

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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McMAHAN CASE REVISITED

In the recent case of Rose Marie Garcia v. Industrial Commission, the appellate court issued a Rule 23 Order which extends the McMahan opinion. You will recall that in the January, 1999 Newsletter, your editor commented on the fact that the McMahan decision, while equating "medical services" with "compensation" for the purpose of penalties and attorney's fees, only awarded the 50% penalty on unpaid compensation and did not actually award penalties on the amount of the medical services. In McMahan, the only "penalty" assessment was for the 20% attorney's fees. In the recent Garcia case, the appellate court interpreted McMahan to provide that the 50% penalty should be applied to medical expense.

In Garcia, the court failed to address the 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." Your editor questioned whether or not that particular statutory provision had been brought up before the appellate court.

Upon a review of the briefs in Garcia, your editor noted that the issue had actually been raised in the briefs. In the Garcia brief, the petitioner conceded that the payment of medical services should not be considered compensation but argued that the provision did not apply because, in Garcia, the employer did not furnish medical services. Based on petitioner's argument, the above described statutory provision could never prevent a penalty for unpaid medical services because the respondent, by failing to pay for the medical services, obviously did not "furnish medical services." In summary, the court has taken the position that the failure of the employer to pay for medical services renders the employer liable for a 50% penalty and a 20% attorney's fee.

EDITOR'S NOTE: Your editor has received a number of inquiries as to whether the payment of medical services is to be considered compensation for the purpose of limitations. The only case in Illinois is Pope v. Industrial Commission, where the Supreme Court of Illinois stated that payment for medical services was not to be considered compensation for the purpose of extending the limitations statute. In that case, however, since the employer had mislabeled the payment by calling it "compensation", it was estopped from using a limitations defense. As noted above, the petitioner's brief in Garcia admitted that the payment of medical services would not extend the limitations statute but the court chose fit not to comment on this argument.

It would be our recommendation that the limitations defense be considered as valid if no weekly compensation payments are made within the two years prior to the filing of the application. If medical benefits are paid, the payments should be quite clear in describing that the payment is for medical services and not compensation.

ANOTHER CASE INVOLVING AN ATV INJURY WHILE PERFORMING A RECREATIONAL ACTIVITY.

In the January, 1999 Newsletter, we reported on the Bagcraft Corporation v. Industrial Commission case, where the employee was on a business trip out of town and also had the opportunity to participate in riding an all-terrain vehicle. While doing so, the employee flew over his handlebars and struck a tree. The court stated that the claimant should be deemed a traveling employee, that the personal pleasure was a by-product of the business meeting and that the employee's conduct was not unreasonable at the time of the accident. The Bagcraft court stated that the claimant's conduct was reasonable and foreseeable.

In the recent case of Jensen v. Industrial Commission, a somewhat similar set of facts produced an opposite result. Joseph Jensen was a pilot for Baldwin Aircraft Corporation and provided air transportation to Baldwin's summer retreat in Marquette, Michigan. After flying Baldwin's guests to Marquette, Jensen would sometimes stay over to await the return flight or, if the stay was extended, he would fly a commercial airliner back and then return when scheduled to pilot the return flight. On August 7, 1991, Jensen flew Baldwin's wife and children to Marquette, with the return trip scheduled for August

11. Consequently, because of the short stay, Jensen stayed in Marquette. On August 9, Jensen took an ATV ride to an unfamiliar area of Baldwin's property. He declined to wear a helmet. While driving down a country road, Jensen lost control and struck a tree, thereby sustaining severe injuries. The court made a fine distinction, stating that while the activity of riding the ATV itself might be reasonable and foreseeable, the manner in which the activity is conducted might be unreasonable or unforeseeable. In such case, it should be noted that Illinois courts look to the manner in which a claimant engages in the questionable activity. The court decided that the manner in which the claimant used the ATV was unreasonable and foreseeable. The court noted that 1) the claimant rode in an unfamiliar area; 2) he was driving on a county road and not on Baldwin's property; 3) the claimant did not wear a helmet, which was available; and 4) the claimant drove too fast for conditions.

EDITOR'S NOTE: The case was decided three to two, leading to the possibility that the supreme court might wish to review this case.

DOES THE STATUTE REPEALING THE VILLAGE OF WINNETKA DECISION HAVE A RETROACTIVE EFFECT?

Section 22-306 and 22-307 have long provided that any municipality that enacts an ordinance which provides medical care for accidental injury, then that municipality would be immune to any action brought by the policeman or fireman against that municipality. Acting with this authorization, the Village of Winnetka had passed an ordinance incorporating this provision. In the Village of Winnetka v. Industrial Commission case, the appellate court stated that the immunity would also extend to the policemen or firemen attempting to collect workers' compensation benefits.

