

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 8 ISSUE 1

January 1998

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

CONTENTS

1 COMPENSABILITY ALLOWED WHEN STRAY DOG BITES SECURITY GUARD

*The Springfield S.D. #186 v. I.C.,
App. No. 4-96-0823WC (Ill. App. 10/31/97)*

3 SETTLEMENT CONTRACT DID NOT PRECLUDE EMPLOYEE FROM ASSERTING ADDITIONAL CLAIMS

NOT LISTED IN CONTRACT
*Keith Countryman v. I.C., App. No. 2-96-1000WC
(Ill. App. 10/16/97)*

4 APPELLATE COURT AUTHORIZES AWARD OF PROSPECTIVE MEDICAL EXPENSES

*Plantation Manufacturing v. I.C.,
App. No. 2-97-0018WC, 2-97-0019WC,
2-97-0020WC (Ill. App. 12-29-97)*

5 INDEPENDENT CONTRACTOR VS. EMPLOYER-EMPLOYEE RELATIONSHIP

*Rev. Rul. 87-41
1987-1 C.B. 296, 1987 WL 419174 (I.R.S.)*

6 SOCIAL SECURITY DISABILITY CASES

UNPUBLISHED DECISIONS UNDER RULE 23

8 NEW AVERAGE WEEKLY WAGE AND COMPENSATION RATES

COMPENSABILITY ALLOWED WHEN STRAY DOG BITES SECURITY GUARD

Claimant was responsible for maintaining security at an elementary school, three mobile classrooms, and a service center all sitting on the same property located in a predominantly-single family residential area. While claimant was making his rounds, a stray dog grabbed him by the right pant cuff, at which time the claimant kicked the dog with his left foot. The claimant immediately felt pain shooting up his left leg into his spine, neck and head, and down his right arm. The claimant noticed no break in the skin, no bruising or swelling, but only a right ankle redness, which later disappeared. Four days later, claimant visited his family physician, whose initial history made no reference to a dog. Claimant ceased working one week after the occurrence and was enrolled in a therapy and pain management program. Several months later, claimant was referred to a neurosurgeon, who had diagnosed neck pain of a myofascial origin and recommended continued therapy and exercise. At the time of the hearing, claimant was still being treated and remained off work.

Several weeks before the described incident, the claimant had been advised that his position as a security guard would be ending soon but he could transfer to a custodian position. At that time, the claimant told the supervisor that he needed to check with his doctor to confirm his physical ability to perform custodial work. Neither the supervisor nor a fellow security guard were aware of any prior instances where a security guard had a problem with a dog at the location where the claimant was stationed, although the supervisor admitted that there had been similar reported incidents at other locations.

The Industrial Commission and the circuit court found the claim to be compensable. The employer appealed contending that:

1. The finding of causal connection between the claimant's employment and his injury was against the manifest weight of the evidence, and
2. An employee who suffers an injury as a result of the unexplained assault by a stray dog in a residential area presents a claim which is not compensable as a matter of law.

In a three to two decision, the majority held:

Here the Commission concluded claimant was exposed to a risk greater than that of the general public and that a stray dog is a "natural" risk. While it is true the location to which claimant was assigned had not experienced problems with stray dogs before, other school grounds within the district had. More importantly, claimant was at a location when and where the general public would not and should not be located. The incident occurred at 4:40 in the morning on school grounds at a time when claimant was to protect the property against intruders. Claimant's confrontation with the dog occurred while he was in the performance of his watch duties, and his injuries accordingly resulted from protecting both the school grounds and himself.

The two dissenting judges provided a more lengthy and detailed opinion than that of the majority. The dissent questioned the majority's use of the term "natural risk", pointing out that employee risks generally fall into three categories:

1. An employment risk is one directly associated with the employment, such as machinery catching fingers or limbs;
2. A personal risk is one personal to the employee, like assaults by personal enemies or diseases not connected with work;
3. Between these two areas lies the neutral risk, such as an employee in a factory yard being struck by a stray bullet from no where,

stabbed by a lunatic, struck by lightning, or injured by a piece of tin blown from someone's roof.

