

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## **NEITHER A BORROWER NOR A LENDER BE, FOR LOAN OFT LOSES BOTH ITSELF AND FRIEND.**

William Shakespeare (1564-1616),  
British poet. Hamlet (I, iii).

On January 24, 2002, the appellate court awarded medical expenses, additional TTD, penalties and attorney's fees when neither the borrowing nor loaning employer paid the medical expenses amounting to \$777,000. The loaning and borrowing employers pointed fingers at each other as the person responsible for those expenses. The decision as to liability is not unusual, but the penalty and attorney's fees findings are highly unusual.

On December 2, 1996, Steven Bunnow was involved in an accident while driving a tractor owned by Champion Trucking (Champion) and hauling a trailer owned by Chicago Suburban Express (Suburban). The claimant's truck jack-knifed, fell on its side, slid into a concrete bridge, and burst into flames. It was uncontested that the claimant suffered serious injuries for which he has required extensive medical treatment.

Prior to arbitration, the claimant filed a petition seeking payment of penalties and attorney's fees. As in most equipment lease cases, certain facts suggested Champion as the sole employer and others suggested Champion as the loaning employer and Suburban as the borrowing employer. The facts suggesting that Champion was the employer included: 1) lease provisions which gave the equipment over to the "exclusive use, direction and control of lessee;"

2) Champion was solely responsible for training its drivers, determining the drivers' routes and maintaining its tractors; 3) Champion performed all the employee evaluations and determined the amount of raises, selected and hired all drivers and gave instructions as to how to perform the job; and 4) only Champion had the authority to fire the claimant.

Suggesting that Suburban may have responsibility included the following: 1) Champion had Suburban's name and ICC number painted on the doors of the tractors; 2) Suburban never admonished Champion not to do so; and 3) Suburban had the ability to fire the claimant if he was driving recklessly or arrived for work intoxicated.

On April 17, 1998, the arbitrator entered a decision finding that the claimant was an employee of Champion and that Champion did not have a borrowing/loaning employer relationship with Suburban. The arbitrator awarded claimant \$450.56 per week for 41 weeks and ordered Champion to pay \$777,000 in medical expenses. In a surprising twist, the arbitrator ordered both respondents to pay the claimant penalties and attorney's fees: \$4,800 pursuant to Section 19(k), \$2,500 pursuant to Section 19(l) and \$1,467 in attorney's fees pursuant to Section 16. These payments were for non-payment of TTD benefits only, not medical expenses. Champion and Suburban both reviewed. Champion argued that the arbitrator should have found Suburban as the borrowing employer. Suburban asserted that the arbitrator could not award fees and penalties against it after having concluded that it was not the claimant's employer. The claimant did not file a petition for review, but, in his Statement of Exceptions, argued that the arbitrator should have found a borrowing/loaning employer relationship. He did not raise the question of penalties and attorney's fees. On December 10, 1998, the Commission, on review, found that a borrowing/loaning employer relationship existed with Champion as the loaning employer, thereby being secondarily liable for all compensation and expenses and Suburban as the borrowing employer being primarily responsible for all

payments. The Commission left undisturbed the amount of TTD benefits and medical expenses awarded and the amount of penalties assessed, except that it reduced the attorney's fees paid pursuant to Section 16 of the Act from \$1,467 to \$967. Despite the fact that only three days before the Commission decision, the appellate court had equated penalties on medical expense as being in the same category as penalties on unpaid compensation (McMahon), the Commission had no discussion of the issue of penalties for the non-payment of medical expenses.

The claimant appealed contending that the Commission's decision denying penalties and attorney's fees based on the non-payment of medical expenses was against the manifest weight of the evidence. However, the claimant's appeal was tardy. Suburban filed a timely appeal contending that the borrowing/loaning employer relationship finding was against the manifest weight of the evidence. Despite the fact that the claimant's appeal was late, the court stated that by virtue of the timely appeal by Suburban, the court had jurisdiction to review the entire record and could consider the claimant's contentions pursuant thereto. Ultimately, the circuit court rejected the arguments of both parties and affirmed the Commission's decision.

