// WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY
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WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## WORKERS' COMPENSATION COVERAGE ISSUE MAY BE DETERMINED BY THE INDUSTRIAL COMMISSION

In Casualty Insurance Company v. Kendall Enterprises, Inc., The Appellate Court upheld that, under certain circumstances, the Industrial Commission could decide an insurance coverage issue. Casualty Insurance Company had filed a declaratory judgement action contending that the trial court "erroneously deferred resolution of this insurance company dispute" for the Illinois Industrial Commission.

Arthur Bastyr sustained accidental injuries while employed by Kendall Enterprises Inc. Up to the time of arbitration, Bastyr had been temporarily totally disabled for 75 weeks, without receiving any benefits. Kendall, a sub-contractor, had agreed to perform carpentry work and, as requested by the general contractor, had submitted a Certificate of Insurance describing coverage with Casualty from November 1, 1991 through November 1, 1992. The injury occurred on September 16, 1992. Casualty contended that, because of Kendall's non-payment of premium, the policy had been canceled prior to the accident date.

The Casualty employee produced a Notice of Cancellation which was reportedly sent to Kendall along with an attached Proof of Mailing. The Notice of Cancellation had been received by the insurance agent. Casualty also contended that a copy was sent to the National Council on Compensation Insurance (NCCI) which was the agent of the Commission charged with the compilation and monitoring of insurance information. The Casualty employee admitted that she would not have personal knowledge that the notice was actually mailed or that it was received by NCCI. Casualty had no standard practice in place to verify the receipt by NCCI of the cancellation notice.

The NCCI service manager testified that she was familiar with the procedure whereby insurance companies would cancel a policy. After an "exhaustive search" of all records, she could not find either the original filing of the policy or a notice of any filing of a cancellation.

The arbitrator found for the claimant because Casualty "could not provide conclusive proof of receipt of a notice of cancellation by the NCCI as required by the statute." In awarding the claimant the TTD requested, the arbitrator also found that Kendall and Casualty were liable for significant penalties because of "unreasonable and vexatious conduct".

The declaratory judgement action was not instituted until after the arbitrator's decision while the compensation case was pending on review. The court dismissed Casualty's action and the dismissal was upheld by the Appellate Court, stating:

> *The circuit court and the Commission had concurrent jurisdiction over questions arising under the Act (citing* Employers Mutual v. Skilling*) . . . . Under the doctrine of primary jurisdiction, a court should refer a matter to an administrative agency when it has special expertise to help resolve the controversy or where there is a need for uniform standards.*
>
> *This case is procedurally distinct from* Skilling*, where the Commission had not made factual findings regarding the issue and unlike plaintiff in our case, the insurance company contested the authority or jurisdiction of the Commission to hear the case . . . plaintiff's complaint contained assertions of fact regarding whether it had effectively canceled Kendall's insurance policy. The Commission had held a hearing over several days, heard evidence and issued findings of fact contrary to plaintiff's position. In addition, the cause was still pending on review before the Commission when plaintiff filed its complaint.*

**EDITOR'S NOTE**: IF THE CARRIER IS TO INSTITUTE A DECLARATORY JUDGEMENT ACTION REGARDING COVERAGE, IT SHOULD DO SO PRIOR TO ANY ARBITRATION HEARING. BEFORE THE COMPENSATION HEARING BEGINS, COUNSEL FOR THE CARRIER SHOULD CONTEST THE AUTHORITY OF JURISDICTION OF THE COMMISSION TO HEAR THE CASE.

## KOTECKI APPLIED THROUGH CITY OF CHICAGO PENSION CODE BENEFIT

Policemen and firefighters in the City of Chicago are expressly exempted from the Workers' Compensation Act. The language of the pension code is quite similar to Section 5(a) of the Workers' Compensation Act, and provides as follows:

> *Whenever any city or village enacts an ordinance pursuant to this Division, no common law or statutory right to recover damages against such city or village for injury or death sustained by any policeman for fireman while engaged in the line of his duty as such policeman and fireman, other than the payment of the allowances of money and of the medical care and hospital treatment provided in such ordinance, shall be available to any policeman or fireman who is covered by the provisions of such ordinance * * * or to anyone who would otherwise be entitled to recover damages for such injury or death.*

In McNamee v. Federated Equipment and Supply Company, Inc., the Supreme Court had occasion to consider whether payments made under the pension code provide the same type of *Kotecki* cap as do payments under the Workers' Compensation Act. The Supreme Court concluded

that the cap would protect the city.

