

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## TEMPORARY TOTAL DISABILITY DENIED WHEN CLAIMANT WAS RELEASED FOR LIGHT DUTY AND FAILED TO LOOK FOR WORK.

Robert Beuse was a fireman for the Village of Franklin Park. After a hearing before the arbitrator, he received an award of 40% loss of use of the right arm and approximately 80 weeks for TTD. Upon review, the Commission took away one year of TTD benefits, despite the fact that the claimant did not work while on light duty disability. No light duty job existed with the Village. The respondent's medical examiner had released the claimant for full duty but the Village would not allow the claimant to return to full duty until he was released from his duty disability status by his own physician. The court stated:

*In Archer Daniels Midland, our supreme court restated the settled law that "an employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." The court further observed that "[o]nce an injured employee's physical condition stabilizes, he is no longer eligible for [temporary total disability] benefits, although he may be entitled to [permanent disability compensation under the Act.]" In fact, the Illinois Workers' Compensation Act provides for awards of temporary total disability in cases where "the disabling condition is temporary and has not reached a permanent condition."*

**EDITOR'S NOTE:** Obviously, respondents will approve of the language in this case. It can certainly be used as an argument to avoid additional TTD payments and, most certainly, avoid the impact of any penalties should the Industrial Commission rule

differently. Keep in mind the following:

1. In each case where the appellate court has upheld the right of the respondent to deny additional TTD based on a light duty release, the claimant's condition had reached a permanent stage. If the light-duty release was given during the course of active treatment, the decision would probably have been different.
2. If the injury had reached a permanent stage, the fact that the respondent did not have light duty available would not be controlling.
3. The claimant, whose injury has reached a permanent stage and where the employer cannot provide light duty employment, has an obligation to seek employment elsewhere.
4. In each case where the appellate court has approved denial of TTD based on a light duty release, it is merely finding that the Industrial Commission decision is not against the manifest weight of the evidence. Conceivably, if the Commission had ruled otherwise, the appellate court would have affirmed the decision.

See, Beuse v. Village of Franklin Park.

#### **OVERPAYMENT OF TTD BENEFITS ARE A CREDIT AGAINST PPD AWARD.**

Since the employer has a right to credit for any compensation paid, it should certainly be entitled to use an overpayment of TTD against the PPD award. Surprisingly, because of two cases where such a credit was not allowed in Section 8(j) group benefit cases, the question of TTD overpayment was raised and the appellate court has now clarified the issue. In pointing out that the Section 8(j) language pertains only to group payments, the court concluded in

#### **Messamore v. Industrial Commission (State Farm Insurance Company):**

*We allow State Farm credit against the permanent award for TTD overpayments. The employee should not receive a windfall at the employer's expense due to an accidental overpayment of TTD benefits. In drafting the Act, the legislature was careful to protect injured workers and to encourage employers to make prompt payments before the amount of liability is certain. Denying credits for errors such as the one in this case would encourage administrative delays as employers attempt to resolve every ambiguity before paying benefits.*

At issue also in Messamore was the date of TTD termination. The court affirmed the Commission's decision to cut off TTD when claimant was released to restricted duty. Respondent had no work for claimant at that time, but she had reached maximum medical improvement. (See Beuse v. Village of Franklin Park above).

**EDITOR'S NOTE:** The court suggested that the claimant could not collect TTD merely because the respondent could not provide restricted duty but could make such a claim "if no positions fitting those limitations are available".

#### **VIOLATION OF A SAFETY RULE.**

In Saunders v. Industrial Commission, the appellate court was asked to decide whether an injury resulting from violation of a safety rule occurring while a claimant was in route to a scheduled break arose out of the employment. Claimant was riding as a passenger on a forklift to retrieve his lunch and proceed to the break room. Company policy prohibited passengers on the forklift -- "double riding". This safety policy was regularly communicated to all employees. Further, no exigent circumstances required claimant to ride on the side of the forklift. Claimant jumped down from the forklift and it ran over his foot.

The claimant relied on the Chadwick and Hines cases. In Chadwick, the employee had failed to tether himself to a lifeline while working on a scaffold and, consequently, fell 75 feet to his death. In Hines, the

employee was injured while being lowered into a hatchway to get into the sub-basement because he had locked his keys in his room. In each instance, the appellate court affirmed the Commission award allowing compensation because the acts were not purely personal and, although negligent, were within the sphere of the employment.

