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SUPREME COURT EXPANDS DEFINITION OF CONCURRENT EMPLOYMENT WHEN DETERMINING AVERAGE WEEKLY WAGE

Section 10 provides in part: *When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation.*

Larry Flynn'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. Claimant testified that he was sometimes called back to work by asphalt companies during the off-season after he had finished work for the year and before he began the next year but provided no specific information on such recalls. In effect, the claimant had two seasonal jobs which were performed at different times of the year.

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 *Flynn* case, the amount of the average weekly wage was quite significant. If the wages from the two employments were not to be considered “concurrent” the claimant actually had no wage loss. The Commission, the circuit court and the appellate court found that the earnings were not concurrent and as a result, the claimant had no wage loss. All of these decisions found the wage at the time of the accident, which occurred during his winter job, to be \$8.00 an hour whereas, after the injury, he was able to earn \$9.00 an hour as a security guard. If the claimant had been able to work as an asphalt driver, his wages would have been \$22.59 per hour.

Unfortunately for the employer, our Illinois Supreme Court, on June 17, 2004, reversed the appellate court, thereby reversing the Industrial Commission as well. In *Jacobs*, the claimant’s employment had previously overlapped, whereas *Flynn*’s employment in his seasonal employments had not, but the court concluded that the claimant was concurrently employed at the time of his injury. The majority opinion concludes:

It is undisputed that claimant was laid off from one of his jobs at the time that he suffered the injury in his other job. But claimant’s long and consistent history of rehire after layoff, in the seasonal business in which he was employed, in addition to the facts that he was subject to rehire at any time during the layoff and that he did return to that employment after the layoff, lead

to the conclusion that his employment relationship was not wholly severed such that his earnings from that employment became irrelevant to prediction of his lost future earnings. Rather, the relationship “remain[ed] sufficiently intact such that the claimant’s past earning experience remains a valid predictor of future earnings loss.” He was concurrently employed, and therefore his AWW in his “usual and customary line of employment” – as an asphalt truck driver – must be taken into account in determining the award to which he is entitled under the Act.

We reverse the judgments of the appellate and circuit courts, set aside the decision of the Industrial Commission, and remand the cause to the Commission for a calculation of claimant’s section 8(d)(1) award consistent with the views herein expressed.

A strong minority opinion referred to the inconsistencies in the majority opinion, stating:

Finally, I question the majority’s decision to make a finding about whether claimant was “working concurrently” and to remand the cause for calculation of claimant’s award. When a court sets aside a decision of the Commission, but the facts found by the Commission are sufficient to determine the correct decision, a reviewing court may enter the correct decision. However, when it is not clear from the record what decision is appropriate, the reviewing court should remand to the Commission so that it may decide in the first instance. The record in this case is as clear about claimant’s compensation at the two jobs as it is about the other circumstances of

his employment. If the majority has found the record insufficient to calculate claimant's section 8(d)(1) award to avoid a wasteful remand, then perhaps it also need to reconsider whether the record is complete enough to support its finding that claimant was working concurrently.

In conclusion, the majority explains that the sole issue in this case requires statutory construction of the phrase "working concurrently" in relation to seasonal workers. However, the majority fails to construe this phrase; no definition or rule is provided. Instead, the majority seems to consider several factors in a sort of totality-of-the-circumstances test before concluding that claimant was working concurrently as an asphalt truck driver and a snow blower. In doing so, the majority mixes two different types of analysis. The majority should use only one of these analyses and perhaps alter the standard of review accordingly. Because of the confusion that may be generated from the majority's opinion, I respectfully dissent.

EDITOR'S NOTE: When this issue of concurrent employment was first interpreted by the Commission, the claimant needed to show that both employments must be present on the date of the accident. In the *Jacobs* case, this interpretation was extended when the employee's concurrent employment was subject to a short-term layoff. Finally, in the instant *Flynn* case, the court included in the definition of concurrent employment a completely different seasonal employment if the claimant could only show that during that particular season, he was "available" for employment with his primary employer.

The real explanation is actually found in the supreme court's approval of the

language in the *Jacobs* case which, in effect, seems to rely on social policy rather than legal reasoning.

