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GRAYMATTER RETURNS

Oliver Wendel Graymatter returned from his sabbatical leave with all of his old enthusiasm and vigor. His reading of the three recent cases concerning "employment risk" caused him some concern. "I acknowledge that the school teacher case has more of a causal connection issue than that of employment risk. But the gunshot and the stairway cases suggest the court's acceptance of the "positional risk" doctrine, which is not accepted in Illinois."

Graymatter's junior associate, Ms. Truly M. Equal, was most happy to agree with the senior partner, "I know it's always bothered you that the Commission and the courts have found "unexplained falls" compensable. You probably love the special concurring opinion in the Illinois Consolidated Telephone Company case."

"You're absolutely right," Graymatter responded, "how can an injury be said to arise out of the employment when its cause is unexplained?"

Three recent cases have involved the issue of employment risk. In the O'Fallon case, the finding of compensability is clouded somewhat by the question of minimal trauma to a pre-existing condition. The IIT Research case resembles a positional rather than an employment risk. Finally, the Illinois Consolidated Telephone Company case was found compensable for the wrong reason and a specially concurring opinion attacks the majority opinion's conclusion that all unexplained falls are compensable.

ARISING OUT OF AND IN THE COURSE OF - TEACHER IN PURSUIT OF RUNNING STUDENT

In O'Fallon School District No. #90 v. Industrial Commission, the appellate court considered

the injury claim of Karen Kenna, a sixth grade teacher, who was assigned to hall duty, thereby making her responsible for the safety of students moving through the halls. On the day of her injury, she was assigned to a particularly dangerous section where there had been problems with children running down the hall. While standing in the doorway of a classroom talking to another teacher, she noticed out of the corner of her eye a student running down the hall. She turned, twisted and began to pursue the child when she felt the pain in her low back. Although the arbitrator found that the activities did not expose her to a risk greater than that to which the general public was exposed, the decision was based somewhat on the fact that the claimant's spondylolisthesis was a non-occupational condition. The Commission initially affirmed the arbitrator's decision but was reversed by the circuit court. The employer appealed, contending that the injury did not arise out of claimant's employment. In response, the court noted:

Claimant was ordered specifically to undertake the risk of pursuing a running student. The need to turn, twist, and pursue a child, thereby stressing her back, is a risk that would not have existed but for claimant's employment obligations as hall monitor. Consequently, claimant was exposed to a risk greater than that faced by the general public.

EDITOR'S NOTE: The employer seemed more upset about the aggravation of the pre-existing back condition allegedly resulting from the claimant turning her back and not doing much else. Actually, stopping a running student in the hallway would appear to be an increased risk.

ARISING OUT OF AND IN THE COURSE OF - SHOT BY STRAY BULLET

In IIT Research Institute v. Industrial Commission, the appellate court considered the claim of the widow of Thomas Kaufman, who was killed by a stray bullet while working as a security guard. Kaufman worked inside the lobby at 10 West 35th Street, Chicago, fronted by a floor-to-ceiling glass window. Kaufman sat behind a desk approximately 20 feet from the window where his torso and head were exposed. Kaufman's duties included monitoring building alarms and manning the front desk. Kaufman was not required to patrol outside the building and the building was not opened to the

public.

Across the street from employer's building, south of 35th Street, are the Stateway Gardens homes. Rival gang members were disputing control of the building and several gang members began firing shots at a man who ran from the playground toward employer's building. The man was struck by a bullet but continued to run until he reached the employer's revolving door when he fell just as his hand reached the door. He died shortly thereafter. One of the bullets fired by the gang pierced a window of employer's building and struck and killed Kaufman. Initially, the court defined the three categories of risk to which an employee may be exposed: 1) employment risks which are universally compensable; 2) personal risks such as non-occupational diseases or injuries which are generally non-compensable; and, 3) neutral or street risks which include stray bullets, dog bites, lunatic attacks, lightening strikes, bombing and hurricanes. Neutral risks are compensable if the claimant is exposed to a risk of injury to an extent greater than that to which the general public is exposed.

