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DOES THE EMPLOYER'S SHARE OF THE PLAINTIFF'S EXPENSES DEPEND ON THE GROSS OR NET RECOVERY OF THE EMPLOYER'S SUBROGATION CLAIM?

As a result of the workers' compensation claim of Thomas Overlin, his employer, Brittany Homes, paid him \$121,592.92 in workers' compensation benefits. Overlin then sued Windmere Cove Partners, Inc. and several other parties to recover for those injuries. The employer assigned its workers' compensation lien to Windmere Cove. A jury found Windmere Cove liable and awarded Overlin \$250,114.96. The sole remaining issue in the case concerned the liability of Windmere Cove for its share of the plaintiff's expenses.

Section 5(b) of the Act permits an injured employee to bring a separate action for damages against the third party. If the employee recovers from the third party, the employer may be reimbursed for the amount of workers' compensation benefits it paid. The reimbursement may take the form of a lien or a credit on future payments. From the "reimbursement received by the employer" pursuant to the statute, the employer must pay his proportionate share of the costs and expenses of the third-party action. In addition, the employer must pay an attorney's fee of 25% "of the gross amount of such reimbursement." The issue concerns the employer's share of the expenses. Is it based on the employer's gross or net recovery after payment of the 25% attorney's fees?

The plaintiff contended that since both provisions at issue used the word “reimbursement,” the same dollar amount should be used to calculate both amounts. Windmere Cove pointed out that the word “reimbursement” is modified differently in each instance. It pointed out that the statute required the employer to pay 25% of the “gross amount” as attorney’s fees and, in providing for the apportionment of costs, the statute refers to a share of the reimbursement “received by the employer.”

The calculations can be simplified as follows:

Judgment:	\$250,114.96
Gross Compensation Lien:	\$121,592.92
$\$121,592.92 \div \$250,114.96 = 48.6\%$ of recovery to be paid by the employer.	

Gross Compensation Lien:	\$121,592.92
Less 25% Attorney’s Fees:	30,398.23
Net reimbursement to employer:	\$ 91,194.69
$\$91,194.69 \div \$250,114.96 = 34.6\%$ of recovery to be paid by the employer.	

The court concluded that Windmere Cove was, therefore, responsible for 34.6% of the costs. The court stated:

We agree with Windmere Cove that, by using different phrases to describe the amounts forming the bases of the calculations, the legislature must have intended that different figures be used. The most logical reading of the statute, then, is that the legislature intended that 25% of the employer’s total reimbursement for its workers’ compensation lien be taken off the top as fees to plaintiff’s attorneys. The remaining amount is then compared to the total recovery from the third party to determine the employer’s pro rata share of costs and necessary litigation expenses.

EDITOR’S NOTE: This case may be somewhat surprising to many employers who have, without question, accepted the contention that the employer’s share of expenses should be based on the gross recovery.

ALL INDUSTRIAL COMMISSION DECISIONS MUST BE APPEALED WITHIN A TWENTY-DAY TIME LIMIT

Wal-Mart Stores sought to utilize a portion of Section 8(a) of the Workers’ Compensation Act (which also applies to the Occupational Diseases Act), which states as follows:

[u]pon agreement between the employer and the employees, or the employees’ exclusive representative, and subject to the approval of the Industrial Commission, the employer shall maintain a list of physicians, to be known as a Panel of Physicians, who are accessible to the employees.

How did Wal-Mart approach the problem of obtaining an agreement from “the employee’s exclusive representative” as required by the Act as set out above? It filed a petition with the Industrial Commission requesting the Commission’s approval of such a Panel of Physicians and asserted that it had reached such an agreement with the employees in 74 of its 132 Illinois locations. To support its petition, Wal-Mart attached an affidavit of Theresa Russell, an employee of Claims Management, Inc., a wholly owned subsidiary of Wal-Mart which administers its workers’ compensation claims. In her affidavit, Russell averred that more than 50% of the employees at each of the 74 locations had signed an agreement consenting to the formation of the panel.

After the petition was filed, Commissioner Gilgis informed Wal-Mart that its petition was scheduled for two evidentiary hearings, the first to be held on December 7, 1999 at the Commission’s Springfield offices and the second

to be held on December 14, 1999 at its Chicago office. Wal-Mart was instructed by the Commission to post notices in each of its stores informing its employees of the date and location of each hearing and inviting them to attend the hearings. No Wal-Mart employees appeared at either hearing.

