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EXPANSION OF EMPLOYER LIABILITY

In *Kotecki v. Cyclops Welding*, 146 Ill. 2d 155 (1991), the supreme court ruled that while contribution was available from employers, it was limited to the amount of the workers' compensation liability of the employer. Apart from mechanical issues involving the cost of expenses and attorneys' fees, this more or less resulted in the extinguishment of employer liability for practical purposes.

In its decision, the supreme court disposed of the defendant's complaint that it would be forced to pay more than its pro-rata share of liability as follows:

Under the Contribution Act, as interpreted in Doyle the second problem discussed by the Minnesota court, or that the third party will pay too much, is not an issue in Illinois, as the employer will clearly be liable for contribution. Rather, the issue is whether the employer will be forced to pay too much, thereby losing the protection that the Workers' Compensation Act is supposed to provide. (Emphasis applied.) Kotecki at 156 Ill.Dec. 5.

The court concluded that the contribution obtained from an employer must be limited in this way in order to reconcile the protections of the Workers' Compensation Act with the right of the defendant to seek contribution. The court added that "while this approach may not allow full contribution recovery to the third party in all cases, it is a solution we consider most consistent with fairness and the various statutory schemes before us." In further explaining its rationale, the court stated that the Workers' Compensation Act clearly shows an intent that the employer only be required to pay statutory benefits which are paid in exchange for a no fault system of recovery.

Within the last year, several decisions have turned away from this rationale and found that, despite the clearly-stated equitable principles enunciated in *Kotecki*, an employer may be liable for unlimited contribution in certain cases. Most recently *Liccardi v. Stolt Terminals* was decided by the supreme court in its September term of 1997, whereas the *Braye* case was reported in our April 1997 newsletter.

These three cases all involved the interpretation of contract documents between the employer and the defendant in a construction-related work activity. In each of these cases, the employer entered into contracts which contained what can only be described as boiler plate "indemnity" language. Typically, the language provided that the employer "agrees to indemnify and hold harmless [defendant] from all loss or the payment of all sums of money by reason of all accidents, injuries, or damages to persons or property that may happen or occur in connection therewith."

The supreme court, following the lead of *Herington v. Alberici*, has decided that this boiler-plate indemnity language is a waiver of the limitations on contribution liability established in the *Kotecki* decision. Specifically, the court held in *Herington* that "... when Shield entered into the subcontract with Alberici containing the terms set out in paragraph 8(c) of the subcontract, it waived the workers' compensation limits recognized in *Kotecki* . . . The defense of limited liability under the Workers' Compensation Act was bargained away." This holding has been echoed in *Liccardi* and *Braye*, and is now law. Obviously, these holdings completely ignore the supreme court's prior rationale enunciated in *Kotecki* that unlimited contribution from the employer would "thwart the central concept" behind workers' compensation, i.e., that of fixed, non-fault benefits available to an employee in return for liability limitations.

Even more odd, and yet not discussed in the decision, is that *Kotecki* had not even been decided at the time the contract in *Herington* was entered into between the parties, nor had *Kotecki* been decided at the time of the accident in *Herington* which was November 27, 1989. The court in *Herington* held that "when" the employer entered into the subcontract, it "waived the workers' compensation limits recognized in *Kotecki* . . ." How can a party waive a right which had not yet been created? At the time the contract at issue in *Herington* was executed, *Kotecki* had not been decided and to conclude that the contract was a "knowing" or meaningful waiver is, at the least, doubtful.

Nonetheless, insurance carriers who provide employer liability must now be aware that these types of "boiler plate" indemnity agreements in contracts executed by the insured will expose them to unlimited liability under the Contribution Act. Care should be taken to examine any pending contracts particularly for large scale operations, which are being undertaken by the insured to determine whether this liability exists.

It is yet to be seen whether or not these erosions of *Kotecki* represent a change in philosophy in the supreme court, which, heretofore, had been unwavering in its application of the Workers' Compensation Act's protections to limit civil liability of employers in this state.

RICHARD J. LEAMY, JR.