The dissent continues by stating that employment risks are compensable, personal risks are not, and that neutral risks generally are not. The dissent contended that this claim could only be compensable if the court were to adopt the "positional risk doctrine", which Illinois has declined to follow. In its conclusion, the dissent stated:

There is no evidence in the record to suggest dog attacks are more likely to occur at the school as opposed to any other place. There is no evidence to suggest that dogs are more frequently seen or around at 4:40 a.m. or are more likely to attack at that time. Finally, the record does not establish that claimant was attempting to remove the dog from the school premises when he was attacked. Had this been the case, I too would agree that the claimant's injury arose out of his employment. At no time, however, did claimant testify that the dog was damaging school property or that he was attempting to remove the dog from the premises. Rather, the evidence is clear that the dog attacked claimant for no apparent reason as he was patrolling the premises. There are simply no facts, and no inferences to be drawn from any facts, that claimant's work as a security guard occasioned the dog's assault.

The evidence in this case established that the area in question is primarily a residential neighborhood consisting of single-family homes. It is impossible to draw a conclusion that somehow a security guard simply walking in this area in the early morning hours of a spring day had an increased risk of an attack by a stray dog over and above the risk to the general population of Springfield. Although the majority finds important the fact that other problems occurred here and there, I suggest that such reliance is misplaced. The fact that stray dogs may have presented some undefined problems at other undefined locations is not a proper factual subject matter from which an inference can be drawn. First, there is no evidence what the "other problems" were or if they involved dog attacks on

people. One can only speculate. Nor is there any evidence as to when the "other problems" occurred, at what time of day, or at what location. There is no evidence as to the frequency of these "other problems." Could it be one occurrence, two occurrences, three occurrences? Again, one can only speculate. Finally, there is no evidence as to over what period of time these other problems took place. I respectfully suggest that it is not reasonable to say that a logical inference can be drawn to connect an undefined dog problem at an unknown time and location to the specific instance of a singular stray dog attack at 530 West Reynolds Street, Springfield, Illinois.

EDITOR'S NOTE: YOUR EDITOR HAS EMPHASIZED THE DISSENT BECAUSE OF A POSSIBILITY OF REVERSAL EITHER ON A REHEARING OR AN APPEAL TO THE SUPREME COURT. SPRINGFIELD SCHOOL DISTRICT NO. 186 V. INDUSTRIAL COMMISSION.

SETTLEMENT CONTRACT DID NOT PRECLUDE EMPLOYEE FROM ASSERTING ADDITIONAL CLAIMS NOT LISTED IN CONTRACT

In our July 1997 newsletter (Vol. 7 Issue 3), we discussed the appellate court's decision concerning the interpretation of the settlement contract under which the employee released his claim for benefits resulting from a specific accident date and 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 the settlement, the employee 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). The court held that the two subsequent claims for injuries had been released by the language in the settlement contract.

In the recent *Countryman* case, the appellate court was requested to consider a somewhat similar situation but reached the opposite conclusion. In that case the December 15, 1992, settlement agreement listed three distinct accident dates of May 2, 1988, March 26, 1991, and April 1, 1992, with the contract reflecting the locations of those accidents in Rochelle,

Illinois, descriptions of the periods of TTD after those three accidents, and the injuries involving bilateral carpal tunnel syndrome and elbow neuritis, including two settlements involving a percentage loss of use of each arm. The contract further provided that the settlement "includes any other accident, injury, aggravation or onset of symptoms to the date of this settlement." After execution of this contract on December 15, 1992, the employee filed a claim for back injuries sustained on October 15, 1991, also with the injury occurring in Rochelle. The employer moved to dismiss the claim on the basis that the settlement contract released all accident claims through the date of settlement. The appellate court held that the contract was ambiguous because it contained conflicting release provisions that expressed different intentions. In finding that the settlement contract did not close out the most recent accident, the Court noted:

- 1.The settlement contract listed specific dates of accidents and dates that claimant was temporarily totally disabled and made no reference to the latest accident.
- 2.The contract stated that the claimant suffered injuries to both arms with no reference to the back.
- 3.The settlement was for "this incident" and injuries incurred "as described herein" and "resulting from such accidental injuries."
- 4.The contract makes no reference to the back injury on August 15, 1991, even though the employer knew of this injury at the time of this settlement.

