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ARM AMPUTATION PERMANENCY BENEFITS TO BE CREDITED AGAINST WAGE LOSS AWARD

In *Richard A. Payetta v. Industrial Commission*, the appellate court had occasion to consider whether wage differential benefits under Section 8(d)1 should commence from the date of the claimant's arm amputation or should be postponed to the date petitioner found other suitable employment. In conjunction with this issue, the court would necessarily consider whether respondent was entitled to a credit of \$50,437.02, payments made for the arm amputation, against the wage loss award.

On April 23, 1996, Richard Payetta, an employee of Graber Concrete Pipe, lost his right arm in an accident while working for respondent. The claimant was paid TTD for 147 weeks at \$491.59, plus one week at \$400, or a total of \$72,663.73. The Commission entered a decision finding that the petitioner was entitled to TTD for a period of 129 weeks from April 24, 1996 through October 14, 1998. As a result, the claimant received an overpayment of TTD amounting to \$11,655.76.

Under the statute, the claimant was entitled to receive PPD for a period of 235 weeks at the rate of \$142.43 per week. The Commission found that the respondent had promptly paid to petitioner statutory amputation loss benefits of \$442.43 per week for a period of 114 weeks and further found that respondent was entitled to credit for these payments as they represented statutory amputation loss benefits.

Finally, the Commission ordered that commencing on October 14, 1998 (the date the TTD was terminated) respondent was obligated to pay the sum of \$239.73 per week on a wage loss basis for the duration of petitioner's disability. Petitioner had decided to pursue a wage loss award under Section 8(d)1 rather than the statutory payment for the arm amputation. Consequently, the respondent was given credit for the overpayment of PPD of \$50,436.11. This, together with the TTD overpayment credit of \$62,092.78, was to be deducted from the amount due

under the wage loss award, that being \$239.73 per week. The petitioner was, therefore, not to receive any payments until October 2003 when the credits are amortized to zero at the rate of the wage loss payment of \$239.73 per week.

In an attempt to avoid the size of the credit, the petitioner argued that the wage loss payments should begin as of the accident date rather than on October 14, 1998 when the TTD payments were terminated. After pointing out that the recovery for wage differential should not extend into a period where the petitioner received the maximum amount of TTD benefits, the court stated:

The framework of the Act calls for prompt payment for loss of a member and crediting the complying employer if the employee later decides to seek compensation under section 8(d)(1). Indeed, the rationale for penalizing an employer who does not promptly pay a scheduled award is based on the fact that the employer would be entitled to a credit if the employee later seeks an award for wage differential.

EDITOR'S NOTE: In the past, petitioners' attorneys have suggested that PPD payments on an award should begin with the accident date and not at the termination of TTD benefits. This decision clarifies that issue so that the petitioner will not receive overlapping benefits, whether they be TTD, PPD for amputation or PPD for wage loss. The problem was created when the petitioner chose a lesser weekly payment than would be made for life rather than the larger weekly payment that would have ceased after 235 weeks. Because of the compulsory nature of the amputation payment provision, the respondent had no choice but to assume that the larger payment need be made until the Commission held otherwise.

CAN TWO EMPLOYEES WHO PARTICIPATE IN AN ALTERCATION BOTH BE AGGRESSORS?

Sandra Franklin, a Carson Pirie Scott employee at its River Oaks store in Calumet City, worked as a cosmetic artist and counter manager for the Elizabeth Arden cosmetic line. Claimant's co-worker, Geniver Mohan, sold a different cosmetic line from a bay directly across from claimant's bay. Carson's had a sales policy which provided that if a customer purchased cosmetics at that employee's sales counter, the employee was permitted to accompany the customer to a different sales counter to sell another cosmetic line's products. Otherwise, the employee was limited to a particular counter. As might be anticipated, the policy resulted in some

misunderstandings and animosities, particularly between the claimant and Geniver Mohan. The claimant and Mohan each made complaints about the other. After an extensive argument, Mohan walked to the claimant's bay and grabbed claimant's left arm and hair, pulling claimant toward her. Claimant picked up her cup and struck Mohan in the head. A co-workers pulled the two employees apart. When called to testify as to her version, Mohan invoked the Fifth Amendment.