In Saunders, in a 3 - 2 decision, the court affirmed the Industrial Commission's denial of compensation, stating claimant was injured getting off a forklift after riding as a passenger in contravention of company policy. It noted the distinction between prohibited activities that are not part of the employment tasks and prohibited methods of doing work. Injuries occurring during the former are not compensable, while injuries occurring during the latter are compensable. Since claimant was engaged in prohibited activity that was not a part of his work, his injuries did not arise out of the employment. Additionally, the court noted the employer never condoned nor acquiesced in the violation of a safety rule, and that "the ground most frequently relied on for rejecting the defense of a safety rule violation is the lack of enforcement of the rule in practice."

**TRAVELLING SALESMAN'S PROTECTION  
VS. RECREATIONAL ACTIVITY  
PROHIBITION - CONFLICT BETWEEN TWO  
THEORIES OF COMPENSABILITY.**

Compensation, as in other fields of law, has a number of general rules upon which compensability is decided. On occasion, however, the rules seem conflicting. Such is the situation in the recent Bagcraft case.

Richard Bolda, was a plant manager for Bagcraft, a company that produces paper packaging products. Rhinelander Paper Company is one of Bagcraft's major suppliers of paper. Rhinelander invited Bagcraft to send a group of its employees to visit its paper mill and to stay overnight at the Rhinelander Lodge in Wisconsin. After the Bagcraft employees arrived on the Rhinelander Company plane, they were given a tour of the paper mill. They then spent several hours discussing business. Around 2:30 p.m., the Bagcraft employees were driven to the lodge where they were to spend the remainder of the afternoon and evening.

The Bagcraft employees had the option to participate in a number of recreational activities, including trapshooting, riding all-terrain vehicles (ATVs), fishing, walking and hiking. Bolda decided to go for an ATV ride and, while doing so, struck a tree and suffered a fatal head injury. Discussion for dinner that evening was canceled.

The two conflicting rules are as follows:

1. An accidental injury sustained, during reasonable and expected activity while traveling away from home, is compensable even if that activity is recreational in nature.
2. Unless a travelling employee is assigned or ordered to participate in the recreational activities, Section 11 precludes recovery.

The Industrial Commission and, eventually, the appellate court held Bolda to be a travelling employee.

*As early as 1968, Illinois courts have applied the traveling employee doctrine to cases similar to the instant case, where the employee is away from home on a business trip and is injured while engaged in a recreational activity ... Without specific language directing application of section 11 to the traveling employee scenario, we cannot conclude that the legislature intended to abrogate an entire body of case law. We thus conclude that the proper analysis requires application of the traveling employee doctrine and not section 11.*

With reference to the employer's claim that Bolda's trip to the Rhinelander Lodge did not make him a traveling employee, the court stated:

*In this case, there is ample evidence to support the Commission's determination that decedent was a traveling employee. One will be deemed a traveling employee where he is required to travel away from home to perform his employment-related duties. Here, five of decedent's colleagues*

*testified that the Rhinelander trip was for business purposes, only the former president of Bagcraft said it was not. Testimony established that the trip was an opportunity to review current business conditions as well as to continue building a close relationship with Rhinelander ... Although personal pleasure was a byproduct of participating in the Rhinelander excursion, it is apparent from the record that decedent would not have gone on the trip but for his employer's request. As such, there was ample evidence from which to conclude that decedent was on a business trip and that the traveling employee analysis was applicable to this case.*

Finally, Bagcraft argued that Bolda's conduct was not reasonable and could not be anticipated by Bagcraft. The court stated;

*As to the "reasonableness" prong, all the record indicates is that, while returning to the lodge, decedent flew over his handle bars and struck a tree. There is nothing to suggest that decedent's conduct was unreasonable at the time of the accident; nor can we say that riding an ATV is unreasonable per se. As to the "anticipated" prong, the evidence shows that Bagcraft knew or should have known that ATV riding was among the recreational options at the Rhinelander lodge. Not only did Bagcraft employees ride the ATVs on previous trips, but Rhinelander distributed information packets on each trip describing the recreational activities available at the lodge. As such, we find that the Commission's conclusion that decedent's conduct was reasonable and anticipated by Bagcraft is not against the manifest weight of the evidence.*

**EDITOR'S NOTE:** This case is consistent with prior case law and as the Bagcraft court stated:

*Illinois courts have repeatedly held that, even though the recreational activities of a traveling employee fall outside the scope of employment, any injuries incurred*

*during those activities are compensable under the Act as long as the recreational activity and the employee's conduct were reasonable and foreseeable.*

#### **FELLOW EMPLOYEE'S CONFIRMATION OF CLAIMANT'S ACCIDENT VERSION DID NOT AMOUNT TO A JUDICIAL ADMISSION BINDING RESPONDENT.**

In Elliott v. Industrial Commission, John McAuliffe and Paul Wiedner of our office defended United Airlines in a claim brought by a pilot, Jess Elliott. Two issues were raised: 1) did Elliott actually have an accidental injury, and 2) did the statement of Elliott's supervisor, Captain John Parker, constitute a judicial admission, thereby proving Elliott's case. The Industrial Commission, and eventually the appellate court, answered in the negative and denied compensation.

