

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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WIEDNER & MCAULIFFE, LTD.  
ATTORNEYS AT LAW

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## REPETITIVE TRAUMA CLAIM DENIED BECAUSE OF THE RUNNING OF THE THREE-YEAR LIMITATION FOR FILING

In the Deana Durand case, the court addressed a question which is quite often faced by the claims examiner. In the *Peoria County Bellwood Nursing Home* case, our supreme court held that the date of accident in a case involving repetitive trauma is the date on which the injury "manifests itself." In *Peoria County*, the court stated:

*A repetitive trauma injury manifests itself on "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each individual case. The point in time at which both the fact of the claimant's injury and its causal relationship to her employment would have become plainly evident to a reasonable person is a question of fact to be resolved by the Commission.*

The claimant had been employed by the

RLI Insurance Company for approximately 11 years and had spent six hours of her work day using a computer keyboard. On August 15, 2000, she visited her physician with typical complaints leading to a diagnosis of bilateral carpal tunnel syndrome. She gave subsequent histories to other physicians, giving a history of symptoms for a period of six months to 18 months. Eventually, she underwent surgery and, on January 12, 2001, filed a claim with the Industrial Commission. In her testimony, she admitted that she had symptoms in both of her hands beginning in September or October of 1997 and that she told her supervisor at that time that she believed her condition was work related. The Commission denied the claim, finding that the claimant's condition of ill-being manifested itself in 1997 and that her filing in 2001 was more than three years after the accident date. The appellate court affirmed the Commission, stating:

*In this case, the claimant admitted in testimony before the arbitrator that she knew that she was having problems with her wrists in 1997 and that she told her supervisor that year that she believed that her condition was work-related. Although the claimant stated that she "wasn't sure" that she had carpal tunnel syndrome, she was of the belief that she had the condition and that it was job-related.*

*As noted earlier, the question of when a repetitive trauma injury manifests itself is one of fact to be resolved by the Commission. The Commission's determination on an issue of fact will not be disturbed on review unless it is against the manifest weight of the evidence.*

Two of the justices dissented, pointing

out that in 1997, the claimant's symptoms were intermittent so that she was not sure that she even had carpal tunnel syndrome. As a result of which, she never sought medical treatment until August of 2000. The dissent added:

*At best, the majority has used the date Petitioner became aware of a potential disability as the manifestation date. Their narrow interpretation penalizes her for giving her employer notice of a potential disability, for not immediately seeking medical attention, and for continuing to perform her regular work for the same employer, notwithstanding a suspicion that she might be developing work related carpal tunnel syndrome.*

**EDITOR'S NOTE:** Because of the strong dissent, this case may be accepted for hearing by the supreme court . We will keep you posted of developments. In the meantime, the case can be used to determine the liability on your existing repetitive trauma cases.

### **HOSPITAL NURSING ASSISTANT AWARDED BENEFITS FOR REPETITIVE TRAUMA**

Lesley Bonney, a 55 year old hospital nursing assistant, who had been employed in that capacity for 30 years, testified that she was often assigned patients who had suffered strokes and were without use of their limbs. The patients normally weighed between 150 and 250 pounds. Her duties included changing sheets, bathing patients, moving patients from beds to chairs and commodes, and pushing patients on gurneys.

On January 24, 2001, she reported to the employer's emergency room that she could no longer button patient's gowns and that she experienced stiffness, tingling and soreness in both her hands. Symptoms had begun six or seven months prior to that date. She was originally diagnosed with chronic bilateral wrist pain with probable bilateral carpal tunnel syndrome. One month later, the treating physician added degenerative joint disease in the left thumb and eight months after the accident, a similar diagnosis to the right thumb. In addition to the finding of causal connection through the employment of the bilateral carpal tunnel syndrome, the treating physician described a causal connection of an aggravation of both thumbs due to the claimant's job-related activities. The claimant's left cubital tunnel condition was not found to be connected to the employment.

Dr. Glasgow, the claimant's original treating physician, testified that there was a causal connection between the accident in question and claimant's bilateral carpal tunnel syndrome, as well as her left thumb condition. Dr. Baxamusa opined that if claimant was doing a lot of pinching, loading and gripping with her thumb, these activities would exacerbate the basilar joint arthritis. Dr. John Ruder, who testified for the employer, found no causal connection between the claimant's carpal tunnel syndrome and her bilateral thumb condition and her job duties. He did not believe that the claimant's duties required her to perform the type of repetitive, forceful activities necessary to cause carpal tunnel or bilateral joint arthritis.