FILLING THE TEMPORARY PARTIAL GAP IN ILLINOIS

The Workers' Compensation Act provides temporary total disability (TTD) benefits for employees who are temporarily unable to work following an industrial accident. TTD benefits, calculated at 66% of the employee's average weekly wage, terminate once an employee returns to work or reaches maximum medical improvement (MMI). Then, the employee is entitled to permanent partial disability (PPD) benefits to compensate for any residual impairment. PPD benefits, calculated at 60% of the employee's average weekly wage, are not available unless and until there is a finding of permanent impairment.

Often employees fall into a gap between TTD and PPD benefits. Specifically, when an employee returns to part time or light duty work, earning less than usual wages, prior to reaching MMI. TTD benefits are not

available, since the employee is working, and PPD benefits are not available, since the employee has not reached MMI and there has been no finding of permanent impairment. Since there is no statutory provision for the payment of temporary partial disability (TPD) benefits, the Industrial Commission, to avoid punishing those employees attempting to return to work in a limited capacity before reaching MMI, has awarded compensation as maintenance pursuant to Section 8(a) of the Act. Without any express statutory provision for an award of TPD benefits, two prevailing methods of calculation have been established:

Method I:

SIXTY-SIX AND TWO-THIRD'S PERCENT
(66%) OF THE AVERAGE WEEKLY WAGE
LESS THE WEEKLY CREDIT FOR PART TIME
OR LIGHT DUTY EARNINGS.

In *Modelski v. Royal Crown Bottling Co.*, 94 IIC 1099, claimant, who earned \$776.45 a week at the time of injury, returned to light duty work earning \$340 a week after undergoing surgery for a work-related condition. The Commission found that claimant was entitled to maintenance payments, but noted that the Act does not provide a maintenance compensation rate. However, it adopted the rate established by the legislature for the payment of TTD benefits--66% of the claimant's average weekly wage. Thus, claimant was entitled to weekly maintenance payments as follows:

1. $\$776.45 \text{ (AWW)} \times _ = \$517.63 \text{ (TTD rate)}$
2. $\$517.63 \text{ (TTD rate)} - 340 \text{ (present wage)} = \177.63

Similar awards and computations can be found in *Baptista v. Cook County Hospital*, 91 IIC 823, *Gordon v. Hardwick*, 90 IIC 617, and *Frakes v. D&W Pontiac, Inc.*, 90 IIC 607.

Method II:

SIXTY-SIX AND TWO-THIRDS PERCENT
(66%) OF THE DIFFERENCE BETWEEN THE
AVERAGE WEEKLY WAGE AND THE
WEEKLY PART TIME OR LIGHT DUTY
EARNINGS.

Maintenance payments have also been awarded based on 66% of the difference between the claimant's average weekly wage at the time of the accident and the weekly part time or light duty earnings. In *Simmons v. Illinois Dept. of Rehabilitation Services*, 94 IIC 432, claimant, pursuant to a rehabilitation plan, returned to part time work earning \$352.96. At the time of injury,

he was earning \$843.08. The maintenance payments were calculated on the basis of a wage differential:

1. $\$843.08 \text{ (AWW)} - 342.96 \text{ (present wage)} =$
 $\$490.12 \text{ (wage differential)}$
2. $\$490.12 \text{ (wage differential)} \times _ =$
 $\$326.75 \text{ (maintenance payment)}$

Notably, a dissenting opinion was filed, indicating that while the aforesaid award attempts to invoke principles of equity, there is no expressed language in the Act permitting such an award.

An award for maintenance payments, calculated on a "wage differential" basis, was also made in *Carvajal v. Naylor Pipe Co.*, 95 IIC 222. There, claimant returned to part time work earning \$85 a week while he had enjoyed an average weekly wage of \$332 at the time of the injury. The award for maintenance payments was computed as follows:

1. $\$332 \text{ (AWW)} - \$85 \text{ (present wage)} =$
 $\$247.00 \text{ (wage differential)}$
2. $\$247 \text{ (wage differential)} \times 66\% =$
 $\$164.67 \text{ (maintenance payment)}$

PART TIME OR LIGHT DUTY EARNINGS:
GROSS OR NET?

