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INDUSTRIAL COMMISSION'S DENIAL OF WAGE DIFFERENTIAL AWARD IS REVERSED BY APPELLATE COURT

Jeffrey Labonte, employed by Yellow Freight Systems as a dock worker, and spotter, suffered a work accident on April 5, 1998, while cranking down dolly legs on a trailer. On April 15, he underwent arthroscopic surgery on his left shoulder, after which Dr. Weidman, the surgeon, ordered permanent restrictions prohibiting lifting over 40 pounds and frequent lifting over 25 pounds. Claimant began working for this employer in 1987 and had several accidents. In 1990, he suffered a cervical injury which required a C5-C6 fusion which led to a settlement of his workers' compensation claim and resumption of regular employment in 1991. During the years 1992 and 1993, he noticed soreness in his left shoulder, with no documentation of significant treatment prior to April 5, 1998. The employer's examining physician opined that the April 5, 1998 incident involved merely a shoulder strain and claimant's shoulder problems were chronic in nature prior to that date. Most likely, since the shoulder surgery was performed shortly after the April 5, 1998 accident, the Commission found an aggravation of the pre-existing condition.

Prior to his employment with Yellow

Freight, the claimant had performed primarily physical labor consistent with his eleventh grade education. After his shoulder surgery, claimant began working with Tracy Peterlin, a vocational consultant retained by the employer. Claimant's earnings at the time of his accident, exceeded \$19 per hour. Peterlin suggested that the claimant contact several security companies which had a salary range of \$6 to \$8 per hour. Peterlin was not informed by the claimant at that time that he had already secured a job with Metro Milwaukee Auto Auction prior to meeting with Peterlin and that this job paid \$7 per hour. Claimant testified that he accepted this position only after he had obtained the approval of his employer. The employer advised Peterlin of the claimant's acceptance of the position and told Peterlin to keep the file open for 30 days and if the claimant was still working, the file could be closed.

During the arbitration hearing, the claimant acknowledged that he had been living in Franklin, Wisconsin and commuting to Illinois for five years prior to his work accident. The parties stipulated that claimant had been advised of job openings with the employer in July, 1999, some five months after accepting the position as security guard. The employer introduced the job descriptions for three open positions: Associate Dock Operations Supervisor, Shift Operations Manager and Dock Supervisor. Two of the positions required a bachelor's degree or previous supervisory experience, and the third required a high school education or equivalent and some work experience with computer applications. Claimant testified that he did not have the skills required for these positions and could not type due to a previous injury to his finger. He never

looked for any other jobs after accepting the position as a security guard.

The Commission initially refused to award a wage differential and instead found claimant disabled to the extent of 40% loss of a man. The circuit court reversed the Commission and remanded the case to the Commission with instructions to find a wage differential. The Commission responded by finding such an award to the extent of \$361.34 per week and the circuit court and appellate court affirmed.

In its appeal, the employer contended that the initial Industrial Commission decision was not against the weight of the evidence. In response, the court stated that the employer had, in fact, agreed that the security guard position was appropriate, stating:

In the instant case, the employer conceded that claimant could not continue in his usual and customary line of work as a dock worker or spotter. The employer arranged for a vocational expert to assist claimant in a job search. The vocational expert listed security guard as a position which would be appropriate for claimant given his education, experience, and physical restrictions. The vocation expert set forth that claimant could expect to make between \$6 and \$8 per hour in such a position. Prior to meeting with the vocational expert, claimant obtained employment as a security guard, earning \$7 per hour. Claimant testified he works 32 hours per week, which is considered full-time. His new employer provides health insurance for him and his wife who has diabetes.

Claimant checked with the employer and was told that the job as a security guard was appropriate and he should go ahead and accept the position. Accordingly, his meeting with the vocational expert was cancelled. The employer told the vocational expert to keep the file open for 30 days and if claimant was still employed with the security company, she should go ahead and close the file.

With reference to claimant's failure to apply for the three jobs with the employer, the court pointed out that the employer did not actually offer the claimant any of the three positions, but merely gave him notice, which was in the nature of a sham offer. The court stated:

It is clear that claimant was not qualified for the jobs "offered" by the employer, as claimant does not even possess a high school diploma. While claimant alleged management experience with previous employers when he applied for a job with the employer in 1987, this allegation appears to be nothing more than mere puffing. Most importantly, the employer only notified claimant about three open position, but never actually offered the employee any of the positions. The employer cannot be allowed to use this type of tactic to defeat claimant's entitlement to a wage differential award.