The Commission and the trial court found that the finding of causal connection between both sets of conditions and the job duties were not against the manifest weight

of the evidence. With reference to the absence of a 45-days notice, for the thumb injuries, the court responded:

*The notice requirement is met if the employer possesses known facts related to the accident within 45 days, and a claim is barred only if no notice whatsoever is given. Our General Assembly has mandated a liberal construction of the notice requirement, and, therefore, if some notice has been given, even if inaccurate or defective, the employer must show that it has been unduly prejudiced.*

*The fact that claimant did not specifically state she was experiencing pain in her thumbs does not mean that she did not give proper notice of her injuries. The employer was in no way prejudiced by claimant's lack of the term "thumb."*

Finally, the employer argued that the claimant had not supplied a causal connection opinion from Dr. Glasgow 48 hours prior to the hearing and that the doctor's testimony should not be considered. In denying the employer's argument, the court stated:

*The employer could not have been surprised by Dr. Glasgow's opinions regarding causation, especially in light of the fact that claimant's attorney even provided the employer's attorney with a letter indicating that he intended to inquire into the issue of causal connection with regard to both the bilateral carpal tunnel and basilar joint arthritis conditions.*

**EDITOR'S NOTE:** Since the reported injury included both hands, the fact that it did not specifically refer to both thumbs was not sufficient to provide a notice defense to the thumb claims.

**IN A COMPLEX ISSUE CLAIM,  
INVOLVING WAGES, MEDICAL  
PROOF, PENALTIES AND WAGE  
LOSS, CLAIMANT IS COMPLETELY  
SUCCESSFUL**

William Greaney, employed by Michel Masonry Company as a laborer, stated that on June 15, 1998, he was carrying two buckets containing approximately 100 pounds of mortar down a flight of stairs when his right hip “gave way” causing his back to rotate. After emergency room treatment at the Palos Community Hospital, the claimant was treated by Dr. Paul Atkinson for his low back and right hip. The claimant reported that he was referred by Michel’s insurance carrier to Dr. Muhammad Alvi, who then referred the claimant to Dr. William Earman, who recommended physical therapy and felt that the claimant would reach MMI on October 30, 1998. Despite this finding, Dr. Alvi, after an examination on December 14, 1998, found the claimant to be totally incapacitated. In addition, Dr. Alvi referred the claimant to Dr. Mark A. Lorenz, who referred the claimant to Dr. Bob Hung for physical therapy. In a report dated April 15, 1999, Dr. Hung stated that the claimant’s lower back pain had resolved “quite nicely” but that his right hip pain prevented him from returning to work on a full-duty basis. A final FCE suggested that the claimant could not return to his former position as a laborer.

Michel did not offer the claimant a position within his restrictions, after which

the claimant initiated an independent job search, thereafter accepting a position as an x-ray technician by a national testing service at the rate of \$10.75 an hour. The physical demands of this job caused back pain and the claimant subsequently took a job with Inlander Brothers as a forklift driver at \$8.00 per hour. Dr. Boone Brackett, who examined the claimant several times at Michel’s request, noted that the claimant returned to work in November, 1999 and that he was working well within his restrictions.

**Average Weekly Wage**

Prior to the accident, the claimant worked only 59 days during the 17 weekly pay periods, although he described himself as a full-time employee scheduled to work five days a week. The court divided the 59 days that the claimant worked by 5, the number of days in a full work week, and concluded that the claimant worked 11.8 weeks prior to his injury, with the gross wages being \$9,451.18. The court divided this gross wage by 11.8, the “number of weeks and parts thereof” that the claimant worked prior to his injury, and arrived at an average weekly wage of \$800.95.

**Causal Relationship**

Michel contended that the Commission erred in allowing into evidence the records and reports of Drs. Brackett, Alvi and Lorenz together with the records of the LaGrange Rehabilitation Center, which included a description of the physical demands of the claimant’s job, together with the report of the FCE. The appellate court agreed saying that the claimant had failed to lay a proper foundation for their admission into evidence. The claimant did not even take advantage of the simple certification

procedure set forth in Section 16 of the Act. The court found no merit in the claimant's assertion that Dr. Alvi's compliance with a subpoena established the authenticity of his report. However, the court found that the claimant's testimony, the findings of Dr. Atkenson and the findings of Dr. Hung was sufficient, in the absence of any independent intervening act, to establish that the claimant's right hip bursitis was causally related to his work-related injury.

### **Maintenance**

Michel contended that the claimant was not entitled to maintenance benefits because he did not request vocational rehabilitation and was not in a "prescribed rehabilitation program." The claimant had reached MMI on November 4, 1999 and was allegedly disabled until November 29, 1999. The court held that the claimant was not required to request vocational rehabilitation before being entitled to an award of maintenance and there is no rule prohibiting claimant-created and directed vocational rehabilitation programs.

### **Wage Loss Calculation**

Claimant testified that since his accident, the Union Laborers had their wage increased to \$25.41 per hour. Since no objection was posed when the claimant so testified, the court considered the evidence unrebutted and calculated that the claimant would have been able to earn, at the time of the arbitration hearing, \$25.41 per hour times 40 hours per week, or a total of \$1,016.40. Since the claimant was earning \$320 per week, the wage loss was a difference between those two amounts.

**EDITOR'S NOTE:** The impact of this case is certainly minimized by the new statutory

changes. The new legislation extends admissibility to bills which are certified as true and correct by the provider of the medical treatment. In addition, the amendment establishes a rebuttable presumption that any records, reports and bills received in response to a Commission subpoena are considered certified as true and correct.

