

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 12 ISSUE 2

April 2002

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

C O N T E N T S

- | | |
|---|---|
| <p>2 HYDRAULICS, INC. CASE APPLIED
PETRILLO DOCTRINE TO WORKERS'
COMPENSATION CLAIMS
<i>Hydraulics, Inc. v. Industrial Commission,
No. 2-00-1186WC, decided March 22, 2002</i></p> <p>3 AGGRAVATION OF HYPERTENSION
HELD TO BE AN ACCIDENTAL INJURY
<i>City of Springfield, IL P.D. v. Industrial
Commission, No. 4-00-0562WC, decided February
25, 2002</i></p> <p>4 WHEN IS A "LOANED EMPLOYEE" NOT
A LOANED EMPLOYEE?
<i>Charles Lanphier v. Gilster-Mary Lee Corporation,
No. 3-01-0369, decided February 21, 2002</i></p> <p>5 EMPLOYEE OF MALL TENANT FALLING
ON ICY PARKING LOT HELD
COMPENSABLE
<i>Anna Homerdig v. Industrial Commission,
No. 1-01-1175WC, decided February 21, 2002</i></p> <p>6 PENALTIES ARE RETROACTIVE EVEN
ON CASES BEFORE <u>McMAHAN</u>
<i>American Airlines v. Industrial Commission,
No. 1-01-1545WC, decided February 14, 2002</i></p> <p>7 AWARD OF VOCATIONAL
REHABILITATION BENEFITS AND
MAINTENANCE NOT PERMITTED AT
SECTION 19(b-1) HEARING
<i>Mobil Oil Corporation v. Industrial Commission,
No. 3-00-0931WC, decided February 1, 2002</i></p> | <p>8 EMPLOYER PENALIZED FOR FAILURE
TO PAY PORTION OF AWARD NOT IN
DISPUTE
<i>Robert Zitzka v. Industrial Commission,
No. 1-01-0955WC, decided March 14, 2002</i></p> <p>8 NEW PARTNER</p> <p>8 NEW ASSOCIATES</p> |
|---|---|

HYDRAULICS, INC. CASE APPLIED
PETRILLO DOCTRINE TO WORKERS'
COMPENSATION CLAIMS

The well-known case of Petrillo v. Syntex Laboratories established the rule prohibiting the defendant from having ex-parte communications with the plaintiff's treating physician. Petrillo held that citizens of Illinois have a confidential and fiduciary relationship with their physicians, stating:

[W]e believe that the fiduciary relationship existing between the patient and physician requires, at the very minimum, that the patient have a right to rest assured that the physician will act in good faith, while at the time, the physician complies with court-authorized discovery.

Thus, when a patient files suit, the physician should be prepared to release those records relevant to the condition placed at issue, be available to give depositions, and be prepared to testify, should he be called upon to do so. ... Discussion of the patient's confidences under any other circumstances, such as the ex-parte conference, could be inconsistent with the duties of ... the physician [T]he ex-parte conference involves conduct which could be violative of the duties of a fiduciary and would, therefore, be contrary to public policy favoring the fiduciary nature of the physician-patient relationship.

Because of the unavailability of civil discovery in workers' compensation cases, employers contended that the Petrillo rule did not apply. However, the appellate court opinion in the Hydraulics, Inc. case, makes it quite clear that the rule does apply to workers' compensation cases. The court said:

Throughout Petrillo, the court stressed that ex parte communication produces no better or greater evidence than that which

is obtainable through traditional means of discovery. We note that workers' compensation practice, while not subject to discovery procedures as provided under the Code of Civil Procedure (735 ILCS 5/1-101 et seq. (West 1988)), nonetheless has analogous avenues for securing information from treating physicians. Every competent, non ex parte method of acquiring medical information referenced in Petrillo as a basis for barring ex parte contact, including subpoenas, release of relevant records, interrogatories, oral depositions, and live testimony, can be found in an analogous form within the Workers' Compensation Act. (Act) (820 ILCS 305/16 (West 1998)). These procedures under the Act and the rules of the Commission provide sufficient methods for the employer to obtain all the information necessary to act upon a claim within the proper time frame. In view of the existence of discovery-like methods in workers' compensation, we see no reason to override the public policy and constitutional aspects of the sanctity of physician-patient relationship for the workers' compensation arena, where the courts have already held that ex parte communications violate those public policy and constitutional concerns in the personal injury arena.

