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POLICE OFFICER DENIED COMPENSATION FOR CLAIM OF MENTAL STRESS

In *Anderson v. Industrial Commission*, the appellate court had occasion to consider the claim of Vernon Anderson, seeking benefits for a depressive disorder which he alleged resulted from his employment with the East St. Louis Police Department. Anderson had joined the department in 1977, advanced through the ranks, and was appointed an inspector in 1988. During this period of time, Alonzo Perron, was one of the claimant's supervisors. In May of 1991, Perron was appointed chief of police. The claimant testified that since 1980 he had a number of incidents with Perron but that they "never amounted to anything." On June 5, 1991, Perron issued an order reassigning the claimant from his position as an inspector to the position of sergeant in the Department's patrol division, a move which resulted in a \$600 reduction in claimant's annual salary. On June 9, 1991, Perron had a closed-door meeting with the claimant to explain the reassignment. Perron denied the claimant's testimony that, in that meeting, Perron stated that he was going to "destroy" claimant and that the claimant should take out some more insurance.

Anderson felt that these statements amounted to a threat on his life. Later that night, he parked in front of Perron's home, "sitting there for awhile with a weapon." After a period of time, the claimant went to a vacant house where he sat until his father and brother found him four hours later.

The following day, Anderson saw his personal physician, Dr. William Juergens, complaining of job stress. Dr. Juergens, who had prescribed Valium periodically for Anderson since 1976, immediately referred Anderson to Dr. Robert Hicks, a psychiatrist, who evaluated Anderson on June 11, 1991. As a part of his record, Dr. Hicks stated that Anderson "has recently been obsessed by the idea of shooting the police chief, though he thinks this would be an irrational move and would result in his death or incarceration." Nothing in the records of Dr. Juergens or Dr. Hicks made any reference to any confrontation between the claimant and Perron on June 9, 1991, nor do they reflect that the claimant told either physician that Perron had threatened him. Dr. Hicks concluded that the claimant suffered from "probable major depression with secondary obsessional thinking" and was medically unable to work.

Dr. Hicks treated the claimant with anti-obsessional and anti-depressant drugs and psychotherapy. The claimant was authorized to return to work on December 15, 1992. In his concluding report, Dr. Hicks opined that, although the claimant's work environment was not totally responsible for his condition, it was a "major factor in the intensity, severity and duration of his illness."

The arbitrator held that the claimant was credible and that Perron's threat to the claimant's well-being was "beyond the common and necessary stresses of employment." The Commission issued a decision which reversed the arbitrator and denied benefits. It found that the claimant lacked credibility because his version of the events of June 9, 1991 was wholly uncorroborated and found no support in the records of his treating physicians. The Commission found that the conditions under which the claimant worked were "not so outside the norm in terms of everyday employment stresses, occasioned by employees in general so as to warrant compensability." In affirming the Industrial Commission decision, the appellate court stated:

Recovery for nontraumatically induced

mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the nonemployment conditions, were the "major contributory cause" of the mental disorder.

Accepting, as we must, the Commission's determination that Perron did not threaten the claimant, there is nothing in the record before us to support the proposition that the claimant's employment exposed him to any greater stress or tension than one could reasonably and objectively expect to encounter as a member of the general workforce. The claimant himself stated that, other than the alleged incident of June 9, 1991, the "run-in" he claimed to have had with Perron "never amounted to anything."

EDITOR'S NOTE: With few exceptions, Illinois has consistently denied emotional stress cases which did not meet all of the requirements described above.

U.S. COURT OF APPEALS AFFIRMS PAYMENT FOR RETALIATORY DISCHARGE CLAIM

The federal courts have become increasingly more active in hearing retaliatory discharge claims. Since such a claim is based on an Illinois statute, it would seem that the Illinois state courts should hear these cases. However, since the claimants are filing multiple count complaints with one count being based on the Americans with Disabilities Act ("ADA"), the federal courts take jurisdiction. Such was the situation in Tullis v. Townley Engineering & Manufacturing Co., where the jury denied the ADA claim but awarded the claimant \$15,925.04 in lost wages and \$80,185.68 as non-pecuniary damages for "mental anguish and

inconvenience.”

