village the other half, and Ms. Swets, who started the lawsuit, zero. The trial court had relied on *Carlson v. Powers*, which actually involved the Hospital Lien Act and not the Workers' Compensation Act. The Hospital Lien Act "expressly provides that liens filed pursuant to its provisions are inferior to attorneys' statutory liens." No such provision exists in the Workers' Compensation Act.

The Appellate Court reviewed a long line of cases, which limited the plaintiff's lawyer's fees to 25% of the lien amount despite the fact that the plaintiff may have contracted for a lien of 33 1/3% or more. The court stated:

*Thus, we conclude that the trial court improperly reduced plaintiff's settlement by one-third before distributing the remaining funds. In order to comply with the Act, the settlement proceeds must be considered as a whole, i.e., \$100,000; then reduced by \$25,000, representing the statutory 25% amount in fees to plaintiffs' attorney; then reduced by plaintiff's attorney's costs of \$425.67. The remaining \$74,574.33 would be payable to*

*the Village for workers' compensation benefits already paid.*

In *American States v. Bailey*, the Appellate Court again had occasion to consider a \$100,000 policy limit settlement. In 1981, at the time of the settlement, the attorney requested Hartford {the compensation carrier} to agree that the American States settlement draft be made payable to all three parties and that the amount be placed in an escrow account so that interest would accrue pending the disposition of the workers' compensation claim. Hartford refused.

Eleven years later, American States filed an action in the circuit court acknowledging its obligation to pay the \$100,000 and asking directions from the court as to the method of distribution. The compensation lien now exceeded \$200,000. The plaintiff's attorney took a very aggressive approach, stating that he was entitled to 33 1/3% of the settlement and that Hartford had intentionally interfered with the attorney's contractual relationship with the plaintiff.

Despite the attorney's argument, the circuit court awarded Hartford the entire settlement proceeds, subject to the attorney's statutory fee of 25% and reimbursement of the costs stating:

*The fact that Hartford declined to release the lien it became statutorily entitled to, pursuant to Section 5(b), does not establish that Hartford intentionally induced Bailey to breach his contingent fee agreement with {the attorney}. {The attorney's} allegations amount to nothing more than an attempt to circumvent the holdings in {citing past Illinois decision}.*

-----  
**ADA AND EMPLOYER'S LIABILITY CORNER**

By: Michael S. Simon

**Does the ADA require the employer to**

**reassign injured employees to "light duty" positions?**

The Federal Americans with Disabilities Act (commonly known as the "ADA") presents many difficult questions for once settled state workers' compensation issues. One of the most troubling questions for employers and insurers is whether the ADA requires reassigning injured employees to "light duty" positions.

**1.THE FIRST QUESTION FOR ANY ADA ISSUE IS: IS THE EMPLOYEE COVERED BY THE ADA?**

Contrary to popular belief, an employee who receives workers' compensation is not automatically protected by the ADA. Equal Employment Opportunity Commission guidelines do supply a good, if simplistic, answer:

*Work related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments . . . with little or no permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation . . . may not be protected by the ADA.*

**2.FOR THOSE EMPLOYEES WHO FALL WITHIN THE ADA'S DEFINITION OF "DISABLED" AND "QUALIFIED" THE EMPLOYER MUST MAKE A "REASONABLE ACCOMMODATION" FOR THEIR DISABILITIES. 42 U.S.C. §12112(5)(A).**

Under the Act's own definition of "reasonable accommodation" this may include "job restructuring" or "reassignment to a vacant position." 42 U.S.C. §12111(1). Assuming then that an injured worker is covered by the ADA, is the employer required to reassign them to a light duty position?

The most important consideration in answering this question is whether there is any such position open. According to section 9.4 of the EEOC's Technical Assistance Manual (abbreviated herein as "TAM"), "Creating such positions by job restructuring is not required by the ADA." The courts have generally followed this limiting approach as well, such as in the leading case of *White v. York International Corp.*, 45 F.3d 357, 362 (10th Cir. 1995):

*EEOC guidelines provide that reassignment may be considered as a reasonable accommodation. However, the ADA does not require an employer to promote a disabled employee as an accommodation, nor must an employer reassign the employee to an occupied position, nor must the employer create a new position to accommodate the disabled worker.*

Therefore, unless the employer has a vacant light duty position at the same level as the employee's usual position, the answer to the question of reassignment is that it is not required.

3. IF THERE IS A LIGHT DUTY POSITION AVAILABLE, THE QUESTION THEN BECOMES: WOULD THIS BE A REASONABLE ACCOMMODATION?

This is a difficult issue, as what constitutes a reasonable accommodation depends upon the unique facts of each case. Suffice to say that reassignment to a vacant light duty position "may be a reasonable accommodation in some cases". (TAM at §9.4).

