

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## COURT MANDATES WAGE LOSS RECOVERY

The appellate court, in the case of Galianetti v. Industrial Commission, has provided a new interpretation to Sections 8(d-1) and 8(d-2) which, respectively, cover a wage loss differential as opposed to a percentage of the body. Not unexpectedly, the claimant proved to be quite difficult and the employer did not recognize its exposure.

The claimant, a resident of Tiskilwa, Illinois, on July 3, 1992, was hit in the left elbow with shotgun pellets while working as a tree trimmer in the Peoria area. His formal education was limited to two years of high school but he had completed an apprenticeship with the local electrical workers' union. At the time of his injury, he was 41 years old and working as a tree trimming crew foreman. The case provides no explanation as to how claimant sustained a compensable injury while struck in the elbow with shotgun pellets.

Initially, the injury did not appear serious. On July 24, 1992, Dr. Mark Phillips, an orthopedic surgeon, performed an arthroscopy of the left elbow with a partial synovectomy and a debridement of the elbow joint. Despite the surgery, the complaints persisted and never seemed to be alleviated by any further treatment.

On December 8, 1992, Dr. Ronald Palmer removed a pellet from the elbow and prescribed physical therapy. On July 6, 1993, Dr. Palmer released claimant to work without restrictions, except that he was to avoid any vibration, lifting or heavy pulling. On July 26, 1993, Dr. Palmer diagnosed cubital tunnel syndrome and shortly thereafter, performed an anterior transposition of the left ulnar nerve. The complaints persisted and Dr. Palmer, the original physician, referred the claimant to Dr. Daniel

Nagle, who first saw the claimant on February 10, 1994, with complaints of pain on elbow extension.

On August 16, 1994, Dr. Nagle prescribed steroid shots in the elbow and ordered a functional capacity evaluation. On October 18, 1994, Dr. Nagle reviewed the results of the evaluation and concluded that the claimant could only return to a sedentary-type job which would require only light intermittent use of the left hand as an assistant to the right dominant hand.

In October, 1995, approximately one year later, claimant began experiencing pains in his left thumb, forearm, hand, neck and shoulder, causing him to return to Dr. Nagle. The doctor recommended pain medication and the claimant was instructed to return on an as-needed basis.

Up to this time, the claimant had contacted a few employers in his home area, with no success. Following a January, 1996 visit with Dr. Nagle, claimant applied to several local factories and finally obtained employment as a local garage, earning \$5.50 per hour. The claimant had limited his employment search to the area near his home because he experienced discomfort in his arm when driving more than 10 or 15 miles.

The Commission found a 60% loss of use of a body as a whole and credited respondent for \$42,000 overpayment of TTD. The appellate court modified the Commission award so that the claimant would receive two-thirds of the wage differential between the average weekly wage of \$891.60 and his current wage of \$220.00 per week. The court referred to the language in the two sections of Section 8(d). Section 8(d-1) (commonly described as the wage loss provision), states that the employee "shall" receive two-thirds of the wage differential between the prevalent wage in his former occupation and the amount he is able to earn in some present suitable employment. Section 8(d-2) permits the employee to waive his wage loss claim and request an award for a loss of a body as a whole. In the absence of such a waiver of the wage loss provision, the appellate court has now ruled that the Commission must find on the basis of a wage loss differential if the claimant has

established the wage loss as set out in Section 8(d-1). The court stated:

*In addition, the word "shall" in section 8(d) (1) leads us to conclude that where a claimant proves that he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d) (2) award in its stead. As mentioned, the only exception to this rule is where the claimant waives his right to recover under section 8(d) (1). See Freeman United, 283 Ill.App.3d at 791 (explaining that where the claimant could fit under either section 8(d) (1) or 8(d) (2), employee receives a wage-differential award unless he waives such right and opts for a percentage-of-the-person-as-a-whole award). Further supporting our interpretation is the inclusion of the waiver language in section*

***"Where a claimant proves that he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d)(2) award in its stead."***

*8(d) (2). This language would be rendered unnecessary if the legislature intended the Commission to have the sole discretion to elect a percentage-of-the-person-as-a-whole award even in those cases in which a claimant has proven entitlement to a wage-differential award.*

Respondent argued that the claimant's job search was minimal and pointed out that claimant presented no documentation to support his claims that prospective employers did not have available work within his restrictions. The court disagreed, stating:

*There is no affirmative requirement under section 8(d) (1) that a claimant even conduct a job search. Rather, as discussed above, a claimant need only demonstrate an impairment of earnings.*

#### **Overpayment of TTD after claimant reached his MMI**

An interesting side issue concerned the court's affirmation of the Commission decision to credit respondent with \$42,000 overpayment of TTD. Dr. Nagle had testified that claimant had reached maximum medical improvement on October 18, 1994

and claimant had not obtained his \$5.50 per hour job until January, 1996. The court held that the claimant was not entitled to the TTD benefits paid during this period of time. The mere introduction of a document from the claimant to the respondent requesting vocational rehabilitation, was not sufficient to prove that the TTD was due after the claimant reached maximum medical improvement.

The claimant argued that the employer should not receive credit for the overpayment of TTD benefits. The court disagreed and emphasized that it was merely restating the prior finding in the Messamore case, stating:

*Our holding in Messamore was also premised on public policy. In particular, we noted that the employee should not receive a windfall at the employer's expense due to an accidental overpayment of TTD benefits. We further explained that one of the goals of the Act, i.e., to encourage employers to make prompt payments before the amount of liability is certain, would be frustrated if we were to deny credits. We also concluded that disallowing credits would encourage administrative delays as employers attempt to resolve every ambiguity before paying benefits.*

***“One of the goals of the Act, i.e., to encourage employers to make prompt payments before the amount of liability is certain, would be frustrated if we were to deny credits.”***

**EDITOR'S NOTE:** Your editor had a number of reactions when reading this case. One, no explanation is provided as to the reason for compensability when the claimant was allegedly hit in the left elbow with shotgun pellets. Two, the claimant's relatively minor injury resulted in apparent over treatment with the restrictions seemingly based on a number of exaggerated complaints. Three, the job search was rather limited and seemed targeted toward the minimum wage employment. Four, due to the absence of a request for vocational rehabilitation, the respondent was able to terminate TTD benefits when the claimant reached his MMI, with no permanency payments being necessary until the claimant obtained his minimum wage job.

Over the years, we have seen a number of cases where the claimant deliberately seeks to obtain a low

wage position so that he will be able to obtain a maximum wage loss differential award. Up to this time, the Commission has not entertained a 19(h) type petition to reduce the weekly payments based on the claimant obtaining a more lucrative position. Section 19(h) permits such a review if “the disability of the employee has subsequently recurred, increased, diminished or ended.” In the absence of proof of a change in the physical condition, the Commission has stated that it will not review such a case under Section 19(h) if the only change in the condition is “economic.” It should also be noted that a 19(h) review must be filed within 30 months after the last Industrial Commission decision. However, the appellate court has not had the appropriate case to decide this issue.

### **CAN THERE BE AN AGGRAVATION OF A PRE-EXISTING CARPAL TUNNEL SYNDROME?**

Because the accident date of a carpal tunnel syndrome injury is established by the date of medical diagnosis, the employer in Concrete Structures of the Midwest v. Industrial Commission, took the position that it should not be responsible for an aggravation of this pre-existing condition. The claimant had been employed as a carpenter since February, 1993, for various companies. She was assigned the job of building concrete forms for the foundations of pumping houses. The nature of her duties required extensive and heavy use of her hands.

On November 6, 1996, Doris Ramirez first became employed by the respondent. During the next ten days, she noted tingling and numbness, which became more pronounced with harder work. By November 16, the pain was so intense that she could not sleep. On November 18, her own physician, Dr. Scott O'Connor, opined that claimant's employment exacerbated a pre-existing condition of carpal tunnel syndrome and instructed her to remain off from work. The employer's medical expert, Dr. Robert Schenck, examined claimant on April 11, 1997 and confirmed the diagnosis of bilateral carpal tunnel syndrome but opined that the condition was idiopathic and pre-existing and was not related to or aggravated by her employment.

Prior to her employment with respondent, claimant had previously experienced occasional tingling sensations in both hands and fingers but such sensations went away after taking aspirin. She received no medical treatment for this condition.

The respondent contended that it should not be responsible as the condition had developed over three years and not solely during the ten days of her employment with respondent. The appellate court treated the carpal tunnel syndrome as just another pre-existing condition which was aggravated by the heavy work during the ten-day period and found the matter to be compensable.