[F]airness to the employee and fairness to the employer-carrier are not symmetrical, and cannot be judged by the same standards. To this one employee, this one loss is everything - he has nothing against which to offset it. To the employer, and even more to the carrier, this is just one case among many. The rule operates impartially in both directions. Today this employer-carrier may be saddled with a slight extra cost; tomorrow the positions may be reversed, and the employer-carrier will be completely relieved of the cost of an injury to one of its employees in a concurrent-employment situation, when it happens to be the other employment in which the injury occurs. This is the essence of the concept of spreading the risk in a system like workmen's compensation.

*For the injured workmen *** [h]e, and he alone, bears the burden to being reduced to \$20 a week when his actual earnings may have been five times that much. That is real unfairness. By comparison, the "unfairness" to the employer, in the form perhaps of a slight premium increase, eventually offset by the times he will benefit by the same rule, is an artificial construct with no genuine content.*

RESTRICTIONS ON EMPLOYER'S SECTION 12 IME SCHEDULING RIGHTS WHEN FAILING TO PAY TTD BENEFITS

In our January 2003 Newsletter, we reviewed the Industrial Commission

decision on the employer's right to insist on an independent medical examination when denying its obligation to pay TTD benefits. The conflict had been created by the prior *Fencl-Tufo* case, where the claimant had not been required to attend a medical examination when TTD benefits were not being paid. The employer had unilaterally suspended the claimant's TTD benefits after it received the report from an investigator that she had observed the claimant playing golf. The claimant submitted to a Section 12 examination by Dr. Grin, who was selected by Fencl-Tufo. Dr. Grin advised the claimant not to return to work and initially suggested that the claimant return to the doctor in one to two weeks. Dr. Grin then extended the call back examination for six months. However, in three months, the claimant was requested by the employer to be examined by a different physician, Dr. Dupre, but he did not appear because benefits had not been reinstated. The court concluded that when the employer has arbitrarily suspended benefits and the employee has already complied with one requested examination, his failure to attend a further examination does not violate Section 12.

Section 12 of the Workers' Compensation Act states:

An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer...for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of the Act.

...If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period.

In the *R.D. Masonry* case, the petitioner, Scott Hunter allegedly sustained accidental injuries to the low back on August 21, 1998 while moving a load of bricks. The petitioner's treating physicians opined a causal connection while the petitioner's IME physician disputed the causal connection (after initially concurring with the treating physicians). The parties proceeded to a 19(b) immediate hearing and the arbitrator found for the petitioner, awarding TTD benefits from the date of accident though the date of arbitration.

While the 19(b) order was being reviewed, the Respondent scheduled a repeat Section 12 examination two months after the initial hearing. The petitioner's attorney instructed his client not to attend the examination stating that Respondent had not paid any disability benefits as ordered by the arbitrator (even though that decision was still under review by the Commission). When the appellate court finally upheld the arbitrator's 19(b) decision, the respondent proceeded to pay the TTD award and additional benefits through the date of the scheduled Section 12 examination that the petitioner failed to attend.

After a subsequent 19(b) hearing, the Commission majority, in a seeming departure from the legislative intent of Section 12 examinations, held that the petitioner was not required to attend the evaluation because the respondent was not paying TTD benefits. The Commission stated that respondents were not precluded

from paying benefits to encourage attendance because Section 8(b) is clear that the payment of compensation may not be construed as an admission of liability. Thus, there would be no apparent prejudice in the payment of benefits.

R. D. Masonry argued that the claim was on review and the employer had the right to obtain this IME because the claimant's right to additional TTD benefits was an issue to be determined at a subsequent hearing. After the first award was affirmed on review, R.D. Masonry paid all of the TTD up to the date of the first Section 19(b) award, together with interest. However, R.D. Masonry declined to pay the claimant any TTD benefits for the period subsequent to May 27, 1999, the date of the scheduled IME for which the claimant refused to appear. The Commission followed *Fencl-Tufo* and held that the claimant was not required to attend this medical examination on May 27, 1999 and awarded the claimant TTD benefits through February 1, 2001, the date the claimant was released to return to work. The Commission finding was reversed by the appellate court. The court stated:

At the time R.D. requested that the claimant be examined on May 27, 1999, he was an "employee entitled to receive disability payment: within the meaning of section 12 of the Act. Further, as the Commission found, R.D.'s request for a second examination was for a proper purpose and not done to harass the claimant. Nevertheless, the claimant argues that he was still not required to attend the examination as R.D.'s request was not accompanied by an advance of travel expenses and the examination was not scheduled for a convenient time as he was still undergoing physical therapy. However, as R.D. points out, the claimant never made such arguments before the

Commission or the circuit court and there exists no factual support for these assertions in the record before us. Consequently, the claimant cannot now rely on the arguments to justify his failure to attend the scheduled examination as arguments not made before the Commission or the circuit court are waived for purposes of appeal.

