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## NON-CONSENSUAL ASSAULT IS A "PHYSICAL-MENTAL" TRAUMA, AS OPPOSED TO "MENTAL-MENTAL" TRAUMA THEREBY PROVIDING THE BASIS FOR A COMPENSATION RECOVERY.

In City of Springfield v. Industrial Commission, the Appellate Court upheld an Industrial Commission decision awarding benefits for a psychological injury suffered by the claimant after her supervisor forced her to engage in five occasions of non-consensual sexual intercourse over a five-month period of time. She claimed debilitating depression because of the assaults. The Respondent contended the encounters were consensual and added that, in the absence of physical trauma, the psychic injury belonged under the mental-mental classification, thereby making it non-compensable.

The claimant testified that during the period from August, 1991 through January, 1992, her supervisor forced her to engage in non-consensual intercourse, suggesting that she might lose her job. In February, 1993, after hearing that another female co-worker had filed sexual harassment charges against the same supervisor, the claimant reported her incidents to her supervisor's superiors. The incidents became public, the claimant became very emotional, was confronted by her fellow employees and contemplated suicide. On April 15, 1993, the claimant was diagnosed as suffering from generalized anxiety and post-traumatic stress disorder due to the sexual harassment and assaults at work. She came under the care of a psychiatrist, who diagnosed major depression and placed her on medication. Her problem was compounded when the claimant was demoted and reassigned to work for the supervisor who allegedly assaulted her. The psychiatrist removed her from work due to

her emotional state.

The Court noted the different standards of proof required in "mental-mental" as opposed to "physical-mental" types of cases:

*In Pathfinder, our supreme court held that psychological injuries could be compensable in either of two ways: (1) where the psychological injuries were related to and caused by a physical trauma or injury, i.e., 'physical-mental' trauma, or (2) where the psychological injuries were caused by 'a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm \*\*\* though no physical trauma or injury was sustained,' i.e., "mental-mental" trauma. Pathfinder, 62 Ill. 2d at 563, 343 N.E.2d at 917. The "mental-mental" theory of recovery is generally recognized as a more difficult basis for trying a case in which the claimant is seeking to prove his or her psychological injury is compensable. See Chicago Board of Education v. Industrial Comm'n, 169 Ill. App. 3d 459, 466, 523 N.E.2d 912, 917 (1988). Under the "physical-mental" theory, the work-related physical trauma need not be the sole causative factor, but need only be a causative factor of the subsequent mental condition.*

Prior to Pathfinder, mental disability was compensable "only if it was precipitated by physical contact or injury traceable to a definite time, place and cause." Recovery was allowed in Pathfinder, with the court stating that minor physical contact with no objective manifestation, i.e., bruises, contusions, broken bones, etc. was sufficient to cause psychological injuries to be compensable. The court stated:

*After reviewing the case law, we are convinced that the physical contact explicit in nonconsensual sexual intercourse is sufficient to meet the requirement of physical contact necessary for the*

*"physical-mental" trauma theory of recovery. Rape, sexual assault, and batter are all physical bodily injury crimes in Illinois. See 720 ILCS 5/12-13, 12-3 (West 1992). For purposes of battery and aggravated sexual assault, bodily harm may be shown by either actual injury, such as bruises, or may be inferred by the trier of fact based upon common knowledge. People v. Lopez, 222 Ill. App. 3d 872, 584 N.E.2d 462, 467 (1991). Therefore, we find that it was proper for the Commission to infer that a nonconsensual sexual assault was likely to involve physical trauma, and it was appropriate to characterize claimant's injury as a "physical-mental" trauma, as opposed to a "mental-mental" trauma.*

**EDITOR'S NOTE:** Possibly, the case may have had a different result if the supervisor had testified. The court emphasized that the claimant's testimony was "unrebutted" and the medical evidence of a post-traumatic stress disorder "unrefuted."

### **INSURANCE COVERAGE DISPUTES NOT SUFFICIENT TO JUSTIFY NON-PAYMENT OF COMPENSATION. PENALTIES IMPOSED.**

In Robert McMahan v. Industrial Commission, the claimant was a laborer who sustained a compensable back injury which eventually required surgery. The employer followed a policy of paying small workers' compensation claims internally without reporting the claims to the insurance company. This constituted a violation of the policy provisions. Because of this dispute, neither the employer or the insurance carrier paid any of the medical bills or compensation. The Arbitrator awarded TTD, medical expenses, attorney's fees under Section 16 of the Act and penalties under Section 19(l) and 19(k) of the Act. The Industrial Commission eliminated the award of attorney's fees and penalties and this was affirmed by the Circuit Court. The Appellate Court reversed, however, contending that the penalties and attorney's fees should have been awarded even though, as the

employer contended, no award had been entered in favor of the claimant for which payment was unreasonably delayed.

