

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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HOSPITAL RECORD SUBPOENA DOES NOT ENTITLE HOSPITAL TO CHARGE PER-PAGE COPY FEES.

One of the most controversial issues concerning subpoenas for hospital and other records was the policy of certain hospitals to demand excessive fees for preparing copies of the requested documents. In *Clayton v. Ingalls Memorial Hospital*, the claimant issued a subpoena, accompanied by a \$20 per day witness fee and a 20¢ per mile travel fee. The subpoena was returnable before an arbitrator on the status call date and not the date set for hearing on the case. The claimant advised the hospital that it could comply with the subpoena by sending copies of the documents. Accompanying the subpoena, was a \$25 check made payable to the hospital for the statutory witness and mileage fees.

Midwest Medical Records Associates advised that the claimant could review his medical records at the hospital or photocopies would be provided for a fee. The copying charges for the requested documents amounted to \$203.25 (189 @ \$1.00 per page, \$17 base rate, \$20.75 postage and handling, less the \$25 check previously tendered). Instead of making this payment, the claimant presented a petition to enforce the subpoena. The arbitrator entered an order permitting the claimant to enforce the subpoena in the circuit court. The circuit court judge ordered the hospital to comply with the subpoena and found that no fees, other than those provided by the Workers' Compensation Act, should be demanded, those being the witness and travel fees.

Section 16 provides in pertinent part, as follows:

The Commission, or any member thereof, or any Arbitrator designated by the Commission, shall on written request of either party to the dispute, issue subpoenas for the attendance of such witnesses and the production of such books, papers, records

and documents as shall be designated in the applications, and the parties applying for such subpoena shall advance the officer and witness fees provided for in civil actions pending in circuit courts of this State.

The court felt that the legislature clearly intended that Section 16 would be read in conjunction with Section 4.3 of the Circuit Court's Act, which governs the fees payable to witnesses who are compelled to attend depositions or trials in Illinois circuit courts.

EDITOR'S NOTE: Some problems remain. The hospital might have successfully moved to quash the subpoena since the records were not subpoenaed for a definite hearing date. In addition, it only authorizes the records to be brought in for the hearing and does not provide a method to obtain copies where the subpoena requires the records to be delivered to a party's selected copy service.

Hopefully, reason will prevail. The hospital's selected record copy service should charge only a rate competitive with other photocopy companies and deliver copies even if the records are not subpoenaed to the Commission on a hearing date.

**PENALTIES AWARDED FOR A
PREMATURE TERMINATION OF
COMPENSATION TO COLLEGE
STUDENT INJURED DURING SUMMER
EMPLOYMENT, EVEN THOUGH
CLAIMANT HAD RETURNED TO COLLEGE.**

In Mobil Oil Corporation v. Industrial Commission, the appellate court awarded penalties for nonpayment of TTD, even though the employer contended that the claimant had reached his maximum medical improvement and had also returned to college. The case also allowed an additional award for a percentage of a man for an injury to a left pelvic fracture on the side where the claimant had received an award for the total loss of the leg because of a below-the-knee amputation.

On June 16, 1992, Brad Clodi, was struck by a forklift which led to a below-the-knee amputation of his left leg. In addition, the claimant required an internal fixation of an acetabular and left iliac wing fractures. While in the hospital, he was also treated for post-traumatic stress disorder.

Subsequent to his hospital discharge, the claimant was treated by Dr. Pinzur for the amputation

and Dr. Dobozi for the left hip. By August 18, 1992, Dr. Pinzur stated that claimant was walking with a prosthesis but his treatment for the leg and hip continued. Nevertheless, on August 25, 1992, only ten weeks after the accident, respondent informed claimant that "inasmuch as you have been released by your doctors and have returned to school, your temporary total disability benefits will be suspended." Respondent then began PPD payments for the loss of the left leg.

In subsequent reports, the treating physicians reported that the claimant was undergoing physical therapy for his leg. On March 25, 1993, seven months after the TTD benefits were terminated, the treating physician advised that the claimant should not return to work until one year after the injury date of June 16, 1992.