The Court concluded:

Although the contract also contains a general release from all claims to the date of settlement, the specific provisions relating to the release from specified injuries and accidents control over the more general provision because the contract is ambiguous.

EDITOR'S NOTE: EACH SETTLEMENT AGREEMENT MUST BE EVALUATED ON A CASE-BY-CASE BASIS TO

EVALUATE THE INTENT OF THE PARTIES WHEN THE RELEASE LANGUAGE IS AMBIGUOUS.

APPELLATE COURT AUTHORIZES AWARD OF PROSPECTIVE MEDICAL EXPENSES

Traditionally, the Industrial Commission has held that Section 8(a) of the compensation act did not permit an order directing the employer to authorize and pay for medical expenses not yet incurred. In recent years the Commission began hinting that it might have the power to do so, particularly since it had frequently issued orders directing future vocational rehabilitation and housing renovation, both of which would be covered by Section 8(a) as well. In the recent *Plantation Manufacturing* case, the appellate court ordered the employer to pay for future surgery.

Maria Razo sustained a fall, injuring her back. Because of a diagnosis of a herniated disc, her physician, Dr. Minster, recommended lumbar surgery, but Razo declined, opting for a work hardening program and rehabilitation at Plantation's expense. In 1988, the arbitrator awarded disability to the extent of 30% of a person as a whole, which decision was affirmed by the Commission.

On January 16, 1991, Dr. Minster again recommended surgery based on the fact that conservative treatments had been ineffective. The surgery, scheduled for November 9, 1991, was delayed because Plantation refused to authorize the procedure based on an independent medical evaluation obtained by its own physician. The Commission subsequently ordered Plantation to provide written authorization to the surgeon and to pay all reasonable and necessary bills related to that surgery. The circuit court confirmed this decision.

Plantation made two arguments. One, Section 8(a) of the Act did require it to pay for future, speculative medical costs not yet incurred. Section 8(a) of the Act provides in relevant part:

The employer shall provide and pay for all the necessary first aid, medical and surgical services, and all necessary medical surgical and hospital services thereafter incurred, limited, however to that which is reasonably required to cure or relieve from the effects of the accidental injury. The employer shall also pay for treatment, instruction and training necessary for the physical, mental

and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required.

Plantation correctly pointed out that the word "incurred" is in the past tense and that it demonstrated the legislature's intent to limit the employer's liability for prospective medical treatment. The Court disagreed, stating:

The term "incurred," as used in the statute, refers to the necessity of the medical treatment or procedure having been incurred, not the cost thereof. Specific medical procedures or treatments that have been prescribed by a medical service provider have been "incurred" within the meaning of the statute, even if they have not yet been paid for. To limit the scope of section 8(a) to treatments already performed or paid for would be contrary to the remedial purpose of the Act and the mandate to interpret the Act liberally so as to affect that purpose.

Plantation referred to the *Zephyr* case pointing out that the Court had not authorized the Commission to award perspective medical expenses but only described the liability of the employer for remodeling the injured employee's home. The Court disagreed stating that in *Zephyr*, it had affirmed the Commission's award, which was clearly prospective in nature as the expenses for modifying claimant's house had not yet been paid. The Court did modify the Commission decision in one respect. It held that the Commission was in error when it ordered Plantation to provide written authorization to Dr. Minster to perform the surgery prescribed. In its language of modification, the Court stated:

This would leave Plantation with no recourse to challenge the reasonableness of the cost of the surgery. We therefore modify the decision of the Commission by eliminating the direction to execute such authorization. We find the surgery to be necessary and order Plantation to pay all reasonable costs in connection therewith.

INDEPENDENT CONTRACTOR VS.