The court concluded that the essential facts of the case were not in dispute. The court stated:

The focus then in the instant case is whether the conditions or environment of decedent's employment increased his risk of being struck by a stray bullet over that of the general public. Again, if the only basis for finding that decedent sustained injuries was the fact that his employment placed him in the position where he was struck by a bullet at that time ("but for"), then the injuries would not arise out of his employment. This would be the classic positional risk situation. However, if the injury occurred not just because of where decedent was, at that particular time, but was coupled with some factor that increased the risk of being struck by a stray bullet, then the injury is said to arise out of his employment...There is no magical shield down the center of 35th Street. According to Detective Winstead, the area south of 35th Street was the most dangerous beat in the most dangerous police district of the City of Chicago. Moreover, this already dangerous environment was heightened even more as

a result of the gang turf war over Stateway Gardens. Decedent's exposure was not simply a matter of positional risk. Clearly, the risks decedent were exposed to, including being struck by a stray bullet, by virtue of the conditions of his employment are not the same that the general public is commonly exposed to.

EDITOR'S NOTE: It is difficult to separate positional risks from increased risks. In Brady v. Ruffolo, the employee was within his employer's building when an out-of-control truck left the nearby highway and penetrated the employer's building. Despite the fact that traffic perils are considered street risks just as stray bullets, the court found that the employee was injured because of a positional risk. The major difference between the Brady and IIT cases seems to revolve around the dangerous neighborhood.

ARISING OUT OF THE EMPLOYMENT - OFFICE WORKER INJURED WHILE DESCENDING A STAIRWAY

In Illinois Consolidated Telephone Company v. Industrial Commission, Linda Budd, a 38 year old office worker, fell while descending steps between the second and first floors of the office building as she was returning from using the women's restroom. Ms. Budd was wearing high heels, some of the stair treads were worn, handrails were not present on the landing where she fell, and the stairs were alleged to be slippery. Ms. Budd testified that she did not know that she slipped on the last step or the landing itself, did not see any moisture on the floor of the stairway, nor did she see anything about her shoes that contributed to the fall. There were handrails along the stairs themselves, if not on the landing between the flights, and the size and angle of the stairs appeared normal. The Commission found the case to be compensable and the court applied the manifest weight standard, stating that an opposite conclusion was not clearly apparent. The court made a statement with which respondents would not agree, stating:

In this instance, the arbitrator concluded that the claimant sustained an unexplained fall, and the arbitrator awarded benefits because unexplained falls are compensable in Illinois.

Then it chose to decide that this matter more

closely came within the purview of the "personal-comfort doctrine," stating:

She was on employer's premises at a time when she was engaged in her employment in a place where she had a reasonable right to be. More importantly, we believe that claimant was exposed to a greater risk than the general public because she was continually forced to use stairs to seek personal comfort during her workday.

Two justices concurred with the outcome but not the majority reasoning. Their opinions provide the most lucid explanation of the law on unexplained falls. After acknowledging that because the claimant was wearing high heels, some of the stair treads were worn, handrails were not provided where claimant fell, and stairs were slippery, that the Commission could properly conclude that the claimant was exposed to a risk of injury greater than that to which the public was exposed, the dissent emphasized, however, that the majority misinterpreted the law, adding:

I cannot find any case where this panel or our supreme court has held that an injury arises out of employment solely because the fall was unexplained. To do so would necessitate adopting the positional risk doctrine:

If an employee falls while walking down the sidewalk or across a level factory floor for no discoverable reasons, the injury resembles that from stray bullets and other positional risks in this respect. The particular injury would not have happened if the employee had not been engaged upon an employment errand at the time. In a pure unexplained-fall case, there is no way in which an award can be justified as a matter of causation theory except by a recognition that this but-for reasoning satisfied the "arising" requirement. Our supreme court, however, has consistently rejected the positional risk doctrine.

At the risk of much repetition, I hope to make one point clear. Whether an injury arises out of employment is solely a

function of risk, specifically, whether the employee was exposed to a risk of injury greater than that to which the general public is exposed. The terms “explained,” “unexplained” and “idiopathic,” while useful to describe the nature of a fall, cannot accurately determine whether an injury arises out of employment. As previously discussed, some idiopathic falls arise out of employment; others do not. The same is true with explained and unexplained falls. Although employment risks always arise out of employment, whether personal risks (idiopathic falls) or neutral risks (explained or unexplained falls) arise out of employment is determined by whether the employee was exposed to a risk greater than that to which the general public is exposed. To put this another way, where conditions of employment expose the employee to a risk of injury greater than that to which the general public is exposed, the risk becomes one of employment and resulting injuries arise out of employment.