It is often said that bad cases make bad law. The factual situation in Hydraulics suggested that the medical management specialist hired by the employer was utilizing the direct communication with the claimant's physicians to challenge medical conclusions. The claimant, Lynn Anderson, alleged an injury to her left wrist, resulting from repetitive trauma. The medical management specialist, Rhonda Pencak, sent the claimant to the company clinic where Dr. Jablonowski found the claimant's symptoms work related. He then sent the claimant to a Dr. Cox, who diagnosed a left wrist fracture. Dr. Cox then referred the claimant to Dr. Ruder, a

hand surgeon, who found that the fracture and the wrist pain were related to the claimant's work duties.

Pencak then obtained a report from Dr. Mitsos, who found the injury to be not work related. She then prepared a videotape of a person doing the claimant's job, sent the video, a new job description, and Dr. Mitsos' report, along with the employer's theory of defense, to Dr. Ruder. Following this communication, Dr. Ruder issued a "clarified" opinion finding no causal connection between the claimant's injury and her work. In a special concurring opinion, Justice McCullough points out that:

The plaintiff-patient does not, by the simple act of filing suit, consent to ex parte discussions between his treating doctor and defense counsel, nor does he consent to disclosure of confidential information unrelated to the subject matter of the lawsuit.

The concurring opinion also emphasized that the provisions of Section 8(a) do allow the employer appropriate methods to determine merits of the claim, its nature, and its extent. He specifically made reference to that provision of Section 8(a) which provides:

Every hospital, physician, surgeon or other person rendering treatment or services in accordance with the provisions of this Section shall upon written request furnish full and complete reports thereof to, and permit their records to be copied by, the employer, the employee or his dependents, as the case may be, or any other party to any proceeding for compensation before the Commission, or their attorneys.

EDITOR'S NOTE: Claim procedures may differ with reference to obtaining initial information. Obviously, authorizations signed by the claimant should be obtained whenever possible. In the absence of such authorization, the claims handler

should consider sending out a letter to the treating physician requesting the information. This communication should quote from the appropriate provision of Section 8(a) entitling the employer to those records and conclude with a request to forward the information as soon as possible. It might be well to send a copy of that letter to the claimant so that he is informed of the necessity of obtaining this information.

If no response is received within a reasonable time, it might be well to write the claimant, or his attorney if the claimant is represented, advising that the records had not been received and, as a result, the payment of benefits cannot be undertaken. This will put the burden on the claimant to expedite your obtaining the appropriate records.

A medical management expert should be able to meet with the claimant's physician providing that the claimant is present. Keep in mind that only *ex parte* communications are prohibited and, therefore, not admissible as evidence.

AGGRAVATION OF HYPERTENSION HELD TO BE AN ACCIDENTAL INJURY

Glen Wessel, a 45 year old juvenile detective, began working as a police officer for the City of Springfield in June, 1982. In October 1993, he was transferred to the Juvenile Division where his duties included the investigation of criminal activities by juvenile offenders, interviewing suspects and victims of crime and making arrests, including drug arrests at crack houses. The juvenile office work was considered one of the most stressful jobs in police work due to volume, recidivism, frustration and an overriding sense of futility.

In March, 1992, Wessel had begun treating with Dr. Thomas Wiss, who diagnosed acute hypertension. Over the subsequent years, the hypertension had become increasingly more

difficult to control. On July 14, 1998, Dr. Wiss, in a report, observed that “over these last two years it was noted that during times of stress at work or eventually indeed any time at work (Wessel’s) blood pressure would be essentially uncontrollable with high doses of two or three medicines at a time.” As a result of these prolonged episodes of hypertension, the claimant began to show signs of organ damage, including retinopathy, a thickening of the arteries in the back of the eye and early ventricular hypertrophy. Dr. Wiss concluded that Wessel was disabled from his job and that continued work in law enforcement would be detrimental to the claimant’s health.

At the request of the City, Dr. Merry Downer examined the claimant and reviewed the medical records. Dr. Downer noted that the claimant’s blood pressure became controllable only during vacation and leaves of absences from work. After noting that hypertension is a very complex disease with many physiological and psychological contributors, Dr. Downer agreed that it would be beneficial for the claimant to be employed in a less stressful environment.

The arbitrator denied the claim, finding that the claimant had failed to prove that he sustained accidental injuries arising out of and in the course of his employment. On appeal, the Commission reversed the decision of the arbitrator and found that the claimant’s condition should be considered a “mental-physical” case. The claimant’s “mental” trauma in the form of work-related stress aggravated the “physical” condition of hypertension. The appellate court agreed:

Here, the medical evidence is uncontroverted that the claimant suffered from a pre-existing physical condition of hypertension. It is also uncontroverted that the claimant’s job-related stress aggravated that pre-existing condition to the point where the claimant could no longer engage in police work without

endangering his health. Given the overwhelming medical evidence, we cannot say that the Commission erred in finding a direct connection between the claimant’s work-related stress and his uncontrollable hypertension.