**EDITOR'S NOTE:** In the appellate court, the respondent contended that the benefits and expenses for claimant's condition should have been apportioned between claimant's various employers. The court declined noting that it had no authority to make such an award because "the issue of apportionment of benefits between various employers is a matter for the legislature to address first, not us."

**AGGRAVATION OF  
PRE-EXISTING CONDITION -  
TEMPORARY OR PERMANENT?**

The issue as to whether an aggravation of a pre-existing condition results in an increased permanent disability or whether the effect of the injury provides only a temporary aggravation of the pre-existing condition is paramount in many disputed cases. Two recent appellate court opinions address this issue and reach opposite conclusions. It may be significant that in the first case, x-rays revealed new findings and, after the second accident, the x-ray findings were not new.

**AGGRAVATION OF PRE-EXISTING CONDITION  
LEADS TO PERMANENT INJURY**

In Edward Gray Corp. v. Industrial Commission, the claimant, Michael Gimino, injured his back while employed by Graycor, on October 7, 1994. Gimino had suffered previous back problems and had recovered the equivalent of 40% loss of a man as a whole because of two prior back injuries. A functional capacity evaluation, taken after the second accident in November of 1989, revealed that Gimino

was capable of performing at the medium level of work and that his duties as an ironworker would be limited in the amount of stooping and lifting.

Gimino went to work for the Pangere Corporation in April of 1990. On April 1, 1994, he injured his back turning corrugated sheets of metal. He was treated by Dr. George Miz, who recommended a second functional capacity evaluation. The results established various lifting restrictions, as well as restrictions against stooping and climbing ladders. The evaluation noted that Gimino did not meet the maximum lifting restrictions at Pangere but would permit Gimino to return to work as an ironworker if certain modifications were placed on his job. Pangere did not offer Gimino a job and he filed a claim under Workers' Compensation.

After leaving Pangere, Gimino worked for several weeks in a "soft touch job". On August 11, 1994, he began working for Graycor. On his job application, Gimino indicated that he suffered no physical conditions which would affect job safety or performance. His duties with Graycor included standing on a roof, pulling sheets weighing 50 to 100 pounds up a height of 20 feet to a roof where the sheets were cut, using a saw weighing 30 pounds.

On October 7, 1994, after cutting 20 to 30 sheets, Gimino developed back and right leg pain. He returned to Dr. Miz, who found an L5-S1 disc herniation, which Dr. Miz attributed to disc pathology rather than degenerative changes. The doctor concluded that the pathology was due to the accident of October 7, 1994. On February 27, 1995, Dr. Miz found that Gimino had reached MMI and that he could not handle the duties of an ironworker. Dr. Jeffrey Coe, testifying for the claimant, agreed but Dr. Calvin Brown, who testified for Graycor, felt that Gimino was not a high risk of re-injury if he returned to ironworking.

The April 1, 1994 injury at Pangere was consolidated with the October 7, 1994 injury with Graycor for the arbitration hearing. In the meantime, Gimino had obtained employment at a wage of \$304

**"The issue of apportionment of benefits between various employers is a matter for the legislature to address first, not us."**

per week, whereas the ironworker weekly wage was not \$1,002 weekly. Gimino sought a specific loss on the first claim and a wage loss recovery on the second.

The arbitrator found that the claimant's current condition was due to his injury of October 7, 1994 with Graycor and consequently awarded wage loss benefits under Section 8(d-1).

On appeal, Graycor maintained that the Pangere injury has resulted in restrictions that precluded Gimino from working as a full-duty ironworker and, as a result of that previous injury, Graycor contended that ironworking could not, as a matter of law, have been Gimino's usual and customary line of employment at the time of his October 7, 1994 injury. While this argument may appear logical, the court disagreed stating:

*The question of whether ironworking was Gimino's usual and customary line of employment becomes one of law only if the evidence that he could not have returned to ironworking is undisputed and of such character as to give rise to no other inference.*

*In support of its position*

*Graycor relies on the July 12, 1994, functional capacity evaluation which, according to Graycor, demonstrates that Gimino could not have returned to ironworking.*

