

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## SECTION 12 IME REQUEST DID NOT COMPLY WITH STATUTE AND RESPONDENT WAS ASSIGNED SIGNIFICANT PENALTIES

In Navistar v. Industrial Commission, the claimant, Harold Mayes, was found permanently totally disabled in a decision filed with the Industrial Commission on December 14, 1987. No review was taken of this decision. Claimant continued to seek medical care for his disabling condition. From June, 1994 through March, 1995, Navistar made repeated attempts to contact the claimant demanding that he provide current medical reports to substantiate his ongoing disability and his failure to do so would result in the suspension of PTD benefits. Claimant failed to forward such documentation and Navistar unilaterally terminated payments on the award effective March 24, 1995. Navistar did not seek an order from the Industrial Commission permitting the termination of payments on the award. Thereafter, it scheduled a Section 12 exam but failed to forward travel expenses in advance of the exam. Claimant did not attend the exam but rather scheduled a physical therapy session for the exam date. No payments were made from 1995 to 1998.

In May, 1998, claimant filed a petition for the resumption of payments on the PTD award, a petition for penalties pursuant to Section 19(k) and attorney's fees pursuant to Section 16 for the unilateral termination of PTD payments, and an 8(a) petition for the

payment of medical expenses. Navistar resumed payment on the award on May 15, 1998 and filed an 8(f) petition maintaining claimant was no longer entitled to permanent total disability benefits for failing to forward current medical information and was no longer permanently and totally disabled. After filing the 8(f) petition, Navistar scheduled claimant for a Section 12 exam with Dr. Blonsky on August 31, 1998. Dr. Blonsky found petitioner capable of functioning at a light to medium level though he could only walk a half of block at a time. Claimant's treating physician opined that he remain permanently and totally disabled. Navistar retained a vocational expert who concluded claimant was capable of gainful employment in a light to medium category. Claimant's vocational expert concluded that since he was absent from the job market for over 20 years since his disabling work injury, he no longer had transferrable skills, and given his 7<sup>th</sup> grade education, he was not placeable in any full time employment.

The Industrial Commission found that claimant was entitled to unpaid PTD benefits for the period of March 24, 1995 through May 15, 1998 or 164 1/7 weeks at \$231.29 totaling \$37,964.63. The Commission also awarded 19(k) penalties of \$18,949.60 and Section 16 attorney's fees of \$7,579.84 for the employer's unilateral termination of PTD benefits. It noted the employer has the burden to show an award should be modified pursuant to 8(f), and Navistar impermissibly terminated benefits without receiving Commission approval.

The appellate court affirmed the findings of the Industrial Commission. First, it held that Section 12 does not give the employer the right to suspend PTD benefits for failing to provide current medical information on request. Instead, if an employer believes a claimant's medical condition has changed so

that he is now able to return to work, it may request the claimant to submit to a medical examination pursuant to Section 12. Section 12 requires the employer to pay in advance travel expenses and that the exam be scheduled at a time and place reasonably convenient for the employee. Navistar failed to pay travel expenses in advance of the exam, thus, claimant was not required to attend the exam. Moreover, claimant was under medical care at the time of the scheduled exam and had an appointment scheduled on the same day. Therefore, it was not scheduled at a time and place reasonably convenient to the employee. Finally, the court noted that the employer had suspended payments almost two months before the scheduled Section 12 exam. Thus, claimant was not compelled to attend the exam, and his failure to do so could not be used to justify a prior termination of PTD benefits.

Additionally, the appellate court affirmed the award of penalties and attorney's fees noting the unilateral suspension of payments in contravention of a final decision by the Industrial Commission is unreasonable and vexatious as a matter of law. Thus, Navistar had no right to suspend payment of PTD benefits merely because claimant failed to respond to its request for information on his current medical condition. The appellate court also affirmed the Commission's denial of the 8(f) petition noting the testimony from lay witnesses, the medical providers, and the vocational experts supported a determination that the claimant remain permanently and totally disabled.