The City had attempted to show that the factual situation suggested a “mental-mental” case where the claimant would be required to prove a sudden, severe emotional shock, as established in the Pathfinder case. The appellate court found that the Commission’s decision was not against the manifest weight of the evidence, pointing out that hypertension was a physical condition and that if there is work-related stress, either physical or emotional, that aggravates the disease so as to cause physical disability, then there is an accidental injury arising out of and in the course of his employment.

EDITOR’S NOTE: The Commission noted that while the claimant had proven that he could no longer work in law enforcement, he had failed to show that he was not employable elsewhere, had presented no evidence of a job search and made no request for vocational rehabilitation. The case was, therefore, remanded to the arbitrator for a finding only as to the permanency.

WHEN IS A “LOANED EMPLOYEE” NOT A LOANED EMPLOYEE?

As you may have noted from the last newsletter, the question of loaning and borrowing employers is difficult to evaluate. In a recent case, the Third District of the Appellate Court reversed a decision that the same court had rendered in 1989. Both the 1989 and the current case involved the question of immunity of the alleged borrowing employer.

Section 1(a)4 of the Act, after describing the liability of the borrowing and loaning employer as being joint and several, further

provides that an employer who operates as a day labor service shall be deemed a loaning employer within the meaning of the Act. That reasoning was followed in the 1989 case of Wasielowski v. The Havi Corporation, where the day labor service fit the description of the “loaning employer” and the employer, where the employee was sent, was accepted as the “borrowing employer.” A civil action brought by the claimant against the alleged borrowing employer was dismissed because of employer immunity.

Unfortunately, in the case of Charles Lanphier v. Gilster-Mary Lee Corporation, this same appellate court reversed its prior finding. The court agreed Defendant Services, a day labor service, fit the definition of a loaning employer but concluded “*that the definition of ‘loaning employer’ was not meant to define borrowing employers or loaned employees.*” In other words, the court adopted the position that the statutory definition of a loaning employer did not automatically establish as a matter of law the status of borrowing employer and loaned employee.

EDITOR’S NOTE: The automatic immunity of the borrowing employer is removed when the loaning employer is a day labor service. The court is more likely to deny a motion for summary judgment and refer the issue to a jury.

EMPLOYEE OF MALL TENANT FALLING ON ICY PARKING LOT HELD COMPENSABLE

In the January, 2002 Newsletter, we discussed the case of a Wal-Mart store employee who fell in the icy-surfaced back lot. The claimant was leaving work and was to be picked up in that lot by a friend driving the claimant’s car. Employees were encouraged but not required to park in the back lot in order to make the front lot available to customers. The court held that the claimant did not establish that she

Claimant went out to her car to retrieve the case and slipped on the ice in her

was exposed to a risk not common to the general public.

The decision was decided on a three to two vote. The dissenting opinion pointed out that an employee who fell in the employer’s lot within a reasonable time before or after work was generally deemed to have an injury arising out of and in the course of the employment.

No sooner was the ink dry on that opinion when the Justice who wrote the dissenting opinion in the Wal-Mart case, wrote the majority opinion, again after a three to two vote, in the Anna Homerding case where the employee fell in a shopping mall parking lot.

The claimant was a nail technician for the “House of Charles,” a tenant in a small strip mall. While the employer asserted he had no policy as to where the employees parked their cars, the claimant contended that she was encouraged to park in the back of the lot and apparently all of the employees did so.

On the day in question, she parked in the back lot, went into the employer’s back door and, while setting up her supplies at her work station, she realized that she needed a case that had been left in the car. Carrying the case in her left hand, claimant slipped on some ice about five feet from the employer’s door, thereby sustaining a fractured wrist. The arbitrator found for the claimant on the basis that she was required to park in the back lot and awarded compensation. The Industrial Commission reversed on the basis that the employer did not own, maintain or control the parking lot in which claimant fell. The appellate court reversed and found the matter compensable. The court pointed out that the claimant had already begun her work day and was injured while performing a task that advanced her employer’s interests. The court stated:

efforts to return to the salon. It is clear that claimant fell while working, carrying

out a task that was quite foreseeable and necessary to her job. Accordingly, her injury necessarily arose out of and in the course of her employment. Additionally, the risk of injury to which claimant was exposed was connected to her employment. Claimant was required to park in the rear of employer's business on a lot employer financially contributed to maintain, and she needed certain supplies to perform her job. But for the demands of her job, she would not have needed to make a second trip to her car nor negotiate the ice between her car and the salon door while carrying a large case. Her risk of injury accordingly was greater than that of the general public.

