

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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ATTORNEYS AT LAW

## CONTENTS

### 1 POLICE OFFICER SUSTAINED HEART ATTACK WHILE

#### DRIVING TO WORK-- PERMANENT TOTAL DISABILITY CLAIM ALLOWED BECAUSE OF EMPLOYMENT STRESS

*City of Waukegan v. Industrial Commission, App. No. 2-97-0750WC (Ill. App. 8/12/98)*

### 2 THE COMMISSION MAY DISREGARD THE ACCIDENT DATE ALLEGED BY THE CLAIMANT AND AMEND THE

#### ACCIDENT DATE TO CONFORM TO THE PROOF

*Freeman United Coal Mining Co. v. Industrial Commission (Lawrence E. Smith), App. No. 4-97-0057WC (Ill. App. 7/15/98)*

### 3 TRUCK DRIVERS TRAVEL EXPENSES (WHICH AMOUNTED TO ONE-HALF OF THE GROSS PAY) SHOULD BE INCLUDED IN THE AVERAGE WEEKLY WAGE

*Swearingen and Scroggins v. Industrial Commission, App. No. 5-97-0160WC (Ill. App. 8/24/98)*

### 4 TTD BENEFITS CAN BE RECOVERED AS A PART OF A SECTION 19(h) PETITION

*Poore v. Industrial Commission, App. No. 5-97-0223WC (Ill. App. 9/8/98)*

### 5 ADA CORNER

*Riemer v. Illinois Department of Transportation, No. 97-1129, 97-1734, 97-2011 (7th Cir. 6/29/98)*

### 6 MUST AN EMPLOYER PAY AN ATTORNEY'S FEE TO RECOVER ITS OWN CONTRIBUTION TO THE CIVIL VERDICT?

*Silva v. Electrical Systems, Sup. No. 84356, (Ill. Sup. 9/24/98)*

### 6 MURDER V. SUICIDE CASE FINALLY DECIDED

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### POLICE OFFICER SUSTAINED HEART

Additional testimony was provided by Dr.

### ATTACK WHILE DRIVING TO WORK-- PERMANENT TOTAL DISABILITY CLAIM ALLOWED BECAUSE OF EMPLOYMENT STRESS

Edward Herner had been a police officer for the City of Waukegan since January, 1971. After several promotions, he was appointed shift commander from 1985 to 1990 and, in 1990, again promoted to commanding officer of community services. As shift commander, Herner became involved in adversarial situations with the public and aldermen and was subject to too much "second guessing" by his superiors. These confrontations led to significant stress. As a result, Herner had a continual upset stomach, slept poorly and noticed a rapid heartbeat. He would become sweaty and felt extremely anxious and frustrated. Several weeks before his heart attack, he had difficulty in maintaining the operation of the firing range and, since he was not able to have it repaired by the end of the work day on November 4, anticipated controversy the following day.

On November 5, 1991, Herner awoke at 6:00 a.m. with a burning sensation in his stomach, after having not slept well the night before. While driving to work, claimant noticed profuse sweating, heart palpitations and left arm pain. He returned home and requested emergency assistance. He was taken to the hospital by a rescue squad and diagnosed as having a heart attack. His recovery was poor and he never returned to work.

Herner had first begun treatment for high blood pressure in 1980. In 1984, he began treatment by Dr. James Monahan, whose records contain repeated history of work-related stress. Dr. Monahan testified that Herner was the type of individual who reacted physiologically to stress more than most people do. The doctor concluded that Herner's work-related stress caused his heart attack and that he was permanently disabled.

Nathaniel Greenberg who stated that the prolonged and

substantial occupation stress had accelerated the atherosclerotic process, all of which was significant because of "the relative absence of other major risk factors." The employer's expert, Dr. Fintel, concluded that the claimant's condition resulted from hereditary causes and long-standing health problems.

The Commission concluded that the heart attack claimant suffered on November 5, 1991, was an accidental injury that arose out of and in the course of the claimant's employment. In affirming the Commission, the court majority stated that it could not regard the decision as being against the manifest weight of the evidence. In this three/two split decision, the court majority stated:

*It is well established that an employer takes its employees as it finds them and that, even if an employee suffers from heart disease, if the heart attack which brings on disability or death is work related the employee may recover workers' compensation. If there is a work-related stress, either physical or emotional, that aggravates the disease so as to cause the heart attack, then there is an accidental injury or death arising out of and in the course of the employment. While the claimant must prove that some act of employment was a causative factor, the act need not be the sole, or even the principal, causative factor.*

The strong dissenting opinion expressed the following:

*I respectfully submit that the above in no way establishes that claimant was subject to a greater risk of stress and/or heart attack than the general public. His job was routine and the situations he described were situations that anyone engaged in police work would be subjected to on a daily basis. On a scale of one to ten, claimant's job was at best a two when compared to the stress that most Americans are exposed to at the work place on a daily basis.*

*Nor is there any evidence that the stress claimant was exposed to was unusual. The only evidence claimant offers is that a firing range had broken down and that his supervisors were not willing to make the recommended repairs. Is this the type of "unusualness" that can be said to subject an employee to greater emotional strain than that to which all employees are subjected? Can it be said to be "unusual" when compared to the stress of claimant's own normal*

The initial problem concerned the accident date. Smith first began to notice problems with both hands

*conditions? I respectfully submit that the answer is no.*

**EDITOR'S NOTE:** AFTER 20 YEARS AS A POLICE OFFICER, CRITICISM REGARDING THE ABSENCE OF PROPER MAINTENANCE OF THE FIRING RANGE WOULD NOT SEEM TO BE A GREATER RISK THAN THAT TO WHICH ALL EMPLOYEES ARE SUBJECTED. IN VIEW OF THE THREE-TO-TWO DECISION, THE CITY OF WAUKEGAN MAY ATTEMPT TO APPEAL FURTHER.

### **THE COMMISSION MAY DISREGARD THE ACCIDENT DATE ALLEGED BY THE CLAIMANT AND AMEND THE ACCIDENT DATE TO CONFORM TO THE PROOF**

Based on the Peoria County Bellwood Nursing Home case, the date of an accidental injury is different in repetitive trauma types of cases. Peoria County established the accident date as the date when the injury manifests itself and is diagnosed by the treating physician as being attributable to the employment. In the Freeman United Coal Mining Company case, the Commission actually found compensability by utilizing a date that was not alleged by the claimant.

Lawrence Smith filed a claim alleging that he suffered repetitive trauma injuries to his wrist and arm, with the alleged accident date being August 25, 1992. He also filed a petition for penalties, based upon the employer's alleged refusal to pay TTD benefits. The arbitrator found that the claimant had failed to prove an accidental injury and failed to prove a causal connection. The claimant filed a review to the Commission which reversed the arbitrator's findings and determined that March 13, 1992 was the correct accident date. In addition to awarding TTD, medical benefits and permanent partial disability to both hands and arms, the Commission found that the employer's delay in paying TTD was unreasonable and vexatious and awarded penalties. The appellate court confirmed the decision of the Commission in all aspects.

The claimant testified that his job duties as a repairman included the use of a wrench, as well as the turning of small screws with his hands. Most of his work involved the use of tools with his hands in a flexed or extended position. Both hands were required to perform fine manipulations.

near the end of February, 1992. On March 4, 1992, he visited Dr. Brewer, who in turn referred him to Dr.

Trudeau. Dr. Trudeau examined Smith on March 13, 1992 and immediately diagnosed bilateral carpal tunnel and bilateral cubital tunnel syndrome. The doctor speculated that the claimant's condition may have been caused or exacerbated by "over use syndrome."

The following day, Smith requested his supervisor to permit him to prepare an accident report. The supervisor declined, stating that carpal tunnel "was not a job-related injury and that they were not going to fill out an accident report." Smith continued to work until August 25, 1992, when Dr. Brewer recommended surgery. Smith was again denied the opportunity to fill out an accident report.

Thereafter, conservative treatment was found to be unsuccessful. On March 4, 1993, Smith underwent surgery to his left hand and elbow and, on April 22, 1993, to his right hand and elbow. On June 1, 1993, he was released to return to work without restriction. All compensation was denied.

The employer maintained on appeal that the Commission was in error when it amended the accident date from August 25, 1992, to March 13, 1992. Admittedly, March 13, 1992, the date of the diagnosis, conformed to Peoria County Bellwood, rather than August 25, 1992, the last day at work. The employer contended that the Commission's decision to amend the date of the accident deprived it of due process. The court disagreed because the employer was given a complete opportunity to examine witnesses and offer evidence concerning the repetitive nature of claimant's injuries.

Finally, the employer maintained that it was unfair to award penalties and attorney's fees when the arbitrator had not even awarded any benefits whatsoever. The appellate court stated quite emphatically that the Commission can award penalties and fees regardless of the arbitrator's ruling.

