

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 11 ISSUE 2

April 2001

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

CONTENTS

- 1 EXPOSURE TO SMOKE AGGRAVATED PRE-EXISTING CONDITION - DEATH HELD COMPENSABLE
Ford Motor Company v. Industrial Commission, No. 1-00-1950WC, decided March 15, 2001
- 2 INJURY DURING OUT OF TOWN RECREATIONAL ACTIVITY - HELD COMPENSABLE
Insulated Panel Company v. Industrial Commission, No. 2-00-0404WC, decided January 5, 2001
- 3 UNRULY PASSENGER CAUSES FLIGHT ATTENDANT TO SUFFER PSYCHOLOGICAL INJURY - HELD COMPENSABLE
Beverly Matlock v. Industrial Commission, No. 1-99-3877WC and 1-99-3898WC, January 25, 2001
- 4 TERMINATED VOLUNTEER FIREMAN, NOT AN EMPLOYEE, WHILE PARTICIPATING IN FIREFIGHTING EFFORT
Mark Pearson v. Industrial Commission, No. 3-00-0153WC, decided January 26, 2001
- 5 PUNITIVE DAMAGES AWARDED FOR RETALIATORY DISCHARGE
Glen Hollowell v. Wilder Corporation of Delaware, No. 5-99-0293, decided January 31, 2001
- 6 RETALIATORY DISCHARGE CLAIM DENIED BY UNITED STATES COURT OF APPEALS
Donald Emery v. Continental General Tire, Inc. No. 00-3297, decided February 16, 2001
- 7 EMPLOYER'S BEWARE!
- 7 EVIDENCE OF A SUCCESSFUL VOCATIONAL REHABILITATION EFFORT

Wiedner & McAuliffe, Ltd
One North Franklin, #1900
Chicago, IL 60606
(312) 855-1105
wmlaw.com

EXPOSURE TO SMOKE AGGRAVATED PRE-EXISTING CONDITION - DEATH HELD COMPENSABLE

On July 14, 1987, a fire broke out on the roof of the paint building at the Ford plant. The fire occurred in an oven where an anti-corrosion process would be applied to automobiles. Warren Schussler, the decedent, and a co-worker, James Porte, were standing approximately 100 feet from the fire using a two inch fire hose to put water on the fire. Neither was wearing a protective mask. During the 20 to 30 minutes that the fire continued, it produced smoke and pieces of burnt out substance into the air. After the fire was extinguished, decedent returned to his shift.

After decedent returned home, a co-worker of decedent's wife noted decedent was gasping for air, taking short breaths and appearing pale. A next door neighbor heard him coughing and inquired whether the cough was due to the fact that he had returned to smoking, which the decedent had stopped one year earlier. When the decedent began coughing up black phlegm, decedent's wife called the family physician, and obtained a prescription for medication, which was ineffective. Decedent went to the hospital that night with complaints of abdominal discomfort and chest pain and was given another prescription and discharged after the diagnosis was made of gastritis and diabetes. An x-ray revealed a mild chronic bronchitis change. Within four days, decedent was back in the hospital in significant respiratory distress. Later that day, decedent suffered a massive heart

attack and died. He was 44 years of age. The death certificate listed the cause of death as cardiac arrest as a result of cardiogenic shock. No autopsy was performed.

Decedent's expert, Dr. Nathaniel Greenberg, an internist, who frequently provides the petitioner's testimony in coronary and pulmonary cases, disagreed with the death certificate findings, stating that the fume inhalation at work coupled with the past smoking and diabetes weakened the decedent's pulmonary resistance to infection. The cardiac manifestations were due to the decedent's severe lung problems and lowered oxygen and, according to Dr. Greenberg, did not indicate a heart attack. Dr. Greenberg concluded that the absence of abnormal EKG readings and CPK enzyme findings would indicate that the death was more likely due to lung rather than heart problems. The employer's expert, Dr. David Cugell, a pulmonologist, opined that the exposure to the fumes and smoke would have produced more immediate and severe symptoms if it would have any relationship to the death. Dr. Cugell stated decedent's course in the hospital was typical of someone with a massive, fatal heart attack, especially given the history of smoking, obesity, and diabetes.

The Commission decision, finding compensability, was affirmed by the appellate court. The court reasoned that, though the decedent did not complain of breathing problems upon his first hospital admission, he was found to be suffering from bronchial problems. Although the hospital records make reference to bronchial problems, decedent complained of no breathing problem. While in the hospital the second time, the decedent was in significant respiratory distress, suffering from bronchitis and pneumonia. The decedent died shortly thereafter. It appears that the death occurring only four days after the exposure was a significant factor in finding the case compensable.