Justice McCullough dissented and pointed out that the arbitrator had found that the claimant had "presented no evidence of an appropriate job search and no testimony from a vocational expert." In effect, the court was now merely basing its

decision on the testimony of the claimant. The opinion concluded by noting that the majority had simply re-weighted the evidence and determined credibility in the place of the fact finder.

EDITOR'S NOTE: The court found it significant that the vocational consultant had closed her file when the claimant accepted a security guard position. Perhaps, even more importantly, it should be noted that the court felt that the employer could not rely on the existence of the three subsequent openings unless it actually offered one of the positions to the claimant.

FALL DUE TO ALLEGED DEFECT IN PARKING LOT HELD NOT COMPENSABLE

Margaret Vill, was employed by the Loyola University Medical Center as a security officer. After driving her automobile to Loyola, she arrived at Lot No. 15, which was the only parking lot in which security personnel were permitted to park, but visitors to the hospital and patients were also permitted to park in this lot. Lot 15 was more crowded than usual when the claimant arrived on April 2, 2002. Consequently, she chose to park in a space near the Administration Building, where the space was narrow due to an SUV parked on one side. As she attempted to exit her vehicle, she found that she only had eight inches of room and as she squeezed out of the vehicle, she twisted her knee when she stepped in a crevice in the parking lot.

The medical and hospital records contained histories which were consistent with each other, none of which made any reference to the crevice. The arbitrator

found the case to be compensable, but this decision was reversed by the Commission which after making reference to the inconsistencies as to the lot condition, concluded that the claimant failed to prove that her risk was different from that to which the general public was exposed.

The appellate court emphasized that the claimant's testimony was not credible and, consequently, she had not established the existence for increased risk. With reference to the issue of credibility, the court stated:

Based upon the total absence of any reference in the claimant's medical records to her foot having gotten caught in a crack in the parking lot and the claimant's failure to mention that fact to Wilson (the claimant's supervisor), we cannot say that the Commission's determination that the conditions in the parking lot did not cause the claimant to fall is against the manifest weight of the evidence.

EDITOR'S NOTE: Employer's reliance upon this case should be tempered somewhat by the fact that the court seemed to rely primarily on the claimant's lack of credibility because of her contradictory statements. It should be noted that the last sentence of the majority opinion, which states:

We express no opinion on the Commission's alternate holding to the effect that, even if the conditions in Loyola's parking lot caused the claimant to fall, she did not sustain her burden of proof.

WHEN CAN MEDICAL AND

HOSPITAL RECORDS BE INTRODUCED INTO EVIDENCE?

On July 15, 1992, J. Guadalupe Velasquez, a 38 year old laborer, injured his back while employed by National Wrecking Company. Claimant described a sudden back pain accompanied by lost sensation in his legs. Although an MRI requested by the treating physician, Dr. Benjamin Narrajos, was normal, the doctor continued treating the claimant for his complaints. In September, 1992, Dr. Jit Kim Lim, a neurosurgeon, diagnosed sciatic pain and possible median and ulnar nerve entrapment. He prescribed a myelogram which the claimant refused. In February, 1993, Dr. John Dwyer, examining at the employer's request, found no objective evidence of any disability and released the claimant to work without restrictions or further treatment.

In April, 1994, the Commission found that the claimant was entitled to TTD benefits from August 5, 1992 through February 11, 1993. Claimant had last treated with Dr. Narrajos in January, 1993 and the last medical examination was conducted by the employer's expert, Dr. Dwyer, on February 11, 1993. This finding was confirmed by the trial court and the employer did not appeal.

The case was subsequently set for hearing on November 13, 2000 to determine additional TTD and permanent disability. By this time, the claimant's attorney had withdrawn and claimant, who did not speak English, was pro-se and testified through an interpreter upon questioning by the arbitrator. The claimant described physical therapy treatments at the Holy Cross Hospital in October, 1993, a visit to Dr.

Phillip Gattas, for an examination in February, 1994, visits to Dr. Amal Hachache, a neurologist who prescribed medication in July and September, 1994, a few visits to UIC Medical Center between February, 1995 and February, 1996, a finding of total disability by the Social Security Administration in May of 1996, and subsequently, three visits in 1998 to Dr. Stanley Bianowas. Claimant testified that his injuries prevented him from returning to work, that he experienced pain and numbness in his legs and feet and used a cane for ambulation and that he continued to see Dr. Bianowas for prescription renewals.