EDITOR’S NOTE: Justice McCullough, in the other specially concurring opinion, was quite brief stating:

I join in the special concurrence of Justice Rakowski. With respect to this discussion of Illinois case law concerning “unexplained falls,” I suggest the words “unexplained falls” be stricken from the workers’ compensation vocabulary.

The fact that recent decisions have stated that “unexplained falls are compensable,” is certainly contrary to common sense. If the fall is truly unexplained, how can it be shown that it arose out of the employment? Hopefully, this split decision on a very important issue will cause this case to be accepted by the supreme court.

SETTLEMENT CONTRACT BY EMPLOYEE PREVENTED WIDOW FROM FILING DEATH CLAIM ON THE SAME INJURY

In our July, 1999 Newsletter, we reported the case of Elmer Segers, a long-time coal miner with Old Ben Coal Company. Sometime after his retirement in 1979, Segers filed a disability claim against Old Ben, which claim was based on Segers’ exposure to coal and rock

dust. In 1991, Segers and Old Ben entered into a settlement contract in the lump sum of \$25,664. The agreement resolved issues concerning the extent of Segers’ injuries and health conditions, including questions of temporary total and permanent disability.

Shortly after Segers died in 1995, his widow sought death benefits. Old Ben responded by filing a Motion to Dismiss based on Section 9, which is identical for both the Compensation and Occupational Diseases Acts. The section provides as follows:

The payment of compensation in a lump sum to the employee in his or her lifetime upon order of the Commission, shall extinguish and bar all claims for compensation for death if the compensation paid in a lump sum represents a compromise of a dispute on any question other than the extent of disability.

Since the settlement contract had described a compromise of all disputed issues, Old Ben stated that “other than” in Section 9 should be construed as meaning “in addition to.” The widow argued that the term “other than” should be construed as creating an exception. Since all settlement contract terms reflect a compromise of issues other than nature and extent, Section 9 would have no further meaning.

However, the supreme court has just reversed the appellate court, thereby stabilizing the effect of Section 9, stating:

Section 9 provides that “[t]he payment of compensation in a lump sum to the employee in his lifetime upon order of the Commission, shall extinguish and bar all claims for compensation for death if the compensation paid in a lump sum represents a compromise of a dispute on any question other than the extent of disability” 820 ILCS 310/9 (West 1998). Old Ben argues that the words “other than” in section 9 mean “in addition to.” By contrast, plaintiff argues that the words “other than” mean “except.” Both Old Ben and plaintiff discuss the legislative history of section 9 and public policy surrounding the Workers’ Compensation Act and section 9 to support their interpretations of “other than”, but we believe the plain and ordinary meaning of

the words “other than” is sufficiently clear. “Other than” means “existing besides, or distinct from, that already mentioned or implied.” Oxford English Dictionary 981 (1d ed. 1989).

Both parties had conceded that the settlement agreement resolved a number of issues other than the extent of compensability. On that basis, the employee’s settlement contract would bar the widow’s subsequent claim for death benefits. (See, Seger v. Industrial Commission - Supreme Court opinion).

ATTORNEY’S FEES ON SUBROGATION RECOVERY

In our April, 1999 Newsletter, we reported on the Dierkes case where the petitioner’s attorney had managed to collect two separate fees on a total settlement of \$100,000. Based on his contract with the plaintiff, the attorney collected one-third (\$33,333.33). Then, based on the statute, the attorney had collected 25% (\$16,666.67) of the remainder leaving approximately \$50,000 to the employer as partial reimbursement of its workers’ compensation lien. Your editor commented that, most likely, the supreme court would accept this case for a final determination. Such has proved the case.