Subsequent to that decision, many municipalities enacted a similar ordinance. Because of the impact on workers' compensation claims involving policemen or firemen, the Illinois General Assembly passed the 1997 Amendment to the statute, removing the language upon which the Village of Winnetka decision was anchored.

The question then arose as to the status of the workers' compensation claims that arose before the 1997 Amendment. In Nelson v. Industrial

Commission, the claimant contended that the statutory amendment merely clarified the existing law. Obviously, the court disagreed, pointing out that a material change in the language of an unambiguous statute created a presumption that the amendment was intended to change the law. Such a change would, therefore, not go into effect until November, 1997 and apply only to injuries occurring after that date.

NO JURISDICTION IN ILLINOIS

Our office recently defended two United Airlines cases where the employees, while originally hired in Illinois, subsequently were transferred to other states where they sustained injuries. In both cases, the attraction of higher Illinois benefits led to the filings of Illinois applications. In both cases, the Illinois Appellate Court affirmed the Industrial Commission denial of jurisdiction.

In Robert J. Mason v. Industrial Commission, the claimant was hired in Illinois in 1976. He alleged an involuntary transfer to Tulsa in 1982 and then to Dallas in 1984. He could have transferred to Chicago in 1988 but requested a transfer to Los Angeles, which was accomplished in 1990.

On August 16, 1991, Mason sustained an injury in California, with all of the initial treatment being provided in that state. In late 1991, Mason was transferred to Chicago, but continued treating with his California medical providers until June 29, 1992, at which time his treatment was transferred to Chicago.

On September 21, 1992, while receiving physical therapy and back rehabilitation in Chicago, Mason's condition was allegedly aggravated. He now contended that he had a new injury for which he should be compensated under Illinois law.

Initially, the court pointed out that Mason had not sustained a new injury and his treatment in Chicago was part of Mason's ongoing treatment relative to the August 16, 1991 injury. The court stated:

The test is whether the ultimate injury or disability was caused by an event that would not have occurred had it not been for the original injury. A subsequent disability resulting from treatment for the first injury is not an independent intervening cause breaking the chain of

causation between the work-related injury and the subsequent disability. When the medical treatment is necessary to relieve a condition resulting from an accidental injury, a condition resulting from the treatment is causally related to the original injury.

With reference to the question of jurisdiction for the August 16, 1991 accident, the court noted:

Claimant did not have any significant contact with Illinois since 1982. The injury occurred nine years later. Therefore, whether or not the initial transfer from Chicago was voluntary was found to be immaterial by the Commission, given the considerable length of time between that transfer and claimant's injury in Los Angeles. Moreover, claimant could have voluntarily transferred back to Chicago at the time of respondent's large expansion in 1988. Rather than choosing to return to Chicago, claimant transferred to Los Angeles. The facts that respondent was headquartered in Illinois, payroll was generated there, and nationwide personnel policies issued through the main office were not sufficient to establish that claimant maintained significant contacts with Illinois. Based on those facts, the Commission found Illinois was without jurisdiction over the claim of injury occurring in Los Angeles on August 16, 1991.

The case of Richard Wangsness v. Industrial Commission, raises the same question concerning jurisdiction. Richard Wangsness, an Illinois resident, was hired and trained at O'Hare International Airport in Chicago, beginning in 1978. In 1986, Wangsness could apply to return to Illinois, but chose not to do so. Wangsness admitted that at the time of the accident, he was a resident of Colorado, had a Colorado driver's license, paid Colorado income taxes, had been married in Colorado where he raised his two children who were enrolled in the school system. His only contact with Illinois was the initial contract of hire, plus the fact that he occasionally visited his family, who still lived in Illinois. In denying Illinois jurisdiction, the court stated:

In the present case, claimant was an Illinois resident when his contract for hire was made in Illinois. In addition, respondent has continuously employed claimant. Claimant's significant contacts with Illinois, however, ceased in 1986, when he voluntarily transferred to Denver, Colorado. More than seven years later, claimant was injured in Denver, Colorado, and treated in Colorado. Claimant's only contacts with Illinois since his transfer have been visits to family members. Claimant is now clearly a resident of Colorado, who has chosen not to return to Illinois. Thus, we find that the Commission's decision was not against the manifest weight of the evidence.

DANCE PARTICIPATION INJURY DID NOT ARISE OUT OF THE EMPLOYMENT.