For sometime, confusion has existed as to whether optional penalties or attorney's fees on awards were permissible in view of the Brinkman v. Industrial Commission case. It is true that prior to the Supreme Court's decision in Board of Education, penalties under Section 19(k) and attorney's fees could only be assessed after an award. This apparently is no longer the case.

*The reason claimant was not paid was because of the employer's own actions in delaying reporting the incident to the insurance company and whatever reasons it now offers to explain its failure to pay compensation obtained after the fact. Employer's conduct alone created the need for this litigation and as such justifies the award of additional penalties under Section 19(k) as well as attorney's fees.*

**EDITOR'S NOTE:** THE COURT MIGHT ALSO HAVE RELIED ON SECTION 4(A)(3) WHICH PROVIDES THAT ANY POLICY PROVISION, WHICH ATTEMPTED TO LIMIT OR MODIFY THE LIABILITY OF THE INSURANCE CARRIER WOULD BE WHOLLY VOID. THE FACT THAT AN INSURANCE CARRIER HAS A COVERAGE DISPUTE CANNOT PROVIDE ANY DEFENSE TO THE CLAIM BROUGHT BY THE EMPLOYEE. SECTION 19(K) AND 19(L) PENALTIES MAY BE INCLUDED IN THE ARBITRATOR'S DECISION.

### **DOES THE CIRCUIT COURT HAVE THE RIGHT TO ENFORCE THE TERMS OF A SETTLEMENT CONTRACT OR AN AGREEMENT TO SUBMIT A SETTLEMENT CONTRACT?**

Customarily, attempts to enforce the terms of a settlement contract approved by the Industrial Commission are handled through the Commission process on the theory that the plaintiff must exhaust all administrative remedies before seeking court enforcement. However, the Emery case holds that the Exhaustion of Remedies Doctrine applies only where the

relevant administrative agency enjoys exclusive jurisdiction to hear an action.

The employer, Emery Worldwide Freight Corporation, entered into a written contract with the employee, Benjamin Snell, wherein the parties agreed to settle claims arising under the Illinois Workers' Compensation Act. The settlement contract, which was approved by the Industrial Commission, required Emery to pay Snell \$60,000 with the terms specifically including "any other accident, injury, aggravation or onset of symptoms to the date of this settlement," with the purpose of the settlement "to end all litigation between the parties." After this settlement, Snell continued to press two claims for injuries which occurred prior to the date of the settlement contract approval (but apparently after the original accident date for which the settlement was made). In response to Emery's request for a declaratory judgment, Snell stated that Emery's action could not be used to remove cases pending before the Industrial Commission. The Appellate Court disagreed, stating that "our supreme court, however, interpreted the Workers' Compensation Act to grant the Industrial Commission and the Circuit Courts concurrent jurisdiction over contract matters ancillary to disputes arising under the Act . . . Plaintiff here requests only that the trial court interpret a specific provision in the settlement contract related to several workers' compensation claims. This is a question of law and, thus, a question which the Circuit Court and not the Industrial Commission is in the best position to address."

**EDITOR'S NOTE:** THE SETTLEMENT CONTRACT TERMS WERE VERY GENERAL IN REFERRING TO ALL CLAIMS INSTEAD OF REFERRING TO A SPECIFIC ACCIDENT DATE. SOME ARBITRATORS WILL NOT APPROVE SETTLEMENT CONTRACTS WHICH REFER TO "ALL CLAIMS TO DATE OF THE SETTLEMENT CONTRACT."

In Village of Oak Park v. Schwerdtner, the Village entered into a contract with its employee police officer to terminate his employment. Subsequently, the Village requested a declaratory judgment to enforce the settlement agreement, which included the closing of a workers' compensation claim, prior to the approval of a settlement contract. As a part of the consideration for the agreement, the claimant agreed to accept paid sick leave as a settlement of a workers' compensation claim, to

withdraw his application for a disability pension and to resign. When preparing the check for the claimant's paid sick leave, the Village withheld Federal income tax. The claimant refused to accept the check and would not perform any obligations under the agreement, including the submission of a settlement contract to the Industrial Commission, contending that workers' compensation proceeds should not be taxed. The claimant argued further that "the workers' compensation settlement agreement as part of the contract, including lump sum payments of sick leave, is contrary to public policy because it taxed workers' compensation proceeds." The court disagreed, stating:

*The first part of defendant's argument suggests that his promise to cooperate with the Village in obtaining Industrial Commission approval for the withdrawal of a worker's compensation claim violates the Internal Revenue Service policy of not taxing worker's compensation proceeds. Defendant overlooks the contract: the contract proceeds are in lieu of proceeds that might have been awarded under the worker's compensation claim. Defendant has contracted for an arguably taxable benefit in exchange for a nontaxable benefit. The defendant cites to no case that holds such an exchange to be against public policy.*