Having determined that the claimant was an "employee entitled to receive disability payments: within the meaning of section 12 of the Act at the time of R.D.'s request that he be examined on May 27, 1999, and that he had no valid reason to refuse to comply with the request, we hold that the Commission erred, as a matter of law, in awarding the claimant benefits for the period from May 28, 1999 through February 1, 2001. When, as in this case, an employee refuses to submit to a request for a medical examination made pursuant to section 12 of the Act, his "right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under [the] Act for such period.

Belatedly, the claimant argued that he was still not required to attend the examination as the request by R.D. Masonry was not accompanied by an advance of travel expenses and the examination was not scheduled for a convenient time as he was still undergoing physical therapy. The claimant had never made that argument before the Commission and it was now waived on appeal.

EDITOR'S NOTE: If a request for a second IME is deemed unreasonable, the request may still be denied. If it appears that the employer is "doctor shopping" because the first IME produced an unfavorable opinion,

the request will, most likely, be denied. However, if the issue concerns a different period of disability or if the initial IME physician had suggested a follow-up examination within a prescribed time, the request should be granted. Nevertheless, travel expenses must be advanced and the examination scheduled for a reasonable time.

SEIZURES CAUSALLY RELATED TO ACCIDENT SUFFERED OVER FOUR YEARS EARLIER - OVERTIME EXCLUDED IN CALCULATING AVERAGE WEEKLY WAGE

The *Freesen* case involved two issues. One, was there sufficient medical evidence to justify a finding that seizures which first developed more than four years after an accident were causally related to the accident, and two, were the *Sylvester* case findings retroactive to an accident many years before?

The claimant, a 42 year old laborer foreman, assisting in a bridge demolition across the Sangamon River, fell with the structure to the river below. Since he was pinned under water under the girder, he nearly drowned before he was rescued by other workers. His injuries included a fracture of L1, macular degeneration in his right eye, total loss of use of bladder and bowels and severe post traumatic headaches. The accident happened on November 21, 1991, and the case did not go to hearing until June 20, 2001. Apparently, no dispute existed that the claimant was permanently and totally disabled.

Approximately four and one-half years after the accident, he had a grand mal seizure which was sometime later, followed by another, which fractured two or three vertebrae. An EEG gave indication of clinical epilepsy.

The arbitrator initially found that the seizures were not compensable injuries as they did not relate causally to the November 21, 1991 accident. The arbitrator awarded a permanent total disability and used a rate of \$314.92 per week, with the award to include “all medical services” except those related to the claimant’s seizures. The Industrial Commission reversed and increased the rate to \$478.17 per week. It concluded that the seizures and epilepsy were due to the original accident and awarded medical expense of \$84,646.85.

The circuit court was puzzled by the Commission’s calculation of the average weekly wage and referred the matter back to the Commission for explanation. Thereafter, the Commission issued a new decision, after which the court increased the average weekly wage to \$608.41 and the PTD benefit rates to \$405.81. The claimant had earned \$23,119.47 in regular wages for the 52 weeks prior to the injury and the overtime wages, calculated at the straight-time rate, were \$1,816.51. The court concluded that overtime was not properly included in the average weekly wage calculation and used only the regular wages divided by 38 weeks to reach the average weekly wage of \$608.41.

The employer had begun making benefit payments as soon as the accident occurred, which was prior to the *Sylvester* case. As we all know, the *Sylvester* case changed the method of calculating wages. Prior to *Sylvester*, the calculation was based on weeks worked but in *Sylvester*, the court used the “parts of weeks” statutory language to provide significant increases. The original benefit payment of \$314.92 per week was now \$405.81, indicating that the employer had underpaid the benefits in the amount of \$24,864.84.

The employer complained that this

amount was a “windfall” which was “tax free” and amounted to 32% more in TTD benefits than the claimant would have earned as regular wages. The court did not agree with the employer’s contention that *Sylvester* involved a change in the law and should not be given a retroactive application. The court stated:

Because Sylvester neither explicitly gave retroactive effect, nor established a new principle of law, employer has failed to show that Sylvester should not be applied retroactively in this case.