The claimant argued that Section 19(f) of the Act permitted the Commission, on its own motion or the motion of any party, to recall its decision in order to correct "any clerical error or error in computation." The court agreed that the failure to assess penalties on the medical expense was "the act or action of computing." The court stated:

*In our opinion, by this definition, the term "computational error" encompasses both the use of an incorrect mathematical formula and any mistakes in performing the mathematical functions, such as addition or multiplication, needed to implement that formula.*

After addressing this interpretation of "computational error," the court noted that the

Commission decision had already found that the respondent's position was unreasonable or vexatious in failing to pay the disputed TTD benefits, stating:

*In awarding the claimant penalties pursuant to section 19(k) of the Act and attorney fees pursuant to section 16 of the Act based on the under-payment of TTD benefits, the commission implicitly found that Suburban's refusal to pay such benefits was unreasonable or vexatious. The trial court confirmed the Commission's decision, and Suburban had not appealed. Suburban has never contested the reasonableness of the claimant's medical expenses or that they are wholly attributable to his December 2, 1996 accident. As such, there was never any question that, if Suburban was liable to pay the claimant TTD benefits, it was also liable to pay all of the medical expenses at issue. Accordingly, if Suburban's failure to pay TTD benefits was unreasonable or vexatious, as the Commission implicitly found, so too was its failure to pay the claimant's medical expenses. (Emphasis supplied)*

Since the Commission had made a computational error in not awarding 50% penalties pursuant to Section 19(k), the case was referred back to the Commission "with directions that it determine the proper amount of section 19(k) penalties to which the claimant is entitled in accordance with McMahon and, after doing so, to assess the amount of attorney fees it deems reasonable pursuant to section 16 of the Act."

**EDITOR'S NOTE:** In a discussion with the petitioner's attorney, Mark DePaolo, I learned several other facts that were not included in the appellate court decision. On July 7, 1998, less than three months after the arbitrator's decision finding Champion the employer, Champion's insurance carrier, a Wisconsin-based company, paid \$682,000 of the \$777,000 total outstanding expense. This may have included all of the bills incurred in Wisconsin and payment was made approximately five months before the

Commission decision on review.

After the decision on review on December 10, 1998, claimant had filed his motion for reconsideration and it was not until May 7, 1999, that Commissioner Weaver entered his final order denying the claimant's motion to reconsider. Within three months thereafter, Suburban's carrier had paid \$95,000, which amounted to approximately all of the balance of the medical bills. Suburban may have concluded that the Commission decision was the first finding that Suburban had any responsibility for the payment of the balance of the medical expense. As the payment was made within three months of the Commission's final order, Suburban may have felt that such payment was timely.

We must keep in mind that delays in the respondents making medical payments would be sufficient to invoke penalties. At the time of the arbitration hearing, none of the medical bills had been paid and the claimant described receiving three letters in the mail each day regarding overdue medical expense. He testified that he stopped answering his telephone due to calls from creditors and has received counseling to deal with financial pressures. In addition, his doctors had recommended additional surgery which could not be performed because the doctors insisted upon guarantee of payment.

In retrospect, the respondents should have agreed from day one to be responsible for the medical benefits on some type of percentage basis, with an agreement between the respondents that a reimbursement would be made if one of the respondents was held not liable. One of the situations causing irritation with the Commission and, now the appellate court, is the fact that two parties are at issue without taking into account the claimant is an innocent victim.

#### **RETAIL STORE NOT LIABLE FOR EMPLOYEE'S FALL IN PARKING LOT**

It has been some time since the appellate court attempted to clarify the issue of

compensation liability if the employee falls in the retail employer's parking lot when the lot is available to customers. In the recent case of Wal-Mart Stores, Inc. v. Industrial Commission, the appellate court denied liability for such a fall.

On November 11, 1995, Heather Parry, a Wal-Mart employee, was scheduled to work from 4:30 p.m. to 11:00 p.m. She left the store at 8:30 p.m. for a meal break. She did not return but called the store from her home and, according to Parry, she told Sharon Nielsen, a supervisor, that she had slipped on ice in the parking lot on her way to her automobile, thereby sustaining an injury to her back. Nielsen testified that Parry's initial report was that she had fallen in the parking lot of her building, one block away. Wilda Mae Land, another supervisor, testified to a similar admission by Parry. Neither supervisor made any written report of the conversation.

The Wal-Mart parking lot was covered with ice as a result of a recent ice storm occurring on either November 10 or 11. Wal-Mart had only one parking lot, which lot was used by both employees and customers. Employees were requested, but not required, to park on the south side of the lot so that customers would have better access to the front door. Parry had not driven herself to work on November 11. Her roommate, Amber Samples, who had borrowed her automobile, was waiting to pick up Parry in the south portion of the lot, which proved to be the location where Parry described her fall.