The Justices who had participated in the majority opinion in the Wal-Mart case concurred with the final result as to compensability but expressed concern about the reasons given for compensability. For example, the opinion stated that nothing in the record could support a finding that the case of supplies which the claimant was carrying in any way contributed to her fall. The concurring opinion gave the following reasons for agreeing to the compensability finding:

The rear lot in which the claimant fell was available for use by members of the public and there is no doubt that, had a member of the public chosen to park in that lot, he or she would have been exposed to the same risk of falling to which the claimant was exposed. The critical difference is that the public was free to use the front lot and the claimant was not. By compelling the claimant to use the rear lot, her employer chose the route she would use to enter and leave the premises. The only practical way that the claimant could enter and leave was by the rear door which, on the day of her fall, exposed her to the hazards of the ice in the rear parking lot. Since the claimant was required to use the rear lot, she was exposed to a risk common to the general public to a greater degree than other

persons who were free to use the front lot.

It is for this reason that I believe that the uncontradicted evidence in the record supports only one reasonable conclusion; namely, that the claimant's injury arose out of her employment.

EDITOR'S NOTE: While all five Justices agreed that the case was compensable because of the increased risk, the minority opinion was concerned that the majority's reasoning might be misinterpreted as adopting a theory of recovery grounded in positional risk, which was repudiated by the supreme court in Brady v. Ruffolo. It should also be noted that the appellate court felt that there was a reasonable dispute and that no penalties should be awarded.

PENALTIES ARE RETROACTIVE EVEN ON CASES BEFORE McMAHAN

On October 22, 1998, our supreme court issued an opinion in the McMahan case wherein the court held that Section 19(k) and 16 of the Act did not preclude the imposition of penalties and the assessment of attorney's fees for unreasonable and vexatious delay in paying medical expenses. Prior to that date, on May 21, 1998, Anne Hennessy had obtained an award against American Airlines, which award included medical expenses. In her review, Hennessy requested penalties only on the unpaid TTD benefits and the Commission so awarded. The circuit court affirmed the Commission decision but did not award penalties on the medical expenses because it believed that McMahan represented a change in the law and, therefore, its finding should be given prospective application only. Prior to McMahan, the Childress case had refused to extend the penalties provision to medical expenses. The appellate court concluded that McMahan was retroactive, noting that neither side had relied on Childress. The court stated:

Neither party cited Childress or made any argument with respect to whether the amount of medical expenses awarded should be included in the determination of the amount of penalties and fees. ...

Because our supreme court did not state in McMahan that it was to be given prospective application only, and because the parties did not rely on Childress, the precedent overruled by McMahan, the presumption of retroactive application is not overcome.

EDITOR'S NOTE: Since most pending cases were decided after McMahan, this decision will not affect many cases. It just provides another warning to employers to be careful in denying claims for medical expenses. The result of such a decision can have a very severe effect as pointed out in the Bunnow case, cited in the January, 2002 Newsletter.

AWARD OF VOCATIONAL REHABILITATION BENEFITS AND MAINTENANCE NOT PERMITTED AT SECTION 19(b-1) HEARING

David Haberkorn, a machinist employed by the Mobil Oil Corporation, had sustained a prior laminotomy in 1990, but was able to return to unrestricted work. In January of 1997, the claimant developed back pain, which was treated conservatively. On July 17, 1997, the claimant was engaged in a firefighting training exercise at work when the hose broke loose causing him to jerk backwards at which time he felt pain in the back. Thereafter, he underwent an extensive course of treatment leading to a back fusion on September 24, 1998, with treatment continuing until the arbitrator's hearing on October 5, 1999. During the arbitration hearing, the claimant's vocational rehabilitation expert recommended a vocational rehabilitation plan for the claimant, although she admitted that the claimant was capable of finding employment within his physical restrictions without additional training.

The arbitrator awarded TTD benefits for 82.4/7 weeks or the payment of the outstanding medical expenses and, after finding that the claimant was unable to return to his former job as a machinist, he ordered that Mobil pay the costs associated with an approved vocational rehabilitation plan and to pay the claimant

maintenance while he was involved in the plan.

On appeal, the court affirmed the award of TTD, even though the claimant's rehabilitation counselor had found that the claimant was capable of finding employment within his physical restrictions. The court stated:

The fact that the claimant may have been able to perform light duty work does not necessarily preclude a finding that he was temporarily totally disabled. We believe that the evidence in this record is sufficient to support a finding that, as of the date of the arbitration hearing, the claimant's condition had not stabilized, he was still receiving medical treatment, and he had not reached maximum medical improvement. As a consequence, we do not find the Commission's decision to award 82 4/7 weeks of TTD benefits to be against the manifest weight of the evidence.