**EDITOR'S NOTE:** The findings in King and Navistar provide that an employer may schedule a Section 12 exam for a claimant previously found permanently and totally disabled. However, it must forward travel expenses in advance to the exam and schedule the exam on a time and place reasonably

convenient to the claimant. Left unresolved is whether the employer may unilaterally terminate PTD benefits to a claimant who refuses to attend a proper Section 12 exam. To avoid the imposition of penalties and attorney's fees, an order to terminate payments should be secured from the Industrial Commission. After a hearing, the Industrial Commission may permit the employer to suspend payments on the award until the claimant attends the Section 12 exam.

By Michael F. Doerries

### NO PENALTY ON PPD UNTIL AMOUNT IS ASCERTAINABLE

The Commission, in its discretion, may award Section 19(k) penalties and attorney's fees pursuant to Section 16 on the entire amount of an award that has accrued or the unpaid portion. However, in National Manufacturing v. Industrial Commission, another penalty case decided after Navistar, the Appellate Court stated that the calculation of penalties and attorney's fees may not include an award of PPD benefits not ascertainable or known by the parties before the award was entered. There, claimant was awarded 6 1/7 weeks of TTD benefits, \$7,738.10 in medical expenses and found to have suffered a permanent partial disability of 40% loss of use of the left leg. The arbitrator found that the employer's conduct in delaying payment of benefits was unreasonable and vexatious and awarded penalties pursuant to Section 19(k) and attorney's fees pursuant to Section 16 on the amount of TTD and PPD benefits awarded. The Commission confirmed the award but modified the penalties and fees noting they could only be calculated on the amount due at the time of arbitration. The appellate court affirmed the finding of the Industrial Commission. It noted that the plain language of Section 19(k) provides that any unreasonable, vexatious or frivolous conduct may result in a penalty of 50% of the amount

payable at the time of the award. Further, for the purposes of calculating penalties under Section 19(k), each type of benefit -- TTD, PPD and medical expenses -- constitutes an award. The penalty calculation should not include PPD benefits that have not accrued at the time of the arbitration when not known to the parties until the award is entered.

By Michael F. Doerries

**EDITOR'S NOTE:** Keep in mind that statutory benefits, such as amputation, as well as certain fractures and organ losses, are ascertainable and must be paid without delay.

### CALCULATION OF AVERAGE WEEKLY WAGE WITH CONCURRENT EMPLOYMENT

In Mason Manufacturing, Inc. v. Industrial Commission, the appellate court had occasion to consider the AWW when the injury occurred on the concurrent rather than on the primary employment. Christopher Flanagan injured his left knee when he fell from a ladder. He had worked for Mason four or five times during the previous five years, usually working several days to several weeks. When injured, Flanagan was in his fourth day with Mason. Prior to the current session, Flanagan had not worked for Mason for several years. The issue became significant because Flanagan could not return to his former employment either at the railroad or at Mason. With the railroad, Flanagan earned \$35,418.37 per year, reaching an average weekly wage of \$689.20. With Mason, Flanagan's average weekly wage was \$420. The arbitrator added the annual wage with the railroad of \$35,418.37 to the one week's wage at Mason, arriving at a total of \$35,838.37, which, when divided by 52 reached an average weekly wage of \$689.20. The arbitrator, therefore, arrived at a weekly TTD rate of \$459.47 and ordered Mason to pay this amount in weekly maintenance benefits until

Flanagan completed a computer aided drafting degree program at the local community college.

The Industrial Commission disagreed. It calculated the average weekly wage at Flanagan's primary railroad job at \$681.12. It then utilized the \$420 average weekly wage at the secondary job with Mason and added the two figures to derive a total average weekly wage of \$1,101.12, which established a TTD rate of \$744.08.

Mason appealed to the appellate court contending that Flanagan's employment was sporadic in nature and of limited duration and that the commission's award resulted in a "windfall" to Flanagan. The court stated:

*The employment in which Flanagan was working at the time of his injury was with Mason. Mason's position is in conflict with the language of the statute. Even if Mason's position could be reconciled with the language of the statute, we believe that in cases of concurrent employment, the better practice is to determine the average weekly wage of each job separately, by the method appropriate to that job, then add the averages together to determine the average weekly wage.*

**EDITOR'S NOTE:** The appellate court felt that the arbitrator's decision would only increase the average weekly wage by \$8 per week, when Flanagan had actually been earning \$420 more that particular week because of the employment with Mason. Actually, Mason averaged only an additional \$8 per week when taking into consideration the fact that for the entire year Mason only paid Flanagan \$420. The concurring opinion did point out that for the six years prior to the accident, Flanagan had concurrent employment with three employers but no specific earnings were

provided.