On January 25, 1996, William G. Tullis, sustained a back injury while lifting a mold. He was totally disabled until January 30, when he was authorized by his family physician to perform light duty. Thereafter, Tullis had intermittent periods of light duty until July 18, 1996, when he was authorized to resume full duty.

Less than six weeks later, on August 27, Tullis called the company and stated that he would not be at work because he was seeing his physician concerning back pain. That same day, Tullis spoke with Virgil Sanders, Townley’s resident general manager, advising that Tullis’ physician had instructed him not to return to his present job, but perform only lighter-duty work. Sanders and Tullis disagree as to what occurred thereafter. Tullis contended that Sanders advised that no lighter work was available and that Sanders should accept a layoff and draw unemployment. Sanders qualified this statement by stating that he would telephone the main office in Florida to obtain further instructions, at which point Tullis indicated a willingness to be transferred from El Dorado to Harrisburg if work was available. The following day, Tullis reported he was advised by Sanders that he had not heard from Florida but that he should accept unemployment compensation to ensure that some income would be available. On August 29, Sanders allegedly made the same suggestion. Consequently, on August 30, Tullis applied for unemployment benefits because he believed that he had been laid off.

Sanders recalls the exchange differently. When Sanders was informed on August 27 that Tullis should perform lighter duty, Tullis was instructed to report the following day because Sanders was still awaiting a response from Florida. Sanders denied ever suggesting that Tullis seek unemployment benefits. On August 28, Sanders claims that he told Tullis that he had not reached Florida but that he would call him if he found a position available for him. Sanders denied any conversation with Tullis on August 29.

When Sanders reached the Florida office on August 31, he was told that he should apply Townley’s policy whereby an employee is considered to have quit if he is absent for three days without notifying the company. Since it was now three days from the August 28 conversation, Tullis was officially terminated. To further complicate the issue, on September 10, Townley filed an objection to Tullis’ unemployment insurance claim. A workers’ compensation claim was filed shortly thereafter.

In November of 1996, Tullis called Sanders to advise that he had obtained a full medical release and was ready to return to work. After making reference to the fact that Tullis “had now sued the company” Sanders advised Tullis that he had no position available for him. Tullis contended that Townley subsequently did fill vacancies without contacting him about any job opening.

Tullis’ claims went to the jury. On his ADA claim, the jury returned a verdict for the defendant. With reference to the retaliatory discharge claim, the jury awarded Tullis benefits for lost wages and non-pecuniary damages. The punitive damage count was dismissed as a matter of law.

Townley contended that Tullis had not proven that his discharge was causally related to the exercise of his rights under the Workers’ Compensation Act. Townley argued that it had no specific concern about Tullis filing a workers’ compensation claim because it had full insurance coverage. It also noted that the termination occurred long before the Industrial Commission filing. In response, Tullis was able to obtain an admission from Townley that its premium could increase because of claims and also established that Tullis’ supervisor had documented Tullis’ departures from his restrictions because such activity could be relevant to a future workers’ compensation claim.

Although Townley raised some question about the \$15,925.04 verdict in lost wages, it complained bitterly about the absence of proof to justify the verdict of \$80,185.68 as non-

pecuniary damages for “mental anguish and inconvenience.” Townley pointed out that the award was based exclusively upon Tullis’ own testimony, without any medical support of a claim for mental anguish. The court, in affirming the jury verdict, stated:

The jury, as seen by the amount they awarded Tullis, which some may even characterize as exceedingly generous, must have not believed that Tullis needed to show that he sought the help of psychologists or friends for his emotional distress or that he was required to provide more detail about either his emotional distress or the inconvenience that he experienced. Tullis’ testimony did reveal he felt “low” and “degraded” when he was laid off and “back-stabbed” when the company opposed his unemployment claim. He also said that he was without work for nine to ten months, and this affected his personal life, including that he had to borrow money from family and friends and he had his lights and phone shut off.” The jury could have determined that these were not minor events. The jury also may have taken into account that his family life was disrupted in that he was not able to buy his children new school clothes, pay his child support, or take his children out dining and shopping. Tullis also did find a new job, but it was as a trucker, which required him to be away from home, and he even said that Townley “was a very convenient place for [him] to work at because it was close to the house. It was five minutes from the house.” The jury may very well have found that these types of changes were significant to Tullis’ family situation. Because it is within the jury’s domain to assess the credibility of witnesses, specifically in this case the testimony of Tullis, we cannot find the award was monstrously excessive or not rationally connected to the evidence. Further, since we have determined that the verdict was supported by the evidence, then necessarily it was not a result of passion and

prejudice.