4. THE REASSIGNMENT DOES NOT NECESSARILY HAVE TO BE PERMANENT. "IF THE POSITION WAS CREATED AS A TEMPORARY JOB, A REASSIGNMENT TO THAT POSITION NEED ONLY BE FOR A TEMPORARY PERIOD." (TAM at 9.4).

Moreover, in certain circumstances, the reassignment can be to a lower level position.

(ADA regulations at 29 C.F.R. §1630, appendix §1630.2(o)). The employer can then pay the reassigned employee at the wage rate of the lower position so long it does not discriminate by doing so. For example, an employer could not do this while paying employees covered by workers' compensation but not covered by the ADA the higher wage rate of their usual position.

5. SOME EMPLOYERS KEEP LIGHT DUTY POSITIONS OPEN FOR THE PURPOSE OF TEMPORARILY REASSIGNING INJURED WORKERS. THE ISSUE THEN BECOMES, CAN THE EMPLOYER REFUSE TO PLACE INTO SUCH A POSITION AN EMPLOYEE COVERED BY THE ADA BUT INJURED OFF THE JOB?

A recent guidance statement by the EEOC says no, that such a policy would violate the law. These guidelines, published in September, 1996, state that the need to keep these light duty positions open for employees on workers' compensation is not a valid defense in an ADA action.

However, these recent guidelines do state that an employer who creates light duty positions for employees injured on the job does not have to create such positions for employees injured off the job even when those employees are covered by the ADA. Therefore, as long as the employer creates light duty positions on an as-needed basis, it will likely be able to avoid being forced under the ADA to create such positions for workers not covered by workers' compensation.

EDITOR'S NOTE: MICHAEL SIMON, AN ASSOCIATE WITH OUR FIRM, SPECIALIZES IN CASES DEALING WITH THE ADA AND OTHER EMPLOYMENT DISCRIMINATION CLAIMS. HE APPEARS BEFORE FEDERAL AND STATE AGENCIES AND COURTS AND HAS RECENTLY PARTICIPATED IN AN ADA DECISION WHICH WAS APPEALED TO THE U.S. SUPREME COURT. HE IS CURRENTLY PREPARING AN ARTICLE ON THE USE OF PROCEEDINGS IN A WORKERS' COMPENSATION CLAIM TO DEFEND AGAINST AN ADA CLAIM.

#### LEGISLATIVE CORNER

By: Mark D. Wilkening

The final gavel of the 1996 legislative session in downstate Springfield sounded on January 8, 1997 without having effected any changes to the Illinois Workers Compensation Act. With a 10 Seat Republican majority in both the House and Senate throughout 1995 ad 1996, hopes were high that Worker's Compensation reform would become a reality. Unfortunately, this was not to be.

Many will recall the massive reform bill that passed the Illinois Senate in May of 1995 but failed to be called for a vote in the House. That bill (House bill 838) addressed a wide variety of problems that have plagued employers since the Workers Compensation explosion of 1975. Highlights from "838" include credit for prior "person as a whole" recoveries, restrictions on repetitive trauma, cap on permanency rate, control of average weekly wage calculations, written notice of accident and zero tolerance for workers who are injured while under the influence of drugs or alcohol.

Many different explanations have been offered as to why "838" was never called for a vote in the House. However, despite these different and sometimes contradictory explanations, certain truths were illuminated during this process:

1. The scope of worker's compensation and who it affects is as vast as any issue that has ever been considered by our legislative.
2. The interests of employers, insurance carriers and physicians are not necessarily the same.
3. Seemingly "small" changes to the Workers Compensation Act impact a very large portion of our population both negatively and positively resulting in bitter disagreement between various interest groups.
4. Educating our elected officials in the area of worker's compensation is a monumental task (no insult intended).

Following the failure of "838" to become law, numerous attempts were made over the next eighteen months to pass scaled down versions of the bill. As recently as January 7, 1997 a bill was drafted for consideration which would have included about 30% of the major components of "838". All of the medical provisions were removed, as were the fraud and alcohol provisions. Key items remaining were average weekly wage, forum shopping and written notice. Again however support for this extremely limited version of "838" could not be mustered.

Thus, we are all left scratching our heads as to whether or not these powerful competing interests will ever be able to unify on the issue of workers compensation reform. Without such unity, workers compensation reform appears to be stalled. Certainly, the newly elected Democratic majority in the Illinois House makes workers compensation reform less likely over the next two years. However, should the Republicans regain control in two years, it will be interesting to observe whether or not a new and more unified strategy develops among the ranks. Stay tuned.

EDITOR'S NOTE: MARK WILKENING AND MARK WIEDNER SERVED AS LEGISLATIVE ASSISTANTS TO THE SPEAKER OF THE HOUSE DURING THE LAST SESSION.

✍️FRANK J. WIEDNER