When calculating maintenance payments, should the claimant's gross or net wages enjoyed while working in a light duty or part time capacity be adopted? While this specific issue is yet to be addressed, the Commission, in *Modelski* and *Baptista*, *supra*, utilized the claimants' gross wages in the maintenance calculation.

While the Illinois Workers' Compensation Act does not have an expressed statutory provision for temporary partial disability benefits, the Commission has awarded maintenance payments to obviate any inequity to those employees who return to work in a part time or light duty capacity before reaching MMI and earn less than their TTD rate. Section 8(a) of the Act, which requires an employer to pay for training necessary for the physical, mental, and vocational rehabilitating of the employee, including all maintenance costs, has been interpreted to empower the Industrial Commission to award such payments.

MICHAEL F. DOERRIES

EDITOR'S NOTE: WHICH METHOD SHOULD THE CLAIMS REPRESENTATIVE USE? THE EMPLOYER'S PAYMENTS UNDER METHOD I WOULD USUALLY BE LESS THAN THOSE UNDER METHOD II. ASSUME A HYPOTHETICAL CASE WHERE THE EMPLOYEE EARNS \$900 PER WEEK WITH A TTD RATE OF \$600. IF THE EMPLOYEE RETURNS TO A TEMPORARY POSITION EARNING \$300 PER WEEK, THE EMPLOYER, UNDER METHOD I, WOULD PAY \$300 AS MAINTENANCE:

$$\begin{aligned} \$900 \text{ (AWW)} \times 66\% &= \$600 \text{ (TTD RATE)} - \$300 \\ \text{(PRESENT WAGE)} &= \$300. \end{aligned}$$

UNDER METHOD II, THE CALCULATION WOULD BE:

$$\begin{aligned} \$900 \text{ (AWW)} - \$300 \text{ (PRESENT WAGE)} &= \$600 \times 66\% \\ &= \$400 \text{ (WAGE DIFFERENTIAL)}. \end{aligned}$$

AS YOU CAN SEE, PAYMENT UNDER METHOD I WOULD BE \$100 PER WEEK LESS THAN THAT UNDER METHOD II.

CAN THE INDUSTRIAL COMMISSION ADJUDICATE THE AMOUNT OF CREDIT BASED ON FUNDS RECEIVED IN SETTLEMENT OF A THIRD PARTY ACTION?

The interplay between the parties involved in workers' compensation claims and civil actions resulting from the same accident has resulted in much contested litigation. Customarily, the dispute arises out of the compensation lien, third party actions, attorneys' fees and "Kotecki" caps. In most cases, reasonableness prevails and the issues are resolved. However, the parties' lack of flexibility often results in unsatisfactory outcomes. Such is the recent appellate court opinion in *Scott v. Industrial Commission*.

The underlying workers' compensation claim was brought by Emma Scott, wife and widow of Hughie Scott, Jr., deceased, against Illinois Wrecking Company (employer-subcontractor), Capitol Construction Group (general contractor), and Travelers. The Commission found that the employer, insured by Travelers, was liable and awarded TTD, medical, additional compensation under Sections 19(k) and 19(l), and attorneys' fees under Section 16. In a companion case, the Commission explained fully why it found no cancellation of Travelers' policy because of

underpayment of a premium by the employer and awarded additional compensation and attorneys' fees.

The civil claim was settled for \$438,557.05. The total amount of the Commission awards, including interest, amounted to \$430,723.36. Travelers tendered a check in the sum of \$281,259.34 with a calculation sheet showing credits claimed, including those for amounts paid in the settlement of the third party action. It should be noted that Travelers had not participated in the settlement of the third party action because it had voluntarily withdrawn its lien. Why did Travelers withdraw its lien in that action? Travelers felt that it could not protect its lien on the one hand and deny jurisdiction and liability in the workers' compensation case because, by maintaining the lien, the Commission could construe it as a judicial admission that Travelers was subject to the Commission's jurisdiction.

Travelers failure to make a full payment was based on its fear that an overpayment would be unreimbursable should it be entitled to a credit. Travelers asked the Commission to allocate the amounts distributed in the third party action because the lien was not considered by the court at the time of the settlement.