The Industrial Commission awarded benefits to the claimant and this decision was affirmed by the circuit court. The appellate court concluded that the Industrial Commission was the proper arbiter to decide the conflicting versions concerning the location of the fall, which finding would not be disturbed. The appellate court held, however, that despite the acceptance of the claimant's version of the facts, the Commission decision was against the manifest weight of the evidence. The court stated:

*The evidence is clear that the entire Wal-Mart parking lot was available for use by both patrons and employees alike. Parry*

*did not park her own car in the lot that night. Although Samples was waiting for Parry in the section of the lot in which employees were asked to park, Samples was not an employee, and there was no evidence that anyone, including Parry, asked her to park there. Parry's fall resulted from a hazard to which she and the general public were equally exposed; thus, her injury did not arise out of her employment.*

The appellate court cited the landmark supreme court case of Caterpillar Tractor Co. v. Industrial Commission, where the claimant had stepped from a curb onto a company parking lot driveway and twisted her ankle:

*Our supreme court found that the claimant did not establish that he was exposed to a risk not common to the general public. "Curbs, and all the risks inherent in traversing them, confront all members of the public." The court noted that the object of comparing the exposures to risk of an employee and the general public "is to isolate and identify the distinctive characteristics of the employment." Here, there are no such distinctive characteristics. Both Parry and every member of the general public were free to park anywhere in the lot. Parry's employment at Wal-Mart did not place her in any special position vis-a-vis the general public in that lot.*

The case involved an additional issue concerning the possibly defective bond filed by Wal-Mart when appealing to the circuit court. At the time of the filing, Wal-Mart submitted only a copy of the bond, with the original bond being filed six days late. The appellate court held that Wal-Mart had substantially complied with the statute.

**EDITOR'S NOTE:** The Wal-Mart decision was decided by the appellate court in a three to two vote. The dissenting opinion pointed out that injuries sustained in a parking lot either owned or controlled by an employer within a reasonable

time before or after work are generally deemed to arise out of and in the course of the employment, especially when the claimant's injury was sustained as a result of the condition of the employer's premises. Encouraging employees to park in an area farther away from the store subjected that employee to an increased risk of injury in traversing the icy lot.

**ADDITIONAL DECISION  
SUPPORTING INDUSTRIAL  
COMMISSION DECISIONS WHICH  
ARE NOT AGAINST THE MANIFEST  
WEIGHT OF THE EVIDENCE**

In our last Newsletter (October 2001), we reviewed the F & B Manufacturing Company case, emphasizing the weight to be given to Industrial Commission decisions on questions of fact. Since that time, two additional cases have emphasized this issue and reversed decisions of the circuit court which had concluded that the claimant was just not receiving enough money.

In Inter-City Products Corp. v. Industrial Commission, the employee, David Wright, had begun his employment with the predecessor to Inter-City in May of 1991. Approximately one month later, he injured his neck and shoulder while lifting, at which time he "felt something like a rubber band" in between his neck and shoulder and "knew that something was wrong."

On July 24, 1991, several weeks after the plant had been sold to Inter-City, Wright noticed pain in his neck, shoulder, arm and thumb and was unable to keep up with his present duties.

He began treating with his family physician, Dr. Furry, on July 29, 1991, and continued treatment until September 24, 1991, when TTD was terminated because of claimant's refusal to appear for an IME. Thereafter, the claimant received no treatment until 08/24/92, after which he returned to Dr. Furry for treatment until 3/19/93. During this period, the employer had obtained an IME and other testing from Dr. Phillips, a neurosurgeon, who opined that Wright's condition was not due to his employment.

Nevertheless, the claimant's attorney sent Wright to Dr. Marrese, an orthopedic surgeon, who felt that the claimant's pre-existing condition had been aggravated at work. Eventually, Dr. Marrese performed cervical surgery with fusions. Dr. Marrese finally felt that the claimant could return to some type of limited duty.

The legal proceedings were as follows:

08/25/99 The arbitrator awarded 8-2/7 weeks of TTD on the basis that the claimant's condition had stabilized by 9/24/91, 5% man as a whole and \$260 in medical expense. The arbitrator felt that the condition leading to the surgery did not result from the accident and accepted the opinion of Dr. Phillips that the claimant had sustained only a temporary aggravation of his prior condition, which aggravation had not effected the claimant's ability to work.