The employer’s only consolation was the court’s conclusion that the claimant’s overtime wages should not be included. The claimant presented no evidence establishing the number of hours he was required to work and Section 10 of the Act explicitly states that overtime is to be excluded in calculating the average weekly wage. In other words, any hours in excess of the number of hours (the claimant) was required to work would be considered as overtime and not to be included in the wage calculation.

EDITOR’S NOTE: How many employers have pre-Sylvester files that might require re-calculation on a PTD or death case?

APPELLATE COURT REVERSES COMMISSION’S DENIAL OF COMPENSATION IN PARKING LOT FALL

In the *Litchfield Healthcare Center* case, the claimant, a certified nursing assistant, testified that when she began working for Litchfield, a secretary “suggested” that she park her car in the north parking lot, which was also used by visitors to the facility. On occasion, the claimant would park in the west parking lot when the north lot was full. On September 24, 2000, she parked in the north parking lot

but, immediately after punching the time clock, she realized that she had forgotten her “gait belt” in her car. The claimant testified that she was required to have a gait belt, a device used to hold a resident during lifting and could be disciplined if she did not have it. She testified that as she went from the parking lot surface to the sidewalk she tripped on the part of the sidewalk where the concrete was not level. On a 19(b) hearing, she described her severe ankle and foot sprain, which required surgery to repair ligaments. The arbitrator found that the injury was compensable but in a 2-1 decision, the arbitrator’s decision was reversed. The Commission “found that there was no evidence to show either that Litchfield restricted the method by which the claimant entered or exited its building or that she was subjected to a risk uncommon to the general public or to a greater degree than the general public.” However, the circuit court reversed the Commission and the appellate court affirmed the circuit court, thereby holding the case compensable.

The appellate court admitted that it would be unusual to reverse the Commission on a question of fact, but that it was clearly apparent that the Commission’s finding of fact was contrary to the manifest weight of the evidence. Why did the majority opinion feel that the Commission’s decision was clearly wrong? The majority stated:

The claimant testified that she tripped on an area of the sidewalk where the slabs of concrete were “not level with each other.” She identified an exhibit which showed one slab of concrete higher than the adjoining slab and testified that the difference in height was approximately 1-1/4 inches. The Commission, however, found that there “was no defect or hazard in the sidewalk.” In light of the claimant’s uncontradicted testimony on the issue and the concession by Litchfield’s

attorney during oral argument that the photographic exhibits “show varying heights” in the adjoining sidewalk to be against the manifest weight of the evidence.

Two Justices dissented pointing out that the majority opinion was simply re-weighing the evidence which was presented to the Commission. The minority opinion stated:

The Commission in its decision stated that it had “reviewed the exhibits, PX7, RX1 and RX2, the photographs of the sidewalk, along with petitioner’s medical histories, and finds there was no defect or hazard in the sidewalk.” The Commission also stated “More specifically, the Commission finds that Petitioner provided significantly varying accounts of the incident in her medical histories.” And the Commission further stated that “in her contemporary medical records, Petitioner indicated that she twisted her ankle on the sidewalk, twisted her ankle in a big hole in the ground, and slipped off the edge of the sidewalk.” The commission also noted that the testimony of the claimant at the time of arbitration differed from her medical records and further found that when petitioner was asked to preview PX7, “she testified that it accurately portrayed the sidewalk as it was on the date of the incident.” She did not mark on the photograph where the incident occurred, whether the sidewalk was dry, whether there were any holes, obstructions or rocks on the pavement.

EDITOR’S NOTE: With all of the areas of contradiction recited by the dissenting Justices, how then could the majority conclude that the evidence was “indisputable?” The position of the majority in this type of case would certainly cause

employers to question any parking lot case. The decision makes the *Caterpillar* case seem less important.

MAINTENANCE BENEFITS DUE AFTER MMI IF CLAIMANT FOLLOWS A SELF-CREATED AND DIRECTED JOB SEARCH

Larry Grabis, a heavy equipment operator employed by Roper Contracting, was climbing the ladder of a fuel truck on January 17, 2000, when he slipped and, to prevent his fall, he grabbed the door of the truck with his extended left arm. The claimant suffered a left rotator cuff tear requiring surgical repair by an orthopedic surgeon, Dr. Alan Johnson.

Because of a developing adhesive capsulitis, the claimant underwent an extensive physical therapy program until March 19, 2001. The physical therapy report noted that the claimant would benefit from a vocational rehabilitation program and retraining to an occupation which required less overhead lifting.