This effort by Travelers failed. The Industrial Commission stated that the statute and the Commission rules did not give the Commission jurisdiction to determine the credit because the circuit court was a proper forum for determining credit for funds received in settlement of third party actions. In addition, the Commission rubbed salt in the wounds by awarding additional compensation and attorneys' fees. In denying Travelers' request, the court stated:

The express language of section 5(b) of the Act allows for the enforcement of the lien in the circuit court in which the third-party action pends. Nowhere does section 5(b) say anything about the Commission enforcing the lien. None of the cases cited by Travelers is an appeal from a decision of the Industrial Commission. All involved enforcement of liens in the courts. Nor do the cases cited by claimant relate directly to the question of whether the Commission has jurisdiction in this case. The Commission was correct in determining it did not have jurisdiction to enforce any lien.

AN AWARD FOR "PENALTIES" IS ACTUALLY AN AWARD FOR ADDITIONAL COMPENSATION

In the same case, Travelers argued that the Commission should not have awarded "penalties" in the computation of the additional compensation of attorneys' fees. The court pointed out that Sections 19(l) and 19(k) do not actually refer to "penalties" but to "additional compensation." As a result, awards under these sections are includable in the calculation for further violations of these provisions. In effect, the court agreed that "penalties" could be imposed on prior "penalties."

WHAT IS THE EMPLOYER'S OBLIGATION TO RESPOND TO A DISCOVERY SUBPOENA AND TO PRESERVE RECORDS WHICH PETITIONER WISHED TO UTILIZE FOR WORKERS' COMPENSATION AND CIVIL CLAIMS?

The claims of Concetta Chidichimo, widow of Martin Chidichimo, deceased, resulted in two appellate court decisions. The first case, *Chidichimo v. Industrial Commission*, referred to here as "Chidichimo I", involved the widow's appeal from a denial by the Industrial Commission of a claim for death benefits. The second case, *Chidichimo v. University of Chicago Press*, hereinafter referred to as "Chidichimo II," involved a claim against the employer for failure to respond to a subpoena followed by the employer's destruction of the records.

In the compensation claim, the widow contended that on March 18, 1983, the decedent suffered a fatal heart attack as a result of lifting and moving items weighing 25 to 35 pounds. The employer denied that the decedent had performed any lifting that day. Prior to the scheduled hearing, the widow served subpoenas on the employer asking for "employee daily time tickets," which the employer refused to produce on the basis that the Commission rules do not provide for pretrial discovery. In February 1988, nearly five years after the death, the arbitration hearing began, at which time the employer advised that in March 1985, two years after the date of the heart attack, the employer had deleted the requested records from its computer system. The

employer contended that these deletions were performed as a routine matter when the records were two years old. The widow argued that she was entitled to a presumption that the time sheets would show that the decedent had performed heavy work on the date he died. The arbitrator disagreed and added that the presumption, if it existed, was not evidence.

The Chidichimo I court made the following factual findings regarding the employer's destruction of the decedent's records:

1. The employer did not comply with the subpoena because the Workers' Compensation Act did not require it to do so;
2. The destruction of records occurred in a routine purging process more than a year after the subpoena was issued;
3. The widow failed to seek enforcement of the subpoena until four years after it was issued; and
4. The widow failed to take reasonable steps to ensure preservation of the records and protect against routine destruction after the employer refused to comply with the subpoena.

In Chidichimo II, the widow brought an action for spoliation of evidence alleging that the employer had intentionally or negligently purged his computer of records the widow had requested in the workers' compensation claim. The circuit court dismissed the complaint finding that Section 5(b) of the Act barred any action for damages resulting from an injury incurred in the course of employment. The court noted that the exclusivity provision provided that, in return for incurring liability without fault, employers are protected by a prohibition of common law suits by employees against employers. Having said that, the court provided that the employee can escape the exclusivity provision and bring a common law action against the employer if the employee can prove any of the following:

1. The injury was not accidental;
2. The injury did not arise from his or her employment;
3. The injury was not received during the course of

employment; or

4. The injury was not compensable under the Act.

Since the widow's claim for compensation had been denied, the "injury was not compensable under the Act" as described in Number 4 above, and her action was not barred by the exclusivity provision. However, in denying the widow's claim, the court noted that the widow, in a claim for negligent spoliation, must show that the destruction of evidence caused her to be unable to prove the underlying suit and that, in *Chidichimo I*, the court had already noted that the widow had failed to show that the destruction of the records caused her to be unsuccessful in her workers' compensation claim.