EDITOR’S NOTE: While the evidence indicates that the employer might have been happy to see Tullis leave, it contended that it was speculation on the part of Tullis that he was being punished for filing workers’ compensation claims. The jury apparently felt that Townley’s record did not support its testimony concerning the reason for the termination and the failure to contact Tullis about re-employment. In effect, the jury believed Tullis and not Townley.

**DEATH DUE TO LIVER FAILURE
BROUGHT ON BY OVER
CONSUMPTION OF ALCOHOL TO
OVERCOME PAIN FROM INJURY
HELD COMPENSABLE**

You will recall that the Special Appellate Court has reduced the number of opinions which are to be published. Customarily, Rule 23 Order cases affirm the fact finding body and have some value to providing insight into the thinking of the court on a particular issue and are not to be cited as precedent in other cases.

In the case of Turbo Carpet, Inc. v. Industrial Commission, Alfred Boardman was employed as a carpet installer by Turbo Carpet, Inc., which was owned by Robert Boardman, Alfred’s brother. On November 22, 1994, Alfred sustained a work-related right knee injury which caused him constant, intense pain. Several surgical procedures in January and March of 1995 failed to relieve the pain and led to a total knee replacement in September of 1995. When told that he would never be able to return to work as a carpet layer, Alfred became depressed at not being able to support his family.

Alfred had been hospitalized in 1991 for alcohol addiction. But, according to uncontradicted testimony, Alfred had not had any alcohol from that confinement until after his accident in November, 1994. Sometime prior to the first surgery, he began drinking quite heavily, reaching a point where he was drinking a pint of whiskey per day. He died from liver failure on

February 17, 1996, approximately six months after the total knee replacement.

Dr. Nathaniel Greenberg, after reviewing all of the records, concluded that Alfred was in considerable pain that was not alleviated by medication or three surgical procedures. The pain and the inability to work led to depression, which Alfred handled by drinking, with the abuse of alcohol leading to his death. Dr. Robert Carroll, a board certified cardiologist, opined that there was no causal relationship between the accidental injury of November 22, 1994 and his subsequent death on February 17, 1996. The Commission finding of compensation for the widow was affirmed by the appellate court.

EDITOR'S NOTE: This case is not as far reaching as it may seem because of a strong factual situation. Actually, the appellate court was merely affirming the Commission on its factual inferences, particularly that the Commission had a right to accept Dr. Greenberg's analysis over that of Dr. Carroll.

MEDICAL EXPENSES AWARDED FOR TREATMENT RENDERED AFTER DATE OF MAXIMUM MEDICAL IMPROVEMENT

In Elmhurst Hospital v. Industrial Commission, the appellate court had occasion to consider the claim of Debbie Oblak, who on August 11, 1992, sustained an injury to a right hand and arm while working as a nurse. The emergency room physician prescribed a splint and instructed the claimant to see her own physician. During the next five months, the claimant came under the care of seven physicians, four of whom were recommended by Elmhurst, and was treated with therapy and anti-inflammatory medication without any significant improvement. The diagnosis seemed to vary from one doctor to the next. Dr. Frank Lagattuta diagnosed an ulnar lesion. Dr. Dennis Martonffy suspected a muscular/tendon avulsion, neither of which were confirmed by the results of the arthrogram, MRI and EMG.

From January 15 to April 6, 1993, the claimant came under the care of Dr. Kenneth Schiffman. The diagnosis varied from a muscle injury to a possible flexor myotendinous tear. Therapy and other conservative treatment failed and, on February 24, 1993, Dr. Schiffman performed exploratory surgery on the claimant's right forearm flexor compartment, with no significant improvement. On April 6, 1993, Dr. Schiffman recommended additional surgery to include a possible triangular fibrocartilage complex debridement and a possible ulnar shortening osteotomy.