Relying on the treating doctor's reports, the claimant's attorney requested TTD benefits through the one year anniversary of the accident, but respondent's attorney refused because 1) the claimant was a seasonal employee who had planned to return to college following his summer, 1992 employment; and 2) the claimant did return to college as scheduled. After receiving another similar request, the respondent stated that the matter could only be resolved through litigation. Unfortunately for the respondent, it was resolved by the court's imposition of penalties and attorney's fees.

Respondent also pointed out that when the claimant returned to college, he performed some light work which would indicate that he was not totally disabled. The court refused to accept that argument, stating:

We agree with the arbitrator that the type of minimal activity engaged in by claimant, attending classes and working 10 hours per week in his college's wellness center, is insufficient to eliminate a finding of TTD given the extent of claimant's injury. Moreover, there is no case law supporting a theory that attending school in and of itself disqualifies an injured worker from receiving TTD benefits. Indeed, we reject such a proposition. Many industrially injured individuals realize that they may not be able to return to their original line of work. We do not want to discourage these

individuals from furthering their education when they have not reached maximum medical improvement and they have taken the initiative of enrolling in school.

A one-judge dissent concluded that the Commission was correct when it denied the additional TTD and penalties, stating:

[Claimant] needed 16 more credit hours and planned to work at Mobil until August 25, 1992, and return to college. There is no question that the job was temporary summer employment.

When claimant returned to school he removed himself from the job market. This is the basis for both employer's termination of TTD and the Commission decision to deny penalties.

EDITOR'S NOTE: Quite commonly, a summer employee who returns to school, will find that his TTD benefits are terminated even though his condition has not reached maximum improvement. The majority opinion in the Mobil Oil case would suggest that those benefits should continue until the employee completes active treatment or is given a work release. This Mobil Oil case is also significant because the claimant actually obtained work at college, although his activity was sedentary and limited to ten hours per week.

EMPLOYER'S JOB OFFER HELD A "SHAM"; PERMANENT TOTAL DISABILITY AWARD AFFIRMED.

In the October, 1999 Newsletter, we reported on the Smith v. Industrial Commission case where the employer was held responsible for a wage differential, even though the present wage reflected little or no differential. In that case, the employee had received a very remarkable and unusual hourly rate increase from \$9.75 to \$15, for no apparent reason. The court held that the artificial increase "was a sham and transparent device to avoid the effect of a Section 8(d)1 finding."

In Reliance Elevator Company v. Industrial Commission, decided by the appellate court just two months later, the court restated its objection to this type of conduct. In the Reliance case, Louis Todaro, an elevator mechanic, was released to return to work,

with certain restrictions, including no excessive bending and no lifting over 30-50 pounds. Vocational rehabilitation services were provided to Todaro, but he was told that his employer had no position within his restrictions. Todaro continued his job search activities, having contacted 3,600 potential employers without any position being offered to him. Edward Steffan, a rehabilitation counselor, concluded that, given Todaro's age, education, work history and experience, level of transferrable skills, and in light of his extensive but unsuccessful job search, Todaro was not placeable. Steffan further opined that given Todaro's age, then 56, he was not a candidate for retraining. On July 24, 1995, three years after the accident, almost two years after Todaro's limited release to work, and after the arbitration hearing had begun, Reliance offered Todaro a job that provided full pay and benefits. Todaro did not accept the position. The position was non-union and normally compensated at \$10 per hour, yet Reliance was offering it to Todaro at full union wages and benefits, a compensation package in excess of \$44 per hour. The Commission concluded that there existed no business or economic justification for this, except for the avoidance of liability.