**EDITOR'S NOTE:** IF THE CLAIMANT HAD ALLEGED THE APPROPRIATE ACCIDENT DATE, THIS CASE WOULD NEVER HAVE REACHED THE APPELLATE COURT. THE EVIDENCE DOES NOT INDICATE THAT THERE WAS ANY CHANGE IN INSURANCE COVERAGE BETWEEN THE TWO *The general rule that most jurisdictions seem to have adopted is that payments designated as a "reimbursement" for travel expenses should be included when calculating an employee's average weekly wage to the extent that such payments represent real economic gain rather than the actual*

ACCIDENT DATES. IF THERE HAD BEEN SUCH A CHANGE, IT WOULD CERTAINLY SEEM UNFAIR THAT A COMPANY WHICH HAD THE COVERAGE FOR THE AUGUST 25, 1992 DATE AND SUCCESSFULLY DEFENDED THE CLAIM MIGHT PREJUDICE THE CARRIER FOR THE MARCH 13, 1992 DATE, WHEN THAT CARRIER DID NOT HAVE THE OPPORTUNITY TO DEFEND THE CLAIM. HOPEFULLY, THE CLAIMS REPRESENTATIVE FOR THE CARRIER HAVING THE COVERAGE FOR THE LAST DAY OF EMPLOYMENT, WOULD NOTIFY THE CARRIER HAVING COVERAGE FOR THE DATE OF DIAGNOSIS.

### **TRUCK DRIVERS TRAVEL EXPENSES (WHICH AMOUNTED TO ONE-HALF OF THE GROSS PAY) SHOULD BE INCLUDED IN THE AVERAGE WEEKLY WAGE**

Long-haul truck drivers often have fifty percent of their gross pay allocated as reimbursement for travel expenses, rather than earned income. This travel expense is to cover drivers' personal expenses but the drivers are not required to turn in any expense report or receipts. The travel expense allowance did not cover the cost of fuels, tolls, or repairs, for which the drivers were reimbursed separately. Some drivers paid income taxes on the expense-reimbursement portion of the check, while others did not. The Industrial Commission found that this one-half of the gross pay was not earned income but was reimbursement for travel expenses and, as a result, did not include this amount in the average weekly wage, thereby reducing the wage from \$400 to \$200 per week. The Commission concluded that this reimbursement for per diem travel expenses constituted fringe benefits, excluded under Section 10 of the Act. The Commission disagreed with the claimants' contention that this per diem allowance was merely designated as such in order to reduce the amount of tax withholding and workers' compensation benefits.

The appellate court did agree with the claimants and reversed the Commission, concluding that the expense items should be a part of the average weekly wage, stating:

*reimbursement for actual travel expenses. As in many of these cases, the claimants in the present case were not required to keep any kind of expense records or turn in any receipts in order to receive the "reimbursement." It appears that [the employer] simply designates a percentage of its employees'*

salaries as "reimbursement" in order to take advantage of Internal Revenue Service tax regulations. [The employer] is not required to withhold Federal, social security or income taxes from the "reimbursement" portion of claimants' pay, and the claimants are not required to pay income taxes on this money. Although [the employer] maintains that it carefully calculated the per diem reimbursement so as to reflect the amount its employees actually spent on lodging, meals, and incidental expenses, there is no evidence in the record to support this contention. We also find significant that eligible drivers were entitled to a one-week paid vacation at \$400. If one-half of the amount [the employer] paid its drivers were reimbursement for expenses, then vacation pay would have been \$200, because the drivers would not have been incurring any expenses while on vacation. That [the employer] paid its drivers \$400 per week while on vacation suggests that that portion of drivers' wages which [the employer] designated as "reimbursement" was actually in the nature of wages constituting real economic gain to the drivers.

**EDITOR'S NOTE:** FROM THE FACTS, IT IS DIFFICULT TO DETERMINE WHETHER THE EMPLOYER UTILIZED THIS METHOD TO SIMPLIFY RECORD KEEPING OR TO PROVIDE ADDITIONAL INCOME NOT SUBJECT TO WITHHOLDING.

## **TTD BENEFITS CAN BE RECOVERED AS A PART OF A SECTION 19(h) PETITION**

In cases not closed through lump sum settlement contracts, petitioners have the right to file petitions for review pursuant to Sections 8(a) and 19(h) of the Workers' Compensation Act. Section 8(a) concerns the petitioner's right to receive medical and hospital benefits for the rest of his life. Section 19(h) authorizes the Commission to increase the permanent partial disability (PPD) benefits and also to grant additional temporary total disability (TTD) benefits. A Section 19(h) Petition must be filed within 30 months of the last Commission decision.