The arbitrator reviewed the security videotape and found that the claimant was not credible and had actually begun the altercation by attacking Mohan with the cup as soon as Mohan approached. The arbitrator further found that the dispute arose out of the parties' drive for sales commissions and there was no causal relationship between the claimant's injuries and a work incident. All compensation was denied.

The Commission affirmed and concluded that the claimant and Mohan were equal participants in the altercation and thus *both were aggressors*. In reviewing current Illinois law, the appellate court noted:

Generally, injuries arising from an assault by a co-worker at the workplace during work hours are compensable if the assault arose in the course of a dispute involving the conduct of the work. However, where the party seeking compensation was the aggressor, the party's acts are not within the scope of employment and are not compensable.

The court also noted criticisms of the aggressor defense in that the rule relies too heavily on the fault-based concept that has been borrowed from tort law and thus had no place in workers' compensation law. After noting that the aggressor defense had somewhat fallen into disfavor and that the defense does not appear in most compensation statutes, the court noted that it was likely time for Illinois to revisit the continuing vitality of the aggressor defense. As a part of that review, the court reversed and remanded the cause for the Commission to determine which party was the aggressor. The court stated:

According to the foregoing descriptions of the aggressor defense, only one participant in a workplace altercation can be deemed an aggressor. Thus, we conclude that the Commission erred in determining that both claimant and Mohan were aggressors. We respectfully disagree with the dissent's contention that, so long as the Commission's finding that claimant was an aggressor is

supported by the record, it is "irrelevant" that the Commission found both employees to be aggressors. The Commission clearly concluded that "[Claimant] and Mohan were in fact equal participants in the altercation[,] marking them both as the aggressor." The dissent's analysis essentially ignores part of the Commission's finding. We believe that this approach is incorrect in that it disregards the Commission's misapplication of the aggressor defense.

Two dissenting opinions were filed. The first by Justice McCullough, who concluded that two employees involved in the altercation who were equally responsible for fomenting the dispute, could be determined as both being aggressors. Justice Holdridge felt that the majority analysis was "too wedded to semantics" and that compensation should be denied to both perpetrators of mutual aggression. **EDITOR'S NOTE:** Although cases involving altercations are not frequent, the clear division of opinion with reference to the Justices would suggest that the matter might eventually be accepted by the supreme court in order to provide the requested review of the aggressor defense.

WHAT IS CONCURRENT EMPLOYMENT WHEN DETERMINING AVERAGE WEEKLY WAGE?

In *Larry Flynn v. Industrial Commission*, the appellate court had occasion to consider a number of issues, including issues of employment versus independent contractor as well as the determination of the amount of the average weekly wage from concurrent employment when claiming a wage loss under Section 8(d)1. While working on a snowblower attached to claimant's tractor, his chisel caused a piece of metal to strike the claimant in the eye. After a surgical enucleation of the eye, the claimant was subsequently fitted with a prosthetic eye and was consequently unable to obtain a license for driving a truck.

The use of the 1099 Tax Form, together with the fact that the claimant provided his own equipment, suggested that the claimant was an independent contractor, whereas the direction and control suggested an employer/employee relationship. The court held that the issue was one of fact and would not disturb the Commission's finding that claimant was an employee.

Claimant's accident occurred on January 16, 1997. During the preceding years, he would work as an asphalt truck driver from March or April through November or December, depending on the weather.

During the winter layoff, he was on the union "out of work list" and also raised livestock on a farm he rented from his mother. The claimant relied on the *Jacobs* case, where the claimant worked for both employers for the entire time he worked for the respondent, except when he had been periodically temporarily laid off from a sheet metal job and was in a layoff period when injured in the accident with respondent employer. In the *Jacobs* case, the court held that since the claimant was readily available and subject to recall for work, the employment was concurrent, even though at the time of the injury the claimant had been temporarily laid off for two or three weeks.

In the instant case, the claimant had two seasonal jobs which were performed at different times of the year and, as a result, the employments were not concurrent. As a result, the claimant's employment at the time of the accident was found to be \$8.00 an hour and since, after the injury, he was able to earn \$9.00 an hour as a security guard, no wage loss existed.

EDITOR'S NOTE: Even though the claimant in the *Jacobs* case did not actually work on both jobs at the time of the accident, his usual habit of doing so overcame the fact that the claimant was actually on a two to three week temporary layoff. In the instant *Flynn* case, the two jobs were actually performed in different seasons, thereby making it difficult to consider the employments concurrent.