EDITOR'S NOTE: MOST EMPLOYERS AND INSURANCE CARRIERS ARE AWARE OF THE FACT THAT THEY NEED NOT PRODUCE ANY RECORDS IN RESPONSE TO ANY SUBPOENA CALLING FOR PRODUCTION OF ANY RECORDS PRIOR TO TRIAL. CUSTOMARILY, THE SUBPOENA REQUESTS THE DELIVERY OF THE RECORDS TO A PHOTOCOPY COMPANY WITH AN INDICATION THAT THE RECORDS CAN BE MAILED RATHER THAN PERSONALLY DELIVERED. TO MAKE THE RECORD CLEAR, THE PARTY REQUESTING THOSE RECORDS SHOULD BE NOTIFIED IN WRITING THAT THE RECORDS WILL NOT BE PRODUCED BECAUSE THE INDUSTRIAL COMMISSION RULES DO NOT PROVIDE FOR A DISCOVERY PRODUCTION OF RECORDS. HOWEVER, AT THE SAME TIME, THE KEEPER OF THE RECORDS SHOULD BE NOTIFIED THAT THESE RECORDS SHOULD NOT BE DESTROYED SO AS TO AVOID ANY ALLEGATIONS OF MISCONDUCT.

IMPORTANCE OF EXCLUSIVITY UNDER THE ILLINOIS ACT

The exclusivity provision is relevant when compared to suits brought in states such as Texas. *U.S.A. Today* reported that 100 workers in six Levi plants in the El Paso area sued the jeans maker contending the workers were forced to return to work before fully recovering from injuries and then were humiliated in a bid to get them to quit. The company contended that the purpose of the work hardening program was to "help reintegrate" workers following a leave and that no one was forced back to work without a doctor's clearance. The first five workers were awarded \$600,000 in compensatory damages and \$10 million in punitive damages. The workers' had charged that they were harassed and taunted by fellow workers and managers,

that they were requested to perform work in violation of the doctors' orders, that sometimes they were given nothing to do, that they were forced to take reduced pay and warned that they would lose workers' compensation and unemployment benefits if they did not return to work. These types of complaints are not dissimilar to those made by Illinois workers but no such Illinois action appears likely.

EDITOR'S NOTE: WHILE MOST STATES HAVE A PROVISION REGARDING EXCLUSIVITY OF REMEDY, MANY ARE NOT AS BROAD AS THAT OF ILLINOIS. FOR EXAMPLE, ILLINOIS HAS BARRED CIVIL ACTIONS AGAINST THE EMPLOYER AS FOLLOWS:

1. A CLAIM THAT THE PLANT OWNER KNEW THERE WAS A SUBSTANTIAL LIKELIHOOD OF INJURY TO WORKERS WORKING ON A FURNACE PROJECT;
2. AN ACTION FOR FALSE ARREST AND FALSE IMPRISONMENT; AND
3. CLAIM AGAINST THE EMPLOYER'S SELECTED PHYSICIAN BECAUSE OF HIS OPINION AND RECOMMENDATIONS AFTER AN IME.

WHILE THE COURT, AND NOT THE INDUSTRIAL COMMISSION, ADJUDICATES THE AMOUNT OF CREDIT OR SET OFF BASED ON THE COMPENSATION PAID OR TO BE PAID, THE INDUSTRIAL COMMISSION MUST DETERMINE THE ACTUAL AMOUNT OF THE LIEN

In the *Scott* case *supra*, Travelers learned that only the court could determine the amount of credit or set off to determine the *Kotecki* "cap" to the employer. Suppose that the amount of the subrogation lien has not yet been determined because the payments under an award continue. Who determines the projected value of the future payments?