*Reviewing the evaluation, we note that it did not preclude Gimino from ever returning to ironworking. Rather, it said that he could not perform the maximum lifting requirements of his job at Pangere and could not return unless certain job modifications were made. Further, the opinion of the evaluator was made in the context of the job requirements at Pangere, not Graycor. While this constitutes evidence that Gimino was not capable of performing the maximum lifting requirements of his job at Pangere, it is hardly of such conclusive character that the only permissible inference was that Gimino could not return to work as an ironworker.*

*Moreover, this inference is clearly refuted by the fact that Gimino did in fact return to ironworking at Graycor and was in full performance of his required job duties for 57 days prior to his injury. Additionally, Gimino*

*testified that he had been an ironworker for 30 years, and Graycor offered no evidence to the contrary.*

**EDITOR'S NOTE:** The employer's position that the claimant could no longer perform the duties of an ironworker, because of his severe restrictions, certainly makes sense. The claimant had previous back injuries and in November, 1989, five years before the Graycor accident, had an FCE finding establishing that his duties as an ironworker would be limited in the amount of stooping and lifting. In April, 1994, six months before the Graycor accident, another FCE established restrictions against climbing of ladders, lifting and stooping. It does not compare the restrictions in the two FCEs. Should the fact that the claimant had actually tried working for 57 days for Graycor and that he had been an ironworker for 30 years lead to the court's conclusion that the claimant's usual and customary employment should still be considered that of an ironworker?

**“The claimant's back condition was aggravated by a lifting incident but that the aggravation was only temporary in nature”**

**ALLERGIC REACTION TO NON-CONTAMINATED FOOD DID NOT RESULT FROM AN EMPLOYMENT RISK.**

In Rodin v. Industrial Commission, the appellate court had occasion to consider the compensability of an employee's reaction to food at a luncheon the employee was directed to attend by his employer, P & S Enterprises. The Commission's denial of compensation was affirmed by the appellate court.

Rodin was employed by P & S Enterprises, an electrical contractor, and was working as a foreman on a project at O'Hare International Airport. On January 27, 1993, the owner of P & S directed Rodin to attend a luncheon the following day that was being hosted by T-5, the project's general contractor. Rodin attended the buffet lunch and selected salad, chicken, potatoes and a diet soda. After eating, Rodin noticed nothing unusual and returned to work for the rest of that day.

That evening, he ate a light dinner consisting of

scrambled eggs and baked beans that his wife prepared. After about an hour, he noticed that he had a rash on his face, that he was “burning up” and that he had “terrific cramps” in his stomach. While in the washroom, Rodin passed out, fell, and struck his nose on the bathtub. X-rays at the hospital revealed that Rodin had a fractured nose and, while hospitalized, suffered an anaphylactic reaction.

Several days later, he noted pain in his back which radiated into his left leg. He was taken to the hospital where x-rays revealed significant disc bulging at two levels, with degenerative hypertrophic spurring. While hospitalized for 23 days, Rodin stated that he had never had any prior back symptoms.

Rodin admitted a rather lengthy history of allergies, which led to reactions resulting in hospital confinements. After his most recent episode, he came under the treatment of Dr. Anne Watson, a physician specializing in the treatment of allergies. Dr. Watson testified that Rodin was allergic to wheat, shell fish and preservatives. Dr. Watson believed that Rodin’s allergic reaction was caused by preservatives in the food that he ate at the luncheon. She could not describe the identity of the preservative, but believed that catered food was required to contain preservatives.

In affirming the denial of compensation, the court concluded that the allergic reaction was personal to the claimant and not the result of an increased risk of his employment. The court stated:

*Nothing in the record even suggests that the food which caused the claimant’s allergic reaction was unwholesome or unfit for consumption or that it posed any risk to the general public. The risk that the claimant might have an allergic reaction to food containing preservatives is unrelated to his employment and is a risk to which he would have been equally exposed apart from his work. If, as in this case, a claimant’s injury is the result of a risk to which he would have been equally exposed apart from his employment, it is not compensable. The fact that the claimant would not have consumed the food which caused his reaction had he not been ordered to attend the T-5 luncheon does not, standing alone, mandate a finding that his*

*allergic reaction arose out of his employment, as Illinois has never adopted the positional risk doctrine. Brady, 143 Ill.2d at 552.*

**EDITOR’S NOTE:** The language in this case might be helpful in the defense of “sick building syndrome” and chemical hypersensitivity cases.