EMPLOYER-EMPLOYEE RELATIONSHIP

Illinois courts have identified several factors as bearing on whether an employment relationship exists, including an employer's control over the claimant, the power to discharge, the claimant's consent to the relationship, the length of service, the identity of the party for whom the claimant's services are being performed and the manner of hiring. Some years ago, the Internal Revenue Service conducted its own review of the law and identified 20 factors or elements that have been identified as indicating whether efficient control is present to establish an employer-employee relationship. Some reached opposite conclusions on slightly different factual situations. Those suggesting an employer-employee relationship can be described as follows:

1. The worker must comply with another's instructions about when, where, and how the work is to be performed.
2. The worker is subject to training by an experienced employee.
3. The worker's services integration into the business operations suggests control by the business owner.
4. The services are rendered personally suggesting that the employer is interested in the methods used to accomplish the work as well as in the results.
5. The person requesting the services hires, supervises, and pays assistants.
6. A continuing relationship between the worker and the person for whom services are performed.
7. The establishment of hours of work.
8. The person receiving the services restricts the worker from doing other gainful work.
9. The work is generally performed on the premises.
10. The worker must follow established routines and schedules.
11. The worker must submit regular or written reports.
12. Payment is by the hour, week or month.
13. The person receiving the services pays the worker's business or traveling expenses.
14. The person receiving the services furnishes tools, materials, and equipment.
15. The worker has no financial investment in the facilities.
16. The worker is not subject to a real risk of economic loss.
17. The worker performs services for only one person at a time.
18. The worker's services are not available to the general public on a regular basis.
19. The person receiving the services can discharge the worker.
20. The person receiving the services can terminate the relationship without incurring liability.

The factors which would suggest an independent contractor relationship:

1. Payment is made by the job or on a straight commission basis.
2. The worker furnishes his own tools, material and other equipment.
3. The worker has an investment in the facilities.
4. The worker is subject to a real risk of economic loss.
5. The worker performs services for more than one entity at the same time.
6. The worker makes his services available to the general public on a regular and consistent basis.
7. The worker cannot be fired as long as he produces a result that meets the contract specifications.

Conclusion

IRS ruling 87-41, in referring to the above standards, says:

These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

EDITOR'S NOTE: WHILE ILLINOIS CASE LAW MIGHT NOT ALWAYS UTILIZE THE SAME LANGUAGE, THESE GUIDELINES PROVIDE A GOOD MEANS OF INQUIRY TO DETERMINE THE APPROPRIATE RELATIONSHIP.

SOCIAL SECURITY DISABILITY CASES

Frequently, when lump sum settlements are reached in cases where the claimant has not returned to work, a request is made by the claimant's attorney to include "social security language" in the terms of the settlement contract. The purpose of such language is to minimize the credit that the Social Security Administration can take on the lump sum settlement.

When "social security language" is used, the net settlement obtained by the claimant, after payment of attorney's fees and expenses, is divided by the number of months or weeks within the claimant's life expectancy. For a number of reasons, such as the use of present cash value or because the settlement represents a compromise, the weekly or monthly amount is considerably less than the two-thirds of the average weekly wage payable in a permanent total disability case. The considerable saving between the PTD rate and the amount shown in the settlement contract represents a substantial increase in social security benefits received by the claimant. The federal government is unhappy with the present state of affairs and has proposed a rule which suggests that the only

rate that social security would accept is a rate at which periodic payments are generally made under state law to someone who is totally disabled. In most states, this rate is two-thirds of the person's average weekly wage. The government agreed to accept comments on the proposed rules through November 3, 1997, at which time it would analyze the comments and develop final rules. This could take several months. The final rules will go into effect 30 days after they are published.

On the basis of Social Security's use of the November 3, 1997, date, most attorneys believe that any settlement prior to that date will not be subject to the new rules. Others feel that any settlements approved prior to the effective date of the final rules would also be "grandfathered."

In the meantime, the public has been requested to contact their congressman as well as the Commissioner of Social Security to object to the imposition of these new rules. There remains a thin possibility that the objections will overcome the wishes of social security so that the prior practice can be continued.

UNPUBLISHED DECISIONS UNDER RULE 23

The special appellate court is now rendering more decisions under Supreme Court Rule 23. An unpublished decision of the court cannot be used for precedent and is customarily issued when:

1. the disposition is clearly controlled by case law, precedent, statute, or rules of court;
2. the issues involve no more than application of well settled rules to recurring fact situations;
3. the opinions or findings of fact and conclusions of law at the trial court or agency adequately explain the decision;
4. no error of law appears on the record; and
5. the record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.