EDITOR'S NOTE: The court emphasized that the decedent was in good health for one year prior to the exposure. The opinion makes no reference to the decedent's medical records which should have provided important

information about decedent's prior health.

INJURY DURING OUT OF TOWN RECREATIONAL ACTIVITY - HELD COMPENSABLE

Although it may seem incongruous, injuries suffered by an employee while traveling may be considered compensable even though injuries during the same type of recreational activity while not traveling may not be. In the Insulated Panel Company case, the appellate court agreed with the Industrial Commission that even a somewhat hazardous activity engaged in by the traveling employee could be considered compensable.

Claimant and two other respondent's employees, including respondent's president, were in Hawaii on business to install an industrial freezer. While walking towards a lagoon in an unrestricted area, they walked on lava rocks that formed the coastline. As the lava rocks had gotten bigger, claimant had to jump between them, thereby increasing the hazard. When claimant stepped on the lava rocks, they gave way and he fell about 20 feet. In awarding compensation the court stated:

Illinois courts have repeatedly held that, even though the recreational activities of a traveling employee fall outside the scope of employment, any injuries incurred during those activities are compensable under the Act as long as the recreational activity and the employee's conduct were reasonable and foreseeable. This added protection is afforded under the Act because '[i]t is expected that an employee working out of town will seek some type of recreational activity on his days of rest'.

In response to the claimant's award of 50% loss of a leg, respondent argued that the injury involved a fracture of the right ankle, and therefore, the award should have been a percentage of loss of the right foot rather than the right leg. The court refused to question the Commission's expertise in finding disability, stating:

The Commission correctly found that

claimant suffered severely comminuted displaced fractures of the distal tibia and fibula with posterior malleolar component for which he underwent open reduction and internal fixation with a pin...The Commission's finding that claimant was permanently partially disabled to the extent of 50% of the right leg was not against the manifest weight of the evidence. Moreover, injury to the bones and ligaments of the ankle may be compensable as a percentage loss of the leg.

EDITOR'S NOTE: What does lava rock climbing have to do with installing an industrial freezer? The employer did not force the employee to climb. Apparently, the employer's presence was sufficient? For some reason, the Industrial Commission seemed to ignore the rules of thumb universally followed in ankle cases. While it is true that distal tibia and fibula are leg bones, such a fracture has always been described as a percentage loss of use of a foot. Likewise, an injury to the distal radius and ulna, both forearm bones, has been treated as a percentage of the hand. Only time will tell if this case represents a change in Commission philosophy.

UNRULY PASSENGER CAUSES FLIGHT ATTENDANT TO SUFFER PSYCHOLOGICAL INJURY - HELD COMPENSABLE

Beverly Matlock, an American Airlines flight attendant, contended that she suffered a physical as well as emotional injury as a result of the bizarre conduct of an unruly passenger. The passenger's troublesome conduct was noted during the boarding process, but the airline security coordinator interviewed the passenger and felt that the passenger was a bit eccentric but suitable to fly. While appearing numerous times at the galley where claimant was stationed, the passenger rambled on about FBI death threats to her, her deportation from the country and her possession of valuable chemicals. Finally, she alleged that she was unable to breathe and requested an oxygen tank. The passenger then attempted unsuccessfully to ignite the oxygen. When the tank was removed, the passenger covered herself with a shroud and

sprayed a chemical, determined to be parachlorophenol, on herself. The chemical is used mainly as a topical anesthetic by dentists but can cause side effects such as nausea, vomiting, etc. when absorbed through the skin into the bloodstream. The chemical fumes also penetrated into the galley where the claimant was working causing her to complain of nausea, dizziness, and heart palpitations.

Because of the passenger's misconduct, the flight was diverted to land in Dublin, Ireland. The claimant and other attendants and passengers were taken to a local hospital for observation. After three hours, the claimant was released, resumed her regular duties and flew on to London and then worked her way back to Chicago.

At her request, claimant was permitted to see a counselor, Dr. George O'Shea, on three occasions. The airline, thereafter refused to pay for any more sessions with Dr. O'Shea. Five days later, the claimant saw her own psychologist, Dr. Sharon Lieteau, who had previously treated the claimant in 1992 for depression and again in 1995 following the death of her mother and the burning of her brother in a fire. Dr. Lieteau now diagnosed a post-traumatic stress disorder resulting from the flight incident. Claimant complained of recurring nightmares in which the plane actually explodes and felt that her narrow escape from death caused her to feel unsafe in her normal environment. Dr. Lieteau noted a significant difference in claimant's behavior, physical appearance, and activity. At the time of arbitration, the claimant remained under treatment and had not been released to return to work. Despite the many symptoms, claimant had been able to keep up with her part-time studies at Chicago State University.