The court could obviously not take into consideration that Mason's insurance carrier collected premium on the payroll of \$420 for the entire year and was compelled to pay benefits based on an average weekly wage of \$1100 per week.

### **COURT APPROVES COMMISSION AWARD OF PENALTIES IN DISPUTED MMI CASE**

In Anders v. Industrial Commission, Bobby L. Anders, an employee of OTR Wheel Engineering, sustained an accident on February 18, 1998. The case is interesting because the opinion covers a number of issues, including average weekly wage, penalties under Sections 19(k), 19(l) and Section 16, as well as reasons necessary for the termination of TTD benefits.

#### **Average Weekly Wage**

Anders worked a total of 22 weeks, during which he was off a total of eight days, thereby reducing his net number of weeks to 20.4. For this, he was paid \$8 an hour for 835 hours regular time and \$12 an hour for \$44.75 of overtime. The court relied on the third paragraph of Section 10 where the employment is for less than one year at which time the rate is determined by the number of weeks or parts of weeks that the claimant actually worked. (The court felt that the number of hours of overtime was not sufficient to include the overtime hours in the calculation.) Using these figures, the court found total wages of \$6,432 and arrived at an average weekly wage of \$315.29.

#### **Termination of TTD**

Dr. Curtis Burton released claimant to restricted duty, commencing November 9, 1998. The claimant requested light duty but

the employer had none available. Thereafter, the claimant attended appointments with the employer's examining physicians and continued to actively seek medical treatment from his treating physicians for continued back and right hip pain. The Commission found that the claimant had improved significantly as a result of this subsequent medical treatment, therefore, the claimant could not have reached MMI on November 8.

### **Travel Expense**

The employer arranged for the claimant to see Dr. Marshall Matz and reportedly forwarded a train ticket and travel expense of \$50 for the claimant to travel 600 miles round trip from Quincy to Chicago for an examination by Dr. Marshall Matz. The claimant denied receiving the train ticket and the Commission believed him. On that basis, the \$50 was insufficient to cover claimant's travel expense. The Commission held that it was unreasonable to schedule an examination so far from the claimant's home when physicians who had previously provided expert opinions before the Commission were available closer to claimant's home.

### **\$2,500 Payment Under Section 19(l)**

Section 19(l) provides that additional compensation is to be calculated at \$10 per day for each day a weekly compensation payment has been so withheld or refused, provided that such additional compensation shall not exceed the sum of \$2,500. Respondent argued that the date of the arbitration hearing was only 42 days after the last payment of TTD and that the Section 19(l) penalty should be \$420. However, the arbitrator did not award Section 19(l) benefits. The Commission did and the date of the Commission Decision was more than 250 days after the date of termination.

The court stated:

*The additional compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.' If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.*

### **Penalties and Attorney's Fees for "Unreasonable or Vexatious Delay of Payment"**

Section 19(k) and Section 16 award additional compensation and attorney's fees for this type of unreasonable behavior. The employer pointed out that it had been deprived of the examination by Dr. Matz and that the claimant had failed to appear for two scheduled functional capacity evaluations. With reference to examination by Dr. Matz, the court pointed out, as noted before, that the employer had not complied with Section 12. It also noted that the opinion of Dr. Matz when reviewing the claimant's records concerning the necessity of fusion surgery failed to provide a sufficient good basis for the termination of benefits so as to avoid the imposition of penalties and fees under the Act. With reference to the two failed FCE appointments, the court noted that the employer had failed to make that argument before the Industrial Commission and was now foreclosed from doing so.