Apparently becoming dissatisfied with the lack of progress, the employer requested an examination by Dr. Charles Carroll. At the time of the May 5, 1993 examination, Dr. Carroll found pain and numbness extending from the right wrist to the elbow. On June 3, Dr. Carroll performed an arthroscopy of the wrist, with debridement of a cartilage tear and an ulnar shortening with the application of a plate. Despite this additional surgery, the complaints of a burning sensation to the elbow and wrist continued, leading Dr. Carroll to suggest a possible ulnar nerve transportation to alleviate the remaining pain.

The claimant decided to avail herself of the care at the Mayo Clinic. She was referred to Dr. Stephen Trigg, an orthopedic surgeon, who confirmed Dr. Carroll's findings. Suspecting a possible reflex sympathetic dystrophy, Dr. Trigg referred the claimant to Dr. Timothy Lamer, an anesthesiologist specializing in pain management. Dr. Lamer concluded that the claimant had right ulnar neuropathy and undertook a series of injections, with no significant relief causing Dr. Lamer to recommend that the plate in the arm be removed. On November 8, 1994, Dr. Trigg removed the plate and performed an arthroscopy of the right wrist. Dr. Trigg was now of the opinion that the claimant's ongoing pain was due to a reflex sympathetic dystrophy and there was nothing further from a surgical or therapeutic perspective that he could do for her.

On April 21, 1995, the key date in this case, Dr. Lamer gave his deposition, testifying that the

claimant's reflex sympathetic dystrophy had "quieted down" and that she was "back to her original problem" ulnar neuralgia. Although he was of the opinion that the claimant had reached maximum medical improvement as of that date, she had not been discharged from care and would have a "chronic medical condition ... for the foreseeable future." The employer chose to believe that the admission of maximum medical improvement as of that date was sufficient to deny the claimant any further medical care thereafter. While no TTD may have been due after that date, the employer argued that the subsequent medical expense of \$40,000 was not its responsibility. After the deposition date, Dr. Lamer continued to treat the recurrent right arm pain with anesthetic nerve blocks which continued from that date to May 7, 1998. She received treatments approximately every three weeks for relief of the pain followed by "recurrent dysethesias and vasomotor symptoms." The arbitrator agreed with the employer that the amount owed to Mayo Clinic for treatment after the maximum medical improvement date was not compensable but the Industrial Commission reversed. The arbitrator had awarded two-thirds loss of use of the right arm, plus TTD to approximately the maximum medical improvement date.

In affirming the Industrial Commission decision, after pointing out that the Commission's determination of a question of fact was not against the manifest weight of the evidence, the court added:

Although Dr. Lamer testified that the claimant had reached maximum medical improvement by April 21, 1995, that is to say, she had recovered as far as the permanent character of her injury would permit, he found her condition to be chronic. The injection therapy administered to the claimant after April 21, 1995, did nothing to cure her condition, but the record certainly supports the conclusion that the injections helped to "relieve the effects" of her injury, namely, the chronic pain she suffers. As such, the expenses which the claimant

incurred for the injections she received after April 21, 1995, are recoverable under section 8(a) of the Act.

SUPREME COURT AFFIRMS APPELLATE COURT'S DECISION ADOPTING THE "FULL WEEKS" FORMULA

On July 19, the Supreme Court resolved the long-standing issue between employer and employee with reference to the average weekly wage. The claimant sustained a serious injury in May of 1992 when he fell approximately 16 feet to the ground, shattering both of his ankles. As a result of the accident, the claimant's right leg was amputated below the knee and the left foot was permanently injured. Sylvester had worked for Acme Roofing for 19 years before the accident and was not employed by anyone else during that time. At the time of the accident, he was a roofer foreman and earned \$21 an hour. Because the winter weather prevented much work being done, he usually signed up for unemployment during the winter. However, Sylvester testified that his job required him to be on call from Acme year round and if work were available, he would work a 40-hour week. Based on the wage records, Sylvester's hours worked per week varied from three to 40. The correct average weekly wage would depend on the formula used as follows:

Pertinent Earnings Information

Weeks in year:	52
Total Earnings for year:	\$18,228.55
Number of weeks in which claimant worked during the year:	48
Total days worked during the year:	131

Full-Weeks-Worked Formula

131 days = 26.2 full weeks (131 ÷ 5) the claimant worked during the previous 52 weeks.