**EDITOR'S NOTE:** THE AGREEMENT REQUIRED THE CLAIMANT TO COOPERATE WITH THE VILLAGE IN OBTAINING INDUSTRIAL COMMISSION APPROVAL. IN MOST CASES, THE COOPERATION OF THE CLAIMANT ENSURES APPROVAL. IN A RELATIVELY FEW NUMBER OF CASES, THE ARBITRATOR MAY DISAPPROVE A SETTLEMENT CONTRACT TO WHICH BOTH SIDES HAVE AGREED. DOES THIS RENDER THE CONTRACT INVALID?

**AN AGGRAVATION OF A PRE-EXISTING BACK CONDITION DOES NOT NECESSARILY OBLIGATE THE RESPONDENT FOR THE SUBSEQUENT SURGERY.**

Some of the most difficult factual

situations involve cases where the claimant aggravates a pre-existing back condition and subsequently undergoes back surgery. In a rather surprising recent decision, the Appellate Court reversed the Industrial Commission's finding and held that the claimant's back surgery was not related to the aggravation caused by his most recent accident. The Village of Oreana v. Industrial Commission. Tommy Gephart, a Public Works Superintendent for the Village of Oreana, sustained a back injury on January 22, 1993 as a result of a fall. He noted pain in the back, which radiated to his hips, legs, and calves. After a visit to the hospital emergency room, the claimant saw his family physician, Dr. Fritz, on January 25, 1993. In his history to Dr. Fritz, the claimant described 15-20 episodes with his back over the previous 16 years and six to seven in the last year without any precipitating stress. Dr. Fritz ordered an MRI and referred the claimant to Dr. Fulbricht, a neurosurgeon. On February 8, 1993, Dr. Fulbricht reviewed the MRI, ordered physical therapy and referred the claimant back to Dr. Fritz, stating that he had found no evidence of a surgically remedial disease.

The claimant was then referred to Dr. Schroeder, who, after prescribing physical therapy, which was unsuccessful, suggested that the claimant was suffering from a severe conversation reaction. Dr. Schroeder then referred claimant to Dr. Harms who, on July 13, 1993, performed back surgery. It should be noted that in the history given to Dr. Harms, the claimant referred to back problems on and off over the previous 12 years, but stated that he had no prior injuries, accidents or broken bones.

At the employer's request, Dr. Matz, a neurosurgeon, reviewed the claimant's medical records and concluded that the claimant's surgery was not causally related to his January 22, 1993 accident. He stated that his problem after the accident was "in essence, another episode involving his lower back indistinguishable from the lengthy history of low back complaints that he had over the years." Any aggravation of the pre-existing injury on January 22, 1993 had apparently resolved by the time the claimant saw Dr. Fulbricht on February 8, 1993 because, at that time, Dr. Fulbricht's findings were negative.

The importance of this case is determined by the extensive prior back history.

- (1) In February, 1977, while in the army, the claimant injured his back while lifting a welder with the injury sufficiently serious that, at the time of his arm discharge, the claimant received a disability rating.
- (2) In 1979, the claimant suffered a back injury while lifting, resulting in a constant back ache radiating into his legs. This injury led to his being hospitalized for 30 days in 1980.
- (3) In 1982, a myelogram was performed with normal results.
- (4) In April, 1987, the claimant was seen at the Veteran's Hospital because of low back pain with radiation into his legs.
- (5) In December, 1989, the claimant was again seen at the Veteran's Hospital with similar complaints.
- (6) On January 30, 1990, the claimant was seen for complaints of low back pain with which he had been suffering for three to four months.
- (7) Finally, on January 18, 1993, four days prior to the accident, the claimant also had back pain.

In its appeal, the employer contended that there actually existed no conflicting medical testimony and the only opinion on causal connection was supplied by Dr. Matz. The Appellate Court agreed with the employer's contention, noting that Dr. Harms had been somewhat vacillating in his testimony, and had admitted that it was impossible for him to state whether the claimant's surgery was necessitated by the accident of January 22, 1993. The court referred to a portion of Dr. Harms' testimony as a basis for its decision in reversing the Commission. Dr. Harms stated:

*The more the problems before the incident the less likely the incident is in being a significant factor towards causing worsening. That is, the patient could have had problems in spite of the incident. The more severe, the more frequent the*

*symptoms before the incident, the more likely that he would have gotten worse even in the absence of the incident.*

**EDITOR'S NOTE:** THE COMMISSION IS NOT OFTEN REVERSED ON THIS TYPE OF MEDICAL CAUSATION QUESTION. IN FACT, TWO OF THE FIVE APPELLATE JUDGES DISSENTED STATING THAT ONLY THE COMMISSION SHOULD WEIGH AND RESOLVE CONFLICTS IN MEDICAL TESTIMONY. THE CASE, HOWEVER, IS HELPFUL WHEN THE ACCIDENT CAUSED A RELATIVELY MINOR AGGRAVATION OF A CLAIMANT WITH A LONGSTANDING HISTORY OF BACK PROBLEMS AND BACK INJURIES.