Regarding the accident, Elliott testified that on May 7, 1994, he injured his neck while reading an auxiliary power unit gauge when the aircraft hit a bump. On May 9, he saw his family physician, Dr. Parker, supplying a history of waking during the night with a pillow between the mattress and headboard. On June 18, he sent a letter to Dr. Miller asking him to support his injury as occupationally related because he had "exhausted all of his non-occupational sick leave and vacation time." In responding to Elliott's request, Dr. Miller was the first doctor to suggest a "possibility" that the problem was work related. Finally, on July 8, 1994, seven and one-half weeks after the incident, Elliott wrote a letter to the company stating that he felt a pain while reading a gauge. The appellate court agreed with the Industrial Commission that Elliott's testimony was not credible, stating:

*After creating a paper trail of the true factual start (the pillow/hotel event), the arbitrator believed claimant "set out to discard that premises [sic] and invent, seven weeks later a new accident history. In light of the inconsistent histories given by claimant for the onset of condition, the suggesting of a variety of causes, the length of time it took claimant to "realize" he was injured while reading the auxiliary power unit (APU) meter, and the coincidental timing of this epiphany within the bringing of a workers' compensation*

*claim, the Commission simply did not believe claimant and discounted Parker's account as well.*

With reference to the alleged judicial admission, the claimant submitted a September 24, 1994 statement from Captain Parker that Elliott's duties while checking this gauge, placed him in an awkward position. Elliott had testified to an immediate exclamation when feeling the pain and Parker testified that he heard the exclamation but had no knowledge of the pain. The claimant argued that Parker's statement amounted to a judicial admission that Elliott had proved an accidental injury as a matter of law. The court disagreed, stating:

*To the extent Parker's deposition and report are considered admissions, they constitute evidentiary admissions, not a judicial admission binding on respondent. We stress they were not unequivocal and unambiguous statements by the witness, regardless of whether such an employee can bind the respondent by judicial admission. As such, the other evidence which explained and contradicted Parker's testimony and report was properly considered by the Commission.*

**EDITOR'S NOTE:** Elliott's conflicting histories caused his problem. If the court had agreed with Elliott's contention that the statement of a fellow employee amounted to a judicial admission, thereby binding respondent, the respondent's ability to defend this type of claim would be clearly limited.

#### **WHAT MUST THE EMPLOYER DO TO OBTAIN RECONSIDERATION OF A PERMANENT TOTAL DISABILITY AWARD THAT HAS BECOME FINAL?**

In Joe King v. Industrial Commission, the appellate court had occasion to consider whether Section 12 of the Act (which provides the basis for independent medical examinations) may be applied even though the respondent has filed no petition for additional benefits as provided under Section 8(f) or 19(h).

In 1991, Joe King obtained an award which specifically found that King, although not altogether incapacitated for work, was so handicapped that he would not be employed regularly in any well known

branch of the labor market. The decision became final.

On April 17, 1996, respondent filed a motion to suspend King's compensation because he failed to attend a medical examination. When King failed to cooperate, the respondent filed a motion to suspend compensation until King submitted himself to the IME. King contended that the employer could only obtain an IME prior to the arbitration hearing.

Initially, the appellate court found that Section 12 did not apply. The court then reversed itself. Its reasoning was as follows: Section 8(f) provides a method whereby the Commission may discontinue permanent total disability payments if the employee is shown to be able to return to work, even if he has not done so. Section 12 states that the IME may be "for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act." The court concluded as follows:

1. Respondent must first file an 8(f) or 19(h) petition and could be subject to penalties if the request is vexatious or unreasonable.
2. The respondent would then be entitled to an IME under Section 12.
3. The respondent should continue making the payment of benefits until obtaining a Commission order to terminate.

**EDITOR'S NOTE:** This is another 3 - 2 decision. The dissent examined the original record and found it unlikely that the employee could return to any type of work and suggested that before being entitled to a Section 12 examination, respondent should make a minimal showing that there was reason to believe that the physical condition had changed, thereby making the employee employable.