$\$18,228.55 \div 26.2 \text{ weeks} = \695.75 per

week, which was the claim made as the average weekly wage.

Total-Weeks-Worked Formula

48 weeks in which the claimant worked during the previous 52 weeks.

$\$18,228.55 \div 48 = \368.43 , which the employer contended should be the average weekly wage.

The court adopted the “full weeks formula,” thereby finding for the petitioner and utilizing an average weekly wage of \$695.75. The court reviewed the four methods of calculation of the average weekly wage as described in Section 10:

1. Employment for the full 52 weeks, in which case the actual earnings are used.
2. Employment with loss of five or more calendar days during 52 weeks, at which time the earnings for 52 weeks are divided by the number of weeks or parts thereof.
3. Employment of less than 52 weeks, with earnings divided by the weeks or parts thereof;
4. Employment which is short or casual, in which case the average weekly wage used is determined by the 52 weeks earned by a person in the same grade and same work for the same number of weeks for the same employer.

The court concluded that the factual situations in methods 1, 3 and 4 did not apply and that the arbitrator had correctly used the second method. The court stated:

The parties differ on what to divide earnings by to compute average weekly

wage, however. Acme contends that since any week in which the employee worked at least one day is technically a “part” of a week, and the statute provides that earnings are to be divided by the weeks “and parts thereof remaining,” weeks in which the employee worked at least one day should be counted the same as a full week of work. Thus, the total wages earned in the previous 52 weeks must be divided by the number of weeks in that time period in which the employee worked even one day. Petitioner contends that the fact finder should count the number of days the claimant worked in the previous 52 weeks, divide that number by the number of days in a workweek, and divide the earnings by the result of this calculation. The arbitrator used the method suggested by Acme, which resulted in petitioner’s earnings being divided by 48, as petitioner worked at least one day in all but four of the 52 weeks preceding his injury. By petitioner’s argument, his earnings should have been divided by 26.2, as he worked only 131 days during the previous 52 weeks and his workweek was 5 days long - 131 divided by 5 equals 26.2.

Acme argued that the claimant was receiving a “windfall” by obtaining approximately 32% more in TTD benefits than he would have earned as regular wages.

In distinguishing this case from Hasler v. Industrial Commission, the court pointed out that in Hasler, the claimant was requesting a method of wage computation which would have resulted in an award six times greater than the actual earnings. In referring to Sylvester, the court stated:

It is important to note, as well, that it

would be inaccurate to state that petitioner receives a 32% “windfall,” because his “actual earnings” for purposes of section 10 do not include his yearly bonus, overtime pay, or the unemployment compensation that he regularly earned during the winter months. When these factors are taken into account, it is difficult to characterize petitioner as having received a financial bonanza when he suffered the two crushed ankles which resulted in the partial amputation of one of his legs.

EDITOR’S NOTE: Clearly, the court relied on a number of factors concerning Sylvester’s employment.

1. The claimant worked only for respondent as a working foreman.
2. The claimant never refused to work when called.
3. The time lost was not due to any fault of the claimant.
4. The claimant did not receive a “substantial” windfall over his pre-injury wage.

The court seemed to consider the severity of the injury as a factor. It pointed out that an employee who suffered two crushed ankles leading to a partial amputation of one leg is hardly receiving a “windfall” in benefits.

The problem with cases involving construction workers is the statute which actually seems intended to place those workers in a special category not enjoyed by employees who work five days per week all year long. This same attitude prevails during collective bargaining negotiations when

construction workers receive a higher hourly rate because weather limits the number of available working hours.

APPOINTMENT OF NEW COMMISSIONER

Effective July 2, 2001, former State Senator Robert A. Madigan replaced Commissioner Weaver as the public representative on Panel A. He will maintain review calls in Chicago, Belleville and Mt. Vernon. Commissioner Madigan served on the Illinois Senate since 1987 and chaired the Committee on Insurance and Pensions.

FRANK J. WIEDNER
Editor