

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 9 ISSUE 2

April 1999

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ATTORNEYS AT LAW

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IMPORTANT INDUSTRIAL COMMISSION DECISIONS.

Generally, only those decisions rendered by the appellate and supreme court are considered important. Recently, however, three decisions by the Industrial Commission are worthy of note. One case involves the most recent and complete expression on the application of the Petrillo Doctrine. The Commission, after expressing its view of the application of Petrillo, referred the matter back to the arbitrator for further hearing and, as a result, any appellate procedure will be delayed. Two of the decisions involve the State of Illinois and, since the Workers' Compensation Act does not permit the state to appeal an Industrial Commission decision, these decisions are the final word.

RESPONDENT PROHIBITED FROM COMMUNICATING WITH TREATING PHYSICIAN - PETRILLO CASE CITED.

The Industrial Commission has frequently relied on the Petrillo v. Syntex case to prohibit the employer from communicating with the employee's treating physician. This policy was more clearly described in the recent Commission case of Anderson v. Hydraulics, Inc.

Lynn Anderson suffered a left scaphoid wrist bone fracture, allegedly caused by repetitive lifting of heavy vehicle parts. She was initially sent by respondent to Dr. Jablinowski, who referred her to Dr. Cox, who in turn referred her to Dr. Ruder, a hand surgeon. Based on an apparently incorrect history, Dr. Ruder had found a causal connection. Respondent's rehabilitation nurse then wrote Dr. Ruder requesting that he "clarify" his causal connection opinion. The letter also described Ms. Anderson's repetitive trauma injury and added that the employer had no record of a work-related injury. Enclosed with the letter were the records of Dr. Jablinowski, Dr. Cox, the physical therapist, the job

description and the videotape depicting the job. The letter included the question as to whether the injury was causally related to a repetitive motion. Dr. Ruder responded by stating that he did not think repetitive motion itself, as depicted in the job description and videotape, would have been sufficient to cause the left wrist fracture.

The arbitrator rejected respondent's tender into evidence of the job description, the videotape, Dr. Ruder's report and any proposed testimony from the nurse. After doing so, the arbitrator found a causal connection between Ms. Anderson's fracture and her job duties.

On review, the Commission modified the arbitrator's decision and permitted the job description, the videotape, and the nurse's testimony to non-Petrillo related issues. It held that the letter to Dr. Ruder violated the Petrillo doctrine of physician-patient confidentiality. In Petrillo, the court stated:

In sum, we believe that when a person filed suit and places his mental and physical condition at issue, that person consents to the release of all of the information related to the condition placed in issue. We do not believe, however, that the legislature intended that a person also consents, by filing a lawsuit, to his treating physician engaged in ex parte conferences with that person's legal adversary. ... Accordingly, we rule today that discussions between defense counsel and a plaintiff's treating physician should be pursuant to the Rule of discovery only

How did the Commission treat the fact that no discovery is permitted under the Workers' Compensation Act? The Commission noted that the respondent could have requested a *dedimus* or subpoena for Dr. Ruder's deposition but it did not explain that this would be an evidence deposition rather than one for discovery. The Commission stated:

This is not a case where the Petitioner has refused to turn over medical records at the outset of the injury. Were that to occur, Petitioner would not be entitled to benefits. The facts before the Commission concern a nurse for Respondent having an

ex-parte communication with Petitioner's treating physician regarding his opinion on causality, and seemingly attempting to change the outcome of that opinion. To hold a workers' compensation claimant, by virtue of filing an application for adjustment of claim, waives his or her physician-patient privilege flies in the face of the public policy announced by the Illinois Appellate Court in Petrillo and more recently by the Illinois Supreme Court in Best.

The Commission then interpreted the Best v. Taylor Machine Works case as stating:

In supporting the basis of the Petrillo doctrine, the Court found a strong public policy against ex-parte communications between a Plaintiff/Petitioner's treating physicians and the Defendant/Respondent and its representatives, as such communication could irreparably breach the confidential and fiduciary relationship between a physician and his or her patient.

In a lengthy eight-page dissent, Commissioner Stevenson differentiated the claim handling between civil and compensation cases. He provided the following reasons:

1. Petrillo did not create any special privilege for medical treatment information but only required the use of the supreme court discovery rules to acquire said information in personal injury tort litigation.
2. The compensation statute prescribes a free exchange of medical information which would be jeopardized by the Petrillo application.
3. Dr. Ruder's first opinion, finding compensability, was based upon an incorrect history given by the claimant and Dr. Ruder's subsequent contrary opinion was based on a corrected factual situation.
4. Other states have found that a Petrillo application would be inconsistent with the legislature's intent to create a compensation system that reduces litigation and minimizes the adversarial process.