Paul Poore had sustained severe burns over 46% loss of his body, which burns covered the majority of claimant's lower body and extremities. Initially, he had been granted an award for 50% loss of a man plus 76 5/7 weeks of TTD benefits. Subsequently, Poore underwent additional treatment to his left leg and foot, including the stretching of the achilles tendon, which had been "shortened" by the scar tissue from the burns. The treating physician concluded that claimant's disability status had not changed from the original arbitration award. All of the physicians agreed that the surgical procedure was reasonably necessary for claimant's injury. The Section 19(h) petition claimed TTD and increased PPD benefits.

With reference to TTD benefits, the employer relied on the 1989 Briggs Manufacturing Company case which had held that TTD benefits are available only from the time an employee is injured until he has recovered as much as the character of his injury will permit. In other words, TTD benefits were only payable during the period of the initial healing process. The court, however, pointed out that the Briggs case had been replaced by the 1993 World Color Press case where additional TTD benefits were permitted. The court explained that a period of TTD can be the result of a period in which the claimant's PPD, which was once thought to be permanent, becomes unstable or degenerates and requires additional treatment to restabilize. In the instant case, the court stated:

*Employer argues that, under World Color, claimant must first prove that his permanent partial disability materially increased before he can obtain an additional award of TTD benefits. We disagree. Although the law requires a claimant to prove that his permanent disability has materially increased to qualify for an increase in his PPD benefits, a claimant does not have to prove an increase in his permanent disability to be entitled to TTD benefits. Rather, all claimant must show is that his disability destabilized and required more treatment or recovery time and that, consequently, he was temporarily and totally disabled. That claimant's permanent disability later restabilized or improved after further treatment or recovery does not change the fact that he was temporarily and totally disabled and unable to work.*

With reference to the claim for an increase in the PPD benefits, the court was reluctant to disturb the finding of the Industrial Commission stating that an additional surgical procedure did not necessarily mean that the PPD had increased. Actually, the medical testimony indicated that, after recovery from the surgery, claimant had a normal gait and that the tendon surgery had increased the range of motion of the claimant's left foot.

**EDITOR'S NOTE:** IT ALWAYS MADE SENSE THAT THE CLAIMANT SHOULD BE ENTITLED TO TTD BENEFITS IN A 19(H) PETITION.

## ADA Corner

### THE PERCEIVED DISABLED PLAINTIFF, PLUS A PRECAUTION AGAINST POTENTIALLY PUNITIVE REASSIGNMENT

A strategy that is becoming more and more common amongst the plaintiff employment bar in dealing with ADA cases is to recast the plaintiff's disability as a "perceived disability." The ADA creates three categories of disability: (1) suffering from a physical or mental impairment that substantially limits one or more of the major life activities; (2) a record of such an impairment; or (3) regarded as having such an impairment. Plaintiffs' attorneys have found that it is often quite difficult to establish an actual physical or

IDOT's attorneys appealed, claiming that Mr. Riemer should not be allowed to recast his case as a

mental impairment that substantially limits a major life activity. Indeed, as reported recently in the *Wall Street Journal*, employers have a 92% victory rate under the ADA, and many cases were dismissed or lost at trial because the plaintiff failed to overcome the hurdles of proving an actual disability.

Therefore, plaintiffs' attorneys have turned to the "perceived" prong of disability, even after casting their case as one for actual disability. Surprisingly, the normally pro-employer courts in the 7th Circuit have allowed them to do so. A good example is the recent case of Riemer v. Illinois Department of Transportation.

In Riemer, the plaintiff had worked for IDOT for nine years as an ironworker in its fabrication shop in Springfield, Illinois. During the warm weather months, he spent about 30% of his time working in the field. During the winter months, when there was no field work, he worked exclusively at the shop. In 1993, Mr. Riemer was off of work for 30 days due to asthma attacks, which, he stated, were employment related. His family physician presented IDOT with a note stating that Mr. Riemer's condition had been aggravated by the fumes in the shop. IDOT granted his leave request.

When Mr. Riemer attempted to return to work, he presented to IDOT a letter from his physician stating that his asthma was now under control, and that it would be safe for him to return to the shop. IDOT wanted a second opinion and sent him to another physician, who recommended that Mr. Riemer be assigned to a permanent field position so as to avoid future asthma attacks. IDOT accepted the second recommendation and permanently assigned the plaintiff to the field position. This resulted in him being laid off during the winter months. It also resulted in him working far fewer hours and often having to work far away from home. He was not reimbursed for his hotel and travel expenses.

