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Since the quarterly newsletter went to

press, we have received copies of several most interesting decisions and are adding the court's conclusions as a supplement to the newsletter.

PAYMENT OF MEDICAL EXPENSES EXTENDS LIMITATIONS PERIOD

In our November, 1998 Alert, we reviewed the decision in McMahan v. Industrial Commission, wherein the appellate court concluded that payment of medical benefits amounted to "compensation," thereby providing the basis of penalties under Section 19(k). The court stated:

Although the statute does refer to "compensation," we believe that the legislature intended to use that term in the same way it did in section 8 of the statute. Under section 8, the amount of "compensation" an injured employee is entitled to receive for an accidental injury not resulting in death is expressly defined to include not only compensation for lost wages but also payment for medical services.

At that time, your editor added: *Case law in Illinois has always supported the proposition that payment of a medical invoice would not, in itself, extend the limitations period. What effect does the McMahan decision have when the court suggests that "compensation" would "include not only compensation for lost wages but also payment for medical services."*

Well, now the question has been answered! Payment of medical benefits will extend the limitations period.

In Legris v. Industrial Commission, the claimant sustained an injury on July 2, 1989, with the Application for Adjustment of Claim not being filed until February 3, 1997. From 1989 through 1996, the respondent paid all of claimant's medical expenses utilizing the same claim number assigned in 1989. In December, 1996, claimant received a letter from the claim supervisor that the injury would no longer be covered under workers' compensation.

The arbitrator found that the limitations period had expired on July 2, 1992. The Commission disagreed and found that 1) the medical benefits amounted to compensation within the meaning of the Act, and 2) the respondent was estopped from raising the limitations defense because of its course of conduct in making payments for seven years. The appellate court found for the claimant on the basis of the medical benefit payments and felt that it did not need to address the question of estoppel.

The court referred to the finding in the McMahan case stating:

The Commission properly found that the payment of medical benefits in this case amounted to "compensation" within the meaning of section 6(d) of the Act and the claimant's application for adjustment of claim was timely filed within two years of the last payment of said medical benefits in August 1996.

As additional support for this result, the court noted the previous cases where payment of medical benefits under Section 8(j) had extended the statute and added:

We find no logical distinction between the payment of medical benefits under a group plan covering nonoccupational disabilities and the payment of medical benefits under a workers' compensation insurance policy.

EDITOR'S NOTE: Based on the McMahan interpretation of medical benefit payments as being "compensation" this decision is not surprising. Although the court also supports its decision by referring to Section 8(j), the language in Section 8(j) is quite sufficiently different. But, as the court states, there is no logical distinction.

INSURANCE CARRIER AND REHABILITATION COUNSELORS MAY BE LIABLE FOR CAUSING EMOTIONAL STRESS TO CLAIMANT

In Senesac v. Employer's Vocational Resources, Inc., et al, the appellate court reviewed the circuit court's dismissal of a claim brought by Robin Senesac alleging intentional infliction of emotional distress. The claim was based on Senesac's employment-related back injury of June 20, 1996 and the subsequent unsuccessful rehabilitation program. The trial court granted the defendant's motion to dismiss because of the exclusivity provision of the Workers' Compensation Act. The appellate court found that the allegations sufficiently pleaded a cause of action for intentional infliction of emotional distress.

Employer's Vocational Resources, Inc. (EVR) and CCM, Inc. provided vocational rehabilitation services at the request of the workers' compensation carrier, State Farm. The claimant alleged that the defendant's failure to provide job retraining resulted in "psychological injury" by referring him to jobs that he was not able to perform, and that the defendants did not offer the opportunity to retrain. Plaintiff's complaint stated in part as follows:

Defendants' job placement services required Robin to make 25 "in person employer contacts" per week in addition to the contacts provided by the job placement specialists; Robin applied to over 1,400 businesses and was rejected or failed to obtain employment with any of them; he was required to apply to businesses located over 60 miles from his residence; defendants required him to apply to jobs beyond his training and experience or that were "medically inappropriate"; defendants required him to apply for positions with businesses that were not currently hiring; he was required to apply for jobs that were "demeaning" and would not provide income necessary to support his family; defendants failed to recommend retraining; and defendants failed to deal with him fairly and in good faith. The complaint further stated that as a result of the alleged acts and omissions of defendants, Robin was "diagnosed with depression due to emotional distress resulting from his inability to find employment after applying for over 1,400 jobs, and was at risk to be unemployed as a result of said emotional distress and depression."

Plaintiffs also alleged that on May 11, 1998, Robin was admitted to a hospital as a mental patient and diagnosed with acute depression, sleeplessness, suicidal ideation, and hopelessness. These conditions were attributed to frustration from his employment search.

Section 5(a) of the Act provides:

(a) No common law or statutory

right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

In response to the defense that the Workers' Compensation Act provided an exclusive remedy, the plaintiff contended that: *the Act does not insulate his former employer's insurers or agents from common law liability for intentional torts such as those causing his injuries.* The court agreed that the exclusivity provision did provide a defense to the plaintiff's allegations as to negligence and malpractice but did not provide a defense to the claim of intentional infliction of emotional distress, stating:

*Plaintiffs next contend that the allegations in their complaint were sufficient to state a cause of action for intentional infliction of emotional distress. Plaintiffs argue that defendants were in a position of power over Robin, and state "[A] finder of fact could reasonably conclude that requiring a disabled person *** to apply for 100 jobs a month in person, knowing that nothing will result from this Sisyphean process except failure, is outrageous, extreme and atrocious in and of itself." They*

claim that defendants' actions had no legitimate purpose and that defendants were aware of Robin's susceptibility to emotional distress based on his disability. Plaintiffs also maintain that defendants are not relieved from liability for their intentional torts merely because Robin did not take "affirmative steps to avoid exposure to defendants' injurious conduct."

The record indicates that the trial court did not address this issue, having found that dismissal was required pursuant to the provisions of the Act. We therefore remand this cause to the trial court for reinstatement of plaintiffs' counts alleging intentional infliction of emotional distress and for the trial court to consider whether the allegations of the complaint sufficiently plead such claims. Even if plaintiffs' factual allegations are insufficient to state claims based on intentional infliction of emotional distress, plaintiffs should be allowed an opportunity to replead their cause of action.

Finally, the defendants relied on the case of Langerstrom v. Dupree. In that case, the employer had requested Dr. Dupree to perform an IME. Dr. Dupree released the claimant to return to work. Although the claimant did not feel capable of returning to work and in spite of advice from his treating physician, the claimant did return and suffered additional work-related injuries. The claimant sued Dr. Dupree but the court dismissed the suit on the basis of the exclusivity clause. In differentiating the Langerstrom case from the instant case of Senesac, the court noted a specific distinction:

In Langerstrom, both the plaintiff's

initial injury and subsequent injuries occurred while the plaintiff was actually performing his work duties for his employer. Here, the allegations of the complaint state that Robin's subsequent "emotional" injury occurred during rehabilitation and job placement and was distinct from the physical injury that prevented Robin from returning to his former employment. Robin, therefore, was not injured while taking a work-related risk to serve his employer, and he, in fact, was looking for a new job. ... Again, in the present case, Robin could not return to his former job and was looking for a new job when he was injured. Defendants' allegedly intentional conduct was not related to either Robin's return to work with Bade Appliance or his continued employment with Bade Appliance.

EDITOR'S NOTE: While this decision may cause concern among vocational rehabilitation firms, the claimant still has a substantial burden of proof with reference to intent. The court is merely stating that if everything that the claimant says is true, then he may have a cause of action. It seems to equate "intentional infliction of emotional stress" to physical assault and battery.

FRANK J. WIEDNER
Editor