EDITOR'S NOTE: Without being able to consider Dr. Ruder's denial of causality, the arbitrator will, most likely, render the same decision and the Commission will certainly affirm. Unless other factors intervene, this case will likely wind its way through the system to the appellate court.

INJURY WHILE PLAYING BASKETBALL DURING LUNCH BREAK FOUND TO BE COMPENSABLE.

In Ricky Dean Foutch v. State of Illinois, Centralia Correction Center, the claimant, a 34 year old correctional officer, injured his right ankle while playing basketball on his lunch break. He could spend his thirty-minute lunch break either in the cafeteria, the roll call room, or the gymnasium, but could not leave the facility, an important fact in the decision. Foutch chose to play pick-up basketball with other employees. The state provided the basketball, as well as ping pong equipment, weights and a stationary bike for those who chose to engage in those activities.

The arbitrator found that the basketball game was not a "recreational activity," within the meaning of Section 11 of the Act, but that it was incidental to the employment because of the "personal comfort doctrine." Comparison was made to the Eagle Discount Supermarket case, which is more commonly referred to as the "frisbee case." In that instance, the Eagle employee suffered his injury while throwing a frisbee in the supermarket parking lot during a lunch break.

EDITOR'S NOTE: The Commission failed to note that the Eagle Discount case was decided in 1980 and that Section 11 did not come into effect until 1981. Section 11 denies compensation for "accidental injuries incurred while participating in voluntary recreational programs, unless the injured employee was ordered or assigned by his employer to participate in the program." Apparently, an employer must emphasize that participation is voluntary and also must not provide the equipment.

SEXUAL HARASSMENT FOUND TO BE AN ACCIDENTAL INJURY.

In Liesen v. State of Illinois, Department of Rehabilitation, Charyl Liesen, age 30, testified to a series of events which were found by the Industrial

Commission to constitute sexual harassment.

1. On August 12, 1992, a supervisor, a Mr. Mikkelson (age not shown), while driving Ms. Liesen to another office, a drive that lasted approximately one hour, made inappropriate statements to Ms. Liesen concerning her personal life. He suggested that she needed a man more cultured and understanding than her present boyfriend. He described his disagreement with his own daughter who had become engaged to a long-haired musician, who wore an earring. Mikkelson wondered why women like Ms. Liesen might be attracted to such a person, stating "It can't be the sex."
2. On August 26, 1992, while making that same trip, Mikkelson opined that Ms. Liesen did not love her boyfriend and questioned her relationship with him.
3. Ms. Liesen testified that earlier her mother had told her that she (the mother), had a dating relationship with Mikkelson and was told by him while they were "making love" that she should place her daughter's photo on the pillow so that he could fantasize that he was making love to Ms. Liesen. The mother also testified to this effect.
4. On September 21, 1992, and on several subsequent occasions, Mikkelson questioned Ms. Liesen about her work, causing her to believe that her job was in jeopardy.

Within a month of the first incident, Ms. Liesen reported to her vocational counselor. On November 11, 1992, she filed an internal complaint with the Illinois Department of Rehabilitation Services alleging sexual harassment. The complaint was processed, and on March 3, 1993, the employer reached its decision to terminate the employment of supervisor Mikkelson. However, while the complaint was pending, Ms. Liesen was required to work under the supervision of Mikkelson. There was no testimony regarding inappropriate comments during that period.

Ms. Liesen's psychiatrist testified that Ms. Liesen had suffered from "post traumatic stress disorder, panic disorder and depression." She further testified that the employment conditions were the major contributory cause of the mental disorders,

causing her to be temporarily totally disabled from March 16, 1993 (one week after Mikkelson was terminated) through April 5, 1993. After returning to work, she continued under the care of the psychiatrist, who testified that she could not predict when Ms. Liesen would recover and that some cases of post traumatic stress disorder continue for 20 years.

Illinois law requires that in a case of a "mental-mental trauma" a stricter degree of proof is required. 1) the stress must be greater than the day-to-day emotional strain which all employees must experience, 2) the conditions must, from an objective standpoint, exist in reality and not merely be the employee's perception, and 3) the employment conditions must be the "major contributory cause" of the mental disorder.