The supreme court went to great lengths to explain the statutory basis for the attorney’s fees and workers’ compensation cases and then goes on to say:

*Based on this understanding of section 5(b) of the Act, the appellate court has long rejected the use of a private fee agreement between the employee and the employee’s attorney to reduce the employer’s reimbursement of worker’s compensation payments. In Railkar v. Boll, 125 Ill.App.2d 203, 206-07 (1970), the court, citing Hardwick v. Munsterman, held that: “the provisions of the Workmen’s Compensation Act for a 25% fee provide the only basis for recovery of plaintiff’s attorney’s fees as against the employer. There was no contractual relationship between the employee ***or his attorney*** and the [employer]. The inclusion of the provision of payment by the employer of a pro-rata share of costs, together with attorney’s fees in section 5 of the Workmen’s Compensation Act as amended in 1957, constitutes the only*

basis of the employer’s liability to share the employee’s burden of expenditures for recovery against a third party.”

EDITOR’S NOTE: The court went on to say if the 25% fee on the subrogation recovery did not satisfy the amount owed the attorney under his contract with the employee, then the attorney must seek any additional amount from the employee. (See, Estate of Dierkes - Supreme Court opinion).

ATTORNEY’S FEES - EMPLOYER’S RELUCTANCE TO PAY RESULTS IN SANCTIONS

In Dierkes, the employer refused to pay 50% of the subrogation recovery and the appellate court held that the statutory 25% was sufficient. In the recent U.S. Court of Appeals case, the employer objected to paying the 25% and was punished with sanctions. (See, Jansen v. Aaron Process).

Luxembourg Cheese Factory, Inc., through its workers’ compensation insurer, Traveler’s Insurance Company, paid Jansen \$212,000 in workers’ compensation benefits. In the associated negligence case, the jury found for Jansen against Aaron Process in the amount of \$720,000, and on Aaron’s contribution claim against Luxembourg, the jury attributed 17% of the fault to Aaron and 83% of the fault to Luxembourg. Luxembourg apparently did not contest its contribution liability but argued that it should not be required to pay Jansen’s attorney the \$53,000 in attorney’s fees. Luxembourg submitted several arguments suggesting that Jansen’s attorney had not given proper notice of the litigation nor had he communicated with Luxembourg concerning discovery prior to Luxembourg being named in the suit. The Circuit Court of Appeals felt that Luxembourg’s arguments were frivolous and, at the request of Jansen’s attorney, imposed sanctions in the amount of attorney’s fees and costs reasonably incurred by Jansen’s attorney in connection with the appeal of the trial judge’s decision.

EDITOR’S NOTE: The Dierkes and Jansen case make it quite clear that the plaintiff’s attorney’s fee on the subrogation recovery is 25%, no more and no less.

DEATH BENEFITS - PARTIAL DEPENDENCY

In Pittwood Grain Company v. Industrial Commission, the appellate court had occasion to consider the partial dependency claim brought by the parents of Ronald Regnier, who sustained accidental injuries which led to his death. Ronald was childless, had never been married and had lived with his parents since returning home from the service 18 years before. While Ronald did not pay rent, he gave his parents \$35 to \$50 a week to defray expenses. Ronald's mother provided much testimony about general and irregular shopping, payment for dinners, contributions toward vacations and general yard work. Essentially, she testified they did not live as well as before he died. Without any specific documentation, she testified that Ronald had paid at least one-fourth of the household expenses.

The arbitrator denied the claim but the Commission reversed and, as might have been anticipated, found that the parents were partially dependent on their son to the extent of 25%. The appellate court affirmed the Commission, stating:

A child contributes to the support of his parents within the meaning of the Act when he contributes a substantial sum to the support of the family although this sum is less than the actual cost of his support and maintenance. It is not necessary to show that the claimants would have been without the necessities of life or that they were without other means of support. The test is whether the contributions were relied upon by the parents for their means of living, judging by their position in life, and whether they were to a substantial degree supported by the employee at the time of his or her death. In this instance, the Commission determined claimants were partially dependent on Ronald's earnings to the extent of 25% under Section 7(c) of the Act. "Partial dependency" may exist even though the evidence shows that the claimants could have subsisted without the contributions of the deceased employee.