On March 21, 2001, Dr. Johnson concluded that the claimant had reached his MMI. Dr. Johnson authorized the claimant’s return to work, which would require only limited overhead reaching and lifting with the left arm. On that basis, Roper had no suitable work, and benefits were terminated on April 18, 2001. On May 18, 2001, Roper obtained an IME by Dr. Frank Petkovich, who also found the MMI with similar restrictions on overhead work and lifting.

No vocational rehabilitation was offered to the claimant, nor did he request any. Instead, the claimant conducted his own job search. At the time of the hearing, claimant testified that he was certain that he had a job with the telephone company, paying \$280

per week, although he had no contract with the telephone company indicating an actual job offer.

The Commission awarded the claimant TTD benefits through March 21, 2001, the date of the first MMI, maintenance through September 21, 2001 and 50% loss of a man as a whole. The Commission found that the claimant's self-created and directed job search took the place of a formal rehabilitation program that the claimant had no obligation to request vocational rehabilitation and further held that 50% man as a whole was not excessive. When the circuit court affirmed the Commission, Roper appealed to the appellate court.

With reference to the issue as to whether the claimant's job search qualified as a program of vocational rehabilitation under the Act, the appellate court disagreed with Roper's contention, stating:

While Roper is correct that our supreme court has indicated its disapproval of claimant-created, self-directed, vocational programs, Roper has failed to cite, and our research had failed to uncover, a rule prohibiting claimant-created and directed vocational rehabilitation. In Hunter itself, the Commission's vocational rehabilitation and maintenance award was held improper, not because it was claimant-created, but rather because the award was against the manifest weight of the evidence. Thus, the Commission did not err, as a matter of law, in awarding maintenance for the claimant's self-created and directed rehabilitation program.

Further, we note that the record supports the Commission's award of maintenance in this matter. A claimant is generally entitled to vocational rehabilitation where he sustains a work-

related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity. The evidence here shows that the claimant suffered a work-related injury and that the restrictions arising from that injury impaired his earning power. Further, the evidence shows that the claimant's self-created vocational program did in fact increase his earning capacity as demonstrated by the positive results of the claimant's job search. Therefore, the claimant was properly awarded maintenance benefits for the period of time he was undertaking his self-created and directed rehabilitation program.

With reference to the 50% man as a whole award, Roper argued that the Commission had, in effect, awarded the claimant more than 100% loss of the arm and that the award should not have exceeded 40% to 45%. It further argued that the Commission had used the claimant's testimony to the earning impairment and "rationalized" to an amount according to a wage loss award. The court rejected this argument stating that the work restrictions justified PPD benefits representing 50% loss of a man as a whole.

EDITOR'S NOTE: It would be highly unusual for a reviewing court to modify a permanent partial disability award of the Industrial Commission.

**TREATING PHYSICIAN'S
CAUSATION TESTIMONY
ADMITTED WITHOUT BEING
TENDERED TO EMPLOYER IN
ADVANCE - AWARD OF
PROSPECTIVE MEDICAL EXPENSE
HELD PROPER**

On November 6, 2000, Kevin Schnoeker, a paint department manager for Homebrite Ace Hardware, was lifting

buckets of driveway sealer from a pallet when he heard a pop in his back. About four hours later, he felt back pain, reported the injury to his employer and did not return to work.

Three days later, the claimant visited the office of his family physician, Dr. Garces. Initially, conservative back care was provided and the claimant was referred to Dr. Charisse Barta, a neurologist, who first saw the claimant on November 30, 2000. At the time of Dr. Barta's initial examination, she referred to a lumbar MRI, which revealed a herniated disc at L3-L4 and a disc bulge at L4-L5. She authorized the claimant's return to work with a ten-pound lifting restriction.

Thereafter, Dr. Garces referred the claimant to Dr. Christopher Heffner, a neurosurgeon, whose testimony on arbitration established causation of the claimant's neck injury to the accident. According to claimant, about six weeks to two months after the accident, he began feeling pain in his neck and upper back. Claimant testified that he had never experienced any neck problems before his injury, but he did experience back problems on several occasions.

At his deposition, Dr. Heffner testified that he first examined claimant on January 30, 2001. Claimant described back pain radiating into the hip which Dr. Heffner described as being consistent with herniated lumbar disc disease. Dr. Heffner prescribed steroid medication and opined that the claimant's condition was related to his work accident. No reference was made to neck or back pain.