The arbitrator found that the statements and actions by Mikkelson resulted in a "gradual deterioration of the petitioner's mental processes" and awarded compensation. The majority of the Commission agreed, but the dissenting opinion felt the decision was contrary to fact and law, stating:

I do not believe the so-called stress she claims was unique to her workplace, but rather Petitioner was exposed to a condition, namely sexual harassment, common to all or to a great many occupations throughout this country. Sexual harassment is, unfortunately, commonplace nowadays. I believe Petitioner has failed to prove her mental disorder arose from a trauma arising from a situation of greater dimensions than the day-to-day emotional strain which all or most employees may experience.

The 1988 General Motors Part Division case had denied compensation, even though the personnel director verbally assaulted the employee with profanity and racial slurs. In referring to the famous Pathfinder emotional trauma case, that General Motors decision concluded:

In sum, we conclude Pathfinder authorizes an award of benefits only when an employee suffers a sudden, severe emotional shock which produces immediate disability and is caused by an uncommon, non traumatic work-related

experience out of proportion to the incidents of normal employment activity.

EDITOR'S NOTE: As noted above, the state is prohibited by statute from appealing a Commission decision. Most sexual harassment cases seem to be brought in civil actions based on state and federal statutes. Based on this case, if the employee proceeds under Title VII, may the employer move to dismiss the action because of the Exclusive Remedy Doctrine?

EMPLOYER ENTITLED TO CREDIT TOWARDS PPD AWARD FOR OVERPAYMENTS OF TTD.

In Messamore v. Industrial Commission, the appellate court had occasion to consider whether an overpayment of TTD benefits by State Farm Insurance Company, the employer, could be credited towards the PPD award. In reviewing the difference between Section 8(j)(1) and 8(j)(2) credit language, the court concluded that overpayment of group benefits under Section 8(j)(1) would not result in a credit but that an overpayment of compensation benefits under Section 8(j)(2) would justify such a credit.

Cheryl Messamore was treated for right carpal tunnel syndrome and cubital tunnel syndrome. The Commission found that the cubital syndrome was unrelated and concluded that State Farm had overpaid TTD benefits because the carpal tunnel syndrome had stabilized at an earlier date, while acknowledging the plain language of Section 8(j)(1) as allowing only credit "to or against" TTD benefits, the court stated that Section 8(j)(2) permitted a credit against PPD benefits as well.

In responding to the claimant's final argument about fairness, the court stated:

The argument is made that it is unfair to recoup overpayments which an employee may have used to replace income while he or she has been unable to work. Further, that requiring repayment would cause an injured employee to be hesitant to spend benefits received during the temporary period out of fear that the employer would require repayment of the overpayment in the future. However, interpreting the statute so as to hold the employer to administrative exactness in its payment

prior to adjudication, and denying it the right to recoup any excess payment it may later discover, could frustrate a primary purpose of the Act, to provide prompt payment to the employee.

DUAL CAPACITY DOCTRINE RE-VISITED.

Periodically, one of our appellate courts is requested to decide whether the alleged employer was acting in a dual capacity at the time of the employee's injury. Josef Sobczak, the plaintiff, was employed as a laborer by Harbor Properties, Inc., which renovates commercial property in Bedford Park. Joseph Flaska, the defendant, was Sobczak's immediate boss at Harbor Properties, as well as a Harbor Properties full-time employee. At the time of his injury, Sobczak was working at defendant Flaska's home in Palos Park, while operating a tractor owned by Harbor Properties.

Sobczak contended that Flaska could not utilize Section 5(a) immunity because there existed a significant legal relationship between Sobczak and Flaska separate and apart from the employer-employee relationship. The court agreed.

We find the evidence supports the trial court's determination that Flaska exercised sufficient personal supervision over Sobczak's activities on the day of the injury so as to create a legal duty of care and subject Flaska to liability in negligence. We also find Flaska's activities in supervising Harbor Properties workers at his home as a general contractor to have created a distinct "persona," separate and apart from his role as an agent of Harbor Properties, that was sufficient for Sobczak to avoid a Section 5(a) immunity defense pursuant to the dual capacity doctrine.

EDITOR'S NOTE: Dual capacity existed not because the first function as an employer is so different but because the second function imposed "unrelated legal obligations" between plaintiff and defendant.

RECOVERY PERMITTED EVEN WHEN

AC&S argued that it could not be held liable for an accidental injury which occurred after Delessio had left its employment. The Peoria County

"ACCIDENTAL INJURY" DATE OCCURS AFTER TERMINATION OF EMPLOYMENT.

