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CALCULATION OF AVERAGE WEEKLY WAGE-CONFLICTS AND SOLUTIONS.

Over the past number of years, the appellate court has submitted apparently conflicting opinions on the calculation of the average weekly wage. Two recent cases, Zanger v. Industrial Commission and McDaneld v. Industrial Commission, have attempted to address this particular question.

In the Zanger case, the claimant was performing outdoors carpentry work when a gust of wind pushed his ladder backward, thereby causing him to fall. He was paid $8 per hour and chose to work only 13 hours per week, thereby reaching a gross pay of $104 per week. He deliberately limited his hours so that he would not reduce the amount of his unemployment compensation benefits which paid him $300 per week. The accident occurred on February 22, 1993. Zanger had been employed by Huck Fixture from January, 1991 until September, 1992 and, consequently, a portion of the Huck Fixture employment period occurred during the year preceding the accident. An attempt to introduce the 1992 W-2 form for Huck Fixture was rejected as an exhibit. The claimant attempted to include his unemployment compensation in the calculation of the average weekly wage, but this calculation was rejected.

With reference to the rejection of the W-2 from Huck Fixture, the court agreed that those earnings should not be considered as there was no proof as to what portion of those earnings occurred during the 52-week period prior to the injury. With reference to his income from unemployment compensation, the court noted:

> *Section 10 of the Act requires benefits be computed based on the "the actual earnings of the employee in the employment in which he was working at*

the time of the injury." The purpose of the Unemployment Insurance Act is to provide security for and alleviate burdens of involuntarily unemployed workers and their families and unemployment benefits are paid "with respect to ... unemployment."

In the McDaneld case, the claimant was working three jobs: part-time as a volunteer fireman, full-time as a carpenter, and part-time as a life insurance salesman. As a volunteer fireman, he received no wages. As a full-time carpenter, the claimant received $7.50 per hour, but earned only $4,717.23 over a 44-week period. With reference to his work as an insurance salesman, he was, at the time of the accident, operating as an independent contractor. The parties agreed that the carpentry earnings were those which should be used to calculate the average weekly wage. Admittedly, the claimant lost more than five working days during his carpentry employment.

The claimant argued that the Commission should have multiplied his hourly wage ($7.50) by the number of hours he was scheduled to work per week (40) to yield an average weekly wage of $300. The court disagreed:

Section 10 makes clear that if a claimant worked during a large portion of the year preceding his injury, the Commission shall calculate the claimant's average weekly wage by dividing his "actual regular earnings" by the "period" during which he worked. The only substantive difference between the computation of the average weekly wage of short or casual employments and other employments is that "actual regular weekly earnings" are used to determine the latter, whereas probable regular earnings are used to determine the former." Since the 44-week pay period in question cannot be regarded as a "short or casual" employment, the Commission correctly calculated claimant's average weekly wage based on the actual earnings claimant made during that period.

In arriving at a rate of only $109.70, per week, the court stated:

In this case, claimant earned $4,717.23 from Watts between January 1, 1993 to October 31, 1993, a period of 44 weeks. Claimant testified that he missed at least five days of work in the year preceding his injury. The Commission, in adopting the decision of the arbitrator, calculated claimant's average weekly wage by dividing $4,717.23 by 43 (44 weeks minus five days of missed work), to yield a figure of $109.70. Clearly, this method of computation complied with section 10 of the Act, no matter whether the second part of the first sentence (as in Cook) or the second sentence (as in Smith) of section 10 applied. A calculation under either part of the statute yields the same figure ($109.70), since both calculations require that the same numerator ($4,717.23) and the same denominator (43) be used.

EDITOR'S NOTE: The apparent conflict in the decisions often seems to be due to the fact that the evidence fails to show the exact number of days that the claimant worked during the period in question. It is not enough for the claimant to testify that he lost more than five working days, but he must actually show the number of days worked in order to take advantage of the calculation which refers to "parts of weeks."

Ever since D.J. Masonry and Peoria Roofing, claimants have argued for the higher weekly wage. However, in this McDaneld case, the court points out: *In both D.J. Masonry and Peoria Roofing, the claimants introduced evidence of the exact number of days they worked during the previous year. From that number, the Commission could properly determine the total number of weeks the claimants actually worked and use that figure as the denominator in calculating the claimants' average weekly wages.*

FUTURE MEDICAL EXPENSE MANDATED

In Bennett Auto Rebuilders v. Industrial Commission, the Arbitrator accepted the conclusion by the claimant's treating physician that the claimant required surgery. As a result, the arbitrator ordered the employer to provide written authorization for claimant to undergo such surgical procedure. The

Commission affirmed.