### **Penalties Claim For Failure to Pay Hospital Bill**

The claimant also appealed, contending that the Commission had failed to award

penalties and attorney's fees on a bill from the Blessing Hospital. Penalties had been awarded on a few minor unpaid bills. However, the claimant's attorney apparently did not submit the Blessing Hospital bill until the day of the hearing. He had failed to note the specific amount of the bill in his motion because he did not know the exact amount. The Commission's finding that the claimant failed to prove an unreasonable and vexatious delay in payment of the Blessing Hospital bill is not against the manifest weight of the evidence.

**EDITOR'S NOTE:** Several lessons are to be learned from this case: (a) the court will continue to follow the Sylvester case regarding employment for less than one year by dividing the total wage by only the number of weeks or parts of weeks worked; (b) Section 19(l) will be payable as a "late" fee even if the lack of payment is merely an oversight and not an intentional act; (c) be careful when sending out travel expenses or a train ticket unless you can be assured of delivery; and (d) it would be best to not press an IME with a doctor when the amount of travel is extensive.

### **CLAIMANT'S ATTEMPT TO PIERCE THE CORPORATE VEIL DENIED ON PROCEDURAL GROUNDS**

In JMH Properties, et al v. Industrial Commission, Claimant, Russell D. May, was electrocuted while at work. He filed a claim against his employer, JMH Properties, Inc., d/b/a Quincy Building Materials (JMH), as well as against Michael Haubrich, the principal stock holder of JMH. Following a hearing, an arbitrator denied the claim against Haubrich and found JMH solely liable for claimant's injury. On December 4, 1991, claimant was awarded 18 weeks of TTD, totaling \$4,320 and medical expenses of \$102,000.

On June 8, 1992, May filed a two count

complaint in the circuit court. Count I alleged that JMH had failed to pay the arbitrator's award and Count II was brought against Haubrich, seeking to pierce the corporate veil of JMH and requesting judgment against Haubrich individually for the \$102,000. The circuit court agreed with Haubrich that the claimant was attempting to circumvent the exclusive remedy provided by the Workers' Compensation Act and that the arbitrator's decision was *res judicata* as to the issue of personal liability. Judgment was entered against JMH on Count I but Count II against Haubrich was dismissed with prejudice, on January 4, 1993. May initially appealed the dismissal of Count II but subsequently dismissed the appeal on April 15, 1993.

May filed a new complaint under the old Industrial Commission case number, asking the Commission to pierce JMH's corporate veil and enter judgment against the Haubrichs. A different arbitrator conducted the hearing and found the Haubrichs personally liable for the judgment against JMH. The Commission and the circuit court affirmed. However, the appellate court reversed, stating that the arbitrator lacked jurisdiction to consider the issue of corporate veil. The court stated:

*We note that the result we reach in this case is harsh, especially in light of the humane and remedial purposes of the Act; claimant is essentially denied the ability to recover his award. The harshness of the result, however, is due solely to the conduct of claimant through his attorney. Had claimant maintained his appeal before this court, or had claimant appealed the Commission's initial award, then the result reached here may not have come to pass. Claimant, however, inexplicably abandoned those options. We say inexplicably because claimant's counsel was unable, at oral argument or in his*

*brief, to justify this conduct.*

*In summary, claimant neglected to pursue the specific remedies the Act provides for non-payment or tardy payment of awards. It does not give the Commission the authority to enforce a circuit court's judgment by piercing the corporate veil. Therefore, the Commission lacked jurisdiction to grant that remedy, and we must reverse the order of the Commission.*

**EDITOR'S NOTE:** Based on this decision, the Commission was not authorized to pierce the corporate veil and that action could only come from the trial court. Apparently, the claimant's attorney, when he dismissed the appeal of the original decision by the trial court, lost an opportunity to pierce the corporate veil.

### **WILL ILLINOIS PERMIT CREDIT FOR COMPENSATION PAID IN ANOTHER STATE?**

In Keil v. Industrial Commission, Gary Keil, a United Parcel Service driver, sustained an injury to his right knee on November 26, 1997. His attending physician diagnosed an aggravation of a severe degenerative osteoarthritis of the patellofemoral joint of the knee. Keil subsequently underwent a total knee replacement. The arbitrator awarded 50% loss of use of the right leg.