Initially, the court addressed the question of disability. Reliance argued that no medical expert concluded that Todaro was permanently and totally disabled, but rather that he could return to some form of light physical work. The court concluded that Todaro fell into the odd-lot category because he demonstrated that he could not perform any services except those for which no reasonable stable labor market existed. At that point, the burden would shift to the employer to show that some kind of suitable work was regularly and continuously available to the claimant. The court held that Reliance failed that test, particularly since Todaro contacted Reliance on a regular basis seeking employment, but was not offered anything until the arbitration hearings began. With reference to that job offer, the court stated:

With respect to the job offer made by Reliance, the record overwhelmingly supports the Commission's determination that it was a sham and designed to avoid liability under the Act. It was not offered to Todaro until after the initial arbitration hearing, and was offered at a rate of compensation far higher than was economically justifiable. Reliance's

repeated refusal to offer Todaro any employment prior to this offer, as well as RCI's records clearly demonstrate that Reliance had no intention of bringing Todaro back to work. Reliance maintains that LaPorte testified without contradiction that the deliveryman job had only become available shortly before it was offered to Todaro and that he turned down a bona fide offer. ... Reviewing the record, it is clear that the manifest weight of the evidence supports the Commission's determination that the job offer was a sham. The Commission properly gave no consideration to this "offer" in reaching its conclusion that Todaro was permanently and totally disabled because it was not a bona fide offer, but rather was designed to circumvent Reliance's responsibility under the Act. Such practice must be strongly discouraged and even condemned. Employers must not be allowed to defeat an injured employee's entitlement to a disability award by making sham job offers. To countenance such practice would severely jeopardize injured workers' abilities to obtain relief and would undermine the spirit and purposes of the Act.

COMPENSATION ALLOWED TO CLAIMANT INJURED BY A PASSING CAR WHILE CROSSING THE ROAD TO HIS HOME AFTER ALIGHTING FROM COMPANY BUS.

In Becker v. Industrial Commission, the appellate court recently had occasion to affirm a compensation award to a 15 year old high school student who had completed work and had sustained an injury after alighting from the company bus. The decision discusses issues such as the use of company transportation, the extension of the employment premises and the importance of the age of the claimant.

Randall Russell, a 15 year old high school student, was transported by a company bus from his home at 4:00 p.m. and was taken to the job site, where he worked until approximately 7:00 p.m. He was transported home by the company bus and exited across the street from his home. After alighting from the bus, he walked five to ten feet ahead of the bus to retrieve a newspaper from the mailbox. He then

began to cross the street in front of the still standing bus when a car coming around the bus struck him.

The court found the case compensable for the following reasons:

1. The employer benefitted from providing transportation in that he was able to employ persons not eligible to drive to the workplace.
2. Because the claimant crossed the highway in front of the bus, he was exposed to a hazardous condition because both his view and the view of the automobile driver could have been obstructed. The employer could have dropped him off in his driveway or could have dropped him off and driven away.
3. Randall's going to the mailbox, an act that could not have taken more than a minute, was not a deviation that could remove him from the course of his employment or vitiate the hazardous condition that was created.

EDITOR'S NOTE: No reference was made in the decision to a violation of the Child Labor Act and perhaps a work permit had been obtained. The court also noted that the bus may have been partially on the highway, although the view may have been obstructed even if the bus was completely on the shoulder.

***VALIDITY OF SETTLEMENT
CONTRACT AFFIRMED.**

Because the validity of a settlement contract is so seldom subject to attack, the parties are sometimes careless about the terminology utilized in these contracts. The Carrozza Plumbing v. Industrial Commission case emphasizes the importance of that terminology. The sequence of events is as follows:

1. On February 7, 1989, Carrozza sustained a work-related automobile accident with an uninsured motorist in which he was struck in the chest.
2. On November 25, 1989, Carrozza died at work.
3. His widow filed an uninsured motorist claim, as well as a workers' compensation claim, alleging that the accident of February 7, 1989 led to the death.
4. On January 31, 1992, more than two years after the death, the widow settled both cases and accepted a \$1.00 settlement contract in the workers' compensation claim relieving the employer of all liability for injury, including death, stemming from the February 7, 1989 automobile accident. A substantial amount was paid in the uninsured motorist's claim.
5. On February 18, 1992, the widow filed another workers' compensation claim alleging that Carrozza's death was caused by his work-related activity on November 25, 1989, his last day of

employment.

6. Prior to the original settlement, the parties had a medical report stating that the automobile accident had caused myocardial damage. After Carrozza's death, several medical experts stated that it was highly unlikely that the automobile accident had any effect.