Extensive medical and hospital records were introduced but not supported by any medical testimony. The records did not appear in any logical order and were difficult to follow. Most of the hospital testing produced negative results. Dr. Charles Kennedy, a neurosurgeon who examined at the request of Dr. Bianowas, recommended further testing because of a failure of extensive evaluation, and further, recommended a possible aggressive approach. Dr. Gattas submitted a typical chiropractic type of report, which was not corroborated by any other physician.

The finding of the Administrative Law Judge of the Social Security Administration, was based on a report submitted by Dr. Bianowas on March 15, 1996. He indicated that the EMG was normal and made reference to soft tissue density which caused a great deal of lower back pain and stiffness. The doctor felt that claimant could not walk without using a cane or sit or stand for extended periods. Dr. Dwyer who had previously examined the claimant on February 11, 1993, reexamined him on May

26, 1998 and made findings identical to those he had made five years earlier.

In view of the fact that the subjective complaints were not medically verified, it was rather surprising that the Commission found that the claimant was permanently and totally disabled. The Commission based its findings on their purported opinions of Dr. Kennedy that the claimant was unable to work and that of Dr. Bianowas that claimant needed a cane. Obviously, if the employer had been permitted to cross examine these physicians, the absence of any objective findings supporting permanent disability could have been developed.

The court upheld the admissibility of the reports of Drs. Gattas and Kennedy because they were prepared in the course of claimant's medical treatment. They stated that, in prior cases,

The court recognized that the rule against the admission of hearsay evidence is not absolute and that, under certain circumstances, the probability of the evidence's accuracy and trustworthiness may act as a substitute for cross-examination under oath. It held that, because the reports were not prepared for litigation purposes but instead to assist in the treatment of the claimant's injury, there was little reason to suspect their trustworthiness.

However, the court pointed out that the report of Dr. Bianowas, which was written at the behest of claimant's attorney to an Administrative Law Judge, should not have been admitted because this report was prepared for the purpose of assisting claimant during the litigation to procure

Social Security benefits.

With reference to the admissibility of hospital records, the court stated that Section 16 of the Act required that hospital records be “certified” before being admitted. In setting aside the Commission decision, the court stated:

*Section 16 in effect eases the foundational requirement by stating that hospital records “certified to as true and correct by the superintendent or other officer in charge **** shall be admissible without any further proof ***.” Although the legislature has made it easier to introduce hospital records during workers’ compensation proceedings, the language and purpose of section 16 demonstrate that the legislature intended certification to be a minimum foundational requirement that must be satisfied before the records may be admitted “without any further proof****.” It would be inappropriate for this court to recognize a potential means of bypassing section 16 and the rules of evidence, thereby eliminating the foundational requirement altogether.*

As might be anticipated, one of the justices was consistent in his dissent. In his opinion, the certification requirement could be ignored and the hospital records could be admitted if they were found to be reliable.

EDITOR’S NOTE: The court’s attitude towards the admission of treating medical records will often eliminate the necessity of the claimant supplying actual medical testimony at the hearing. If the claimant were then to introduce the hospital records, after having obtained certification, the entire claimant’s arbitration case would

consist of the claimant’s testimony and introduction of multiple medical and hospital records without the employer having any opportunity to cross examine any of the medical providers on the reasons for their findings. Employers may be forced to take the depositions of the treating physician without even having the benefit of obtaining prior information as to the specifics of the physician’s opinion. Under *Petrillo*, the employer may not speak to the treating physician and can only request the doctor’s records. It is important that the employer request the doctor’s complete records to be in the best position to respond to the claimant’s evidence.

WISCONSIN INSURER LIABLE FOR BENEFITS FOR CASE FILED IN ILLINOIS

On November 7, 1994, Thomas Cholewinski, an Illinois resident, sustained an injury while working in Kenosha, WI for Lenny Szarek, Inc. Szarek was incorporated in Illinois and headquartered in McHenry County. The court noted that McHenry is one of Illinois’ northernmost counties, sharing a border with the State of Wisconsin. Szarek did business in both Illinois and Wisconsin. The claimant filed in Illinois and did not at any time attempt to receive any benefits under the Wisconsin workers’ compensation system.

Szarek was a member of an Employer’s Liability Pooling Association, a form of self-insurance, which expressly stated in its terms that it would cover amounts due under “the workers’ or workmen’s compensation law...of Illinois.” Since the present injury was clearly within those terms, the Pooling Association began paying benefits to Mr. Cholewinski.

