

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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EMPLOYEE'S RELEASE OF INJURY CLAIM AGAINST HIS EMPLOYER'S UNDERINSURED MOTORIST INSURANCE POLICY DID NOT RELEASE HIS WORKERS' COMPENSATION CLAIM

On December 21, 2006, John Van Cleve sustained injuries while driving a truck being operated in the course of his employment with Maxit. Van Cleve filed a claim under Maxit's underinsured motorist insurance policy. He also filed a workers' compensation claim for which Maxit had no insurance coverage.

Van Cleve and his wife settled the underinsured motorist claim and signed a document entitled "Release of All Claims." The agreement provided, in part, as follows:

FOR AND IN CONSIDERATION of the payment to us at this time of the sum of \$800,000, Eight Hundred Thousand Dollars, the receipt of which is hereby acknowledged, we being of lawful age, do hereby release, acquit and forever discharge Maxit, Inc., Transportation Insurance Co. and their agents, ... from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses and compensation, on account of, or in

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any way growing out of, any and all known and unknown personal injuries and property damage resulting or to result from an accident that occurred on or about 12/26/2001, and covered by Underinsured Motorist policy provisions in Policy No. 1035982371.

The document further provides that it releases all causes of action of any kind and nature ... that have been or may hereafter at any time be made or brought against the said Releasees for the purpose of enforcing a further claim for damage on account of the alleged damages or injury sustained in consequence of the aforesaid accident. Van Cleve, however, continued to pursue his workers' compensation claim and subsequently settled the workers' compensation claim for \$200,000, which agreement was approved by the Industrial Commission.

Thereafter, Maxit filed a claim against the Van Cleves contending that they had breached the release by continuing to pursue John Van Cleve's workers' compensation claim after signing the release. The trial court agreed with Maxit noting that the Van Cleves did pursue further payments under the workers' compensation action and now refused to indemnify Maxit as provided for in the release. Unfortunately for Maxit, the appellate court reversed and remanded the case on the basis that the provision of the release purporting to include the workers' compensation claim was invalid, and therefore, unenforceable. The court relied on Section 23 of the Act, which states:

No employee, personal representative, or beneficiary shall have power to waive any of the provisions of this Act in regard to

the amount of compensation which may be payable to such employee, personal representative or beneficiary hereunder except after approval by the Commission and any employer, individually or by his agent, service company or insurance carrier who shall enter into any payment purporting to compromise or settle the compensation rights of an employee, personal representative or beneficiary without first obtaining the approval of the Illinois Workers' Compensation Commission as aforesaid shall be barred from raising the defense of limitation in any proceedings subsequently brought by such employee, personal representative or beneficiary.

It has been long settled that an employer may not ignore this provision of the Act and enter into a settlement with its employee without the approval of the Illinois Workers' Compensation Commission. The release (and settlement with defendants) of John's workers' compensation claim, therefore, is not effective in the absence of the approval of the Commission.

The legal bar to settlement and release of the workers' compensation claim has ramifications in the interpretation of the release. Illinois law is clear: a contractual provision that violates public policy as expressed in statutory law is unenforceable and void. Because of this, we cannot say that the parties intended that the release include the

workers' compensation claim, as that intention would be unlawful, unenforceable, and void. Instead, we must construe a contractual provision, if possible, in such a way that it does not violate public policy and renders the contract enforceable, rather than unenforceable.

EDITOR'S NOTE: As we all know, it has been the policy of some employers to enter into a direct settlement with the employee without submitting the matter to the Industrial Commission for approval. Without that approval, the employee retains the right to file with the Industrial Commission within the limitations period. Should the case thereafter come to the Commission, the award frequently amounted to an increase of the direct settlement but the Commission would then credit the employer for the amount paid in the direct settlement. In effect the Commission does not regard the direct settlement as "invalid" but rather "inadequate" as to amount.

In this *Maxit* case, the appellate court has apparently construed the underinsured motorist settlement as a "direct settlement without approval of the Commission" and therefore, as being invalid and void. Yet, a review of Section 23 suggests that the legislature merely prevented the employer from using limitations as a defense if the claim were filed with the Industrial Commission after the three-year period.

It would be the opinion of your Editor that if this underinsured motorist provision qualifies as a direct settlement then the employer could claim credit for the amount of the prior payment but that the settlement itself would have been valid.