The settlement contract provided in part as follows:

Petitioner agrees to settle out and release forever all claims which she may have against Respondent under the Workers' Compensation Act for accidental injuries, medical expenses and/or permanent disability and/or death, which stem from an accident which her husband sustained on February 7, 1989, which accident allegedly arose out of and in the course of his employment by Respondent.

After a hearing on the second workers' compensation claim, the arbitrator denied recovery but the Commission reversed and found that Carrozza had died as a result of the activities of his employment on his last day of work, November 25, 1989, and awarded twenty years of benefits, with no credit for the payment made in the under-insured motorist claim.

By now, as you might imagine, the respondent had become very nervous. The widow was apparently on her way to making a double recovery for a single death. Fortunately, for the respondent, the appellate court reversed the Commission and found that the settlement contract had terminated

any claim the widow might have had as a result of the death. The court stated:

The settlement agreement clearly determines the February 7, 1989, accident caused John's death in November 1989. On the settlement order, John's date of death was listed beneath the accident date of February 7, 1989. While the nature of the injury was listed on the settlement order as "bruises," the injury was listed as fatal, and the settlement releases J & R from liability for injuries including death. The workers' compensation settlement order explicitly provides that part of the consideration for release of the workers' compensation claim was the money received in settlement of the uninsured motorist claim.

The court then pointed out the importance of the terminology in settlement contracts generally, stating:

We stress the limited nature of our holding. A settlement award is res judicata as to causation, but not as to the nature and extent of the disability. Had John been injured, but not killed, at the time of the first settlement, and the settlement did not, as a matter of contract, address future complications arising from the same accident, the settlement would not bar a later claim for his death. Also, absent language in the settlement agreement to the contrary, a claim for an injury unrelated to the one already settled would not be barred, even if the injury occurred

prior to the settlement.

EDITOR'S NOTE: Claims representatives are cautioned about the terminology of settlement contracts which are prepared by petitioner's attorneys. We are aware of several cases where the terminology seems to close out only part of the claim. One case in particular involves an injury to both knees, with the original treatment to the right knee being minimal but with the total replacement of the left knee. The terms of the settlement contract purported to close out the claim for the left leg only. Thereafter, the right knee worsened, leading to the total right knee replacement. The petitioner filed a new application with the same accident date and is now claiming that the claim for the right knee was never closed out. Obviously, the matter is in dispute, but the proper terminology in the settlement contract would have foreclosed any possibility that such an additional claim might be made.

**COMPENSATION DENIED FOR
PSYCHOLOGICAL INJURY DUE
TO ORDINARY, ON-THE-JOB STRESS,
COUPLED WITH STRESSES OF
PERSONAL LIFE.**

In Skidis v. Industrial Commission, the appellate court denied benefits for stress-induced anxiety, heart arrhythmia and headaches, allegedly suffered by Glenda Skidis while working as a dispatcher for the Fairview Heights Police Department. Claimant, a 61 year old police dispatcher for Fairview Heights from January, 1974 through November 1991, began having problems at work in 1988. When first seeking treatment, the claimant described the work load and demands of productivity caused by the expansion of the police department. Admittedly, she had experienced several personal stressful incidents, such as her son joining the Marines, her ex-husband dying from cancer, her fiancé dying of a heart attack and concern about a developing physical deterioration, causing her to feel like a prisoner and be socially withdrawn. Her

psychiatrist found the claimant totally disabled because of job-related stress, because she had been subjected to derogatory racial and sexual slurs and had been terminated from her employment. The respondent's examining physician found no definable psychiatric illness, beside possible paranoia, which he concluded was not job related.

The claimant then attempted to show that the derogatory slurs and the involuntary termination were, in effect, sufficiently sudden and severe emotional shocks within the language of Pathfinder. The court disagreed, stating that these were not sufficient events to come within the confines of Pathfinder. (In Pathfinder, the employee suffered shock from seeing the amputation of a hand of a fellow employee.)

