

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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### ONLY TO DATE HE REACHED MMI-OVERPAYMENT OF TTD WAIVED BY EMPLOYER'S STIPULATION AT TRIAL

Rodney Walker, employed by AmerenCIPS as an electrical utility foreman, sustained two significant back injuries. On March 30, 1998, while lifting a reel of wire, he sustained a herniated disc, leading to a laminectomy and, after rehabilitation, a return to work for about two months. On February 23, 1999, Walker sustained another herniated disc when he slipped on a sheet of ice while exiting his truck. He underwent a second laminectomy and never returned to work.

Dr. Sheehan, who performed the two laminectomies, indicated that he could be of no further assistance. Walker sought a second opinion from Dr. David Robson who, on September 15, 1999, suggested that Walker either accept his condition with permanent light duty restrictions or undergo surgery. Some restrictions would exist even after surgery. Robson directed Walker to advise him of his decision and, in the absence of surgery, claimant would have "reached the point of maximum medical improvement." On October 4, 2000, one year later, the claimant made a follow up visit to Dr. Robson who found no significant change in his medical condition since the September 15, 1999 examination. Based on

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**CLAIMANT ENTITLED TO TTD**

this follow-up opinion by Dr. Robson, the employer terminated TTD on October 13, 2000.

On April 19, 2001, the claimant testified on arbitration. He described constant pain and indicated a desire to have surgery because he felt it would help some of the pain. The arbitrator awarded continuing TTD benefits to the date of hearing because 1) the claimant had not returned to his duties as an electrical utility foreman; and 2) he had not reached MMI because he had continued pain and had not indicated against any surgery. The total award was 112 weeks.

The Commission modified the arbitrator's decision by reducing the amount of TTD benefits from 112 to 29-6/7 weeks, to cover the period from the second accident until the September 15, 1999 visit to Dr. Robson when the doctor first found MMI. The circuit court affirmed. The appellate court agreed with the Commissioner's decision that once a claimant has reached MMI, his condition is "no longer temporary and entitlement to TTD benefits ceases even though claimant may thereafter be entitled to receive permanent total or partial disability benefits." The court went on the say:

*After September 15, 1999, claimant next saw Dr. Robson on October 4, 2000, and had no treatment in the meantime. Claimant did not contact Robson between those dates to comply with his instruction to let him know what course of action claimant had chosen. On October 4, 2000, Robson concluded no significant change had occurred and claimant's options remained the same. Claimant took no substantial steps to either schedule surgery or indicate he would*

*accept his present physical condition. Instead, he waited until the April 19, 2001, hearing to affirmatively manifest his desire to have surgery. Further claimant admitted at hearing that Robson had told him on September 19, 1999, he had reached maximum medical improvement. Under the circumstances, the Commission could reasonably find as of September 15, 1999, claimant's condition had stabilized to a point that he had reached maximum medical improvement and was no longer entitled to TTD benefits. Claimant asserts, citing no authority, that maximum medical improvement is not as important as whether or not he can return to work, and an opposing position violates the Act and is wrong as a matter of law. However, again, the primary condition in TTD cases is whether claimant's condition has stabilized.*

After agreeing with the Commission that the claimant was only entitled to TTD benefits until September 15, 1999, the date of Dr. Robson's first visit, a total of 29-6/7 weeks, it awarded TTD benefits until October 13, 2000, a total of 84 weeks. Why? The court stated that the employer was precluded from requesting a reduction to 29-6/7 weeks because the employer, had stipulated that the claimant was entitled to 84 weeks. Before the arbitration hearing, the parties had stipulated as to the questions in dispute and the employer had agreed that the 84-week period for which it had paid TTD, was the correct amount. The employer could not now withdraw this stipulation. The language of the Commission rule indicated that all such stipulations were binding on the parties as to

the claims made therein. The court added:

*Moreover, a party may not argue for a suspension of TTD benefits effective on a date prior to a date it has previously asserted was an appropriate date for suspension of benefits. Therefore, employer was bound by its stipulation that 84 weeks' TTD benefits was appropriate.*

**EDITOR'S NOTE:** It is easy to understand why the employer stipulated to the additional TTD of 84 weeks between Dr. Robson's two examinations. It had actually paid for those 84 weeks. However, if the employer had claimed a credit for overpayment in the stipulation, it should have been reimbursed in that amount.