### **EMPLOYER’S THIRD PARTY SETTLEMENT UPHELD DESPITE RETAINING A PORTION OF ITS LIEN RIGHTS**

By: TIMOTHY D. McMAHON

The Third District Appellate Court’s decision in Romack v. Gingerlich, et.al. Appellate No. 3-99-0820, July 2000, addressed the question of whether an employer may retain a portion of its lien rights under Section 5 of the Workers’ Compensation Act while settling a third party claim for contribution brought against it in the employee’s pending third party claim. The good news for employers is that lien rights may be retained in such a settlement so long as the employer supports its settlement with a partial waiver and the contribution of additional funds.

In Romack, plaintiff suffered work related injuries; filed a workers’ compensation claim and ultimately settled with the employer for \$294,000, with the employer agreeing to waive 25% of its recoverable lien against the proceeds of plaintiff’s third party claim. In so doing the employer retained lien rights of \$147,385. The other 25% of the lien reduction was for the statutory attorney’s fee mandated by Section 5.

Two years later plaintiff settled his common law claim with two of the named defendants and the employer while the third party claim continued against the sole non-settling defendant. Under the terms of the settlement the defendants and the employer paid a combined \$200,000 (\$83,333.33 from the employer) and the employer waived an additional \$63,333.33 of its remaining lien, retaining lien rights of \$84,052.34. The employer then brought a motion to discharge it from liability for contribution to the remaining defendant asserting that its settlement was a “good faith” settlement, thereby discharging it from

further liability under Section 2 of the Illinois Contribution Act. The Act provides that any party which enters into a “good faith” settlement with plaintiff is discharged from liability for contribution to any remaining defendants. The issue of good faith is generally determined by comparing the amount paid by the settling defendant to its potential liability to plaintiff.

The remaining defendant objected to the employer’s motion arguing that the settlement was not in good faith because the employer retained some of its lien rights thereby reducing the setoff it would be entitled to against any judgment rendered against it in the pending case. Pursuant to the Contribution Act a non-settling defendant is entitled to a setoff, or credit, against its liability to the plaintiff in the amount of plaintiff’s settlement with other defendants and third party defendants.

The defendant cited Higginbotham v. Pillsbury Co., 232 Ill. App. 3d 217, 596 N.E. 2d 843 (1992) in support of its position. In Higginbotham, the settlement scenario was quite different. In that case the employer settled the plaintiff’s workers’ compensation claim and after it was named as a third party defendant sought dismissal from the third party case without waiving any of its lien and without paying additional funds in the third party settlement. The Appellate Court said that the employer had contributed nothing to the settlement and that the employer’s payment of workers’ compensation benefits could not, without a waiver or payment of additional funds, support a finding of good faith and dismissal of the employer from the suit.

In Romack, the Court found that the settlement was not lacking in good faith simply because the employer does not release its entire lien as part of the settlement. A settlement is not rendered invalid simply because the remaining defendant’s setoff does not include the entire amount of the workers’ compensation lien. The employer’s contribution of “fresh” money, in addition to its partial waiver of its lien was sufficient to support the settlement and, accordingly, the employer was properly dismissed as a third party defendant.

The clear message from Romack is that an employer cannot rely solely on its payment of workers’ compensation benefits to secure dismissal from a third party claim for contribution. The employer must, at the very least, surrender some, if not all of its lien rights to support the settlement. In Romack the court found that the employer’s contribution of a partial waiver and additional funds was a good faith settlement. Nevertheless, this does not mean that an employer will always be called upon to contribute fresh money to a third party settlement. Romack was unusual as the employer retained substantial lien rights. If the employer did not contribute to the settlement the Court may have decided otherwise. In light of the decisions in Kotecki v. Cyclops Welding,

146 Ill. 2d 155, 585 N.E. 2d 1023, and Lannom v Kosco, 158 Ill. 2d 535, 634 N.E. 2d 1097, a complete waiver of lien in a closed workers’ compensation claim will in most cases support a good faith settlement and the discharge of an employer from liability for contribution. If the

employer wishes to retain lien rights without additional payments the settlement is more vulnerable to attack.

**“The issue of good faith is generally determined by comparing the amount paid by the settling defendant to its potential liability to plaintiff.”**

FRANK J. WIEDNER  
Editor