The employer argued that the Commission's order requiring it to provide written authorization for claimant to undergo such surgical procedure, directly contradicted the court's decision in the Plantation case.

In Plantation, the Commission had also ordered the employer to 1) provide written authorization to the surgeon and 2) also to pay all reasonable and necessary bills related to the surgery. The appellate court eliminated only that portion of the Commission's directive that the employer provide written authorization for the surgery. In doing so, the court noted "that such written authorization would leave the employer with no recourse to challenge the reasonableness of the cost of surgery."

The appellate court, however, distinguished Bennett from Plantation and permitted the directive to the employer to provide the surgery, stating:

> *Our holding in Plantation, however, was based upon facts distinguishable from the instant case. Plantation involved a post-arbitration petition under section 8(a) of the Act, and the request for surgery was made in a supplemental proceeding to the Commission. All of the issues presented in Plantation had been resolved, and the claimant received a permanency award. The instant matter, on the other hand, involved a 19(b) arbitration hearing, and the issues regarding further TTD benefits or permanency remained open for determination in subsequent proceedings. Therefore, the opportunity to challenge the reasonableness of the cost of the surgery in subsequent hearings is available to the employer.*
>
> *In light of the fact that Plantation is distinguishable from the instant case, we find that in this matter the Commission's directive to the employer to provide written authorization for Dr. Miz's prescribed surgery was proper.*

EDITOR'S NOTE: Keep in mind that Plantation referred to a post arbitration hearing and Bennett to a pending arbitration case. Bennett now provides the basis for the Commission directing the employer to supply a written authorization for surgery, even before it has any information as to the cost of the surgery. In the customary arbitration case, even after the employer supplies the authorization, it can require proof as to the reasonableness of the cost.

EMPLOYER'S CIVIL ACTION FOR FRAUD AGAINST EMPLOYEE BARRED BECAUSE EMPLOYER FAILED TO SEEK TIMELY ADMINISTRATIVE REVIEW OF ARBITRATOR'S DECISION.

Riverdale Industries, Inc. v. Lawrence Malloy, involved a lawsuit by the employer against a former employee based on fraud. The employer sought to vacate as fraudulent a workers' compensation award granted by the Illinois Industrial Commission. The court granted the employee's Motion to Dismiss the Complaint, on the basis that the action was barred by *res judicata* since the employer failed to seek timely administrative review of the Commission's decision.

The employee had filed a claim with the Commission alleging a work-related back injury. During the arbitration proceedings, the employer attempted to introduce a videotape that allegedly showed the employee participating in vigorous activities during a camping trip. Unfortunately for the employer, the investigator who had recorded the videotape footage could not be located and, consequently, the videotape could not be introduced into evidence. As a result, the employee received an award and the employer never filed a review.

Approximately two years later, the employer sued the employee because it had now found the investigator. It argued that the videotape was proof that the employee had fraudulently obtained workers' compensation, which the employer had not been able to contest because of the investigator's disappearance. The employee contended that the employer knew of the alleged fraud at the hearing and had waived its right to pursue an action now.

Section 19(f) of the Act provides in pertinent part:

> *The decision of the Commission acting within its powers, according to the provisions of paragraph (e) of this Section shall, in the absence of fraud, be*

conclusive unless reviewed as in this paragraph hereinafter provided.

The employer relied on Roadside Auto Body, Inc. v. Miller, where the court had vacated a workers' compensation settlement procured by fraud. However, in Roadside, at the time of the settlement agreement, the employer did not learn that the employee had fabricated his claim until after the settlement was approved by the Commission and the fraud was the basis for the settlement.

> *(The Employer) argues that (the employee) committed fraud when he testified falsely about his activities on a 1991 camping trip in the hearing before the arbitrator. However, at the time of the hearing, plaintiff had in its possession alleged videotaped proof of (the employee's) fraud but was unable to procure a means for the tape's admission due to the absence of the foundational witness, i.e., the private investigator. (The employer's) argument that its inability to locate the private investigator for approximately 1½ years following the hearing is unavailing in order to establish fraud at this time. (The employer) had the opportunity to present this evidence in 1996 but was ill-prepared to do so. The facts of this case are distinguishable from Roadside; therefore, we find that this exception for fraud is inapplicable.*

EDITOR'S NOTE: The fraud suit involved the same parties and the same subject matter as the compensation claim. The employer had failed to prepare his case for the Industrial Commission hearing at a time when he, the employer, knew the facts. As a result, the same set of facts could not be subject to a retrial.