CAB DRIVER WAS NOT THE EMPLOYEE OF THE CAB COMPANY WHEN FATALLY SHOT WHILE DRIVING A LEASED TAXICAB

Michael Gray leased a taxicab from West Cab Company on a regular basis. While in the leased taxicab, he was shot and killed by an armed assailant. West Cab, Northwest Cab and Northwest Package Delivery, Inc. were managed and owned by the same persons. On occasion, the drivers were dispatched to handle assignments from all three companies. The circuit court affirmed the Commission decision. However, the appellate court found that the Commission decision was against the manifest weight of the evidence and reversed.

The Commission had relied upon the *Yellow Cab* case where the court had outlined the factors which were to be given particular weight in determining the issue of control of the manner in which the work was done:

1. whether the driver accepted radio calls from the company;
2. whether the driver had his radio and cab repaired by the company;
3. whether the vehicles were painted alike with the name of the company and its phone number on the vehicle;
4. whether the company could refuse the driver a cab;
5. whether the company has control over work shifts and assignments;

6. whether the company requires that gasoline be purchased from the company;
7. whether repair and tow service is supplied by the company;
8. whether the company has the right to discharge the driver or cancel the lease without cause; and
9. whether the lease contains a prohibition against subleasing the taxicab.

In reviewing the application of these factors, the court concluded:

In the instant matter, of the nine factors enumerated in Yellow Cab, only two were present: the cab was painted with company's logo and phone number; and the fact that the lease contained a prohibition against sub-leasing. Here, the lessee was not required to respond to radio dispatches from the company; the lessee did not pay for maintenance of the vehicle; while the car was painted to the lessors specifications, the lessor could not and did not install advertising in the car; the lessor did not have the right to inspect the vehicle; the lessor could not refuse to provide the driver with a cab; the company had no control over work-shifts or assignments; the company did not require lessees to purchase gasoline from the company; there was nothing in the record to establish that the company provided towing and road service; there was no right to discharge a driver or cancel the lease unless

such discharge or cancellation was for cause. (In Yellow Cab, the court found that the ability to discharge or cancel without cause was an indicia of control.)

Based upon the evidence, we find that the Commission's finding of an employee-employer relationship is against the manifest weight of the evidence. The fact that the cab was painted to the company's specifications and the limitation on sub-leasing, standing alone against the overwhelming weight of contrary evidence simply cannot support a conclusion reached by the Commission. We find the opposite conclusion is clearly apparent. To the extent that our decision in the instant matter may be at odds with the holding in Yellow Cab, we now overrule that holding.

The sole dissenting opinion was filed by Justice Donovan, who felt that the majority had not identified a compelling reason to overrule the *Yellow Cab* case. The dissent noted:

The real question for solution is, Does the plaintiff engage merely in the leasing of taxicabs, or does he operate a line of taxicabs as a common carrier of passengers? When all factors are considered and particularly the contractual relationship of the plaintiff with the passengers carried, I think there can be little doubt that plaintiff is operating the line of taxicabs, and that while he has adopted an ingenious method of fixing the compensation of his drivers and permits the drivers to exercise

some discretion over the cab during the period of the driver's shift, nevertheless, I think there is no discretion vested in the drivers inconsistent with the relation of master and servant.

The dissent then referred to the social importance of finding compensability when it said:

While reviewing the applicable case law on the existence of an employer-employee relationship, I found compelling a line in the Yellow Cab II case, wherein this court noted that “[t]he driving of the taxicabs in the fleet is certainly an integral part of the employer's business, and there is no other channel in this case through which the costs of claimant's work-related death can flow.”

In further expressing his surprise as to the Commission reversal on a factual issue, the dissent commented:

In its opinion, the majority writes, “To the extent that our decision in the instant matter may be at odds with the holding in Yellow Cab, we now overrule that holding.” This court does not generally depart from established case law absent a good cause or compelling reasons. I am troubled by the majority's failure to articulate what part or parts of its opinion could be considered “at odds” with the holding in Yellow Cab II, and its failure to provide any cause or reason to support its decision. I find no basis on which to overrule Yellow Cab II. I find that the Commission's finding that the

claimant's decedent was an employee of West Cab Company and Northwest Cab Company is supported by the evidence and is not against the manifest weight of the evidence.

EDITOR'S NOTE: The factual situation could justify the court's decision but the instant case appears to undermine the social arguments cited in the *Yellow Cab Company* case.