Dr. Heffner next saw the claimant on February 13, 2001, at which time claimant complained of pain in the neck radiating to his right arm. Despite the fact that this neck complaint first appeared in the doctor's

records more than three months after the accident, Dr. Heffner stated that the neck condition was causally related. Initially, Dr. Heffner's only treatment concerned two lumbar epidural injections but when on March 29, 2001, the claimant again complained of neck and right arm pain, Dr. Heffner requested an MRI which he described as revealing degenerative changes at the C5-C6 with some posterior disc bulging. The doctor recommended physical therapy and home cervical traction. On subsequent visits, the claimant's neck condition became a more significant problem. Consequently, the claimant was scheduled to undergo cervical surgery on September 10, 2001, but this surgery was not authorized by the employer. Dr. Heffner never saw claimant again after July 31, 2001, never released him to return to work and never issued a report about causation with respect to claimant's cervical spine injury.

On July 16, 2001, Dr. Peter Mirkin, examined claimant and reviewed the MRI films at the employer's request. Dr. Mirkin stated there was no relationship between claimant's neck condition and his work injury and stated that the small disc bulge in the neck would not require surgery because it would not be beneficial. He also recommended the claimant return to work.

The first evidence of any connection between the neck injury and the claimant's accident is contained in the deposition of Dr. Heffner. On four occasions, Dr. Heffner stated that it was reasonable to assume that there was a causal relationship. The employer objected to the causal relationship testimony on the grounds that it had no prior notice that Dr. Heffner would attempt to provide a causal relationship. The employer relied on the 1996 *Ghere* case, which stated that any undisclosed opinion testimony must be deemed as a surprise and be barred.

In the *Ghere* case, the employee died of a heart attack. The employee's physician had treated the employee on several occasions but not for the heart. Since Dr. Heffner, in the instant case, had treated the claimant for the neck, the appellate court held that the employer should have anticipated that Dr. Heffner might establish causal relationship to a condition which had been subject to his treatment.

Another issue on appeal in the *Homebrite* case concerned the Commission's decision to award the claimant prospective medical benefits when it directed the employer to authorize claimant's cervical surgery recommended by Dr. Heffner. The court based its decision on the 1999 *Bennett* case which held that the Commission's order directing the employer to provide written authorization for a prescribed surgery, was proper. In attempting to provide a limitation to such an order, the appellate court, in the instant case, stated:

We emphasize that claimant is entitled to recover only reasonable medical expenses that are causally related to his work accident and that are determined to be required to diagnose, relieve, or cure the effects of his injury. Therefore, as we noted in Bennett, because issues regarding entitlement to additional TTD benefits and permanency remain open for determination in further proceedings, employer may challenge the reasonableness of the cost of claimant's cervical surgery in subsequent hearings.

EDITOR'S NOTE: The employer's frustration with this decision is certainly understandable. The employer had every right to argue surprise when the first reference to a causal relationship of the neck injury appeared at Dr. Heffner's deposition. The appellate court stated the employer

should have known of this possibility even though the claimant testified that he first had neck symptoms six to eight weeks after the accident and that Dr. Heffner first noted these symptoms on claimant's second visit which occurred three months after the accident. Even then, Dr. Heffner's responses described a "possibility" of causal connection rather than the "reasonable degree of medical and surgical certainty" commonly required in such cases. Dr. Heffner never even saw the claimant from July 31, 2001 until the arbitrator's award on February 5, 2002. The employer's IME, which stated that the condition was not sufficiently serious to authorize surgery with the additional comment that the degenerative neck condition was not related, also made this decision somewhat surprising. Giving the employer the right to challenge the reasonableness of the cost of the surgery is not much of a consolation.

The decision seems to deprive the employer of the protection of Section 12 where the employer is entitled to receive the doctor's records and opinion at least 48 hours prior to the arbitration hearing in order to prevent the claimant from springing surprise medical testimony on the employer. Such was the statement of the court in the *Ghere* case. In avoiding this statement in *Homebrite*, the decision states: *The Ghere court did not set forth a bright-line rule or presumption that undisclosed opinion testimony constitutes surprise.* But, in relaxing the statutory requirement of Section 12, has not the court clouded an area of the law that was previously clear?

HB 805 – PROPOSED AMENDMENTS TO THE ILLINOIS WORKERS' COMPENSATION ACT

On July 24, 2004 the Illinois General Assembly concluded the most lengthy overtime session in Illinois history by

passing a budget for the State of Illinois for the 2005 fiscal year.