## **MUST THE EMPLOYER PAY THE 25% ATTORNEY'S FEES ON ITS GROSS OR ITS NET RECOVERY?**

In Rudolph Silva v. Electrical Systems, Inc., the Illinois Supreme Court had occasion to consider a dispute between the employer and the employee's attorney regarding the amount subject to the 25% attorney's fees. In addition to making its workers' compensation payments, the employer, pursuant to the contribution action, made an additional payment to the third party defendant. The employer contended that its contribution liability payment should be deducted from the reimbursement amount and that it should be required to pay attorney's fees only on its net recovery. The supreme court disagreed.

Silva, an ironworker employed by Midwest Conveyor Company, collected \$400,000 in workers' compensation benefits. He then sued Electrical Systems, Inc. and recovered a net amount of \$316,000. The contribution action by Electrical Systems against Midwest Conveyor resulted in a finding that its culpability was 32% and that Midwest consequently was required to pay Electrical Systems \$101,000. Instead of receiving the total judgment of \$316,000, Midwest accepted a net recovery of \$215,000 (\$316,000 - \$101,000). The court concluded that Silva's attorney was entitled to his 25% fee on the gross recovery of \$316,000 rather than on Midwest's net recovery of \$215,000. The court stated:

*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 \$316,000, Silva's attorneys would receive fees on only \$215,000. 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 \$101,000. In effect, the attorneys would be forced to subsidize Midwest Conveyor's lack of due care.*

**EDITOR'S NOTE:** The court emphasized the unfairness of having the employer pay less in

attorney's fees as the employer's culpability increased. The employer's negligence may not be invoked to diminish its statutory obligation to pay attorney fees.

## **MAY THE EMPLOYER ATTACH A WORKERS' COMPENSATION LIEN TO AN INJURED EMPLOYEE'S LEGAL MALPRACTICE CASE?**

Our office pioneered an employer's attachment of a workers' compensation lien to a United Airlines employee's claim for legal malpractice in the case of Williams v. Katz. Williams was a Federal District Court case in which the Seventh Circuit Court of Appeals had to rule on what was a matter of first impression under Illinois law. Unfortunately, two Illinois Appellate Courts have declined to follow the Williams precedent in the cases of Woodward v. Pratt, Bradford & Tobin, P.C., and most recently in Eastman v. Messner. The Woodward and Eastman decisions indicate that in Illinois an employer may not attach a workers' compensation lien to an injured employee's legal malpractice case.

In Williams v. Katz the Seventh Circuit Court of Appeals reversed a District Court decision striking an employer's workers' compensation lien on an injured employee's legal malpractice claim. The employee asked his attorneys to pursue a medical malpractice claim against the doctors who treated him for the work-related injury. The attorneys did not file the medical malpractice claim within the applicable statute of limitations and the employee sued them for legal malpractice. The suit was brought in federal court under its diversity jurisdiction because the employee was no longer an Illinois resident.

Unfortunately, after the Williams case was decided Illinois Appellate Courts issued contrary opinions in Woodward v. Pratt, Bradford & Tobin, P.C. and Eastman v. Messner. State appellate courts are not bound to follow federal court precedents which rule on questions of state law. In Woodward and Eastman the injured employees retained counsel to represent them in civil suits arising from work-related injuries. The employees' attorneys did not bring suit in a timely manner and the employees brought legal malpractice actions. The law in Illinois now appears to be that an employer cannot attach a compensation lien to an employee's legal malpractice claim premised on the employee's attorney's failure to file an action against a third party who injured the employee. This result seems to dictate that employers

and their insurers more carefully monitor employees' attorneys who indicate that they will file suit against a third party tortfeasor who injured the employee. We have had experience where, despite inquiries made to an employee's attorney, we could not determine if he was going to file suit before the statute of limitations expired. There is no procedure to force an employee's attorney to file suit. As such, we have brought suit in the employer's or insurer's name directly against the tortfeasor despite promises by an employee's attorney that suit would be filed. This has occasionally resulted in two suits being filed: one by the employer and one by the employee. We think that this is a better course of action than risking that an employee's attorney will not file suit within the applicable limitations period. If the employer files suit its case can always be non-suited should the employee file suit and not tell the employer. The employer can then intervene in the employee's suit and preserve its lien.