Steven McNamee suffered fatal injuries while on a training exercise at the Chicago Fire Academy. His estate filed an action against Federated contending that its product caused his injury. Federated then brought a third party contribution action against the city whereupon the city moved to dismiss this action for unlimited contribution, arguing that its contribution liability was limited to the benefits that it had provided to McNamee's estate pursuant to the pension code. In applying the protective cap, the Supreme Court stated:

> *In addition to the largely identical language in these sections of the Pension Code and the Workers' Compensation Act, the purpose and operation of both statutes are identical. Both statutory schemes provide compensation on a no-fault basis to employees injured in the scope of their duties. In return, both statutory schemes sharply limit rights of action. And both statutes provide the employee with a statutory lien on a portion of the damages that an employee might obtain from a third party. So as the employer in Kotecki was entitled to the liability limitation that the Workers' Compensation Act provided as a trade-off for the no-fault compensation scheme, the City is entitled to the Pension Code's liability limitation because it participates in the no-fault compensation scheme under article XXII, division 3, of the Pension Code.*

**EDITOR'S NOTE**: THE CITY OF CHICAGO HAS IT'S OWN PENSION ORDINANCE. OTHER MUNICIPALITIES MAY PROVIDE BOTH COMPENSATION AND PENSION BENEFITS. IN SUCH A CASE, DO THE COMPENSATION AND THE PENSION BENEFITS COMBINED TO PROVIDE A HIGHER *KOTECKI* CAP?

# ADA Corner

## CAN AN EMPLOYEE WHO IS "TOTALLY DISABLED" IN A WORKERS' COMPENSATION CASE RECOVER UNDER THE ADA?

One of the basic elements that an employee must prove to recover under any claim under the Americans with Disabilities Act, 42 U.S.C. 12101 et. seq., is that he is a "qualified individual." The term "qualified individual" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position . . .", ADA, Section 1211(8). An employee who is not a "qualified individual" cannot, as a matter of law, recover under the ADA. White v. York International Crop., 45 F.3d 357 (10th Cir. 1995).

Whether or not an employee is a "qualified individual" has become one of the critical issues of ADA-related litigation. Indeed, employers often make this issue a central part of their motion for summary judgment in a federal court.

Within this context, one of the most controversial matters in all of the ADA-related litigation is whether an employee who claims to be unable to perform any job, such as in a workers' compensation hearing or in connection with seeking social security benefits, can be a "qualified individual." Many of the courts that initially considered this issue held that an employee who previously asserts in any sort of proceeding that he is totally disabled at the time of his discharge cannot later sue his employer for disability discrimination. The most widely publicized of these cases, McNemar v. The Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996), held that an employee who claimed in a filing for state disability and Social Security benefits that he was totally and permanently disabled, including certification by his doctors, was judicially estopped from claiming that he was a "qualified individual" for purposes of the ADA. Judicial estoppel is a variant of the better-

known doctrines of collateral estoppel/res judicata, wherein an issue that is decided in one proceeding cannot be argued another way in a later proceeding. Based upon this judicial estoppel, the McNemar court dismissed the plaintiff's claim.

The judicial estoppel decisions, particularly McNemar, were met with harsh criticism by disability advocates. The EEOC issued an Enforcement Guidance entitled "Effect of Representations made in Applications for Disability Benefits On the Determination of Whether a Person is a `Qualified Individual With a Disability' Under the ADA." (If you would like a copy of this document, please drop me a line or e-mail me at msimon@w&mlaw.com). The lengthy Enforcement Guidance argued that a claim by an individual in connection with a workers' compensation hearing, social security hearing, or even a private disability insurance claim that the individual was totally disabled should not lead to them being judicially estopped under the ADA. As expected, this enforcement guidance, which while it is not binding upon the courts carries great weight with judges, lead to the pendulum swinging far back the other way, with many courts adopting the EEOC's position.

Until recently, it remained to be seen how the 7th Circuit (covering Illinois, Indiana, and Wisconsin) would handle this controversy. As many of you certainly know, our federal appellate court has a well-deserved reputation for being conservative and pro-employer. Somewhat surprisingly then, the 7th Circuit adopted much of the EEOC's arguments in the case of Wiegel v. Target Stores, 122 F.3d 461 (7th Cir. 1997). In Wiegel, the 7th Circuit attacked a trial judge's grant of summary judgment in favor of the defendant on the basis that Ms. Wiegel represented on a social security application that she was totally disabled, and therefore could not be a "qualified employee."

However, as could also be expected, the 7th Circuit did not go so far as other courts, which have held that representations in prior claims are completely irrelevant, but instead have held that representations by employees in connection with matters such as social security claims or workers' compensation hearings, while they are not conclusive as to ADA issues, are relevant evidence on this issue. In fact, the court accepted the employer's backup argument, that Ms. Wiegel's representations were essentially a rebuttable presumption that she was totally disabled. Because the plaintiff did not present sufficient evidence to rebut this presumption, the 7th Circuit found that the defendant was indeed entitled to summary judgment, just not upon the basis on which the trial court granted it. Ultimately then, the trial court's granting of summary judgment in favor of the defendant was affirmed.