In Michael Karastamatis v. Industrial Commission, the claimant was hired by his employer, Annunciation Greek Orthodox Church, to work at the church's annual picnic, to be held in the church's parking lot. For the first three days, the claimant put up tents, drove a van, cleaned and stacked beer and food. On the last day of the picnic, claimant served food and beer. At the end of the day when the picnic was winding down, the claimant asked the picnic chairman whether he could join other workers and guests who were dancing. The response was "Go ahead." Claimant not only joined the other dancers but became a leader performing a very strenuous dance. While doing so, he slipped and fell to the ground, injuring his knee because, claimant testified, the parking lot had oil spots. This allegation was supported by another dancer. A church volunteer, however, testified that he saw the claimant's knee give way, after which the volunteer's area examination found no oil or other unusual substance on the ground. Causation was also in dispute. Dr. Peter Poulos, another volunteer, testified that two days before the accident, he noted claimant limping, with the claimant reporting that he had injured his knee while working as a bouncer and wrestler. At that time, Dr. Poulos examined the knee, found claimant to be wearing an Ace bandage and, upon removal of the bandage, the doctor noted that the knee was "all banged up." In rebuttal, claimant produced 1) a nurse's aid, who worked for claimant's mother, stating that she had seen claimant walking around the house in shorts without ever having an Ace bandage, and 2)

two other witnesses who testified to claimant's prior ability to perform exercises and weight lifting without difficulty.

The Industrial Commission found that the claimant's injury did not arise out of the employment. The circuit court, as well as the special appellate court, agreed. The claimant alleged compensability because of the "personal comfort" doctrine, relying on Eagle Discount Super Market where the claimant was injured while playing frisbee on a nighttime lunch break. The store manager had permitted the employees to utilize the parking lot and had turned on the parking lot's lights so that the employees had sufficient light to play. In distinguishing the instant case from Eagle, the court noted that:

Eagle Discount Supermarket likewise does not assist claimant. The court does not state that when the personal comfort doctrine applied, claimant need not demonstrate his or her injuries arise out of the employment. In fact, the opinion reiterates that claimant must show both arising out of and in the course of. The focus of the Eagle Discount Supermarket case is on "in the course of" employment; the opinion neither raises nor discusses the issue of "arising out of" employment. ... Finally, Eagle Discount Supermarket is distinguishable from the instant case on the facts. There is no evidence in the instant case that it was the church's practice to allow its employees, working the annual picnic, to dance on break. For employer's acquiescence to amount to in the course of, the activity must be a practice, habit, or custom.

The court took pains to distinguish "arising out of" as opposed to "in the course of" the employment.

*"In the course of" refers to time, place, and circumstances of the injury. For an injury to arise out of the employment:
[T]he risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment. ****

[A]n injury is not compensable if it resulted from a risk personal to the employee rather than incidental to the employment.

The court then pointed out that the personal comfort doctrine could establish that the claimant was "in the course of" his employment but that the injury did not "arise out of" the employment.

In the instant case, claimant's injuries did not result from some risk or hazard peculiar to his employment. Claimant was hired to set up and stock the picnic and serve beer and food. He was not hired to dance. The risk of injury from dancing was not peculiar to claimant's work or incidental to his employment "because it did not belong to, or was it in any way connected with, what [claimant] had to do in fulfilling his contract of service."

In response to the claimant's contention that the requirement that an injury must "arise out of" one's employment is not applicable to personal comfort cases, the court stated:

The personal comfort doctrine generally applies when a claimant is on break and sustains an injury. It encompasses acts such as eating and drinking, obtaining fresh air, seeking relief from heat or cold, showering, resting, and smoking.

Although we agree that the personal comfort doctrine may be relevant, its application here would only establish that claimant is considered to be in the course of his employment even though he was on break and dancing. The doctrine is an "in the course of" concept; it has no application to "arising out of" employment. Here, the Commission's denial of benefits was based upon its finding that claimant's injury did not arise out of his employment. As such, application of the personal comfort doctrine does not in any way alter the Commission's decision that claimant's injury did not arise out of his employment.

The court also considered the employer's attempt to secure a ruling that the claimant was required to reimburse the employer for TTD and medical benefits paid. The court stated such a request could not be considered as part of the compensation appeal and must be the subject of a separate civil action by the employer.

EDITOR'S NOTE: The result may have been different if the claimant could show that it was the church's practice to allow its employees, working the annual picnic, to dance on break. For the employer's acquiescence to amount to "in the course of", the activity must be a practice, habit, or a custom.

CIVIL ACTION BY EMPLOYEES FOR IMPROPER STRIP SEARCHING NOT BARRED BY EXCLUSIVITY OF COMPENSATION ACT.

In Connie Toothman, et al v. Hardee's Food Systems, Inc., four female employees of the Hardee's Restaurant were suspected in the theft of \$50 petty cash. The manager and assistant manager, both females, took each of the employees into a small, windowless, locked room to conduct a strip search. Nothing was found. The managers later discovered that the shortage was due to a bank error and that no money was actually missing from the store safe. The employees sued for false imprisonment and assault and battery against Hardee's and the managers. Hardee's filed a motion to dismiss, alleging that a workers' compensation claim provided the exclusive remedy for the plaintiffs. After the motion was denied, the jury returned verdicts in favor of plaintiffs and awarded each of them \$25,000 in compensatory damages and \$200,000 in punitive damages. In its appeal, Hardee's contended that the civil verdict should be reversed because 1) the injury was not accidental, and 2) the injury was not compensable under the Act.