Finally, the claimant raised the argument that it was really a "physical-mental" rather than a "mental-mental" case because of the manifestation of injury in the form of an arrhythmia. The court disagreed, stating:

The presence of a physical trauma, not an employee's subjective physical reaction to some nonphysical incident, determines whether a case qualified as a "physical-mental" case. Except for claimant's unsubstantiated testimony that she suffered a heart arrhythmia on several occasions, no medical evidence in this record supports that contention. We reject claimant's contention.

EDITOR'S NOTE: This is another attempt to obtain compensation for a "mental-mental" case, either by attempting to make it a "physical-mental" case or by claimant an emotional shock as in Pathfinder.

VIOLATION OF A SAFETY RULE LEADS TO DENIAL OF COMPENSATION.

Very few workers' compensation cases are accepted by the Supreme Court. Recently, that court did accept two of these cases, one of which was affirmed in a close decision and the other modified.

In Saunders v. Industrial Commission, the appellate court, in a three to two decision, had denied compensation to a claimant who was injured getting off a forklift, after riding as a passenger in contravention of a company policy (See, January,

1999 Newsletter). The supreme court, in a four to three decision, affirmed the denial of compensation, stating that the claimant had "engaged in a hazardous method of travel, the sole purpose of which was Saunders' personal convenience."

EDITOR'S NOTE: Not only must the employer prove the violation of a safety rule, but it must also establish the enforcement of the rule in practice.

AN EMPLOYEE RECEIVING PERMANENT TOTAL DISABILITY BENEFITS MUST RESPOND TO AN IME REQUEST EVEN IF NO RECONSIDERATION REQUEST IS SUBMITTED UNDER SECTION 8(f).

In King v. Industrial Commission, the appellate court held that a petitioner who was receiving a PTD award need not respond to an IME request until respondent filed a Section 8(f) petition, which would allege that the petitioner could now return to work and, on that basis, the PTD award should be modified (See, January, 1999 Newsletter). On appeal, the supreme court disagreed stating that the respondent could request the IME without filing an 8(f) petition as the results of the IME could provide the necessary information for the respondent to request a change. Interestingly enough, the court stated that the respondent need not prove that the petitioner has returned to work but only that he is able to do so.

EDITOR'S NOTE: Since the respondent had continued to pay TTD benefits, even after the employee's refusal to appear for an IME, the court did not decide whether the respondent could suspend benefits if the petitioner failed to appear.

WORKERS' COMPENSATION LIEN CANNOT ATTACH TO EMPLOYEE'S LEGAL MALPRACTICE CLAIM, BUT THE LIEN CAN REDUCE THE EMPLOYEE'S CLAIM FOR DAMAGES AGAINST HIS ATTORNEY.

As reported in our January, 1999 Newsletter, the case of Williams v. Katz had permitted the employer to subrogate in the employee's legal malpractice claim. However, two more recent appellate decisions, Woodward v. Pratt and Eastman v. Messner, have denied the right of the employer to pursue such a subrogation claim. It is clear, therefore, that:

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 the third party who injured the employee.

Does the amount of the employee's compensation recovery reduce the total amount of the damages recoverable in the legal malpractice claim? This issue was addressed by the Supreme Court in the Eastman case, a decision filed in December, 1999. The facts are as follows.

Dennis Eastman sustained serious injuries while employed by Meyer Material Company, with the facts providing the basis of a negligence claim against a third party, Vulcan Materials Company. Gates McDonald, as workers' compensation insurance administrator for Meyer Material Company, paid a total of \$248,218.66, in workers' compensation benefits to Eastman. Eastman subsequently filed a legal malpractice case against his attorney, Steven Messner, because Messner allegedly failed to file a personal injury action within the limitations period. Gates McDonald filed a petition to intervene in the legal malpractice case on behalf of Meyer Material. The circuit court denied the petition to intervene and Gates McDonald appealed.