However, in January of 1996, the Pooling Association became aware of the existence of another workers' compensation insurance policy which had been issued to the employer by Maryland Casualty Co. Subsequently, the Pooling Association tendered a claim to Maryland Casualty, seeking compensation for the benefits it had paid and the costs it had incurred in the matter. Defendant Maryland Casualty, however, denied liability for Mr. Cholewinski's claim, on the grounds that the policy it issued only covered claims brought in Wisconsin. In support of its position, defendant pointed to the explicit language of the policy, which listed only one state for which it would "pay promptly when due the [workers' compensation] benefits required" that being Wisconsin. Maryland Casualty conceded that the employee *could have* brought a claim in Wisconsin, but- because he did not- his claim was not within the gambit of the policy.

In spite of this ostensibly clear policy language, the court stated that the injury and payments made *were* within the purview of the policy issued by Maryland. In reversing the trial court's decision, the appellate court held that the contested verbiage in the policy did not serve as a limitation upon the jurisdiction(s) in which a suit could possibly be filed in order to be covered by the policy. Instead, the court found that the language in the policy stating that it covered benefits "as required" under Wisconsin workers' compensation law was really a choice of law provision, which indicated the law under which claims should be adjudicated- irrespective of where they were filed. In other words, Maryland Casualty would be liable for workers' compensation payments in any state in which a suit was filed, provided that the injury *would be* compensable under the

workers' compensation law of Wisconsin. The court stated that, since benefits became required to be paid under Wisconsin workers' compensation law at the moment of the employee's injury in Wisconsin, the expenses were within the terms of the policy issued to plaintiff. In other words, Maryland owed the Pooling Association the amount that would have been paid by Maryland, if the case had actually been brought in Wisconsin.

EDITOR'S NOTE: In reaching this decision, the court notes that there is a distinct line of cases holding completely contrarily to their present decision. Nonetheless, the court found the view it was employing to be the more "enlightened" one.

BACK INJURY DENIED BASED ON POST-INCIDENT VIDEOTAPE

Robert Ross, employed by Entenmann's Bakery as a bakery cleaner, alleged a back injury on April 4, 1996 while poking garbage in a trash compactor. Ross reported the incident to a supervisor, continued to work and did not seek treatment until April 25 when he visited Dr. Eugene Bartucci, an orthopedic surgeon. As interpreted by Dr. Bartucci, the x-rays revealed "some degenerative changes, but nothing major." Dr. Bartucci diagnosed a lumbar strain and recommended light duty for three weeks. Instead, Ross remained on light duty until he underwent unrelated surgery on June 27, 1996.

On May 17, 1996, the employer videotaped Ross performing raking and scooping gravel, lifting a large concrete slab and pushing or lifting a stranded motorist's vehicle. That same day, claimant visited Dr. Bartucci because he experienced "trouble

with his back.” No reference was made to the incidents that were videotaped. On June 14, 1996, Dr. Bartucci noted a “bulging disc at L3-4 and recommended physical therapy. On September 3, Dr. Bartucci removed claimant from work, after which claimant underwent six months of physical therapy and other medical treatment. On February 27, 1997, Dr. Bartucci noted that the myelogram was negative for disc herniation and suggested claimant return to light work.

Claimant did not return to work. On March 21, 1997, he injured his back while lifting a mattress in his home and received emergency room treatment. On April 10, 1997, the radiologist noted that an MRI indicated a mild disc bulge at L3-L4 and no significant change when compared to previous study of June 6, 1996. Dr. Bartucci testified that the claimant’s pain might have been causally related to the injuries sustained in the work-related accident on April 4. After reviewing the videotape, Dr. Bartucci testified that had he viewed the videotape on May 17, 1996, he probably would have returned claimant to some type of work.

Dr. Charles Mercier, an orthopedic surgeon, conducted an IME of the claimant at the employer’s request. The doctor reported that the claimant should have returned to work, without restrictions, at least by September 17, 1996 and possibly even before. He found no evidence of permanent disability. The arbitrator’s decision finding compensability was reversed by the Commission which stated that the testimony of Dr. Bartucci and the videotape did not support a finding of causal relationship between claimant’s current condition of ill-being and the injury sustained on April 4, 1996. The Commission noted that the doctor’s opinion

after reviewing the videotape did not support back disability from the accident.

In the appellate court, the claimant contended that Dr. Bartucci’s testimony was sufficient to provide the basis for an award. The court supported the Commission’s finding that the claimant had failed to prove that the injuries resulted from the accident of April 4, 1996. The court rejected the claimant’s argument that the claimant was not required to rule out other contributing causes.

EDITOR’S NOTE: In view of the conflicting causes for the back condition, it is rather surprising that the claimant would take this matter to the appellate court contending that the Commission’s decision was against the manifest weight of the evidence.

FRANK J. WIEDNER
Editor