Mr. Riemer brought an ADA action against IDOT. While the case appeared to be premised as an actual disability claim, at the close of trial the plaintiff's attorney informed the judge and the jury that he would be premising the case upon a perception of disability. The trial judge allowed this, and Mr. Riemer won a verdict in excess of \$99,000.

perceived disability claim at the close of trial. The 7th Circuit rejected this argument, citing the Federal Rules

of Civil Procedure's liberal pleading rules. The 7th Circuit also rejected claims by IDOT that Mr. Riemer had not presented specific evidence that IDOT perceived him to be disabled. The court found that the reassignment itself could only have been premised upon a perception of disability.

The case is also instructive in that employers must be careful how they attempt to accommodate an employee. IDOT's actions in this case appear to be based upon rational motives, that it was concerned that Mr. Riemer would continue to suffer asthma attacks in the shop. However, IDOT ignored the recommendations of the plaintiff's own physician, that he could return to the shop. While those recommendations may have been wrong, by simply ignoring them and choosing its own accommodation, IDOT placed itself in a dangerous position. The accommodation that it forced upon Mr. Riemer was perceived by not only him, but by the jury as well, as a demotion. While not mentioned by the court, the ADA and the EEOC regulations clearly require an "interactive" process. IDOT ignored this interactive process and instead imposed its own solution, one which ultimately cost it at trial.

We would advise all employers to remember that reaching a reasonable accommodation is an interactive process. Should you ever have any questions on how to conduct this interactive process or preserve your rights under it, please call us and we can provide the necessary guidance.

**MICHAEL S. SIMON**

**MUST AN EMPLOYER PAY AN ATTORNEY'S  
FEE TO RECOVER  
ITS OWN CONTRIBUTION TO THE CIVIL  
VERDICT?**

The recent case of Silva v. Electrical Systems, Inc. (ESI), addressed the issue of the employee's attorney's right to fees on the entire employer's compensation subrogation claim. The employer had contributed towards the gross and objected to paying a 25% fee for what it considered the return of its own money. The following represents a simplified version of a complex factual situation which eventually reached the Illinois Supreme Court.

**MURDER V. SUICIDE CASE FINALLY  
DECIDED**

Rudolph Silva sustained an industrial accident while employed by Midwest Conveyor Co. In addition to receiving over \$400,000 in workers' compensation benefits, Silva sued ESI which, in turn, filed a contribution action against Midwest Conveyor. The jury awarded Silva \$300,000 against ESI and, because of Midwest Conveyor's negligence, it was ordered to pay one-third of that amount to ESI.

Silva's attorney claimed a fee of 25% of the \$300,000 gross amount, in accordance with Section 5(b) of the WCA. Midwest Conveyor, as the employer, received the balance of \$225,000. Midwest Conveyor objected to paying 25% of the \$100,000 it had just contributed in the civil case, contending that it would be unfair to compel it to pay a fee to recover its own civil contribution. The court disagreed with Midwest Conveyor and required Midwest Conveyor to pay a 25% fee on the entire \$300,000, stating:

*The [\$100,000] was not a credit against either ESI's payment to Silva or Silva's reimbursement to Midwest Conveyor. ESI had to pay Silva the [\$300,000] as reimbursement for the workers' compensation payments. It was then up to ESI to enforce the [\$100,000] contribution judgment against Midwest Conveyor.*

...

*The benefits received by Midwest Conveyor were due to the efforts of Silva's attorneys. Those attorneys are entitled to be fully compensated for their efforts in accordance with section 5(b). If Midwest Conveyor's position were accepted, that would not happen. After managing to procure an award of [\$300,000], Silva's attorneys would receive fees on only [\$200,000]. For no reason other than that Midwest Conveyor was found to be contributorily negligent, Silva's attorneys would get nothing for their work in securing the balance of [\$100,000]. In effect, the attorney should be forced to subsidize Midwest Conveyor's lack of due care.*

**EDITOR'S NOTE:** AS THE COURT NOTED, THE ATTORNEYS COULD NOT LOOK TO SILVA FOR PAYMENT BECAUSE NONE OF THE MONEY, INCLUDING THE \$100,000, BENEFITTED HIM. THE FULL AMOUNT OF THE AWARD WENT TO MIDWEST CONVEYOR, AS REIMBURSEMENT FOR ITS WORKERS' COMPENSATION PAYMENTS. SILVA COLLECTED NOTHING.

You may recall that in our last newsletter, we provided extensive coverage of the case where the appellate court had found that the death of a bookstore manager in his office was actually suicide and not homicide. We advised that a petition for rehearing was pending. Since that time, the petition for rehearing has been denied and the court's finding that the death was actually due to a suicide and, therefore, not an accidental injury which arose out of and in the course of the employment.

**FRANK J. WIEDNER**  
Editor