EDITOR'S NOTE: This is a case where the deceased may not even have contributed as much as reasonable room and board. There is no suggestion in the record that the respondent brought out Ronald's net wages,

bank accounts or records showing what his personal expenses were. The claim of 25% partial dependency was certainly not established through any documentation.

DEATH BENEFITS, REMARRIAGE OF WIDOW

In Ratlidge v. Industrial Commission, the employer filed a motion before the Commission to terminate life benefits to the widow, Bernice Ratledge. On January 16, 1976, William Ratledge sustained fatal injuries in the course of his employment and the employer began paying death benefits to the widow and two minor children. On August 18, 1991, the widow remarried at a time when one child had reached majority, but the younger was only 15 years of age. The Illinois statute is unusual in that benefits after a remarriage of the widow will be dependent upon the presence or absence of any children under 18 years of age. If, at the time of the remarriage, there are no dependent children, the widow gets two years of benefits. If, on the other hand, at least one child is still a minor at the time of the remarriage, the widow's benefits continue for the remainder of the 20-year period.

There is one exception to this rule. If at the time of the widow's remarriage, the minor child of the decedent is from a prior marriage, then the two-year termination provision applies because the second wife is not responsible for the decedent's child from the first marriage.

EDITOR'S NOTE: The court recognizes the inequity of the statutory provision. It is noted that the supreme court has, on four occasions, unsuccessfully tried to convince the legislature to change the present statute.

EXTENSION OF STATUTORY EMPLOYER DOCTRINE

Although the Workers' Compensation Act does not define the term "statutory employer," its meaning is well known to those who are involved in workers' compensation cases. To begin with, Section 1(a)3 of the Act requires a contractor to pay compensation benefits not only to his own employees, but also to the employees of any subcontractor that he utilizes. As a consequence, general contractors insist that their various subcontractors carry workers' compensation insurance for their employees. However, the statutory

employer can only be liable if his business or enterprise falls within the provisions of Section 3, subparagraphs 1 and 2. These read as follows:

The provisions of this Act hereinafter following shall apply automatically and without election to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:

1. The erection, maintaining, removing, remodeling, altering[,] or demolishing of any structure.
2. Construction, excavating[,] or electrical work.

The most difficult cases have involved subparagraph 1, particularly the application of the word “maintaining,” and occasionally, the word “erection.” As a consequence, the Act is now being applied to employers who are not in the construction business.

In Cropmate Company v. Industrial Commission, Cropmate contracted with Pinkerton to erect a chemical containment building on Cropmate’s property, which building was to be used for the storing, loading and unloading of materials utilized by Cropmate in its business. Claimant was employed by Pinkerton who had no compensation insurance. Claimant sustained severe injuries when falling from the top rafters of the structure. He contended that Cropmate was liable because it was a statutory employer. In response, Cropmate maintained that it was not in the business of erecting buildings or any of the other activities listed in subsections 1 and 2 of Section 3. Cropmate further contended that if it were found to be a statutory employer under these circumstances, then any owner having work done on its

property by a contractor would be liable for injuries to the contractor’s employees. Finally, it contended that Section 3 should only apply when the erection or maintenance of a structure was the principal business of the alleged statutory employer.

The appellate court found that Cropmate was liable as the statutory employer. It reviewed a long line of cases that applied a common-sense interpretation of Section 3 but then pointed out that the supreme court had recently extended the definition of extension in the Fefferman and Graphic Group cases. In Fefferman, the owner hired an uninsured contractor to demolish its building, which building was a capital asset used for the storage of its goods. The previous court had found that Fefferman was maintaining a structure “by virtue of the nature of the storage business.” In Graphic Group, the employee of the painting subcontractor was injured while painting the Graphic Group office. In finding Graphic Group liable, the previous court stated that the Graphic Group’s offices indirectly contributed to the revenue received by the business and that Graphic Group was, therefore, “maintaining a structure.”

The appellate court now applied the “revenue” argument to Cropmate. The building being erected for Cropmate was to be used for the storage of materials, Cropmate would derive revenue from the building and the building would be a capital asset of Cropmate.

EDITOR’S NOTE: There was a strong dissenting opinion pointing out that the Act was not intended to go beyond the construction contractor employer. It is obviously now much easier to extend the statutory employer label to any owner having

work done on its property by an uninsured subcontractor. It does appear that we have extended the purpose of the “statutory employer” section.