07/18/97 The Industrial Commission unanimously affirmed the Arbitrator's Decision.

10/27/98 The circuit court found that the Industrial Commission's decision was against the manifest weight of the evidence and remanded the case back to the Industrial Commission. Inter-City tried to appeal but was denied because of lack of jurisdiction. In other words, the appeal was premature.

05/31/00 The Industrial Commission wrote a new decision increasing the award as follows:

1. TTD increased from 8-2/7 to 200-6/7 weeks;

2. PPD increased from 5% man as a whole to 25% man as a whole;
3. Medical benefits increased from \$260 to \$33,425.70.

12/11/00 The circuit court affirmed and Inter-City appealed.

The appellate court reviewed in detail the conflict of medical evidence and concluded that the original Industrial Commission decision was not against the manifest weight of the evidence and should have been affirmed.

In still another case, the appellate court again reversed the circuit court's remand order to the Industrial Commission and stated that the second Industrial Commission decision in response to that remand order was in error. As a result, the Industrial Commission's original decision denying compensability became the final result. The facts are as follows:

In Gilster Mary Lee Corporation v. Industrial Commission, the employee, Ella Joan Wydeck, testified that beginning June 2, 1988, she began having problems with her knees, which symptoms she attributed to climbing, stooping and squatting as part of her work activity. Her treating physician concluded that the work activities had aggravated a degenerative knee condition. Respondent's examining physician felt that she stressed her knees with every step she took and that the work was not a significant factor. The arbitrator denied the claim on the basis that the climbing, stooping and squatting activities did not rise to the level of repetitive activity sufficient to constitute an accidental injury. The Commission affirmed but the circuit court concluded that the petitioner's physician was more credible

and remanded the case back to the Commission for a new decision. The second time, the Commission awarded 64 weeks of TTD and 20% loss of the left leg, for a total of \$18,960. Obviously, the circuit court now affirmed the Industrial Commission but this decision was quickly reversed by the appellate court suggesting that the circuit court's first decision was an improper exercise of its authority. As a result, all compensation was denied. The court stated:

*Before giving deference to the Commission decision following remand, the reviewing court initially determines whether the circuit court's finding that the original Commission decision was contrary to law was correct. In the case at bar, the circuit court did not correctly determine that the Commission applied an improper legal standard. Different reasonable inferences could have been drawn from the undisputed facts. When different reasonable inferences can be drawn from the undisputed facts, the standard of review is whether the Commission's findings of fact are against the manifest weight of the evidence. The circuit court improperly reviewed the original Commission decision de novo instead of determining whether the findings of the Commission were against the manifest weight of the evidence. When an original decision of the Commission is reversed because it is against the manifest weight of the evidence and a new decision is entered on remand, this court initially considers the propriety of the original Commission decision before reviewing the Commission decision entered following remand.*

**EDITOR'S NOTE:** We now have three very recent cases where the appellate court has instructed the circuit court to leave the Industrial Commission decision as it is. The appellate court emphasized that the resolution of the credibility of witnesses, including medical testimony, is solely the province of the Commission and the circuit court was not authorized to substitute its judgment for that of the Commission.

**OCCUPATIONAL DISEASES ACT  
HEARING LOSS: LAST  
EMPLOYER/LAST CARRIER IS  
RESPONSIBLE FOR HEARING LOSS.  
NO APPORTIONMENT.**

**By Robert Smith**

In a recent Fourth District Appellate Court decision, §1(d) of the Occupational Diseases Act (OD) was interpreted in literal fashion to eliminate any apportionment of hearing loss as between successive employers. In pertinent part, §1(d) provides:

*The employer liable for the compensation in this Act provided shall be the employer whose employment the employee was last exposed to the hazard of the occupational disease claimed upon, regardless of the length of time of such last exposure<sup>1/4</sup>*

*The insurance carrier liable shall be the carrier whose policy was in effect covering the employer liable in accordance with the provisions of this Act. 820 ILCS 310/1(d).*

Claimant Terry Hamilton began working for ANCC in 1970. On August 1, 1995 the company was bought by Silgan. Claimant remained employed through this

transition, performing the same work activities. Subsequently, claimant filed an application against ANCC alleging hearing loss due to his employment with ANCC. Claimant filed a second application, against Silgan, alleging hearing loss incurred during the Silgan term of employment. Hearing tests shows loss during the ANCC employment term and incrementally greater loss during claimant's employment with Silgan.