In *Branum v. Slezak*, the employer was named as the third party defendant in a contribution action claim. The employee had obtained an award for permanent total disability, upon which \$34,617 had been paid. To determine the amount of the employer's *Kotecki* cap set

off, the employer, as third party defendant and the third party plaintiff, stipulated that the present cash value of the future payments amounted to \$173,764.64. The employee plaintiff did not join in this stipulation. Nevertheless, the circuit court agreed to accept this estimated present cash value as a set off amount. This decision was reversed by the appellate court:

Although the court accepted the stipulation by the defendants, the plaintiff was not a party to the stipulation and, in our view, is not bound thereby.

We are mindful that the set off by the court was effected in order to bring closure to the trial proceedings. However, in our view, absent an agreement between all parties, a set off of workers' compensation benefits cannot be made until the amount of workers' compensation benefits to which plaintiff is entitled is fully determined.

...

We therefore hold that the trial court erred in ordering a set off in the amount of \$173,764.64, which represented the present cash value of Miller's future workers' compensation liability. The determination of Miller's future workers' compensation liability should be left to the Industrial Commission, which has the statutory power to make such a determination.

EDITOR'S NOTE: IF THE COURT, UNDER THE *BRANUM* DECISION, CANNOT CALCULATE THE TOTAL AMOUNT TO DETERMINE A *KOTECKI* SET OFF, IT ALSO CANNOT DETERMINE THE AMOUNT OF A LIEN WHEN THE AWARD PAYMENTS CONTINUE UNLESS THE PARTIES STIPULATE TO THE PRESENT CASH VALUE. THERE EXISTS A POSSIBILITY THAT A LITTLE-USED PROVISION OF SECTION 9 OF THE ACT MIGHT COME INTO PLAY. UNDER THAT SECTION, THE COMMISSION MAY ORDER A LUMP SUM IF, "IT APPEARS TO THE BEST INTEREST OF THE PARTIES THAT SUCH COMPENSATION BE SO VAGUE." IN SUCH A CASE, COMPUTATION WOULD BE ORDERED USING THE BANK PASSBOOK RATE OF INTEREST.

WORKERS' COMPENSATION SUBROGATION IN LEGAL MALPRACTICE SUITS

You may recall a prior newsletter where we discussed the case of *Williams v. Katz*. United Airlines was able to impress its subrogation lien on the proceeds

of the employee's legal malpractice suit. In that case, the severity of the permanent impairment did not result from the industrial injury, but, rather, to his doctor's failure to discover a ruptured biceps tendon. Williams' attorney had neglected to file the suit until the limitations period had expired, and, as a result, Williams sued his attorney for legal malpractice. Since the action was pending in the federal court, the United States Circuit Court of Appeals had occasion to interpret Illinois law.

Williams contended that the employer's lien could only attach to the proceeds from "the employee's injurer." The court upheld the employer's lien because the injury occurred "under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages." The court noted that the employer's right to bring an action fell only within a narrow three month time period (the three months prior to the limitations statute) that it made more sense for the employee to file the suit and that failure to protect the employer would result in a double recovery for the employee.

However, in the recent case of *Woodward v. Pratt, Bradford & Tobin P.C.*, the Illinois Appellate Court rendered a contrary decision. Woodward retained the Pratt law firm to represent him in a products case against Crown Central Corporation, but the suit was not filed until after the limitations period had expired. Woodward then sued the law firm for malpractice.

Home Insurance Company, the employer's carrier, attempted to assert Section 5(b) lien against the proceeds of the legal malpractice suit. Woodward opposed this action arguing that "any recovery in the attorney malpractice case was not subject to the workers' compensation lien." The court agreed. In doing so, it analyzed Section 5 as follows:

*Paragraph 1 of Section 5(b) states that "[w]here the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages." (Emphasis added.) (820 ILCS 305/5(b) (West 1994)), a lien arises against any recovery from such other person. The plaintiff's allegedly negligent lawyers did not cause the injury which led to compensation payments. The third paragraph of Section 5(b) states that "the employer may have or claim a lien upon any award * * * out of which such employee*

might be compensated from such third party.” (Emphasis added.) 820 ILCS 305/5(b) (West 1994)). This third party is the “injurer” whose acts or omissions caused the expenditure of medical and hospital payments. (Hartford Accident & Indemnity Co. v. Cummings, 66 Ill. App. 3d 704, 707-08, 384 N.E.2d 119, 122 (1978)), not the lawyer who was allegedly negligent in failing to sue the injurer.