The employer's clinical psychologist, Dr. Ronald Ganellen, disagreed with the diagnosis of post-traumatic stress disorder and concluded that claimant's problems resulted from her anger at the employer. He diagnosed an adjustment disorder with anxiety, agreed that she could not return to work and felt that she needed psychotherapy.

The court felt that the claim was compensable under one of two theories: either

physical-mental, when the injuries are related to a physical trauma, or mental-mental, when the injuries are caused by sudden emotional shock traceable to a definite time and place and cause even though no physical trauma or injury was sustained. With reference to the physical-mental injury, the court stated:

Shortly thereafter, claimant was exposed directly to the chemical parachlorophenol sprayed by Ms. Kelly (the passenger), and suffered immediate physical consequences. She became nauseous and dizzy and experienced heart palpitations. Claimant had no idea at that time as to what the chemical was or to its long-term or short-term effects. Clearly claimant suffered a physical trauma while in the course of her employment.

With reference to the mental-mental claim, the court concluded:

Clearly claimant's psychological disability arose from a situation of greater dimensions than the day-to-day emotional strain and tension to which all employees, including flight attendants, are subjected in their employment. While flight attendants may be trained to handle and regularly face unruly passengers, they are not subjected normally to ones that attempt to blow up the plane or spray toxic chemicals in a confined cabin.

In addition to affirming the Commission's finding of compensability, the court felt that the Commission's decision in failing to award penalties and attorney's fees was erroneous, stating:

Merely because psychological injury cases are difficult to adjudicate does not mean that the award of penalties and attorney fees is unacceptable or inappropriate. Accordingly, we find the Commission's decision not to award penalties and attorney fees to be against the manifest weight of the evidence and therefore reinstate the arbitrator's award of penalties and fees pursuant to Section 16, 19(k) and 19(1) of the Act.

In his dissent, Justice McCullough agreed that this was a physical-mental but not a mental-mental trauma. He agreed with compensability but could not agree with the award of penalties, stating:

This case does present facts concerning psychological injuries, an area even this court has struggled with in adopting a precedent to be used by arbitrators and the Commission. The questions before the Commission concerned the facts being of Pathfinder strength, mental-mental or whether there was a physical-mental trauma basis. This is not a Pathfinder case. I agree there was sufficient evidence to find physical-mental basis for recovery. It was a complex case as to physical-mental and penalties were properly denied by the Commission.

EDITOR'S NOTE: I am surprised that the court would reverse the Commission's denial of penalties in a rather complex, unusual case. The findings were disputed and it should be noted that the claimant was under prior treatment for depression five years before and again three years before following the death of her mother and the burning of her brother in a fire. These are certainly more significant instances. It should also be noted that despite her complaints of anxiety attacks in crowds, periods of forgetfulness, disorientation when she attempted to go out by herself, and difficulty sleeping, she was able to keep up with her college studies. But when returning to the airport to pick up a bid sheet for work return, she was afraid that she would faint. With reference to the mental-mental finding, I would question whether this situation is in any way comparable to the Pathfinder case. Dealing with an unruly passenger is far less disturbing than viewing a hand amputation.

**TERMINATED VOLUNTEER FIREMAN,
NOT AN EMPLOYEE, WHILE
PARTICIPATING IN FIREFIGHTING
EFFORT**

The claimant, Mark Pearson, had been a volunteer fireman for the Clover Township Fire Protection District from March, 1993 through

March, 1994, at which time he was terminated for non-attendance at meetings. On October 7, 1994, the claimant noticed a farm field fire in Clover Township and reported it to the District. When the firemen arrived, the claimant directed them to a gate where they could enter into the field to fight the fire. Although he was not asked to remain at the scene, the claimant offered to get his farm tractor and disk and assist in putting out the fire by disking the field. The District's Assistant Fire Chief was informed of claimant's offer and the claimant was advised that his assistance "would be appreciated." The claimant was requested to go around the fire with his tractor and disk and, while doing so, the claimant drove his tractor into a deep washout and sustained an injury.

The claimant admitted that he did not expect to be paid but believed that he had been requested to help fight the fire and that he did so "out of concern for his neighbors and the community." The appellate court affirmed the Commission's denial of compensability, emphasizing that "a true, employer-employee relationship does not exist in the absence of the payment or expected payment of consideration in some form by employer to employee." Further the court stated:

...the workmen's compensation statutes throughout this country have uniformly been construed to exclude from coverage purely gratuitous workers who neither receive, nor expect to receive, pay or other remuneration for their services.