TRIAL COURT HAS NO AUTHORITY TO ADJUDICATE EMPLOYER'S WORKERS' COMPENSATION LIEN

All of us have had the experience of appearing for pre-trial conferences where the trial judge attempts to adjudicate the distribution of the settlement proceeds between the recovery being made by the employee in his third party case and the employer who seeks reimbursement for his workers' compensation payments. Too frequently, the trial judge may seem overly concerned about providing a significant return to the employee, even though such disposition results in a denial of all or a portion of the compensation lien. In the case of *Smith v. Louis Joliet Shoppingtown, L.P.*, the trial court felt that the employer's representative was not responding promptly and, consequently, held that the employer should receive \$30,000 from a total settlement amount of \$110,000. Liberty Mutual Insurance Company, the workers' compensation insurer, appealed to the appellate court and reversed the trial court. After quoting Section 5(b) of the Act, the court stated:

This provision grants the employer, or in this case, Liberty Mutual, a

statutory lien on any recovery the employee receives from a liable third party equal to the amount of the workers' compensation benefits paid or owed to the employee. One purpose of section 5(b) is to compensate the injured employer to reach the true tortfeasor. Another purpose is to prevent the employee from obtaining a double recovery. Therefore, an employee is entitled to retain only that portion of a recovery from the tortfeasor that exceeds the workers' compensation benefits he received. Further, an employee is obligated to reimburse the employer for the full amount of its workers' compensation payments, regardless of the amount that the employee recovers. If the amount of compensation benefits exceeds the employee's third-party recovery, the employer is entitled to the entire recovery, less fees and costs.

In this case, Liberty had paid \$143,000 in compensation benefits, whereas the total plaintiff's recovery on the civil case was \$110,000. As noted above, the court stated that if the amount of compensation benefits exceeds the employee's third-party recovery, the employer is entitled to the entire recovery, less fees and costs. In this case, Liberty would be entitled to \$110,000, less 25% for attorneys's fees, or a total of \$82,500.

EDITOR'S NOTE: Admittedly, the employer and its carrier may agree to a lesser amount but the trial court may not dictate what that amount shall be. In this case, the opinion notes that Liberty had agreed to accept \$50,000, which offer was rejected by the employee. The trial judge had suggested that the failure of the Liberty Mutual adjustor to respond quickly to the

employee's counteroffer could be construed as being *estoppel* or waiver of his rights to object to the court's order. In response, the appellate court stated: *Liberty Mutual's absence from the later part of the settlement negotiations can be viewed as neither voluntary conduct that would preclude seeking reimbursement of its statutory lien nor an intentional relinquishment of a known right.*

ALL MEMBERS OF A JOINT VENTURE ARE NOT NECESSARILY ENTITLED TO IMMUNITY IF THE TERMS OF THE JOINT VENTURE DO NOT ESTABLISH A TRUE EMPLOYER/EMPLOYEE RELATIONSHIP OF ALL THE MEMBERS

In the case of *Ioerger v. Halverson Construction Co., et al*, the plaintiffs were ironworkers who fell from a scaffold suspended above the Illinois River when the scaffold collapsed plunging the ironworkers into the river below. Three ironworkers were injured and one was killed. Suit was filed against Halverson Construction Co., individually and also against Midwest Foundation Corporation/Halverson Construction Company, a joint venture. Halverson and the joint venture both claimed immunity as employers of the ironworkers.

Approximately one year prior to this accident, defendants, Midwest Foundation and Halverson Construction formed a joint venture entitled Midwest Foundation Corporation/Halverson Construction Company, in order to place a bid with the Illinois Department of Transportation on the bridge repair project. At that time, Midwest and Halverson executed the Joint Venture Agreement, which provided that:

“the parties hereby agree to constitute themselves as joint venturers for the purpose of submitting joint bids ... for the performance of the construction contracts herein described, and for the further purpose of performing and completing such construction project.

The agreement also provided that the profits and losses and liabilities resulting from the bridge project be shared 60% by Midwest and 40% by Halverson. Pursuant to the agreement, Midwest was fully responsible for:

*The performance of all labor for the Joint Venture, including the payment of all payroll, payroll taxes, fringes, and other employee expenses, including, but not limited to, the establishment of worker’s [sic] compensation insurance and the payment of all premiums therefore. *** Midwest Foundation Corporation shall be entitled to reimbursement from the Joint Venture for the costs incurred in performing the foregoing obligations; such reimbursement to be paid at such time or times as the Joint Venture shall determine.”*

Halverson and Midwest performed separate duties on the bridge. Midwest hired, paid and supervised the ironworkers, including the employees who worked on “Rampe,” the portion of the project that Halverson personnel supervised. The joint venture did not hire or employ any workers nor did it pay the wages of any workers on the project, including the injured ironworkers. All workers’ compensation premiums were paid by Midwest to its carrier. The record shows that the joint venture had never reimbursed Midwest for

any expenses it occurred on the bridge project.