The court felt that this interpretation of Section 5(b) was mandated by the fact that the statute permitted Home to bring a cause of action against Crown during the last three months of the limitations period. In the court's own words:

Why provide this right to the employer? It is apparent that the legislature recognize that the lien attached is pursuant to the expressed terms of Section 5(b) against any recovery from the tortfeasor that caused the injury that led to the workers' compensation payments. If the statute of limitations period expires, the cause of action and right to sue held by the injured worker and the employer is lost. If that cause of action is lost, then no recovery can be made against the tortfeasor and the employer's lien will then attach to nothing.

The stark contrast between these decisions indicates a need for the Illinois Supreme Court to review this issue. The U.S. Circuit Court of Appeals and the Illinois Appellate Court reached exact opposite conclusions regarding the express language of Section 5(b) and the impact of an employee's double recovery.

CHRISTOPHER R. MARSHALL

EDITOR'S NOTE: THE APPELLATE COURT IGNORED THE FACT THAT THE COMPENSATION CARRIER, WITHOUT HAVING THE OPPORTUNITY TO OBTAIN ALL OF THE FACTS FROM THE EMPLOYEE, MAY BE UNAWARE OF THE MALPRACTICE OR THE DATE ON WHICH IT ALLEGEDLY OCCURRED, THEREBY MAKING IT IMPOSSIBLE FOR THE CARRIER TO KNOW WHEN THE LIMITATIONS PERIOD WOULD EXPIRE. WITHOUT KNOWING WHEN THE THREE MONTH WINDOW WOULD "OPEN," HOW COULD THE CARRIER KNOW WHEN IT WOULD "CLOSE?" CLAIMS REPRESENTATIVES ARE CAUTIONED NOT TO DEPEND UPON THE EMPLOYEE'S ATTORNEY TO FILE THE CIVIL ACTION WITHIN THE LIMITATIONS PERIOD. ONCE THE LIMITATIONS PERIOD HAS ONLY THREE MONTHS TO RUN, THE EMPLOYER OR CARRIER SHOULD PREPARE TO FILE A

CIVIL ACTION. IF THE LIMITATIONS PERIOD RUNS, THE EMPLOYEE MAY SUE HIS OWN LAWYER AND COLLECT WITHOUT ANY REIMBURSEMENT TO THE EMPLOYER.

DOES CO-EMPLOYEE'S IMMUNITY FROM SUIT ALLOW RECOVERY BY EMPLOYEE AGAINST EMPLOYER'S UNINSURED MOTORIST CARRIER?

The employee was injured while riding as a passenger in a van owned by his employer and driven by a co-employee. The employee received workers' compensation benefits. The employee then made a claim for uninsured motorist benefits under a policy issued to the employer. The employee came up with an ingenious concept. He claimed that since his driver, as the co-employee, was immune from suit under the Workers' Compensation Act, he was, therefore, "uninsured" under the uninsured motorist provision of the employer's automobile policy.

In denying recovery, the court majority quoted Professor Larson's treatise on workers' compensation stating:

Ordinarily, for the uninsured motorist clause to operate in the first place, the uninsured third person must be legally subject to liability. Thus, if the third person is specifically made immune to tort suit by the compensation act's exclusive remedy clause, the uninsured motorist provision does not come into play.

The court majority agreed with the insurance company that if the employee was not legally entitled to recover damages from his co-worker, he would be barred from bringing a civil action for the same injuries against his co-employee, the employer, and the insurer. After receiving the benefits of the Workers' Compensation Act, the employee was not in a position to avoid the exclusive remedy and immunity protection provided by the Act to his employer. He could not have application and non-application of the provisions of the Act at the same time.