In 1995, while also in the employ of UPS, Keil had filed a workers' compensation claim for a right knee injury sustained in Iowa. Pursuant to settlement agreement, Keil was awarded 17½% loss of use of the right leg and received a total of \$21,000. The arbitrator declined to give UPS a credit for the prior award, finding that credit for the prior losses under Section 8(c) is limited to those permanent partial losses as defined under the Illinois Act. Otherwise, reasoned the

arbitrator, the Illinois Commission would be compelled to interpret and apply the laws of other states in determining the amount of such credit and that the Illinois Act differed from the Iowa Act in its requirements as to "permanent partial loss of use." The court responded:

*We believe that the language employed in the statute - "such loss shall be taken into consideration and deducted from any award for the subsequent injury" - was used by our legislature in contemplation that different states might ascertain and compensate injuries differently. The statute does not restrict the Commission as to how it should determine the proper amount of credit. Instead, it requires only that the Commission take the prior loss into consideration and deduct it from any subsequent award. This gives the Commission the necessary flexibility to address each situation on a case-by-case basis in order to achieve the remedial purpose of the statute while achieving a result that is just and equitable.*

Keil also argued that his Iowa settlement was not an "award" and that the Illinois Act provided a credit only upon the entry of an award. The court disagreed, stating:

*We believe that the language employed in the statute - "such loss shall be taken into consideration and deducted from any award for the subsequent injury" - was used by our legislature in contemplation that different states might ascertain and compensate injuries differently. The statute does not restrict the Commission as to how it should determine the proper amount of credit. Instead, it requires only that the Commission take the prior loss into consideration and deduct it from any subsequent award. This gives the Commission the necessary flexibility to address each situation on a case-by-case*

*basis in order to achieve the remedial purpose of the statute while achieving a result that is just and equitable.*

### **COMMISSIONER'S FAILURE TO DISQUALIFY HIMSELF DID NOT RENDER DECISION INVALID**

The case of Robert Preston v. Industrial Commission has involved considerable litigation regarding the award, interest, penalties and attorney's fees. The most recent action involved the claimant's petition to disqualify Commissioners Douglas F. Stevenson and Richard M. Gilgis from the case. Commissioner Gilgis was not assigned to this case and the Commission did not address the motion to disqualify relative to Commissioner Gilgis. An evidentiary hearing was conducted over the objection of the claimant that the Commission did not have authority to conduct such a hearing. The Commission denied the claimant's petition to disqualify Commissioner Stevenson. The record on appeal contains similar petitions in other cases before the Commission wherein the claimant's attorney sought to disqualify Commissioners.

On appeal, the claimant argued that the Commission's denial of additional compensation and attorney's fees is void because of Stevenson's participation. No allegation was made that Commissioner Stevenson had a financial or other interest in the outcome of the litigation and that the claimant was not denied due process. The court stated:

*The Act and the Commission rules do not provide for the substitution of a commissioner as of right. The Commission had adopted a substitution for cause system. There is nothing in the Act that prevents the Commission from*

*conducting a hearing on a petition for disqualification of a commissioner. Claimant has not demonstrated an abuse of discretion by the Commission in conducting a hearing on his petition to disqualify commissioner Stevenson. ... Although we find no error in the handling of the petition to disqualify in this case, in reaching that result, we are cognizant of the fact that two commissioners, neither of whom were the subject of the petition to disqualify, concurred in the denial of the petition to disqualify. In the future, we suggest that a hearing on a petition to disqualify a commissioner not be conducted before a commissioner who is the subject of the petition. We further recommend that the commission promulgate a rule to address the procedural handling of petitions to disqualify commissioners.*

Justice O'Malley dissented. He noted that the majority had agreed that the procedure for substitution was not based on a present Commission rule, stating that Commissioner Stevenson should not have been on the panel that sat in judgment on Stevenson's potential disqualification.

**EDITOR'S NOTE:** The majority opinion suggests that if the motion to disqualify had any merit, it may have remanded the case for further hearing. In effect, the majority did not disagree with the dissent but took a practical approach in arriving at the majority opinion.

### **WAGE LOSS CLAIM DENIED BECAUSE OF CLAIMANT'S LACK OF COOPERATION**

Claimant was released to work on September 9, 1995 and through December did not complete any job applications. He secured employment on January 2, 1996, as a terminal manager with a salary of \$33,800 per year.