In A.C. & S. v. Industrial Commission, the claimant, Nick Delessio, had been an insulation installer for 22 years. The chronology of his claim led to the decision that the correct accident date was June 22, 1993.

02/14/93	Delessio began working on a special "heavy industrial" job involving special equipment, working 12 hours per day for six or seven days a week.
Spring, 1993	Delessio began experiencing numbness, tingling and aching in both hands, none of which symptoms he had before working for AC&S. He did not report his symptoms and received no medical treatment.
April, 1993	Delessio allegedly made an appointment with Dr. James Schlenker, a hand surgeon.
06/10/93	Delessio was terminated, along with other employees, and immediately found a full-time, but lighter job, with Commercial Insulators.
06/17/93	Delessio was seen by Dr. Schlenker regarding the pains in his hand.
06/22/93	Dr. Schlenker advised Delessio that he suffered from carpal tunnel syndrome and that his pre-existing condition had been aggravated by his work for AC&S. Dr. Schlenker believed that Delessio's symptoms began about a month after he started working for AC&S. That same day, at the request of Delessio, Dr. Schlenker's secretary telephoned AC&S.

Delessio continued to work for Commercial until he had carpal tunnel surgery on September 11. He was released for work on November 15, 1993.

Bellwood Nursing Home case established that the date of an accidental injury in a repetitive trauma case is the date on which the injury "manifests" itself, with

the manifestation date at June 22, 1993, the date Dr. Schlenker told Delessio of his diagnosis. In response to the position of AC&S, the court stated:

The modern rule allows compensation even when an injury occurs at a time and place remote from the employment if its cause is something that occurs entirely within the time and place limits of employment.

After acknowledging that Illinois had found carpal tunnel syndrome to be an accidental injury and not a disease, the appellate court looked to the Occupational Diseases Act for guidance. It cited several cases where a recovery was permitted for an occupational disease which did not manifest itself for sometime after the claimant left his employment and, where the claimant had worked for other employers in the interim.

The court acknowledged that the employer might be susceptible to stale claims if the manifestation date occurred long after the termination of employment. The court pointed out that the employer's protection against stale claims lies in the requirement that a claimant must show that his injury is work related and that the longer the delay between employment and the manifestation date, the harder it is for the claimant to prove causation. AC&S further argued that a manifestation date after employment has ended would defeat the purpose of requiring prompt notice and here the court noted that the date of notice would have been sufficient, even if the manifestation date had been the last date of employment.

EDITOR'S NOTE: The selection of the manifestation date as the date of injury is an arbitrary method when all parties know that the true date of injury would be difficult to determine. Since Illinois does not follow other jurisdictions and consider repetitive trauma an occupational disease, it would be difficult to select any other date.

PERMANENT TOTAL DISABILITY FINDING BASED ON FIBROMYALGIA.

In Waldorf Corporation v. Industrial Commission, the appellate court had occasion to review the claim of Janet Johnson, who developed soreness in her knees, right shoulder and spine, while stacking unfolded cartons as they came off a cutting press. Every 30 to 45 seconds, the claimant stacked

hundreds of cartons, placed them in a large container above her head, stooped down and repeated the movements. She went to her family doctor, who prescribed medication. On May 2, 1990, while working, the claimant's pains became worse and she sought treatment on May 3, at the Bridgeview Medical Center where her condition was diagnosed as "right shoulder biceps tendinitis" caused by physical activity at work. The following day she was seen by the employer's physician, who diagnosed "cervical shoulder sprain" and placed the claimant on a ten-pound weight restriction with no repetitive motions.

Thereafter, Dr. Gerber referred the claimant to Dr. Dirk Nelson, an orthopedic surgeon, who examined the claimant on June 7, 1990, after which the claimant was placed on a program of physical therapy. She was totally disabled until July 30, 1990, worked light duty until October 26, 1990, after which she ceased work all together. On October 30, Dr. Gerber diagnosed "chronic fatigue syndrome and fibromyalgia."