The arbitrator found, first, that there was excessive noise exposure during the ANCC employment term. A "date of last exposure to excessive noise" was fixed as the last day of ANCC operations. The arbitrator also found a date of last exposure against Silgan and apportioned compensation between the two employers. For the loss up to July 31, 1995, an award was entered against ANCC. After Silgan took over operations and claimant demonstrated incrementally greater loss on hearing tests, a second date of last exposure was fixed against Silgan and an additional award of hearing loss was made.

ANCC filed an appeal to the Commission. Neither Silgan nor claimant appealed. The Commission determined that ANCC was not claimant's last employer and, accordingly, was not liable to petitioner for hearing loss benefits.

The appellate court agreed, finding that Silgan was "the employer in whose employment the employee was last exposed to the hazard of the occupational disease claimed" within the meaning of the Act. §1(d)(1).

Since it had been determined that there was exposure to "excessive noise" during claimant's term of employment with Silgan, the argument of claimant that ANCC

should essentially contribute for their share of hearing loss failed.

In a specially concurring opinion, Justice Rarick clarified that the arbitrator, Commission, and courts were without authority to apportion hearing loss among employers. Justice Rarick cited the legislative approach of imposing liability for the entire amount of hearing loss on the last employer in an effort to more readily facilitate an employee's ability to recover.

Ironically, because of claimant's failure to file any review petition against Silgan or ANCC, the decision against Silgan as to the amount of hearing loss benefits became final and claimant Hamilton was left without a remedy for the substantial amount of otherwise proven hearing loss that was documented during ANCC's operations.

This irony was exposed in a lengthy dissent by Justice O'Malley. Justice O'Malley suggested that §1(d) of the Occupational Diseases Act should permit a claimant to recover the full measure of compensation either from the last in a succession of employers over the course of whose employ the claimant suffered permanent damage from exposure to the hazard of an occupational disease (the length of the last exposure and the factor degree of harm caused having no effect in the liability of the last employer) or from an earlier employer in the succession who the employee could prove caused discreet permanent harm. In claimant Hamilton's case, there was audio metrically demonstrated hearing loss during the ANCC employment term, and then, incrementally greater hearing loss during the Silgan term of employment. It was argued by Justice O'Malley that even though Silgan was the employer in whose employ Hamilton was "last exposed" pursuant to §1(d), there had

been permanent harm done during the ANCC period, and ANCC should share in the benefits due Hamilton.

In the end result, claimant Hamilton was left without a remedy for the approximately 61 weeks of compensation first awarded by the Arbitrator against ANCC. The award, otherwise final, of 21 weeks of hearing loss compensation against Silgan was affirmed.

## ADA Corner

By Jason Coggins

### TOYOTA v. WILLIAMS: IS AN EMPLOYEE WITH CARPAL TUNNEL DISABLED UNDER THE ADA?

In recent years, courts have made ADA cases increasingly difficult to prove by narrowing the definition of "disability." Historically, plaintiffs have focused upon attempting to prove that they are "substantially limited" in the "major life activity" of working. Courts have rendered several decisions requiring plaintiffs to prove that they are substantially limited from a "broad class" of jobs instead of their specific job; a burden which many plaintiffs cannot meet. Accordingly, many plaintiffs have now tried a new strategy of focusing on another major life activity: "manual tasks." However, courts have disagreed on the proper standard and the United States Supreme Court has now provided much needed guidance on this subject.

In *Toyota v. Williams*, 122 S. Ct. 681 (2002), a plaintiff claimed that her former employer, Toyota, had violated the ADA by failing to reasonably accommodate her disability of carpal tunnel syndrome. The plaintiff worked on an engine fabrication assembly line which included work with

pneumatic tools. This eventually caused her pain in her hands, wrists, and arms and she was diagnosed with bilateral carpal tunnel syndrome and tendinitis. Her personal physician restricted her from lifting more than 20 pounds or “frequently lifting or carrying of objects weighing up to 10 pounds” or engaging in “constant repetitive ... flexion or extension of wrists or elbows” as well as performing “overhead work” or using pneumatic tools. Plaintiff filed for workers’ compensation which claim was settled at 20 percent occupational impairment of the hands. She was then reassigned to a body-paint inspection position. However, years later, Toyota changed her position to require wiping down cars which aggravated her injuries. The plaintiff missed work and was fired, sparking an ADA claim.