Justice Holdridge dissented believing that the claimant's actions in fighting the fire were performed under the direction and control of the District. He felt that the majority opinion had placed too much emphasis on the absence of pay pointing out that other firefighters receive only compensation of \$8.00 each. See, Mark Pearson v. Industrial Commission.

EDITOR'S NOTE: This decision is consistent with other volunteer firemen cases where compensation is awarded when the fireman receives some type of compensation even though it may appear to be nominal. The claimant had also argued the existence of an emergency

doctrine theory under which the facts established a quasi-contract of employment when the claimant is risking his life in order to protect the lives and health of others. The court pointed out that Illinois has never adopted this emergency doctrine. Additionally, the fire presented a risk to crops and did not present a life threatening situation.

PUNITIVE DAMAGES AWARDED FOR RETALIATORY DISCHARGE

The case of Hollowell v. Wilder Corporation of Delaware is unique because it involves Glen Hollowell, the claimant, recovering \$50,000.00 in punitive damages based on his allegations that his brother and immediate supervisor, Kevin Hollowell, questioned the severity of Glen's injuries leading to Glen's ultimate discharge from his employment. On October 5, 1996, Glen, a farm laborer, injured his back while riding a tractor over a ditch. After three weeks, Glen returned to work with physician-ordered restrictions, which continued through January, 1997. On February 14, 1997, Glen's physician instructed him to remain off from work and instructed Glen to see a neurosurgeon, Dr. Murphy, who ordered three epidural blocks which proved unsuccessful. As a result, Dr. Murphy instructed Glen to participate in a physical therapy and work hardening program during which Glen was not to work.

The employer's compensation carrier, Wausau Insurance, then requested an IME from Dr. Gapsis which was performed on April 22, 1997. Dr. Gapsis concluded that Glen had aggravated a pre-existing condition but felt that Glen could return to work immediately. The supervisor/brother, Kevin, went to Glen's residence on May 7, 1997 and instructed him to return to work immediately or face a consequence of being fired. Glen refused on the basis that he could not return until Dr. Murphy's orders to finish the physical therapy program were satisfied. Glen was fired.

The employer argued that punitive damages were improper because the testimony was in conflict and that Kevin appeared to be acting without management approval. The court, however, pointed out that Kevin had apparently

pressured Glen to violate the work restrictions and that Kevin had reportedly stated that Glen was fired because the employer did not want this kind of person working for him. The court apparently also accepted Glen's argument "that it is irrelevant whether the higher ups in defendant's organization knew of Kevin Hollowell's conduct since he is an agent for defendant and, as such, defendant is potentially liable for his conduct."

In its conclusion, the court stated:

Further, it violates the purpose of the Act if an employer can dismiss an employee on the grounds of being lazy and not working when said employee's personal physician has ordered the employee not to return to work until physical therapy is completed. This constitutes sufficient grounds to impose punitive damages so defendant does not take such actions in the future.

EDITOR'S NOTE: Clearly, the two brothers did not get along. However, it seems surprising that the court believed that Doug and Marsha Fraley, mutual friends of both, would supply "the only testimony that was free of any ascertainable bias in the case." What was this testimony? The Fraleys testified that the tone of Kevin's inquiry "indicated skepticism as to plaintiff's injury." Kevin's scepticism regarding his brother's injury was regarded by the court as strong evidence to support the punitive damage award. It should also be noted that this decision came from the Fifth District Appellate Court which has not been particularly friendly towards respondents. Note the difference in the federal court's approach to a similar case.

RETALIATORY DISCHARGE CLAIM DENIED BY UNITED STATES COURT OF APPEALS

It is rare indeed that an Illinois retaliatory discharge claim finds its way to the federal court. However, apparently because of a diversity of jurisdiction situation, the Illinois Division of the federal court decided a retaliatory discharge claim by summary judgment against the employee. On appeal, the United States Circuit Court of Appeals affirmed and set up requirements which were considerably more

demanding than those utilized by the Illinois Fifth District Appellate Court. See, Donald Emery v. Continental General Tire, Inc.

Donald Emery, a tire builder, sustained an injury to both arms, leading to a visit to his family doctor, who referred Emery to Dr. Michael Davis, an orthopedic surgeon. In April, 1998, Dr. Davis performed a repair of a left torn rotator cuff. Thereafter, Emery was referred by Dr. Davis to Dr. Terrence Glennon, a physiatrist. After several visits, Dr. Glennon released Emery to return to work with a lifting restriction of forty pounds.

Emery returned to work for one day, February 19, 1999. He experienced pain on lifting, visited the nurse's station several times complaining of shoulder pain and ultimately turned in his time card and left work before the end of his shift.