Thus, the law as it stands in the 7th Circuit is that while a representation by an employee in a workers' compensation hearing, social security claim, or other disability claim that he is totally disabled is not conclusive in an ADA action, it does create strong evidence, virtually a rebuttable presumption, that he is not a "qualified individual."

**MICHAEL S. SIMON**

**EDITOR'S NOTE**: CONVERSELY, THE ALLEGATION IN THE ADA CLAIM THAT THE EMPLOYEE IS ABLE TO WORK CAN BE USED TO DEFEND A WORKERS' COMPENSATION CLAIM OF TOTAL DISABILITY.

## REPORTING FEES OF CLAIMANT'S ATTORNEYS

Section 1021 of the Taxpayer Relief Act of 1997, titled "Reporting of Certain Payments Made to Attorneys," may sound innocuous. The new provisions will place additional responsibility upon employers and insurance carriers regarding the reporting of payments to attorneys, including the attorneys for the claimants.

Congress' perception was that many payments to attorneys go unreported. It was presumed that if payments are not subject to some type of reporting

via Form 1099 or similar document, the recipient might not report the income at all.

A particular change Congress sought was in the reporting of settlements. Legislators were concerned that reporting generally was not mandatory prior to the Taxpayer Relief Act, or TRA. When an adversarial party paid an attorney to settle litigation or arbitration, that party may have been paying the attorney fees indirectly, but because the party was uncertain about what portion represented attorney fees, no reporting was required.

IRC Sec. 6045(f) establishes a three-part test to determine whether payments to an attorney must be reported. First, the payments must be made by a person engaged in a trade or business. Second, the payments must be made in the course of that trade or business. Third, the payments must be in connection with legal services.

The reporting requirement applies regardless of whether the services are performed for the payor and regardless of whether the check is payable to the law firm exclusively or as a co-payee.

No information is submitted to the IRS regarding the claimant's part of the proceeds. The attorney, however, can claim the client's share as an expense or other offset, just as an investor can claim the basis of the asset sold as a reduction of gross proceeds.

Regrettably, the idea of requesting opposing counsel to issue separate checks may be fraught with practical problems. For one, the disclosure of the fee arrangement could affect the finalization of a settlement. If the agreement falls through, the opposition might use this information in further negotiations. For another, a full accounting of the client costs will have to be computed promptly so that reimbursement may be sought.

(Excerpts from The National Law Journal, March 23, 1998.)

Take, for example, a case settled for $100,000. Damages are to be paid in one check by the opposing party's insurance carrier, and the attorney is to receive a 30 percent contingency fee. Recovery of costs is ignored to simplify the example.

The payor must report the full $100,000 on Form 1099-B or other form designated by the IRS. The attorney must report the $100,000 as gross income, but the $70,000 payment to the client should be allowable as some type of deduction.

However, it is probably safe to say that a high percentage of the dollar volume of law firm receipts will have to be reported by the payor. A prime illustration is the typical big-dollar tort case, in which the payment of damages, if any, usually is made by an insurance carrier.

One possible way to deal with the reporting requirements is to structure future settlements so that two separate checks are issued. One would be for legal fees and costs, if any, and the other for net damages.

This possibility is discussed in the (Congressional) conference report. The result envisioned would be that the payor would report one check as non-employee compensation to the attorney, and payment of damages would not be included on a filing to the attorney.

## OLD BUSINESS

Employers frequently question the obligation to provide the claimant with vacation pay during the period of time he is receiving temporary total disability benefits. Based on the ruling of the City of Chicago v. Industrial Commission, the Commission has held that vacation pay was not a "benefit" for which the employer would be entitled to credit under Section 8(j). Carrying the reasoning one step further, the Commission has held consistently that vacation pay for earned vacation days would not constitute a sum paid on account of injury as contemplated by the Workers' Compensation Act.

The Commission in Johnson v. State of Illinois Department of Public Aid, 93 IIC 2023, stated:

> "Forcing a Petitioner to use vacation and sick time does not relieve the Respondent from its obligation to pay temporary total disability benefits and therefore the Respondent is not entitled to credit for the vacation and sick time used by the Petitioner."

**EDITOR'S NOTE**: IT IS CLEAR THAT THE VACATION PAY IS DUE THE EMPLOYEE FOR PAST SERVICES AND THUS IS NOT TO BE CONSIDERED WAGES PAID IN LIEU OF COMPENSATION.

## CORRECTION

Our last issue contained a typographical error. The new average wage and compensation rates are as follows:

> Beginning January 15, 1998, through July 14, 1998, the average weekly wage is $611.31, with the maximum TTD rate being $815.08.
>
> The revised PPD rate covering accidents from July 1, 1997, through June 30, 1998, is $439.89.

**FRANK J. WIEDNER**
Editor