

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 17 ISSUE 3

JULY, 2007

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

CONTENTS

1 QUESTIONS OF ACCIDENT AND NOTICE RESOLVED IN FAVOR OF PETITIONER - HOWEVER, COURT HOLDS A GLIMMER OF HOPE WHEN COMMISSION REVERSES ARBITRATOR WHEN WITNESS CREDIBILITY IS THE ISSUE

S & H Floor Covering v. Workers' Compensation Commission, No. 4-04-0245WC, decided February 16, 2007

4 INJURED CORPORATE OFFICER DENIES SIGNING REJECTION OF BENEFITS FORM - CASE REFERRED BACK TO TRIAL COURT TO DETERMINE VALIDITY OF SIGNATURE

Virginia Surety Company v. Bill's Builders, et al No. 3-06-0606, decided April 10, 2007

6 PAYMENT OF WORKERS' COMPENSATION BENEFITS BY DEFENDANT DID NOT PREVENT PLAINTIFF FROM PURSUING CIVIL ACTION

Townsend v. James Fassbinder, et al No. 2-06-0226, decided March 30, 2007

8 IN A WAGE DIFFERENTIAL CLAIM, THE COURT FOUND THAT WAGES OF CLAIMANT'S REPLACEMENT WERE TOO SPECULATIVE

Taylor v. Industrial Commission, No. 4-06-0412WC, decided March 8, 2007

9 COURT UPHOLDS CLAIM FOR RETALIATORY DISCHARGE

Siekierka v. United Steel Deck, No. 3-06-0365, decided May 4, 2007

12 WORKERS' COMPENSATION SUBROGATION DENIED BECAUSE OF TERMS OF SETTLEMENT CONTRACT

Burgess v. Tashonda Brooks No. 5-06-0273, decided May 21, 2007

12 RECENT COURT DECISIONS DENIED A NUMBER OF DISPUTED CLAIMS CONCERNING ADDITIONAL MAINTENANCE OR TEMPORARY TOTAL DISABILITY BENEFITS

Consolidated Freightways v. Workers' Compensation Commission, No. 1-06-1919WC, decided May 29, 2007
Mota v. Griffin Wheel Co. No. 07 I.W.C.C. 0365, decided March 30, 2007

Wiedner & McAuliffe, Ltd
wmlaw.com

QUESTIONS OF ACCIDENT AND NOTICE RESOLVED IN FAVOR OF PETITIONER - HOWEVER, COURT HOLDS A GLIMMER OF HOPE WHEN COMMISSION REVERSES ARBITRATOR WHEN WITNESS CREDIBILITY IS THE ISSUE

Rick Gastineau, petitioner, whose regular job involved the laying of commercial flooring, alleged that he had an accidental injury for which he gave the statutory notice while employed by S & H Floor Covering, Inc. His claim was denied by the arbitrator who concluded that something happened to claimant after he left work on August 2, 2002 and found further that the claimant did not provide proper notice of the alleged accident within the 45 days after the onset of his alleged injury. The Commission reversed and found for the claimant and the Commission position was upheld by the appellate court. However, the court went out of its way to speak favorably of a policy wherein the arbitrator's decision would be given "an extra degree of scrutiny" when the witness credibility is the basis of the arbitrator's decision.

The claimant testified that he left work for his employer on August 2, 2002. He then took a leave of absence from his employer and drove to Wichita, Kansas to install flooring in his nephew's girlfriend's home. He further testified that upon arrival in Wichita, he was barely able to walk because of pain in his right knee and was not

able to begin installation for a week and never finished the installation because of knee pain. He did not receive medical attention while in Wichita. The employer provided testimony that on his last day at work, the claimant had no complaints and that he may have injured his knee when working as a floor installer in Wichita.

With reference to notice, the claimant's wife spoke to the employer's project manager to inform him that the claimant was injured and further notified the employer's office that her husband was having knee problems that were going to require surgery.

Obviously, it is not unusual for the claimant and the employer to have disputes regarding accident and notice. The fact that the arbitrator denied the claim and was subsequently reversed by the Commission is also not a novel situation. As you know from our past newsletters, we have called attention to the fact that when this happens, the Commission decision is usually affirmed on the basis that the Commission is the decider of the facts. The court has acknowledged the fact that it has heard frequent arguments complaining that the arbitrator's decision should be controlling as the arbitrator has actually seen the witnesses, heard their testimony and made a judgment regarding witness credibility. This has now led to a possible change in the reviewing court's evaluation of the arbitrator's decision.