**PETITION TO REINSTATE DENIED BECAUSE IT WAS NOT FILED TOGETHER WITH A NOTICE FOR HEARING**

Employers and their attorneys are often frustrated because of the inability to dismiss cases that have been pending for a long period of time without sufficient action. The recent *Banks* case offers some hope in sustaining a dismissal when the claimant files a defective petition to reinstate.

Johnnie Banks alleged that on June 29, 1995, he sustained an injury when a co-worker struck him with a pipe. The chronology of the case at the Industrial Commission was as follows:

11/02/95      Application filed, after which the case was continued automatically at three-month intervals until the case had been on file with the

Commission for three years.

04/21/99      The claim came up on the arbitrator's monthly status and when the claimant failed to appear, the arbitrator ordered that the case be dismissed for want of prosecution.

05/12/99      The claimant's attorney received notice of the dismissal.

06/28/99      The claimant petitioned to vacate the dismissal and reinstate the claim within the prescribed 60-day period from receipt of the Notice of Dismissal but did not notice a hearing date and no action was taken on the petition.

02/28/01      The claimant obtained new counsel, who filed a second petition to reinstate, alleging that the first petition was never ruled on and, because claimant had a meritorious claim, the standards of equity and fairness mandate reinstatement. The arbitrator denied the motion and the claimant sought review before the Commission, which affirmed the arbitrator's dismissal. The trial court, and eventually the appellate court, confirmed the dismissal.

The appellate court pointed out that the Commission rule plainly requires that a petition for reinstatement must set forth the date on which the claimant will appear before the arbitrator to present his petition.

The hearing on the petition need not take place within a certain time but the claimant must notice the petition for hearing. In explaining the reasoning for the rule, the court stated:

*This claim presents a useful example of the reason for the rule. Claimant's attorney filed a timely petition, but no hearing on the petition was scheduled until almost two years later. By the time the arbitrator heard the petition, almost five-and-a-half years had passed since the filing of the application for adjustment of claim. In a claim involving an altercation with a coworker and most likely the issue of who was the initial aggressor, the potential prejudice resulting from the delays in prosecuting this claim is apparent. After a lengthy delay like the one here, witnesses may be unavailable or their ability to recall the incident may be diminished. Neither rule 7020.90 nor the Commission's interpretation of the rule is arbitrary or unreasonable.*

**EDITOR'S NOTE:** In the past, petitioners have filed a standard reinstatement request without noticing the case for a hearing. As a result, the case stayed open until the employer would notice the dismissal request for hearing. The claimant would then have the opportunity to argue his motion. It now appears clear that a petition to reinstate without setting a hearing date, makes that petition invalid.

### **SNOW AND ICE ON PARKING LOT CONSIDERED A "DEFECT"**

### **COMPENSATION AWARDED**

In *Janice Mores-Harvey v. Industrial Commission*, the appellate court had occasion to review the claim of a waitress employed by Bob Evans Restaurant, who sustained a fall in the adjoining parking lot, which was covered with ice and snow. She customarily drove to work to begin her 6:00 a.m. to 2:00 p.m. shift. On December 17, 1997, she parked her car behind the employer's restaurant in the parking lot that surrounds the building. As she exited her car, she placed one foot down and slipped and fell on ice, striking her head against the car door, and landing on her back. Apparently, it had just snowed and the weather was very cold. The parking lot had not been shoveled. The claimant "understood" that the employer maintained the lot, with the claimant being advised by the manager that she had been unsuccessful in her attempts to contact a snow removal service. The employees were directed to park their cars on either side or back of the parking lot so that the customers could park in the front. The lot was not lit.

On arbitration, the claimant was awarded compensation. On review, however, the Commission found that the claimant's fall resulted from the natural accumulation of snow and ice on a lot intended for the use of employees and customers alike. The Commission felt that the accumulation was a natural hazard to which the general public was equally exposed in all parking areas of employer's restaurant.

The circuit court reversed the Commission's decision and reinstated the arbitrator's award. The circuit court felt that the claimant was placed at a greater risk than the general public because of her employment and that the Commission's

finding was against the manifest weight of the evidence. The appellate court affirmed the circuit court.