WAITRESS LEAVING WORK INCREASED THE RISK OF HER EMPLOYMENT - COMPENSATION DENIED.

In Beulah Dodson v. Industrial Commission, the appellate court denied compensation to a waitress who sustained a fall in the company parking area. Beulah Dodson worked for the Meadow Woods Country Club as a waitress and cocktail server. On March 23, 1996, she finished her shift late in the afternoon, about 30 minutes later than usual. She clocked out and exited the clubhouse through the employee exit. After proceeding down several steps of the concrete sidewalk leading to the employee parking area, she left the sidewalk and walked across a grassy slope to reach the driver's side of her car. The stairs and sidewalk were in good condition but Ms. Dodson's walk across the grass, represented the most direct route to her car door. While walking on the sloping, grassy path, Ms. Dodson fell backwards and broke her ankle. The court held that the injury arose "in the course of" but did not "arise out of" the employment. With reference to the course of employment, the court noted that injuries that occur on an employer's premises within a reasonable time before and after work, are generally deemed to arise out of and in the course of the employment. Ms. Dodson's factual situation would qualify. The court stated:

> *Claimant had just clocked out from work, had exited through the properly designated door, and was walking to her car parked in the employee's parking lot when she fell and injured herself. Clearly claimant's injuries were incurred within a reasonable time after leaving work and were incurred on employer's premises. Thus, claimant's injuries were sustained in the course of her employment.*

However, the court, in denying compensation, concluded that Ms. Dodson's injuries did not "arise out of" her employment, stating:

> *Whether an employee's injuries "arose out of" the employment may be determined under two different approaches. First, an injury arises out of the employment where its origin stems from a risk connected with, or incidental to, the employment. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. Second, an injury arises out of the employment where it is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment. Under either approach, an injury does not arise out of the employment where an employee voluntarily exposes himself or herself to an unnecessary personal danger solely for his own convenience.*

The court relied on the Hatfill case where the employee was en route to his car parked in the employee parking lot, but instead of using walkways located 50 feet to his left and right, he took a shortcut by jumping across some water that had accumulated at the foot of a five foot incline leading to the parking lot's upper level. The court stated:

> *[T]he Commission could have inferred that the claimant's injuries resulted from a personal risk assumed by the claimant. While the claimant's injuries were incurred upon the employer's premises and were incurred within a reasonable time after leaving his work duties, nevertheless, it is apparent that the claimant's injuries occurred while he was engaged in an activity which only benefitted himself and not his employer.*

Finally, Ms. Dodson contended that her employer was aware of the fact that the employees often walked across this grassy slope and never attempted to stop it. The court pointed out that employer acquiescence alone cannot convert a personal risk into an employment risk, stating:

> *To accept claimant's argument would require employer to make the grassy slope safe for pedestrian use even though employer already provided a safe route to the parking lot. Furthermore, if other employees chose different paths, employer would be required to make these routes safe as well. The result would amount to the tail wagging the dog. Employees rather than employer would dictate ingress and egress routes, thus allowing the individual whim of each employee to be the impetus for establishing multiple new paths.*

EDITOR'S NOTE: This decision is consistent with prior case law to the effect that an employee who unnecessarily increases the risk of his employment is not entitled to compensation.

EMPLOYER HELD RESPONSIBLE FOR WAGE DIFFERENTIAL EVEN THOUGH PRESENT WAGE REFLECTED LITTLE OR NO DIFFERENTIAL.

In Marianne Smith v. Industrial Commission, the claimant, a security supervisory officer, sustained a significant injury to her right shoulder on March 26, 1972. That position required her to pass an annual physical agility and weaponry test and paid an hourly rate of $14.70. After several surgical procedures, the claimant was physically unable to perform her duties as a security supervisory officer. On June 25, 1995, the employer offered and the claimant accepted the less strenuous position of a senior watch person at a $9.75 hourly rate. For no apparent reason, during March of 1996, the claimant received three raises so that her earnings now reached $15.00 per hour.