The ironworkers received compensation benefits from their employer, Midwest. A civil action was filed against Halverson, as well as the joint venture. Nevertheless, the appellate court reversed the trial court and found that Halverson and the joint venture were not entitled to immunity. The court emphasized that neither Halverson nor the joint venture contributed to the payment of the workers’ compensation premiums or reimbursed Midwest for its payment of them before the accident. On appeal, the appellate court found:

We believe that it would be bad public policy to allow Halverson and/or the joint venture, at this point, to now deliver or postdate a check to Midwest for reimbursement of wages and workers’ compensation premiums to fulfill its obligations under the joint venture agreement in order to obtain the protection of the Act’s immunity. The mere fact that Halverson and Midwest were co-joint venturers and part of the joint venture does not, in our view, provide them immunity under section 5(a). In order to enjoy the Act’s immunity, they must also undertake its obligations.

EDITOR’S NOTE: Your Editor’s position on this case is well expressed in the minority opinion. One, because a question of fact existed, neither party should have been granted a motion for summary judgment and, as a result, the case should be remanded for a determination of the material facts. Two, since the parties had not actually proceeded to trial before the trial court, the defendants did not have the opportunity to explain why they had not reimbursed

Midwest for its costs up to that time. There is no record on which the court could determine whether the project may have been completed or whether there were any gross profits from which to reimburse Midwest. Three, the plaintiffs were granted a motion for summary judgment when they had not even filed a cross-motion. In other words, the defendants never had the opportunity to know what the basis of the plaintiff's motion for summary judgment might contain. Unfortunately, the court has not remanded the case for further evidence.

**CATERPILLAR ALLEGEDLY
PROMISES TO PAY FOR MEDICAL
SERVICES PROVIDED TO ITS
EMPLOYEE BY ROSEWOOD CARE
CENTER**

BACKGROUND OF CASE

All of the evidence in the case is provided by the pleadings. Rosewood is a skilled nursing care facility. It alleges that on October 21, 2001, Betty Jo Cook, suffered injuries while working for Caterpillar and was hospitalized on that date until January 30, 2002. Caterpillar's request that Rosewood admit Cook on a "managed care basis (fixed rate)". Rosewood would not accept Cook on those terms. Shortly thereafter, on January 10th, Dr. Norma Just, Caterpillar's Medical Director, requested that Cook be admitted to Rosewood and stated that the cost of Cook's care would be paid directly by Caterpillar to Rosewood, with a zero deductible and no maximum limit. Just further advised Rosewood that Cook had been precertified for four weeks of care (later reduced to two weeks) and instructed Rosewood to send the bill for Cook's care to Caterpillar's Workers' Compensation Division. Further oral authorizations were given by Caterpillar to Rosewood every two weeks until June 13,

2002, with the charge for Cook's care totaling \$181,857. Caterpillar, although receiving bills monthly, never questioned the charges but ultimately refused to pay for services rendered to Cook.

In its complaint, Rosewood alleged that in the past, Caterpillar had requested and approved care and treatment at Rosewood for other injured employees and had paid for the service. Rosewood claimed that it would not have admitted Cook without Caterpillar's promise to pay.

Caterpillar moved to dismiss the case and argued that the claims were barred because its alleged agreement to take responsibility for the cost of Cook's care was not in writing, as required by the statute of frauds. The supreme court remanded the case to the trial court for further hearings. The language of the supreme court is important in determining the law in Illinois.

The term statute of frauds comes from an English statutory law passed in 1677 and describes certain types of contracts that must be made in writing and signed by the party against whom the claim is to be enforced. In other words, the statute of frauds renders the oral contract unenforceable. This portion of the statute, referred to as the surety provision, provides in relevant part as follows:

*No action shall be brought ***
whereby to charge the defendant
upon any special promise to
answer for the debt, default or
miscarriage of another person ***
unless the promise or agreement
upon which such action shall be
brought, or some memorandum or
note thereof, shall be in writing,
and signed by the party to be
charged therewith, or some other
person thereunto by him lawfully
authorized.*

This section had been unchanged, except for two material aspects, since 1819; 1) Illinois will enforce the oral promise even though the final amount has not yet been established; and 2) Illinois will also enforce the promise if the promissor, while purporting to speak for another, is actually concerned about his own liability.

EDITOR'S NOTE: Under the original Statute of Frauds, the oral promise would not be enforced. But, Illinois law has the two permitted variations: 1) the debt need not be pre-existing or finalized at the time of the promise; and 2) the debt can refer to a promise for another (that of the employee), providing that the promissor (the employer) is ultimately the surety for the employer.

The claims representative must understand that a telephone or other oral commitment may be binding on the employer who is actually the person liable for the promised payment.

FRANK J. WIEDNER
Editor