Emery did not return to work the following Monday, February 22, and through his lawyer, faxed a letter to Continental stating that Emery's job was too strenuous. Continental responded by stating that Emery would be terminated if he did not report for work the following day, February 23. When Emery failed to do so, Continental terminated him for failing to report. Later that week, on February 26, Emery saw his family physician and received an off-duty slip retroactive to February 22.

In response to Emery's retaliatory discharge suit, Continental filed a Motion for Summary Judgment. The court granted judgment in favor of Continental on the basis that it had offered a legitimate reason for terminating Mr. Emery, that being his failure to return to work on February 23.

The court adopted the McDonnell Douglas case framework whereby the employer would be liable if it could be shown that the employees outside the protected class of workers' compensation claimants were treated more favorably. Emery offered no evidence regarding the treatment of employees who had not filed workers' compensation claims.

Mr. Emery claimed that Continental

required him to lift certain things in contravention of his medical restrictions in order to perform at the expected rate. He offered no evidence, however, that Continental required him to work at the same pace as other employees or that Continental required him to do heavy lifting. Further, Continental correctly responds that Illinois law does not require employers to accommodate injured employees by retraining them or by providing work within their medical limitations.

EDITOR'S NOTE: Obviously, Donald Emery, who was terminated for failure to appear for work, did not get the same treatment as Glen Hollowell, who was terminated for the same reason. Not only did Hollowell receive compensatory damages amounting to all of his lost wages, he was also awarded \$50,000 in punitive damages. Clearly, Hollowell received these amounts even though he did not establish that he was treated any differently because he had filed a workers' compensation claim.

EMPLOYERS BEWARE!

Oliver W. Graymatter, who had been away from workers' compensation practice for sometime, returned just in time to read the current Illinois opinions. In a meeting with his junior associate, Ms. Truly M. Equal, he felt obligated to pontificate about what he perceives to be the court's liberal attitude towards workers' compensation cases. In the recent decisions he noted the following:

1. Despite the fact that the death certificate and an outstanding pulmonologist had both described the cause of death as an unrelated heart attack, compensability for death benefits was awarded based on the testimony of the customary petitioner's expert, Dr. Greenberg, who felt that the cause was a pulmonary breakdown and not a heart attack. The decision assumed the good health of the deceased, even though he had a long-standing history of pulmonary problems. There was no

medical evidence introduced showing the decedent's prior condition.

2. An out-of-town employee who finishes his work duties and decides to go rock climbing is awarded compensation when falling as a result of jumping from one rock to another.
3. A flight attendant with a long history of depression requiring extensive treatment is awarded compensation because of exposure to chemical spray which is apparently safe enough to be used by dentists. In addition, the court felt that recovery could even be based on a mental-mental basis, thereby comparing this brief exposure to a Pathfinder situation. Not only was compensation awarded for an extensive period, when, incidentally, the claimant was able to attend her college courses, the court awarded penalties and attorney's fees when the facts were certainly in dispute.
4. Finally, punitive damages were awarded to an employee who was discharged by his own brother when failing to return to work when the employer's IME concluded that the claimant had completely recovered. The punitive damages claims seem to be based on the supervisor's belief that his own brother was exaggerating the injuries.

EVIDENCE OF A SUCCESSFUL VOCATIONAL REHABILITATION EFFORT

Jim Stevenson of our office, recently participated in a seminar concerning vocational rehabilitation. Commissioner Jacqueline Kinnaman, also a participant, supplied her own thoughts as to the nature of a petitioner's diligent job search, as well as the rehabilitation counselor's exercise of

good faith as opposed to merely preparing the scenario to permit a termination of TTD. The following represent factors in her consideration:

Petitioners:

Did petitioner make a lot of job contacts?
Are those contacts documented?
Was there some kind of focus to the job search? Did the petitioner do any follow up after an initial contact?
Was the search steady or intermittent?
Did petitioner look for jobs within his/her restrictions?
Did the petitioner look for jobs which would take advantage of his/her existing skills?
Did petitioner do anything to sabotage the job search?
Did the petitioner hire an expert?
Did the expert really help petitioner or was he/she hired just to testify?

Respondents:

Did respondent accurately assess petitioner's restrictions and take barriers to employment into account?
Did respondent develop job leads or simply refer petitioner to the classified ads?
Did respondent provide job leads within petitioner's restrictions and areas of interest?
Did respondent do a labor market survey and share it with petitioner or was it used only for trial?
Did respondent's rehabilitation expert show initiative and some independent judgment in assisting petitioner or was he/she hired just to police the job search effort or testify?

FRANK J. WIEDNER
Editor