The arbitrator concluded that *[i]t is apparent ... that the action of the Respondent in artificially raising Petitioner’s wage ... from $9.75 to $15.00 per hour was a sham and transparent device to avoid the effect of a 8(d) 1 finding. To permit an employer indulging in such conduct would wrongfully deprive an injured employee of an 8(d) 1 remedy ....* The Commission and the circuit court reversed the arbitrator and awarded 30% loss of a body. The appellate court reinstated the arbitrator’s award and held that a wage differential award was appropriate, stating:

> *Specifically, claimant focuses on the term “is earning or is able to earn,” and asserts that the $15.00 per hour that she was being paid at the time of hearing was not what she was earning or was able to earn. Claimant refers to the definition of “earn” found in Black’s Law Dictionary, pg. 456 (5th ed. 1979) that states “[t]o acquire by labor, service or performance. [Citation.] To merit or deserve.” Claimant submits that to artificially raise wages, as the employer did here, above what is normally paid for such services are not “earned” based on her “labor, service or performance.” We agree.*
>
> *Further, claimant notes that the definition of “earning capacity” states, inter alia, that the “[t]erm does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained, but refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of*

earning." Black's Law Dictionary, pg. 456 (5th ed. 1979).

EDITOR'S NOTE: Respondent are often faced with situations where the employee deliberately accepts a low wage position in order to increase the wage differential award. It would be well to remember the court's language which indicates that "earning capacity" does not necessarily mean the "actual earnings" but refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of earning.

MISLEADING STATEMENTS MADE TO CLAIMANT YEARS PRIOR TO EXPIRATION OF LIMITATIONS PERIOD HELD EMPLOYER NOT ESTOPPED FROM ASSERTING LIMITATIONS DEFENSE.

In Beaudette v. Industrial Commission, the court found that the employer would be estopped from using a limitations defense only when the misleading statements were made reasonably close to the expiration of the limitations period. When the misleading statement was made nearly two years prior, the claimant could not overcome the limitations defense.

The chronology of events is as follows:

04/23/90 Injury to right arm resulting in TTD benefits being paid until date of death. During this time, employer's agents discussed a possible settlement after medical treatment was concluded.

01/18/92 Employee dies and within one week, the widow has several communications with the employer's agents who advised that no further claim exists.

11/03/94 The widow filed a death claim which the Industrial Commission dismissed because the application was not filed within two years, not from the last payment of compensation, but from the misleading statement on January 25, 1992, which was one week after the date of death.

The appellate court distinguished cases where the misleading statements had been made weeks or a few months prior to the expiration of the limitations period. The court stated:

As stated above, section 6(d) establishes a period of limitations of three years from the date of the accident. This period expired on April 22, 1993. However, section 6(d) also provides a period of limitations of two years from the date of last payment of compensation, where any has been paid. The last compensation was paid January 18, 1992. At the time of (the employer's) misleading statements (around January 25, 1992), at most one week of the two-year period has passed. The employer engaged in no further misleading conduct. There is nothing in the appellate record to indicate why (the widow) allowed the original statute of limitations to expire before investigating and filing a claim.

EDITOR'S NOTE: The filing deadlines are set in Section 6(d) of the Act, which has two somewhat inconsistent paragraphs. The court relied on this provision:

In any case other than one where the injury was caused by exposure to radiological materials or equipment or asbestos unless the application for compensation is filed within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred.
The limitations period, measured from the date of injury, expired on April 22, 1993. The limitations period measured from the last day of compensation expired on January 17, 1994. (The widow) did not file this claim until November 3, 1994.

However, that same section has an almost identical provision which states:

If in any case except one where the injury was caused by exposure to radiological materials or equipment or asbestos, the accidental injury results in death application for compensation for death may be filed with the Commission within 3

years after the date of death where no compensation has been paid or within 2 years after the date of the last payment of compensation where any has been paid, whichever shall be later, but not thereafter.

Since this is a death case where the filing occurred less than three years after the date of death, why did not the three-year provision apply? The court made no reference to this paragraph and may have felt it inapplicable because compensation was paid for more than a year. But, that compensation was paid to the employee for his injury case and not to the widow whose right of action did not accrue until the date of death.

ANOTHER ATTEMPT TO GET ILLINOIS RATHER THAN INDIANA JURISDICTION.

By: Mark Matranga

As long as Illinois workers' compensation benefits are significantly greater than those of Indiana, employees will attempt to obtain Illinois, rather than Indiana benefits. Illinois jurisdiction can be obtained by showing that the contract of hire became effective in Illinois. The jurisdiction is determined by the location where the last act was performed necessary to make the contract valid. The Indiana employers contend that the hiring did not take place until the employee arrived at the job site.