This was the second company he contacted and he accepted the job on the same day he completed the applications. The Appellate Court held that even with his restrictions, the claimant had not proved he was incapable of earning a higher salary stating:

*A labor market survey prepared by vocational rehabilitation counselor Michelle Running on May 10, 1995, noted that claimant had 25-30 years of experience in the transportation industry in various capacities such as driving, sales, business owner, and terminal manager. Running noted that only a small percentage of employers actually advertise a job opening, but instead hire people through informal methods such as networking. She stated that, since claimant had been in the transportation industry for many years, he had likely developed a network of job contacts that would greatly increase the likelihood of his finding employment. In her opinion, claimant was employable and could obtain a sedentary-light level position within the industry with a salary ranging from \$35,000 to \$50,000 per year. . . .*

*In the case at bar, the Commission relied on the job survey performed by Running. She found 43 available positions within a two-week period. In her opinion, claimant could obtain a sedentary light-level position within the transportation industry at a salary ranging from \$35,000 to \$50,000 per year. The Commission could reasonably rely on that evidence to find that claimant did not prove his earnings were impaired as a result of his disability. This finding is not against the manifest weight of the evidence.*

## ADA Corner

By Jason Coggins

### CLAIM BASED ON RETALIATORY FAILURE TO REHIRE DENIED

It is well settled that the general rule in Illinois is at-will employment. Employers can generally terminate employees for any reason or no reason at all—except an illegal reason. Despite this rule, many employees who are discharged while on leave due to a work-related injury expect to be rehired under any circumstance and often sue when they are not. Employees have sued employers under various theories, one of which is retaliatory failure to rehire in violation of Section 4(h) of the Illinois Workers' Compensation Act.

The Second District Appellate Court of Illinois recently addressed the viability of this claim for a terminated employee. In *Klinkner v. County of DuPage*, the court affirmed a trial court's dismissal of a claim of retaliatory failure to rehire. In *Klinkner*, plaintiff was employed as an at-will employee at DuPage County Convalescent Center as certified nursing assistant. A co-worker reported that plaintiff had slapped a resident, which plaintiff denied. The employer terminated plaintiff for violating county rules. Defendant reported this incident to the Illinois Department of Public Health for a decertification action, but this was dismissed because the co-employee recanted her accusation. Accordingly, plaintiff demanded that defendant reinstate her, but it refused. Defendant's reason was that the only official account of the incident was the testimony the co-worker gave at the time of the termination and plaintiff failed to follow her administrative remedies to contest her termination, making it permanent and irrevocable.

Plaintiff sued alleging among other claims, retaliatory failure to rehire. The trial court granted defendant's motion to dismiss. Plaintiff argued that the reason for her termination was disputed and relevant to whether defendant's refusal to rehire violated the Workers' Compensation Act. She argued that she had a reasonable expectation of rehire when defendant had reason to know that its discharge was based on the report of an accusing coworker who recanted her accusation. The court disagreed. The court found that since plaintiff was terminated she cannot establish the reasonable expectation of rehire element required to prevail under this claim. In so holding, the court relied on the case of *Webb v. County of Cook*. In that case plaintiff had sustained a work related injury and was placed on disability leave, receiving workers' compensation benefits. Plaintiff was then dismissed and sued her employer for retaliatory failure to rehire or recall, which was dismissed. The court held that she could not establish retaliatory rehire because she was discharged. The court found implicit in section 4(h) a requirement that a plaintiff have a reasonable expectation that she will be permitted to return. Significantly, the court found that a fired employee generally has no reasonable expectation of rehire. The court emphasized that Illinois courts disfavor compelling an employer to reinstate a discharged employee without a statutory requirement of reinstatement. Moreover, the court found that when an employee is fired the correct claim is retaliatory discharge. In contrast to termination, an employer's approval of an employee's temporary leave is prima facie evidence of the employee's reasonable expectation of recall.

FRANK J. WIEDNER  
Editor

**EDITOR'S NOTE:** This case helps clear up confusion as to the correct claims available to plaintiffs under the Act. It also firmly establishes that a terminated employee has no expectation of rehire under the Act.