ARISING OUT OF THE EMPLOYMENT - UNEXPLAINED FALL HELD TO BE NON-COMPENSABLE

Over a number of years, our courts have found a number of "unexplained falls" cases to be compensable. Such a classification was actually unnecessary because attempts were made in those cases to find an explanation for the falls.

Your editor, in the July 2000 Newsletter, stated:

The fact that recent decisions have stated that "unexplained falls are compensable" is certainly contrary to common sense. If the fall is truly unexplained, how can it be shown that it arose out of the employment?

In *Builders Square, Inc. v. Industrial Commission*, the appellate court had occasion to consider the alleged compensable death of Joyce Peters, a 54 year old employee who sustained a fall and died shortly thereafter. Peters worked in the

lawn and garden department with Bernard Beever (a co-workers and long-time friend), who witnessed the incident. Decedent was using an Exacto knife to open boxes which were approximately two to three feet tall. She bent over the boxes to perform the work, which was conducted in an aisle, approximately ten feet wide with metal shelves on both sides. Beever, who spoke with the decedent for approximately five minutes before she fell, testified that she appeared normal in every way. After their conversation, Beever walked approximately ten feet to retrieve a pallet jack and, as he turned around, he saw the decedent suddenly straighten up, stagger two or three steps backward into the metal shelving, and then collapse face first on the concrete floor. She then became extremely pale and shook violently. The aisle in question was opened to the general public and contained no object or defect on the floor that may have caused the decedent to trip.

After she was taken to the St. Francis Medical Center, the decedent underwent a left frontal craniotomy for evacuation of a subdural hematoma. She died shortly after the surgery. The EKG monitoring had not revealed any evidence of a heart malfunction or arrhythmia.

The treating surgeon, Dr. William Olivero, and a neurologist retained by Peters to review the records, Dr. Robert Collins, concluded that the subdural hematoma and the subarachnoid hemorrhage resulted from trauma but neither provided any explanation as to the reason for the fatal fall. Neither doctor attributed the fatal fall to the decedent's prior history of an intermittent fast heart rate or to the fact that the claimant had a fall in 1993, as well as three additional falls in 1998 while climbing stairs, slipping on wet grass or tripping on a ledge. On the other hand, however, the two physicians testifying for Builders Square, Dr. David Schenker, a neurologist, or Dr. William Buckingham, an internist, concluded that the claimant suffered from a condition, cerebral ischemia or a cardiac rhythm disturbance, which could have caused the fall.

The arbitrator found that the decedent sustained a compensable unexplained fall and inferred that the decedent's foot could have stuck underneath the pallet, that she was startled by something when she opened the carton or that she could have lost her grip on the carton, causing her to fall backwards. The Commission reversed the arbitrator's decision, attributing the incident to an idiopathic condition with no increased risk from the employment and was eventually affirmed by the appellate court which stated that the fall was truly unexplained and was, therefore, not compensable. The court stated:

A fall originating from an unknown neutral source is deemed "unexplained," while a fall originating from an internal and personal condition of the employee is deemed "idiopathic." The "arising out of" requirement is generally satisfied with unexplained falls but not with idiopathic falls.

To a certain degree, however, the label "unexplained" is a misnomer in this context. A claimant's burden of proof requires more than merely showing inability to explain why a fall occurred. In addition to such inability, a claimant must present evidence supporting a reasonable inference that the fall stemmed from an employment-related risk. After all, the "arising out of" requirement contemplates "a causal connection between the accidental injury and some risk incidental to or connected with the activity an employee must do to fulfill [her] duties." Awarding compensation for a purely unexplained fall would eviscerate this requirement.

You will note that the appellate court denied compensability because the fall was "unexplained" and affirmed the Commission decision but did not endorse the Commission reasoning that the fall was "idiopathic." The appellate court pointed out also that the arbitrator could not draw inferences as to the reason for the fall when absolutely no evidence on this issue existed. Referring again to our July 2000 Newsletter, we quote Justice McCullough:

With respect to this discussion of Illinois case law concerning "unexplained falls," I suggest the words "unexplained falls" be stricken from the workers' compensation vocabulary.

FRANK J. WIEDNER
Editor