In the Correct Construction Company case, the claimant was home in Illinois when the union business agent from the Hammond, Indiana hiring hall contacted him regarding an available job at Correct, with the job site located near Whiting, Indiana. Claimant informed the business agent that he would accept the position and it was his claim that his acceptance in Illinois constituted an Illinois contract. Upon arriving at the job site, the following day, the claimant was given an employment application and tax forms to complete and also provided Correct with his drug screening card.

The hiring hall agreement in effect between the parties provided that employers obtain all employees by requesting the union hiring hall to refer prospects. It also provided that the employer shall have sole and exclusive responsibility for hiring and to accept or reject persons referred for employment. Where a prospective employee was rejected, he was not entitled to receive show-up pay. The arbitrator concluded that the last act necessary for contract formation was claimant's decision to accept or reject the offer of employment when he informed the hiring hall he would accept Correct's offer. The Industrial Commission affirmed the arbitrator.

The appellate court reversed, citing the hiring hall agreement which established that the union was the exclusive referral agent as opposed to the exclusive hiring agent for Correct. The agreement required Correct to seek all prospective employees from the union but not to hire whomever was referred; Correct retained the exclusive right to accept or reject those referred. Therefore, the last act necessary to form a valid contract did not occur when claimant informed the hiring hall he would accept the employment referral.

EDITOR'S NOTE: In a somewhat similar case, the 1994 Hunter Corporation case had found Illinois jurisdiction on the basis that the union was the exclusive hiring agent. In Hunter, however, the employee received show-up pay and filled out a sign-up form, as opposed to a job application. In our opinion, the reasoning in Correct Construction presents the better view. As long as employers require prospects to sign several documents, including the all-important employment application, upon arriving at a job site, a strong argument can be made that the last act necessary to form a contract of hire is the manifestation of the desire to accept the offer through the union hall by arriving at the job site and completing necessary documents for employment.

ADA Corner

By Jason Coggins

AT THE CROSSROADS OF THE ADA, FMLA, AND WORKERS' COMPENSATION ACTS: RETURN-TO-WORK FITNESS EXAMS.

An inherent conflict exists between workers' compensation statutes, the Family and Medical Leave Act ("FMLA"), and the ADA regarding their treatment of medical exams. Although the Workers' Compensation Act and the FMLA permit employers to obtain medical certifications, the ADA generally

prohibits an employer from requiring a medical exam or asking disability-related questions. Suppose a disabled employee refuses to submit to a fitness-for-duty medical exam claiming that such a requirement violates the ADA?

The court stated the sense of the matter in Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997). In Porter, the plaintiff injured his back and filed a workers' compensation claim which was denied. Porter wanted to return to work after taking a leave of absence and had his doctor's authorization to return to work safely without limitations. But the company was not satisfied because Porter had recently had back surgery and encountered difficulties performing the lifting requirements of his job even before the back surgery. The employer refused to re-hire the plaintiff until he submitted to a functional capacity evaluation at his own expense. The plaintiff never undertook the exam and was fired. Plaintiff brought suit under the ADA, the FMLA, and the common law tort of retaliatory discharge for exercising workers' compensation rights. He failed on all counts.

The court held that the employer did not violate the ADA for requiring the fitness-for-duty medical exam nor for firing the employee for refusing the exam. The court admitted that the ADA generally prohibits an employer from requiring a medical exam or inquiring as to a worker's disability, but recognized an exception: when it is shown to be job-related and consistent with business necessity. The court found that this exception allows employers to require fitness for duty exams when there is a need to determine whether an employee is still able to perform the essential functions of his job. That is exactly what the employer was doing in this case, thus qualifying for the exception. The employer was entitled to determine if the plaintiff could still perform the lifting duties in light of his previous problems and recent surgery.

An employer will not be liable in most cases under the ADA for requiring a return-to-work fitness medical exam as long as it is needed to determine if the employee can perform the essential functions of the position. An employer should still proceed carefully in cases where the employee's work injury may constitute a disability, especially where a medical exam is not business related or necessary for job assessment. Moreover, requiring additional medical assessments in addition to the employee's doctor's authorization can violate the Family and Medical Leave Act where the employee is returning from family or medical leave. See Routes v. Henderson, 1999 WL 604634 (S.D.Ind. 1999). Thus, it is always wise to take the preventative measure of consulting an attorney before deciding whether to require medical certification in light of the conflicting interrelationship of the ADA, FMLA, and workers' compensation statutes.

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