The most significant argument made by Gates McDonald was that the underlying basis of the employer's right to subrogation is a prevention of an unjust enrichment on the part of the employee in the form of a double recovery for the same injury. In response, the court noted:

There is a difference between the damages which an employee may initially collect from the third-party tortfeasor and the damages which the employee is ultimately entitled to keep. ... Because the damages the employee would be legally entitled to retain in the underlying tort action equals the total damage award reduced by the amount of the workers' compensation benefits paid, there would be no double recovery in a legal malpractice suit. The legal malpractice plaintiff is entitled to recover only the property interest lost as a result of the alleged malpractice, an

amount necessarily limited to the net amount the plaintiff would have ultimately recovered in the underlying tort case.

The court gave a hypothetical example to illustrate why a double recovery would not occur in a legal malpractice case. If an employee filed a legal malpractice case against his own attorney and collected \$100,000, and if that same employee had previously received \$80,000 in workers' compensation benefits from his employer, the employee could legally retain only the excess above the workers' compensation benefits paid, or \$20,000. The court explained:

Thus, the employee's damages in the legal malpractice case would be only \$20,000 because this is the amount the employee lost as a result of the attorney's malpractice. Therefore, contrary to Gates McDonald's argument, in the absence of an employer's lien, the employee would not receive a double recovery or be unjustly enriched from the malpractice action. The employee would receive \$80,000 in workers' compensation benefits and \$20,000 in malpractice damages for a total recovery equal to his assessed damages of \$100,000.

EDITOR'S NOTE: In effect, the credit for the prior compensation benefits went to the employee's attorney with the employee receiving only the net amount he would have received if the employer's subrogation claim had been honored.

**INDEMNITY AGREEMENT IN
CONSTRUCTION CONTRACT
CONSTITUTED A WAIVER OF
KOTECKI PROTECTION - VIOLATION
OF TERMS OF INSURANCE POLICY
DEPRIVED EMPLOYER OF COVERAGE.**

By: TIMOTHY D. McMAHON

Before Kotecki v. Cyclops Welding Corp., 146 Ill.2d 155 (1991), an employer was not only responsible for payment of workers' compensation benefits but was also potentially liable for unlimited common law damages in contribution claims brought by third parties sued by its employees. Kotecki, a landmark Illinois Supreme Court decision on employer's liability, held that an employer's liability for common law damages could not exceed its workers' compensation liability. In other words, if

the value of the employee's workers' compensation claim was \$50,000, this would also be the employer's maximum liability for contribution.

The protective shield afforded employers by Kotecki is no longer absolute. In Braye v. Archer-Daniels-Midland Co., 172 Ill.2d 201 (1997), the Illinois Supreme Court found that an employer may, by contract, waive its Kotecki protection and face unlimited contribution exposure. In Braye the Court ruled that an indemnity provision in a contract between the employer/subcontractor and the general contractor constituted a waiver of the Kotecki limitation.

Since Braye was decided, there has been much debate concerning insurance coverage under a workers' compensation/employer's liability policy for an employer's potential liability for contribution damages beyond the Kotecki limitation where the employer has its waived Kotecki protection by contract. This issue was addressed in Christy-Foltz, Inc. v. Safety Mutual Casualty Corporation. In Christy-Foltz, the employer entered into a contract with the general contractor in which it agreed to indemnify the general contractor for all damages and expenses arising out of injuries to the employer's employees. The Illinois Appellate Court of The Fourth District examined the terms of the employer's employer liability policy noting that the policy, as is commonly done, specifically excluded "...any loss or claim and expenses voluntarily assumed by the employer under any contract or agreement..." Citing Braye, the court held that the employer waived the Kotecki limitation and faced unlimited contribution. The employer then claimed that its entire liability for contribution should be covered by its employer liability insurance policy. The insurer denied coverage asserting that the damages in excess of the Kotecki limitation were damages "assumed by contract" and therefore excluded from coverage. The court agreed with the insurer finding that the employer liability policy did not provide coverage for the employer's contribution liability beyond the Kotecki limitation.

The Christy-Foltz decision will be hailed by workers' compensation insurers (whose policies have similar exclusions) and criticized by employers who do not have contractual liability coverage. Employers should think twice before signing contracts with indemnity provisions before they have determined that they have insurance in place covering liability

assumed by contract.

FRANK J. WIEDNER
Editor