With reference to the wage loss, this case follows a pattern. When the claimant accepts employment at a significantly lower wage, he has the option to proceed to a hearing where the award reflects the maximum wage differential. Once the award becomes final, based on present case law, it will continue even if the claimant returns to his original wage. However, a case which seeks the right to revisit the wage loss finding is on its way to the Illinois Supreme Court.

### **EMPLOYEE'S FALL OVER THRESHOLD COMPENSABLE - AWARD OF PENALTIES REVERSED**

On November 14, 2002, Lawrence Baker, an over-the-road truck driver, was seeking his misplaced vehicle inspection book and as he opened the door to the shop building to walk through the door, the toe area of his left boot caught on a piece of tin that covered the concrete threshold, and he fell. Claimant's left thumb and left shoulder struck the ground and he was diagnosed as having a tendon and a possible rotator cuff tear. Surgery was recommended but not yet performed at the time of the hearing.

The employer questioned whether the claimant had a right to be in the shop. The arbitrator found that the claimant entered the shop looking for his VIN book, which he

needed to properly perform his work duties and that the condition was causally related to the work injuries. TTD and medical benefits were awarded and the employer was ordered to authorize and pay for the surgery to the shoulder.

The arbitrator had denied the request for penalties and attorney's fees but the Commission found that the employer had no reasonable basis on which to deny liability and awarded penalties under Sections 19(1) and 19(k), as well as attorney's fees under Section 16.

The employer relied on the *Caterpillar Tractor Company* case where the claimant injured himself while stepping off of a curb in the employer's parking lot. The supreme court in that case had held that the injury did not result from the condition of the premises because there was no evidence that the curb was either hazardous or defective. It also found that curbs and the risks that are inherent in traversing them confront all members of the public. In the *Caterpillar* case, there was nothing in the record to distinguish this curb from any other curb. In the instant case, the injury occurred as a direct result of a hazardous condition of the employer's premises. A photograph had revealed that a pen could fit in between the concrete threshold and the metal strip on top of it. Based on the claimant's testimony that the toe area on his boot caught on the metal and caused him to fall, the Commission awarded benefits. However, the appellate court felt that the Commission's assessment of penalties and fees was improper. The employer had contested compensability since the commencement of claimant's action, relying on claimant's statement in his accident report that he did not see the small step up and tripped as he walked through the doorway. The claimant's reliance on case law with a fact pattern similar to the facts presented here, led the court to conclude that

the Commission's findings of penalties were improper.

**EDITOR'S NOTE:** Because this Commission is presently awarding more penalties, this decision reversing the penalties is encouraging.

### **LACK OF PROPER FOUNDATION FOR INTRODUCTION OF MEDICAL BILLS - PAYMENT DENIED**

On June 7, 2001, Rocco P. Dawson, a 65 year old machine operator, was walking along an earthen ramp on a hill when he lost his footing and fell ten to twelve feet down the slope. He sustained a back injury which resulted in rather extensive treatment with a recommendation for surgery. The arbitrator awarded TTD benefits from June 7, 2001 through September 20, 2002, or 67-1/7 weeks, and \$17,676 in medical expense. The arbitrator also found that the surgical procedures recommended were reasonable and necessary to relieve claimant's symptoms.

The appellate court affirmed all aspects of the claim, except for the outstanding medical expense. In reversing the Commission on this issue, the court stated:

*When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is prima facie reasonable. A party seeking the admission into evidence of a bill that has not been paid can establish reasonableness by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services. Once the witness is*

*shown to possess the requisite knowledge, the reasonableness requirement necessary for admission is satisfied if the witness testifies that the bill is fair and reasonable.*

*Here, the only foundational testimony came from claimant, who testified that he received the bills and that, to the best of his knowledge, most of the balances remained unpaid. This testimony clearly did not meet the foundational requirements for admitting the bills. Claimant was not someone who was familiar with the medical providers' business practices or who could testify about the reasonableness of the charges.*

*Because the bills were the sole basis for establishing the amount of the medical expenses award, the error in admitting the bills over employer's objection was not harmless. Therefore, we must vacate the medical expenses award.*

There are several other issues worthy of note. On November 1, 2001, approximately five months after the accident, the claimant began receiving a \$1,107 per month retirement pension from his union and shortly thereafter began receiving Social Security Retirement benefits of \$1,026 per month. The employer claimed that the claimant was not entitled to TTD benefits beyond November 1, 2001, the date he voluntarily retired. The court disagreed stating that there was competent evidence that claimant was unable to work and really retired not by choice but because he needed income. The employer had further argued before the Commission that it was entitled to a credit under Section 8(j) for the Pension and Social Security benefits. It did not

advance that argument on appeal. Most likely, such an argument would have been unsuccessful because retirement benefits do not provide a credit under Section (j) and Social Security benefits cannot be used for a credit against TTD.

**EDITOR'S NOTE:** In view of the recent statutory changes involving the introduction of medical records, the introduction of bills will be less difficult.

**FRANK J. WIEDNER**  
**Editor**