The Supreme Court held that “when addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives ....” The Court reasoned that the manual tasks unique to a particular job are not necessarily central to people’s lives. Thus, the Court wrote that the activities plaintiff was restricted from (repetitive work with hands and arms

The continued narrowing of the definition of disability under the ADA appears to demonstrate a judicial preference that workers’ compensation is meant to act as the remedy for less serious medical conditions such as “a bad back, tendinitis or carpal tunnel syndrome” in many cases. However, employers should be aware that evidence of the extent of a plaintiff’s disability in his or her workers’ compensation case may be used as evidence in a subsequent ADA case to determine the extent of a plaintiff’s limitation in a major life activity. Moreover, it is important to note that this case changes neither the

extended at or above shoulder levels for extended periods of time) were not an important part of most people’s daily lives. Thus, the Court stated that the inability to do such manual work at the plaintiff’s specialized assembly line position should not be the main focus in this inquiry. Instead, evidence such as the fact that the plaintiff could tend to her personal hygiene, complete personal and household chores should have been the central focus because these are activities key to daily living.

Applying this standard to this case, the Court concluded that the plaintiff was not substantially limited in performing manual tasks. The plaintiff was able to perform many important daily activities such as brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house. Although the plaintiff had to avoid sweeping, quit dancing, occasionally seek help dressing, and reduce how often she played with her children, gardens, and drives long distances, the Court held that “these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people’s daily lives that they establish a manual-task disability as a matter of law.”

requirement, nor the principles to be followed in the creation of an ADA-compliant light duty program, as previously reported in this publication.

## **MEDICARE SET-ASIDE TRUSTS**

**By L. Michelle Michel**

Recently, there is a new emphasis on cost savings in Medicare. Medicare may be secondary payer for workers’ compensation injuries. This means that Medicare will refuse to pay for medical expenses that have been or could reasonably be expected to be paid as part of a workers’ compensation settlement. The

government has recently focused on enforcing these laws, budgeting \$50 million to the U.S. Attorney's Office.

These secondary payer provisions apply only to commutation settlements (those where there is no real controversy over whether the workers' compensation carrier is liable to make payment for the injuries) and not to compromise settlements (where there are significant disputes as to liability and the settlement is intended to resolve those disputes). However, Medicare will look to the facts of each case rather than just to the contract language to determine whether a settlement is a commutation or compromise.

When evaluating a workers' compensation settlement consider the following: First, whether the petitioner currently qualifies (or will qualify within 30 months) for Medicare benefits due to either age or disability status. Second, whether future medical treatment is likely in the particular case. Finally, consider the amount of future medical treatment required and whether the proposed future medical treatment is a cost routinely covered by Medicare (expenses such as prescription drugs are not covered).

Once you have determined that the petitioner is qualified to receive Medicare and is likely to incur future medical expenses covered by Medicare you must determine how to protect the interests of Medicare when settling the case.

In cases where future medical is anticipated to be minimal (perhaps under \$50,000) you may negotiate some portion of the settlement specifically paid to the petitioner in anticipation of his future medical expenses. It is advisable to consult with the petitioner's treating physician to obtain specifics with regard to petitioner's anticipated future medical care and the associated costs. It is important to use specific contract language with regard to the monies paid toward future medical care.

In cases where future medical is anticipated to be significant, development of a life care plan is necessary. These plans are developed by consultants who determine petitioner's

anticipated future medical needs taking into account petitioner's age, medical condition and life expectancy. The government has encouraged attorneys to submit these plans for pre-approval. However, this would obviously create a barrier to efficient settlements. You may consider proceeding to settlement with a carefully drafted life care plan as this will provide some security with regard to Medicare requirements. The monies designated by the life care plan may be set aside in a trust. Keeping in mind the possible claim from Medicare, the structure of these trusts will remain an item negotiated by the parties.

Failing to consider the interests of Medicare may result in a refusal of Medicare coverage up to the amount of settlement or an action for double damages against respondent. This area of the law is rapidly changing and we will continue to update you as new information is available.

**FRANK J. WIEDNER**  
Editor