Having said that, the decisions are worthy of note because they explain the thinking of the appellate court on issues that the court may consider clear based on its prior decisions, but which may not be considered sufficiently clear to the parties involved. The following

represents a summary of a number of recent Rule 23 unpublished decisions:

1. An employee who underwent surgery for a rotator cuff tear, which was superimposed upon acromioclavicular joint arthritis, was awarded 100% loss of use of his right arm. The examining physician testified that the employee should avoid all overhead or heavy lifting as well as any extensive physical activity. The appellate court affirmed the Industrial Commission decision. Compaction America v. Industrial Commission (Floyd J. Workheiser), App. No. 3-97-0046WC (Ill. App. 10/10/97).
2. In another arm case, the employee sustained an arm fracture which required an open reduction with plates and screws used to provide internal fixation. Despite the subsequent removal of the plates and screws, the employee's physician imposed significant restrictions on movement of the elbow and wrist and noted the complaints of pain and stiffness in the joints. Although the employee was able to perform her daily activities, the Commission awarded 60% loss of use of the arm and the appellate court found that this decision was not against the manifest weight of the evidence. Here again, the court satisfied the Rule 23 requirement that the unpublished decision supported the trier of the facts. Caterpillar, Inc. v. Industrial Commission, App. No. 3-97-0131WC (Ill. App. 11/18/97).
3. The employee sustained a back injury as a result of a fall from a ladder, thereby aggravating a prior back condition. The employee was 62 years of age and had been instructed to avoid repetitive bending, standing, or sitting for long periods of time and lifting over ten pounds. The Commission found that no stable labor market existed because of the employee's age, lack of skills, and restrictions. When the employer failed to establish that suitable work was available to the employee, the Commission concluded that the employee fell into the "odd lot" category necessary to establish a permanent total disability. The appellate court felt that the decision was not against the manifest weight of the evidence, thereby affirming the trier of the facts. Silver Cross Hospital v. Industrial Commission, App. No. 3-96-0818WC (Ill. App. 11/14/97)
4. The employee had fallen on a wet floor at work and had undergone surgery to both knees, including

an ACL repair to the right knee. Subsequently, he developed traumatic arthritis as well as fibromyalgia. Shortly after receiving a Commission award, he was descending a stairway at her home when her right knee gave out causing her to fall. The employer denied liability contending that the fall at home was not the natural and probable consequence of the work injury. The Commission disagreed and found for the employee. The appellate court affirmed noting that the knee condition only began with the work injury, that she continued to have pain and discomfort in the knee and that the fall occurred because of the pre-existing knee condition. Valley View Community Unit S.D. #365-U v. Industrial Commission (Susan Balicki), App. No. 3-97-0368WC (1/6/98)

5. The employee sustained a blow to her head at work and subsequently complained of headaches, anxiety, memory lapses, and claustrophobia. The medical testimony suggested that the employee was negative neurologically and that her problems were due to current job pressures rather than the accidental injury. The Commission found that the employee has failed to establish a causal relationship between the work accident and her psychological disability. The circuit court reversed the Commission and found that the decision was against the manifest weight of the evidence. Here again, the appellate court affirmed the decision of the Industrial Commission as the trier of the facts. It noted that the treating physician had prescribed a leave of absence because of current job stress rather than due to the effects of the injury at work. It noted that none of the physicians had found any objective evidence of brain damage. Kroger Co. v. Industrial Commission (Mary Ann Evans), App. No. 3-97-0135WC (Ill. App. 12/23/97).

EDITOR'S NOTE: IN EACH CASE, THE APPELLATE COURT SUPPORTED THE COMMISSION AS THE TRIER OF THE FACTS, FINDING THAT THE COMMISSION DECISION WAS NOT AGAINST THE MANIFEST WEIGHT. WHEN NECESSARY, THE APPELLATE COURT REVERSED THE CIRCUIT COURT WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMMISSION.

NEW AVERAGE WEEKLY WAGE AND COMPENSATION RATES

Beginning January 15, 1998, the average weekly wage is \$611.31.

The maximum TTD rate is \$815.08.

The revised PPD rate covering accidents from January 1, 1997, through June 30, 1998, is \$430.89.

FRANK J. WIEDNER