Thereafter, the claimant was examined by several other physicians. Dr. Robert Katz, a rheumatologist, confirmed the diagnosis of "fibromyalgia" and after noting that the medical community did not know what causes fibromyalgia, opined that the claimant's fibromyalgia was the result of a work-related injury. Dr. Herbert Rubenstein, the employer's examining physician, confirmed the fibromyalgia, even though no objective basis for the claimant's pains could be found. Dr. Rubenstein stated that the predominant theory is that fibromyalgia has a psychological basis and he believed that the claimant's condition was neither caused nor aggravated by the employment. Finally, Dr. Daniel Hirszen, a rheumatologist, concluded that the repetitive physical condition may have aggravated the fibromyalgia.

The Commission had awarded permanent total disability benefits under the "odd-lot" doctrine. The circuit and appellate courts affirmed.

The appellate court noted that the claimant had been employed for several years but that her symptoms only began when she was conducting this particularly strenuous job, which was "fast, heavy and repetitious." The fact that the claimant's state of health so dramatically changed at that time, supported the determination that the condition was causally related to the work. The court found:

A causal connection between work duties and a condition may be established by a chain of events including petitioner's ability to perform duties before the date of the accident and inability to perform the same duties following that date. Here, the claimant went from a state which allowed her to work before May 2, 1990, to a state of disability after that date. Considered in light of the high physical demands of the Hallmark job, the finding of the Commission as to causation cannot be said to be against the manifest weight of the evidence.

With reference to the PTD finding, the appellate court felt that the claimant had fallen into the odd-lot category. She was not altogether incapacitated for work, but so handicapped that she could not be employed regularly in any well-known branch of the labor market. In such instance, the burden would shift to the employer to show that some kind of suitable work was regularly and continuously available. Here the claimant had conducted a search for jobs within her work restrictions, during which she had contacted a total of 106 prospective employers and the employer had provided no evidence that a stable labor market existed for the claimant.

EDITOR'S NOTE: Professor Larson had long contended that a disease may be work connected even though the medical profession did not fully understand the etiology of the disease. To this extent, the court eliminated the requirement of objective findings, with a showing of an ability to work before and not after the alleged accident date.

ADA Corner

By Jason Coggins

CREATING AN ADA COMPLIANT LIGHT DUTY PROGRAM: MAKE IT TEMPORARY, MAKE FORMALLY CLASSIFIED LIGHT DUTY JOBS, AND MAKE IT WRITTEN.

Employers who wish to implement a light duty program for employees who have sustained work-related injuries while also complying with the ADA

should follow four principles: (1) impose a reasonable time limit on the light duty jobs; (2) create a pool of new jobs and formally classify them as light duty positions, rather than simply re-labeling existing permanent jobs; (3) create a formal written policy (including the collective bargaining agreement) that designates the light duty jobs as temporary by specifying a limited time period for holding the jobs; and (4) consistently apply this policy. The farther an employer strays from these principles, the greater the danger of violating the ADA. Hendricks-Robinson v. Excel Corp. illustrates the point.

In Excel, the employer implemented a light duty program by taking some normal production plant jobs as well as other non-production jobs and labeling them as "light duty positions" or "make-work" assignments. The employer and the employees' union set aside certain jobs from the normal job bidding process for this purpose. Injured employees who could not perform their regular jobs were permitted to occupy a light duty position until they reached maximum medical improvement ("MMI"), at which time the employees were forced to either obtain a regular position they could perform or be placed on "medical layoff." There was no formal, written policy regarding this program.

The Court of Appeals for the Seventh Circuit held that the employer's light duty program may have violated the ADA because the light duty positions were not temporary as a matter of law. Because the light duty jobs were not temporary, the court held that evidence suggested that the employer failed to reasonably accommodate the disabled plaintiffs by not allowing them to remain in the light duty jobs permanently.

First, the court noted that the employer's claim that its light duty positions were temporary was not supported by formal, written policy. The court emphasized that the light duty jobs had no end-date; no specified period for holding the job; employees remained in the light duty jobs until a medical decision regarding the permanence of their disabilities was rendered. The court also noted that while the collective bargaining agreement discussed light duty positions, it did not designate those jobs as "temporary."

The court also focused on the type of jobs that were designated for light duty finding it determinative

that some of the light duty jobs were regular production jobs while other jobs were nonproduction work. In this case it appeared that the employer simply re-labeled many of its less strenuous permanent positions as light duty and failed to create new jobs or formally classify the jobs as light duty. Therefore, the court was not convinced that the light duty jobs were temporary.

Adherence to the four principles outlined above will better protect employers from making the mistakes made by the employer in Excel while avoiding having the finite pool of light-duty positions taken permanently by ADA plaintiffs whose conditions do not improve.

FRANK J. WIEDNER
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