THOMAS WEBER

## ADA Corner

### **DOES THE ADA REQUIRE EMPLOYERS TO REASSIGN DISABLED EMPLOYEES TO TEMPORARY LIGHT DUTY POSITIONS RESERVED FOR A WORKERS' COMPENSATION PROGRAM?**

#### **A. Introduction**

Many employers utilize a workers' compensation program that creates and reserves special light duty positions for employees who injure themselves in the workplace. These positions usually provide injured employees who cannot perform their prior job functions with a less strenuous position temporarily until the employees are able to return to their original position. Although light duty programs are not generally required by law, they are beneficial to employers because the program enables injured employees to work thereby reducing workers' compensation costs. However, the requirement under the Americans with Disabilities Act, ("ADA") that employers provide reasonable accommodations to qualified individuals with a disability creates potential problems for employers with such light duty programs.

#### **B. The Issue**

At issue in this article is whether the ADA requires employers to accommodate disabled employees by placing them in light duty positions reserved for employees in a workers' compensation program. At risk is the workers' compensation cost savings provided by the light duty program.

#### **C. The Answer**

Whether the ADA requires employers to provide light duty positions to disabled employees depends on the individual facts and circumstances of the employees' request for light duty and the nature of the employer's existing practice. This article addresses the particular situation where an employer has an existing light duty program which offers only temporary positions for recuperating employees who were injured in the workplace.

In Dalton v. Subaru-Isuzu Automotive, Inc., the employer had an existing light duty program reserved for employees who had temporary disabilities. The light duty program was coordinated with the workers' compensation statute and designed for individuals who were recuperating from recent injuries and had only temporary disabilities. All of the light duty positions were temporary and lasted no more than ninety days. Seven employees who suffered permanent disabilities were unable to perform the essential functions of their current jobs and had requested accommodation in the form of permanent reassignment to vacant positions in the employer's light duty program. The employer did not comply with the accommodation request. The seven disabled individuals then brought suit against their employer alleging a failure to reasonably accommodate their disabilities as required by the ADA.

The court first acknowledged that reasonable accommodation under the ADA includes reassignment to a vacant position for which the disabled individual is qualified. However, the court emphasized that when determining to which jobs a disabled employee can be reassigned, the employer need not violate legitimate, non-discriminatory job prerequisites for its positions. The court then determined that the disabled plaintiffs could perform the essential functions of the light duty positions but found that they could not satisfy the employer's prerequisite for those jobs. The court stated the sense of the matter: "[i]f [the employer's] duty under the ADA to accommodate disabled persons requires it to offer these temporary-duty positions to its permanently

disabled workforce in order to accommodate their permanent disabilities, the effect would be to abolish (in whole or in part) the temporary disability program, leaving nothing for that group of employees.”

The lesson to be learned from Dalton is that an employer can save workers’ compensation costs by designing a light duty program with temporary positions for temporarily injured employees without violating the ADA. However, a light duty program must be carefully administered to comply with these overlapping statutes and retain its usefulness. Employers should note that this article addresses only one specific type of light duty program that complies with the ADA and, in many situations, the ADA might very well require reassignment of disabled individuals to light duty positions. Employers should always consult a lawyer to determine how to successfully comply with both workers’ compensation statutes and the ADA.

**JASON COGGINS**

**DID THE McMAHAN CASE AUTHORIZE SECTION 19(k) PENALTIES ON MEDICAL BENEFITS?**

Ever since the finding in the McMahan case, petitioner's attorneys have contended that Section 19(k) penalties, as well as Section 16 attorney's fees, are applicable to unpaid medical benefits. Reliance is placed on the paragraph in McMahan, which states as follows:

*Although the statute does refer to "compensation," we believe that the legislature intended to use that term in the same way it did in section 8 of the statute. Under section 8, the amount of "compensation" an injured employee is entitled to receive for an accidental injury not resulting in death is expressly defined to include not only compensation for lost wages but also payment for medical services.*

However, it should be noted that the McMahan court did not assess the 50% 19(k) penalty on the medical expense awarded. The only "penalty" assessment was for the 20% attorney's fees. There still remains that provision under Section 8(a) which refers to medical and prosthetic services and says "the

furnishing of any such services or appliances is not the payment of compensation." This particular provision was apparently not considered in the McMahan decision.

Any claims representative, when being requested to pay medical benefits, should request complete medical records and, if possible, a report, together with an itemization of all the charges submitted. It can still be argued that, despite McMahan, no court has ever awarded 19(k) penalties on medical expense.

FRANK J. WIEDNER  
Editor

**NOTICE**

In the recent past, several of our clients have requested the presence of one of our firm members to supply further explanation on an issue covered by the Newsletter. If you believe this would be helpful, please contact us and we will make every effort to have one of our attorneys available for such a presentation.