On February 16, 2000, the Commission issued an order denying Wal-Mart's petition for approval of a Panel of Physicians. The Commission found that Wal-Mart had failed to prove that all of its employees had waived their rights and that establishment of the panel was in the best interests of its employees as a whole. It pointed out that all prior approval of panels of doctors involved a joint proposal made by the employer and the union authorized to represent its employees on such matters. On March 1, 2000, the Commission issued another order in which it directed Wal-Mart to post notices of the Commission's denial of the petition in each of its Illinois locations. On March 10, 2000, Wal-Mart filed a petition for rehearing. On March 15, 2000, the Commission issued an order denying and dismissing Wal-Mart's petition for rehearing, pointing out that there was no provision in the Act, its rules or case law permitting rehearings. On April 7, 2000, Wal-Mart filed its judicial review of the Commission's three orders. The Commission filed a motion to dismiss the judicial review arguing that the trial court lacked jurisdiction over the matter because it was not commenced within the time constraints of Section 19(f), i.e. within 20 days of the issuance of the Commission's February 16, 2000 order. The trial court granted the Commission's motion and dismissed Wal-Mart's action for judicial review. The appellate court agreed.

On July 23, 1990, Martha Quintero, an employee of F & B Manufacturing Company sustained a back injury, as a result of which she was treated that day on an emergency basis at St. Therese Hospital. She followed up at St. Therese on four other occasions, with the last

Wal-Mart argued that the 20-day rule applied only to decisions relating to employees' claims for benefits under the Act. While agreeing that most Commission hearings did apply to an employee's claim for benefits, the court pointed out that Section 19(e) provides that "this paragraph shall apply to all hearings before the Commission." In response to Wal-Mart's contention that the Commission exceeded its authority by conducting hearings, the court noted that Wal-Mart did not object to the hearings and participated therein.

EDITOR'S NOTE: Since Section 8(a) required that any agreement between the employer and its employees was "subject to the approval of the Industrial Commission," Wal-Mart was not likely to obtain a reversal of the Commission decision even if it had filed its appeal within the statutory 20-day period.

**EVEN AFTER A SECOND AMENDED
INDUSTRIAL COMMISSION DECISION,
THE ORIGINAL DECISION CAN BE
SUBJECT TO APPEAL**

In F & B Manufacturing Company v. Industrial Commission, the appellate court had occasion to consider a case that had reached the circuit court for the second time after two different decisions by the Industrial Commission. After an Arbitrator's Decision, an Industrial Commission review and a subsequent reversal on appeal by the circuit court, the Commission entered an amended decision. The circuit court decided that the original decision was still subject to appeal but, at the same time, confirmed the second Industrial Commission decision following remand. The employer, F & B Manufacturing Company, appealed.

date being August 8, 1990. On that date, she received an instruction sheet for her to "follow up with Dr. Rowley by Friday or doctor of choice." She chose her family physician, Dr. Rojas, who referred her to Dr. Treister, who referred her to a psychiatrist. This was her first

choice within the meaning of Section 8(a) of the Act. Subsequently, she chose to undergo chiropractic treatment at the Cragin Health Center and during that time was referred by Treister to Dr. Stobnicki, a neurologist. This was the second provider chosen by the claimant.

Thereafter, at the suggestion of a friend of her husband, she saw Dr. Robert Garcia, who then began a course of hospital treatment, as well as a referral to Dr. Levin, an orthopedic surgeon.

This amounted to her third selection of physicians. Finally, on the recommendation of her husband, she saw a chiropractor, who referred her to several orthopedic surgeons, who provided hospital care. This amounted to four choices, two of which were beyond the two-choice chains of referral allowed under Section 8(a).

Because of the numerous decisions in this case, the case is somewhat confusing and the following is an attempt to clarify everything that happened beginning with the original Arbitrator's Decision in 1996.

06/22/96 The arbitrator awarded the following:

- 1) 31 weeks of TTD which, except for one day, covered the period from July 24, 1990 to February 26, 1991;
- 2) denied all medical expense beyond the two chosen medical service providers, that being Treister Orthopedic Services and Cragin Health Center; and
- 3) denied a portion of the medical expense claim by Cragin as being duplicative of the Treister therapy treatments and also denied the charge of the neurologist, Dr. Stobnicki, to whom claimant was referred by one of the Cragin chiropractors.

04/18/97 The Commission affirmed and adopted the arbitrator's findings.

03/18/98 On appeal, the circuit court affirmed the PPD award but set aside the findings of TTD and the denial of medical expenses and remanded the matter to the Commission for further proceedings.

07/13/99 Without additional evidence, the Commission increased the TTD award, increased the medical expense to \$6,864, including the bill from Cragin and the neurologist, totaling \$22,095.

07/25/00 On the second appeal to the circuit court, the court found that the original March 18, 1998 circuit court order, affirming the original Industrial Commission decision on April 18, 1997, had been non-final and was subject to appeal at this time. In addition, the circuit court affirmed the second July 13, 1999 Industrial Commission decision. The respondent appealed to the appellate court.