**COMPENSABILITY OF CLAIM DENIED
BY EMPLOYER - SUES SENTRY
INSURANCE FOR MAKING PAYMENT**

Approximately twenty years ago, a number of employers groups expressed dissatisfaction with rising workers’ compensation insurance rates, claiming that the insurance companies were paying claims that were not compensable. Consequently, these groups pressed for a statutory provision intended to discourage such payments, leading to the enactment of Section 19(o). This section 1) requires the insurance carrier to submit monthly reports to the employer, which reports would include the claims reserve and a brief statement as to the reasons for compensability, and 2) provides a basis for an action against the insurer by the employer, based on the second paragraph of Section 19(o) which provides as follows:

The insured employer may challenge, in proceeding before the Commission, payments made by the insurer without arbitration and payments made after a case is determined to be noncompensable. If the Commission finds that the case was not compensable, the insurer shall purge its records as to that employer of any loss or expense associated with the claim, reimburse the employer for attorneys’ fees arising from the challenge and for any payment required of the employer to the Rate Adjustment Fund or the Second Injury Fund, and may not reflect the loss or expense

for rate making purposes.

This provision was little used and, as a result, the interpretation of the statute did not reach the appellate court decision level until May 30, 2000.

In Palos Electric Company v. Industrial Commission, Jeffrey Geibel, employed for six years by Palos Electric Company, suffered from numbness and tingling in his hand for over three years. Dr. Fuentes, his attending physician, diagnosed bilateral carpal tunnel syndrome and performed surgery. The expenses were paid by the group health carrier, after Dr. Fuentes checked “no” in the claim form in answer to the question “is the condition related to current or previous employment.” The employer requested that Geibel not file for workers’ compensation and paid Geibel \$2,000 for the four-week recovery period, which payment was allegedly made with a request that Geibel not file a claim for workers’ compensation.

After the application was filed, Palos wrote to Sentry stating that the claim should be treated as non-compensable and be denied. Sentry obtained an IME from Dr. Shin, who confirmed that Geibel had bilateral carpal tunnel syndrome which, he felt, was not related to the employment as an electrician. After an initial denial because of causal relationship and limitations, Sentry paid 10% loss of use of each hand and a settlement on that basis was approved by the Industrial Commission.

Shortly thereafter, Palos filed a petition under Section 19(o) seeking: 1) a finding that Geibel’s claim was not compensable; 2) an order requiring Sentry to purge the records of any lawsuit expense; 3) reimbursement of attorney’s fees; 4) reimbursement of any

payments made to Sentry for the Rate Adjustment Fund; and 5) an order that any loss or expense not be factored into Palos' future insurance rates with Sentry. Palos' claim was denied by the Commission and the circuit court and, eventually, by the appellate court, as well.

The court stated:

Applying the appropriate standard, it cannot be said that a conclusion opposite to the Commission's decision is clearly evident. Geibel's injury appeared approximately three years into his employment with Palos. The job with Palos involved primarily working with his hands, wrists and forearms. Geibel worked long days, up to 12 hours a day, and worked six to seven days per week. Evidence was offered to the Commission demonstrating that Palos knew that other electricians suffered from the same syndrome and that Palos wanted to prevent Geibel from filing a claim for workers' compensation. The Commission determined that Geibel accepted the \$2000 payment in lieu of filing for Workers' Compensation benefits as a result of pressure from Palos.

In reply to the Palos argument that the claimant had failed to provide medical evidence of causal connection between the employment and the injury, the court held *"that the causal connection may be established by a chain of events."* Evidence that electricians often required this type of surgery, the question as to when Geibel could reasonably have known that his condition might be related to his employment and the

effect of the \$2,000 payment to Geibel provided sufficient evidence so that the appellate court could not state that the Commission's finding was against the manifest weight of the evidence.

EDITOR'S NOTE: The insurer could justify acceptance of compensability in a repetitive trauma situation involving a tradesman. Based on the appellate court language, it would seem that the employer could only succeed under this statutory provision if it could show that the claim was clearly not compensable as a matter of law.

FRANK J. WIEDNER
Editor