**COMPANY LUNCH ROOM VENDING MACHINE FAILED TO RESPOND TO A COIN DEPOSIT. DOES AN INJURY RESULTING FROM THE CLAIMANT'S PUSHING OR SHAKING THE MACHINE ARISE OUT OF THE EMPLOYMENT?**

Janet Pallardy recently defended a claim of an airline ramp serviceman who, immediately after a safety training meeting in the employee's lunchroom, deposited coins in vending machine to purchase a candy bar. When the machine mechanism did not release his selection, he was giving the machine "a little bit of a shove" when he heard a snap and felt severe pain in his left ankle. The claimant had observed other people jostle vending machines to dislodge items caught in the mechanism, but he was also aware of a refund system, which he had utilized 25-30 times in the past. The operating manager testified that the claimant had told him that he had kicked the machine and hurt his foot. The manager described the policy of obtaining refunds when the machine failed to operate, but admitted that he was aware that employees often shake the machines when selections do not drop.

The Commission denied compensation but the Circuit Court reversed finding it against the manifest weight of the evidence. The Appellate Court, in turn, reversed the Circuit Court and found that the Commission denial of the claim was not against the manifest weight, stating:

*. . . the Commission noted that if an employee voluntarily and in an unexpected manner exposes*

*himself to a risk outside any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment. The Commission concluded that a forceful pushing or shoving of the candy machine, in contrast to the purchase of candy from the machine, was a voluntary and unexpected exposure to a risk entirely personal and outside any reasonable exercise of claimant's duties.* Lange v. Industrial Commission.

The court cited the case of Yost v. Industrial Commission, wherein the employee cut her hand prying open a tin of candy purchased from a fellow employee soliciting for a charitable fundraiser, stating that while the employer acquiesced in charitable solicitations, the purchase did not cause the injury, but the prying of the lid did, actions the employee voluntarily undertook. In Lange, the court concluded by stating:

*Here, the Commission could also infer respondent did not know or acquiesce in claimant's acts of force that were different in kind from practices which it was aware.*

**EDITOR'S NOTE:** IT SHOULD BE NOTED THAT THE DECISION WAS ISSUED PURSUANT TO SUPREME COURT RULE 23. DECISIONS UNDER THIS RULE OFTEN INVOLVE NO MORE THAN AN APPLICATION OF WELL-SETTLED RULES AND AFFIRM THE DECISION OF THE TRIER OF THE FACTS. IT CAN BE USED AS A PRECEDENT IF THERE IS NO ESTABLISHED CONFLICTING LAW TO THE CONTRARY.

### **POLICY EXTENDS COVERAGE TO INDEPENDENT CONTRACTORS THEREBY JUSTIFYING PREMIUM INCREASE.**

In Wausau General Insurance Company v. Kim's Trucking, Inc., the Appellate Court had occasion to approach the liability of a trucking company for compensation coverage of independent haulers through the process of a premium charge. Wausau argued that Kim's should pay premiums for its own employees as well as for outside truck haulers even if the haulers were independent contractors, unless the haulers could provide proof that they were insured elsewhere.

The Wausau policy language provided that Kim's must pay premiums for its employees as well as for "all other persons engaged in work that could make (Wausau) liable to pay workers' compensation, unless Kim's can demonstrate those persons' workers' compensation obligations were otherwise "lawfully secured." Kim's contended that it had satisfied this burden by explaining that the outside haulers are independent contractors but the court found this to be insufficient stating:

*Because the outside haulers could be found to be either employees or independent contractors, the insurance policy terms require Kim's to demonstrate that their workers' compensation obligations were secured in one form or another. Kim's could show this in one of three ways. First, Kim's could pay the premiums for the outside haulers. Second, Kim's could provide Wausau with certificates of insurance indicating the outside haulers obtained insurance coverage elsewhere. Or third, Kim's could provide Wausau with documentation that the outside haulers had affirmatively opted out of coverage pursuant to the Act.*

**EDITOR'S NOTE:** CUSTOMARILY, INSURANCE CARRIERS HAVE NOT CHARGED PREMIUMS FOR OUTSIDE HAULERS BUT, PERHAPS, THEY SHOULD DO SO.

nFRANK J. WIEDNER, Editor

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