The employer relied on the *Caterpillar Tractor* case wherein the claimant was injured on his way to the employee parking lot after his shift. The claimant stepped off of a sidewalk curb onto a blacktop driveway, which was used by both employees and the general public to pick up employees. The claimant did not trip, skip or fall, but his right foot landed half on the cement incline and half on the driveway, as a result of which the claimant twisted his ankle. There was no evidence that the curb was either hazardous or defective. The court stated *that curbs and the risks inherent in traversing them confronted all members of the public and that nothing in the record distinguished this curb from any other curb.*

In referring to situations where recovery has been permitted, the court noted:

*First, recovery has been permitted where the employee has sustained injuries in a parking lot “provided by and under the control of” an employer. Second, recovery has been permitted for off-premises injuries when “the employee’s presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons.*

The court then quoted Professor Larson’s treatise on workers’ compensation, stating:

*The rationale for awarding*

*compensation is that the employer-provided parking lot is considered part of the employer’s premises. (practically all jurisdictions consider parking lots owned or maintained by the employer as part of the employer’s premises; once the parking lot is considered part of the employer’s premises, “compensation coverage attaches to any injury that would be compensable on the main premises.”).*

The court distinguished the recent *Wal-Mart* case where the employee slipped on the ice in the employer’s parking lot when she was meeting her friend, who was to pick her up. She was not walking to an area where she had been asked by her employer to park her car. As a result, she was not acting under the employer’s control or restrictions and so did not face any risk to a greater extent than those of the general public.

In conclusion, the court in the *Bob Evans* case felt that the claimant’s exposure to risk was necessarily greater than that of the general public and stated:

*We disagree with employer’s contention that the presence of snow and ice in the entire lot compels the conclusion that claimant did not face any risks to a greater extent than other persons. By restricting where claimant could park her vehicle, the employer exercised control over its employees’ actions. In this way, the employee faced risks to a greater extent than the general public.*

**EDITOR’S NOTE:** This case seemed to have a scarcity of evidence establishing that the

lot was owned or controlled by the employer. The decision noted that the claimant “understood” that the employer maintained the lot and that the restaurant manager had been unsuccessful in attempting to contact a snow removal service. The lease was not made a part of the record nor did the employer provide any evidence as to any obligation to provide a service to snow shovel the lot. The claimant admitted that the employer did not instruct her to use the restaurant’s lot but the claimant countered this by stating that there was no other place to park.

#### **WAREHOUSE WORKER FAILED TO ESTABLISH BACK INJURY BECAUSE OF HIS CONFLICTING TESTIMONY**

Christopher Sleeter alleged that he suffered a back injury on June 10, 1994. On June 12, 1994, he sought treatment in the emergency department, complaining of pain in his hip for approximately two weeks, without making any reference to an injury at work on June 10. Five days later, he sought treatment with Dr. Jane Leonardson, describing pain in the “crural fold” for approximately six months after moving railroad ties. He also stated that he was lifting in a warehouse five days earlier on June 12 and not June 10, 1994. There was no specific reference to an accident at work on June 10, 1994 until November 11, 1994, approximately five months following the alleged accident and approximately one month after filing his application for adjustment of claim with the Industrial Commission. Thereafter, the record reflected that the claimant failed to participate in a work hardening program, as well as a therapy program. The treating physician questioned the claimant’s credibility. All of the which appeared to lack credibility.

While the arbitrator found that the claimant had proved that he sustained accidental injuries, the Commission disagreed and reversed, finding that:

*The Commission found claimant’s testimony at hearing “grossly inconsistent with the more trustworthy contemporaneous medical histories.” Claimant sought treatment in the emergency department on June 12, 1994. Although claimant testified at hearing he provided each of the medical care providers details of an accident at work on June 10, 1994, the record does not show claimant provided details of a June 10, 1994, accident at work until November 11, 1994, approximately five months following the alleged accident, and approximately one month after filing an application for adjustment of claim, alleging he suffered an accident on June 12, 1994, and not on June 10, 1994.*

The appellate court affirmed the denial of compensation.

**EDITOR’S NOTE:** The claimant also made a rather novel contention to the effect that one of the Commissioner’s, Robert Madigan, was not qualified to serve as a Commissioner. The statute requires that a Commissioner must (a) be licensed to practice law in the state of Illinois, or (b) serve as an arbitrator for three years, or (c) have at least four years of professional labor relations experience. Commissioner Madigan did not meet the first or second requirement but the court felt that the claimant’s statement that he could not find evidence of Madigan’s labor relations experience was not sufficient to reverse his

appointment.

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