The General Assembly traditionally adjourns its Spring Session at the end of May. While remaining in session to negotiate a budget deal, legislators considered a number of collateral issues, including House Bill 805 (HB 805). HB 805 proposes 35 changes to the Illinois Workers' Compensation Act. The legislature adjourned the Spring Session without taking action on HB 805.

The sponsors of HB 805 are Democratic Representatives Madigan, Currie, McKeon, Verschoore and Flowers and Democratic Senators Link, Sandoval and Martinez.

HB 805 was passed by the Illinois House of Representatives on April 3, 2003. The bill was passed out of the Illinois House and sent to the Senate as a "shell" bill – meaning it contained none of the language presently contained in the bill.

Senator Terry Link (D – Vernon Hills) is the lead sponsor of HB 805 in the Senate. He placed an amendment (Senate Floor Amendment #2) on the bill which contains the current proposed changes to the Illinois Workers' Compensation Act. The more significant changes proposed are as follows:

Permanent Partial Disability (PPD) Rate Increase

Under the terms of HB 805 the PPD rate will increase to 66-2/3% of average weekly wage (from 60%). Additionally, the bill proposes including overtime wages in the calculation of average weekly wage and sets a higher minimum PPD rate equal to 66-2/3% of the Illinois' minimum wage (effective January 1, 2005 Illinois' minimum wage will be \$6.50/hour) multiplied by 40 hours per week. The current minimum PPD rate is \$80.90. HB 805 more than doubles

the minimum PPD rate to \$173.33.

Based upon figures contained in the 2003 Annual Report of the Illinois Industrial Commission, the proposed PPD changes contained in HB 805 will result in a 21% increase in permanency costs – a potential increase of \$380 million for employers.

Increased Penalty Exposure

The Illinois Workers' Compensation Act presently provides for penalties for unreasonable or vexatious conduct on the part of employers. Penalty provisions presently can be assessed at a rate of \$10.00 per day with a total cap on penalties of \$2,500.00.

Under the terms of HB 805, penalties would be available to claimants and their attorneys in every disputed case. Therefore, not only are the fixed costs associated with the Illinois workers' compensation system substantially increased (see above), but also for those employers that choose to dispute their claims – even in good faith – penalties of \$30.00 per day (total cap of \$16,425.00) will be assessed as a result of employers exercising their statutory and constitutional right to proceed to a full hearing. These proposed changes to the penalty provisions of the Illinois Workers' Compensation Act not only strip employers of their due process rights to present a valid defense, they also will result in an estimated \$50 million increase in exposure for Illinois employers.

Medical Fee Schedule

HB 805 proposes abolishing balanced medical billing in the workers' compensation setting and establishes a medical fee schedule allowing employers to pay 90% of the 80th percentile of the usual and customary medical fees.

Proponents of HB 805 allege that the

cost savings contained in the proposed medical fee schedule will offset the increased exposure in permanency and penalty costs for employers. The Illinois State Chamber of Commerce has concluded that any alleged medical cost savings of HB 805 will not be sufficient to offset the substantial increase in benefit costs.

The drafters of HB 805 have overlooked the fact that the overwhelming majority (nearly 70%) of Illinois employers are already benefitting from cost-savings agreements with medical providers which are equal to or more beneficial than the reimbursement rate contained in HB 805. Thus, little or no cost reduction is provided to a majority of Illinois employers under the terms of this bill.

HB 805 is currently pending in the Illinois Senate. The Illinois General Assembly will re-convene on November 8, 2004 for the Fall Veto Session and may address HB 805 at that time.

Wiedner & McAuliffe, Ltd. has worked diligently over the past two months in an effort to prevent the passage of HB 805. In particular, Mark Wiedner, Mark Wilkening, Jim Stevenson and John Pearman have devoted numerous hours to this project. These individuals have organized meetings between legislators, employers and representatives of the workers' compensation bar and have provided legislative counsel to numerous clients, legislators and special interest groups. Working with Senator Dan Cronin (R-Elmhurst), we have been successful in building strong opposition to HB 805 and have prevented its passage to date.

The proponents of HB 805 intend to pursue passage once again in November. To that end, we will be forwarding you additional details on HB 805. In the meantime, we urge you to contact your local

elected officials to voice your opposition to the increased costs for employers proposed in HB 805. Please contact us with any questions you have regarding HB 805.

FRANK J. WIEDNER
EDITOR

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