Was the injury accidental?

After pointing out that each manager was, in effect, the alter ego of the employer, the court refused to permit the employer to argue that an intentional injury could not be "accidental":

The exclusivity provisions will not bar a common law cause of action against an employer, however, for injuries which the employer or its alter ego intentionally inflicts upon the employee or which were

commanded or expressly authorized by the employer. The rationale advanced in support of this rule is that the employer should not be permitted to assert that the injury was "accidental," and therefore under the exclusive provisions of the Act, when he himself committed the act.

Was the injury compensable?

The plaintiffs came up with a novel argument, contending that the finding of non-compensability was correct because the plaintiffs did not seek or require any medical care after the incident, nor did they miss any work. In other words, since no benefits were "recoverable" the claim was necessarily "non-compensable" and the immunity provision did not apply. The court stated:

The purposes (of the Act) are not thwarted or diminished but are enhanced by our conclusion that in order for injuries to be compensable under the Act, there must be some demonstrable medical evidence of injury in order for the claimant/employee to recover. The most basic purpose of the exclusivity provisions of the Act is "to place the cost of industrial accidents upon the industry." A part of that larger purpose is also to prevent double recoveries and the proliferation of litigation. Thus, the employee is barred from seeking common law damages against the employer if the employee previously sought and collected workers' compensation benefits for the same injuries.

EDITOR'S NOTE: The argument that an intentional tort could be considered "accidental" under the provisions of the Act, has been previously followed. The novel approach was the reference to "recoverability" as being necessary before "compensability" exists.

ADA Corner

By Jason Coggins

REPRESENTATIONS OF TOTAL DISABILITY ARE NOT AN AUTOMATIC BAR TO ADA CLAIMS.

One of the most controversial issues in ADA litigation has concerned employees who claim to be unable to perform their job to obtain workers' compensation or social security benefits, can be "qualified individuals" under the ADA. Many courts have ruled that judicial estoppel automatically bars plaintiffs' ADA claims where they previously represented that they were totally disabled before an administrative agency. The doctrine of judicial estoppel prevents a litigant from making contradictory representations in separate proceedings. Thus, because the ADA requires that plaintiffs establish that they can perform the essential functions of their positions, courts have used plaintiffs' representations of total inability to perform the job as an admission that they cannot satisfy the "qualified individual" element under the ADA.

The United States Supreme Court recently resolved this issue in favor of plaintiffs. In Cleveland v. Policy Management Systems, the Supreme Court ruled that receipt of Social Security Disability Insurance benefits does not automatically bar an ADA claim. In Cleveland, a plaintiff who suffered a stroke while employed by defendant applied, and ultimately received, SSDI benefit by representing that she was "disabled" and "unable to work." The Fifth Circuit Court of Appeals upheld the district court's decision that the plaintiff's representations before the administrative body created a "rebuttable presumption" that barred her assertion that she was able to perform the essential functions of her positions required by the ADA.

The United States Supreme Court reversed, reasoning that the Social Security Act does not take into account "reasonable accommodations" as does the ADA. Thus, there could be many situations where an employee is totally disabled for purposes of social security, but could perform the job with reasonable accommodation, consistent with the ADA. The court also noted that a plaintiff's situation can change at the time of the job action at issue. However, the court emphasized that although a special negative presumption is not warranted, plaintiffs must adequately explain the inconsistency between their previous representations and their assertion of being a qualified individual under the ADA. The court noted that to avoid summary judgment the plaintiff must convince a reasonable juror that the plaintiff can perform essential job functions with or without reasonable accommodation despite the earlier assertion of total disability. In

other words, a plaintiff must prove a change in circumstances or point to a reasonable accommodation that would have permitted them to perform the job.

Although factually this ruling applies to social security representations, it is a near certainty that courts will apply the decision to cover representations made while pursuing workers' compensation benefits.

Many employees represent that they are totally disabled and unable to perform their job to secure larger workers' compensation benefits in the form of permanent total awards. Thus, although the Cleveland decision will prevent workers' compensation representations from automatically barring an ADA claim, the inconsistency must be adequately explained in order to withstand the employer's motion for summary judgment. Moreover, employers can often still use workers' compensation "incapable of working" representations to reduce ADA back pay awards since plaintiffs are "estopped and cannot recover back pay for a period during which [they] represented in another legal proceeding that [they] could not work." Best v. Shell Oil Co., 4 F.Supp.2d 770. Thus, although weakened, any such representations made to receive workers' compensation or social security benefits will continue to be ammunition in the employer's defense arsenal during ADA litigation.

FRANK J. WIEDNER
Editor