IN WAGE LOSS CLAIMS EMPLOYEE MUST SHOW EFFORT TO OBTAIN ALTERNATE EMPLOYMENT

In a case defended by our office, the Appellate Court recently revisited wage loss in the case of *Fermaintt v. Industrial Commission*. For the year prior to his injury, claimant had been working weekends for the employer due to his having taken a part-time position for two days during the regular work week. The employer allowed him to switch with co-workers who were assigned to weekend work on a rotating schedule. This had the result of his earning overtime premium for the weekend work at his employer.

The claimant's argument was two pronged:

1. Claimant maintained he was totally unable to resume his former two day per week job due to its strenuous nature. Therefore, he claimed wage loss based on two-thirds of what he would have made at the part-time employment.
2. In addition, due to his restrictions he no longer performed weekend work at his employer as this required different type work beyond his profile, thereby also claiming a wage loss for his alleged current inability to earn premium pay on weekends.

It should be noted that (1) he continued in the same position at the same salary as before the accident, and (2) during the pendency of the trial, the employer offered work several weekends per month.

The arbitrator awarded wage loss benefits for both the lost part-time work and the lost weekend work. The Industrial Commission reversed and entered an award for a specific loss under Section 8(e). The Appellate Court affirmed the Industrial Commission, stating that claimant failed to prove that no suitable employment existed within his medical restrictions in which he could earn as much as he had in his former part-time employment. In addition, the Court found that the claimant was not entitled to a wage loss based on his alleged inability to earn premium pay on weekends at the employer. The Court noted the evidence that claimant was offered weekend work within his restrictions and refused it for personal reasons unrelated to his health. The Court also noted that the claimant was not scheduled to work each and every weekend in the year prior to his accident but rather had traded shifts

in order to accommodate his part-time job outside the employer. The Court made no comment on the employer's contention that since claimant continued in his *customary* employment, wage loss should not be awarded as a matter of law.

The *Fermaintt* fact pattern is an unusual one but the Court's holding emphasizes the two-pronged test for a wage loss award:

1. An inability to pursue customary employment, and
2. A showing of the difference between what can be earned in the full performance of the former occupation and what can be earned in suitable employment after the accident.

To prove a wage loss, an injured employee must do more than prove he is unable to perform his prior work; he must show he has made an effort to find suitable alternative employment as well.

MARK P. MATRANGA

INDUSTRIAL COMMISSION APPOINTMENTS

Effective August 28, 1997, Governor Edgar appointed former State Representative Michael L. Weaver to serve as a public member on the Industrial Commission. Commissioner Weaver will serve on Panel A with Commissioners Richard Gilgis and Jacqueline Kinnaman and will assume the Belleville, Mount Vernon and Chicago review calls formerly assigned to the public member on Panel B.

Effective August 28, 1997, Governor Edgar reappointed Commissioner Diane Dickett-Smart to serve as a public member on the Industrial Commission. Commissioner Dickett-Smart will serve on Panel B with Commissioner Barry Ketter and Acting Commissioner Milton James and will retain her Rockford, Rock Island, Ottawa and Chicago review calls.

Cook County will have four new arbitrators, with three, Richard Hendershot, Edward Lee and Robert Williams, beginning November 1, 1997 and Robert Falcioni, beginning December 1, 1997.

Richard Hendershot received a bachelor's degree

from St. Leo College, an M.B.A. from Chapman College and a J.D. from DePaul University College of Law. Mr. Hendershot is currently in the private practice of law.

Edward Lee received a bachelor's degree from Tulane University and a J.D. from John Marshall Law School. Mr. Lee is currently in the private practice of law.

Robert Williams received a bachelor's degree from LeMoyné-Owens College, a J.D. from Loyola University College of Law and an M.B.A. from the University of Illinois. Mr. Williams is currently chief of the Industrial Commission Bureau of the Attorney General's Office.

Robert Falcioni received a bachelor's degree from Illinois State University and a J.D. from Chicago-Kent College of Law. He is currently a staff attorney for Commissioner Diane Dickett-Smart.

Arbitrator Bernard Barasa will not begin any new cases and will conclude his partially tried cases and render his opinions prior to December 31, 1997. Arbitrators Brown and Erbacci will inherit Arbitrator Barasa's call, with Brown handling the odd numbered cases and Erbacci the even numbered cases.

FRANK J. WIEDNER
Editor