The court ruled otherwise with reference to the rehabilitation issue. After reviewing the appropriate case, the court stated:

We find that vocational rehabilitation benefits and maintenance may not be awarded as relief in a hearing conducted pursuant to section 19(b-1) of the Act and that the Commission's award of such benefits in this case must be vacated, without prejudice to the claimant's right to seek such benefits on remand.

EDITOR'S NOTE: The award of the TTD was not surprising in view of the fact that the claimant was under active medical treatment and his condition had not reached a permanent stage. The finding against the vocational rehabilitation plan is somewhat surprising in that this type of training is often best undertaken while the claimant is completing his treatment. The decision on maintenance is not particularly significant because the Commission has frequently found the amount of maintenance to be in the same amount as the TTD.

EMPLOYER PENALIZED FOR FAILURE TO PAY PORTION OF AWARD NOT IN DISPUTE

In Zitzka, the appellate court again addressed the penalties issue. Robert Zitzka, a forklift operator, was injured when the forklift went out of control and pinned him against a rock. The arbitrator awarded 73-3/7 weeks of TTD, medical benefits and permanency to the extent of 45% loss of a man. After filing a review, the employer, Reflector Hardware Corporation, agreed that it was only disputing the medical expense and the Commission accordingly reduced the amount of medical expense in its decision. The claimant requested penalties on the undisputed portions of the award, that being the TTD and PPD, Reflector argued that an employer was not required to pay any part of an award where there is a legitimate dispute over some portion thereof, in order to avoid a “piecemeal” payment of awards.

Reflector relied on the Mid-American Lines case which denied penalties in a death case when the question of allocation between two dependents was unclear. The court stated:

While Reflector disputed the medical expense award, it did not dispute the TTD or PPD awards. Reflector had no legitimate reason to withhold payment of the undisputed awards and nothing in Mid-American Lines supports the proposition that the undisputed portions of a workers' compensation award can be withheld. The Commission's award of section 19(k) penalties and section 16 attorney fees was proper, and the circuit court erred in finding to the contrary.

Reflector was more successful in disputing the Commission's awarding of penalties on the entire PPD award of 225 weeks. At the time of the penalty hearing, only 85 weeks had accrued. The appellate court stated:

In the present case, the issue is whether penalties and fees should be calculated based upon the entire award, or only that

amount that has accrued at the time of penalty hearing. We hold that penalties and attorney fee awards should be calculated on the amount of the award that has accrued at the time of the penalty hearing. Amounts that have not yet accrued should not be included in the calculation.

EDITOR'S NOTE: The penalties issue seems to arise in a greater number of cases and it is important that prompt payment be made when issues are not in dispute.

NEWSLETTER BY E-MAIL

Several clients have suggested that the newsletter be distributed by e-mail. This request is under consideration. We would encourage all of you to forward your e-mail addresses to us with a request as to the number and identity of persons who would be serviced by the e-mail distribution.

NEW PARTNER

CATHERINE MAFEE LEVINE, born Rochester, New York, November 3, 1964; admitted to bar, 1991, Illinois; admitted to U.S. District Court, Northern District of Illinois, 1991. Education: Michigan State University (B.A., 1986); University of Detroit (J.D., 1991). Phi Alpha Delta. Member: Chicago, Illinois State and American Bar Association; Workers' Compensation Lawyers Association. Catherine has ten years in workers' compensation practice with our firm.

NEW ASSOCIATES

INGRID M. LULICH, born Baltimore, Maryland, December 14, 1967; admitted to bar, 1992, Illinois, U.S. District Court, Northern District of Illinois, Arbitrator for Illinois Mandatory Arbitration Program. Education: University of Maryland (B.A. 1989); DePaul University College of Law (J.D. 1992). Member: Illinois State Bar Association. Author: “Making

COBRA Work: The Role of the Federal Courts,”
Journal of Health and Hospital Law. Ingrid has
ten years of experience in practice before the
Industrial Commission.

RYAN A. MARGULIS, born Chicago,
Illinois, October 21, 1975; admitted to bar, 2001,
Illinois; U.S. District Court, Northern District of
Illinois. Education: Indiana University (B.S.,
B.A. *With Honors*, 1998); Washington University
School of Law - St. Louis (J.D., 2001). Member:
Chicago, Illinois State and American Bar
Associations.

FRANK J. WIEDNER
Editor