09/20/01 The appellate court confirmed the circuit court second order to the effect that the first order was non-final and could now be appealed. In addition, however, the appellate court reversed the second circuit court order and modified the first circuit court order. The appellate court now found as follows:

1. The original Industrial Commission decision awarding only 31 weeks of TTD was not against the manifest weight of the evidence and should be affirmed.
2. Cragin's chiropractic charges of \$2,295 were not duplicative and

the fee of the neurologist, Dr. Stobnicki, who received the referral from Cragin, should have his fee of \$275 paid. The appellate court felt that this portion of the original Arbitrator's Decision on April 18, 1997 was against the manifest weight of the evidence. Consequently, the appellate court vacated the second Industrial Commission decision which had added 30 weeks of TTD and \$6,864 in medical expense.

3. The court affirmed the original findings of the Commission that the five physicians, two chiropractors and two hospitals subsequently seen by the claimant were "beyond the two-choice chains of referral allowed under Section 8(a) of the Act, as are the medical expenses provided to claimant thereafter."

EDITOR'S NOTE: This case is important to establish that a party has a right to appeal to the appellate court the first circuit court order, even after the case had been remanded back to the Commission which had amended its original decision, as long as the first order was non-final, as existed in this case. It is important for the parties to be certain that the decision of the circuit court at that point is not a final and appealable order. This determination is based upon the purpose of the remand to the Industrial Commission. If the remand is for a substantive issue, it is non-final. However, if the remand is for only a ministerial act, the circuit court decision is appealable.

AIRLINE'S MEDICAL STAFF'S FAILURE

TO DETERMINE CLAIMANT'S DISABILITY LED TO A FINDING OF ADDITIONAL TTD EVEN AFTER CLAIMANT'S RELEASE FOR DUTY

George Peri was employed as a Fleet Service Clerk for American Airlines. His duties required him to crouch, kneel or sit in the "belly" of the aircraft, where the baggage, mail and freight were stored. He would grab a parcel with his right hand and throw it across his body, toward the door, onto a conveyor belt. While performing this work on March 28, 1998, he developed a sharp pain in his right shoulder extending down his right arm. Because of the pain and swelling in his right arm, he finished his job on lighter duty.

When first seeking medical attention at the Alexian Brothers Hospital on March 30, he gave no history of a work injury but described joint pain in his arms and legs for the past two weeks. His family physician, Dr. LaSpina, referred Peri to Dr. Tajuddin, who diagnosed a deep vein thrombosis (DVT) without obvious ideology. Dr. Tajuddin did not first consider the incident work related but when testifying stated that he decided that the injury was work related.

Conflicting medical testimony was produced by Dr. Albert Mitsos, specializing in forensic medicine, who felt that the condition was not work related because 1) the claimant was genetically disposed to DVT (his brother had suffered the same condition); 2) no specific trauma was reported; and 3) severe pain did not appear for two days. Contradicting Dr. Mitsos, Dr. Mansour, a board certified vascular surgeon, felt that DVT could be caused by the activities described. The hospital records

indicate several other physicians who supported a finding of compensability. The Commission found for the claimant, stating:

The Commission's decision that Petitioner sustained an injury while throwing pieces of luggage on March 28, 1998, and that his condition of ill-being was causally related to that accident, is supported by the evidence.

The Commission was presented with contradictory medical testimony going to the issue of whether Petitioner had sustained an "effort" deep venous thrombosis in his right arm as a result of throwing pieces of luggage for the employer on March 28, 1998. It is the Commission's role to weigh the contradictory evidence and resolve those factual issues, and its determination on those issues will not be disturbed on review unless contrary to the manifest weight of the evidence.

Respondent has not made any temporary total disability benefit payments. Immediately after the accident, the claimant was given a temporary light-duty release from Dr. LaSpina. However, the employer could only supply light-duty work from May 11 through July 9, 1998, after which claimant was advised to stay home until he received a permanent light-duty release, which would allow him to bid on any permanent light-duty position with his employer. On October 4, 1999, the claimant was given a permanent light-duty release by Dr. Tajuddin. Both prior to and subsequent to that date, the claimant did not seek light-duty work within his restrictions with any other possible employer.

The court noted that the claimant had presented his permanent light-duty release to his employer and was told that it would have to be reviewed by the employer's medical staff before he could apply for any available light-duty positions. As of the date of the arbitration hearing, the claimant had not heard from the employer's medical staff and was unable to bid for any light-duty positions as required by the Union Agreement and company rules.

The court repeatedly emphasized the importance of the examination by the employer's medical staff. For example, note the following:

Moreover, Petitioner has not received any notification from Respondent he is no longer considered an employee or is no longer employed by them. He further testified that once he receives approval from the Respondent's medical staff or physician they have accepted his permanent light duty release, he would immediately be able to bid on any light duty positions available. The fact Dr. Tajuddin provided a work release to him stating that, in his opinion, he had reached maximum medical improvement and was released with permanent work restrictions, is not dispositive of the issue of whether he is entitled to continuing TTD. It is conceivable that another qualified physician on Respondent's medical staff may have suggestions as to further treatment. That physician may also want to perform additional testing to confirm or modify the work restrictions imposed by Dr. Tajuddin. In fact, the work release authored by Dr.

Tajuddin poses a question as to whether a functional capacity evaluation may be warranted prior to a return to work. Dr. Tajuddin answered this by writing "unknown" in the margin. It is certainly possible Respondent's physician or medical staff may require a functional capacity evaluation before they will agree or modify the work release tendered to them by Petitioner.

It is certainly not uncommon to have disagreements between physicians over whether permanent work restrictions should be imposed on an injured worker, or to what degree those restrictions should limit the injured worker's job activities. The commission in this case correctly inferred that this scenario may occur once Respondent's medical staff reviews Petitioner's record and work release. Until that review takes place, Petitioner is unable to work for Respondent.

EDITOR'S NOTE: Since no TTD was paid at any time, the employer apparently relied primarily on the issue of causal relationship. The employer seemed to rely on the opinion of Dr. LaSpina who had given the claimant an early "temporary light-duty release" and that the claimant actually did light-duty work for eight weeks. The failure to pay TTD might have been based on the employer's belief that the claimant had reached MMI within a few weeks after the accident.

To some extent, this decision modified the prior rule which eliminated the necessity of any additional TTD once the claimant

had reached his MMI. However, this modification would only seem to apply where the claimant was prevented from submitting a bid on light-duty positions available because of the employer's failure to satisfy the condition precedent, that being the evaluation by the staff physician.

You may recall the Freeman case and the general rules whereby a finding of MMI will justify termination of TTD benefits (reported in our January, 2001 Newsletter). In Freeman, the court noted the importance of evidence that claimant can be retrained for a job or jobs other than the one that he was doing when injured. In the American Airlines case, the court suggested that the claimant could not supply such evidence until he underwent the staff medical evaluation.

CHANGE IN CHICAGO ARBITRATION PROCEDURES

The Industrial Commission has now established a new Chicago arbitration schedule beginning in January, 2002. Each of the Chicago arbitrators will continue to have a monthly status call. In the past, the arbitrators subsequent ten-day trial schedule would begin one week after the status date. Beginning in January, 2002, the trial schedule will begin the first working day after the status date. In other words, at 2:00 p.m. on the status date the arbitrator can set any case for trial at 9:00 a.m. the following day.

The newly proposed status call procedure has been generally followed in non-Chicago calls. However, in those out-of-town calls, a single arbitrator conducts

the call and tries every case. In Chicago, ten arbitrators are involved with overlapping calls.

NEW FIRM ADDITIONS

We are proud to report that our firm has three new associates. They are:

DANIEL M. O'BRIEN, born Rockford, Illinois, June 10, 1970; admitted to bar, 1998, Illinois, U.S. District Court, Northern District of Illinois, 1998. Education: University of Illinois (B.S. *Cum Laude*, 1992); DePaul University (M.A. 1995); University of Texas (J.D. 1998). Member: Chicago and Illinois State Bar Associations. Areas of Practice: General Federal and State Civil Trial and Appellate Practice, Employers' Liability, Employment Litigation, Insurance Coverage Litigation.

MICHAELA A. MESSENGER, born Storm Lake, Iowa, December 17, 1975; admitted to bar, 2001, Illinois; U.S. District Court, Northern District of Illinois. Education: Loyola University of Chicago (B.A. *Magna Cum Laude*, 1998); Villanova University School of Law (J.D., *Magna Cum Laude*, 2001). Member: Chicago, Illinois State and American Bar Associations. General Federal and State Civil Trial and Appellate Practice, Employer's Liability, Employment Litigation, Insurance Coverage Litigation.

STEPHANIE A. BELONGIE, born Columbia, Missouri, October 14, 1975; admitted to bar, 2001, Illinois. Education: Marquette University (B.A., *Cum Laude*, 1998); Loyola University Chicago (J.D., 2001). Member: Chicago, Illinois State and American Bar Associations. Em-employer's

Liability and Workers' Compensation.

Stephanie will handle workers' compensation and Daniel and Michaela will handle civil litigation.

FRANK J. WIEDNER
Editor