The arbitrator's decision as to accident is described by the court as follows:

Based on the foregoing evidence and his visual assessment of claimant's credibility, the arbitrator found claimant did not suffer injuries arising out of and in

the course of his employment. The arbitrator noted claimant was able to perform all of his job duties up to his last day of employment with employer. The arbitrator stated something happened to claimant after he left work on August 2, 2002, that dramatically changed his condition, preventing him from being able to walk, drive, or work. In addition, the arbitrator found claimant did not provide proper notice to employer of his alleged accident. Claimant's September 20, 2002, phone call to employer occurred more than 45 days after the onset of his alleged injury.

With reference to notice, the arbitrator found that claimant did not provide proper notice to the employer of his alleged accident. Claimant's phone call to the employer occurred more than 45 days after the onset of his alleged injury.

The majority of the Commission found that the claimant did sustain accidental injuries in the form of a cumulative knee condition arising out of and in the course of his employment as a floor installer. It pointed out that the treating physician opined that claimant's work more than likely aggravated his degenerative condition.

With reference to notice, the majority of the Commission found that claimant provided proper notice 49 days after the injury occurred and that the employer suffered no prejudice in this delay, particularly in light of the communication from the claimant's wife and the employer's knowledge that claimant's knee condition had worsened to the point that he could no longer return to work.

The appellate court affirmed the Commission on the basis that the decision was not against the manifest weight of the evidence. Such a ruling would be consistent with most of the recent prior cases. However, the court did provide a basis for citing the 1988 *Cook* case wherein the arbitrator's finding was given more credence when the credibility of the witnesses provides the basis for the arbitrator's decision:

In a long line of cases, appellate courts have held that the Commission has original jurisdiction; it may both consider evidence that was presented to its fact-finding agent, the arbitrator, and consider evidence that is first presented to the Commission. The law is similarly well established that the Commission has authority to determine all unsettled questions and is not bound by the arbitrator's findings, even when it merely reviews the evidence presented at arbitration.

In cases where the Commission has rejected the arbitrator's factual findings without receiving any new evidence, it is the function of this court on review to examine the entire record and weigh the evidence to determine whether the factual findings of the Industrial Commission were against the manifest weight of the evidence. While recognizing that the Commission is in no way bound by an arbitrator's decision, we note that the arbitrator's decision is not without legal effect. Further, we note that in performing its role as reviewer of the record, the Commission is at a practical

disadvantage as compared to the arbitrator. The arbitrator, having heard the live testimony, is actually in a better position to evaluate that evidence.

Accordingly, in cases where the Commission has rejected the arbitrator's factual finding without receiving any new evidence, we apply an extra degree of scrutiny to the record in determining whether there is sufficient support for the Commission's decision.

Although not appropriate in this case, we will consider giving credence to Cook, which provided for "an extra degree of scrutiny" to be applied to the record in determining whether there is sufficient support for the Commission's decision, especially when the Commission makes credibility determinations regardless of the arbitrator's findings.

EDITOR'S NOTE: The appellate court has opened the door to the future applicability of the *Cook* decision. The *Cook* opinion could be utilized to restrain the Commission's tendency to ignore the arbitrator's findings when the credibility of witness testimony is the basis for the decision. Your Editor's first reaction would be to question why the court did not apply the *Cook* opinion to this case because arbitrator's finding as to the credibility of the witness testimony should have led to a reversal of the Commission. One can only assume that the new standard will apply only to decisions when the parties have had the opportunity to argue the issue before the Commission. Any party who has seen the Commission decisions misquote or summarily discount the arbitrator's findings

would be heartened by this present expression of the reference to the *Cook* opinion in this present *S & H Floor Covering* case.

Preparation of proposed findings should also emphasize the issue of credibility. References should be made to the relationship of the witness to the parties; the appearance of veracity and the absence or presence of any bias on the part of the witness.

**INJURED CORPORATE OFFICER
DENIES SIGNING REJECTION OF
BENEFITS FORM - CASE REFERRED
BACK TO TRIAL COURT TO
DETERMINE VALIDITY OF
SIGNATURE**

In our July, 2003 Newsletter and supplemental September, 2003 Alert, we reported to you on the case of *General Casualty Company v. Carroll Tiling Service* where the Illinois Second District Appellate Court awarded compensation benefits to a corporate officer who had signed a Benefits Rejection Form prepared by General Casualty Company. The Rejection Form by which the corporate officer excluded himself from coverage was based on Section 3(17) of the Act, which provides in part as follows:

The corporate officers of any domestic or foreign corporation employed by the corporation may elect to withdraw themselves as individuals from the operation of this Act. Upon an election by the corporate officers to withdraw, written notice shall be provided to the insurance carrier of such election to withdraw, which

election shall be effective upon receipt by the insurance carrier of such written notice.

After reviewing the Benefits Rejection Form, the court noted that the form's signer *appears to withdraw only from insurance coverage* and that this withdrawal would be a violation of the Act. The court stated:

The Act provides that "[e]very policy of an insurance carrier, insuring the payment of compensation under this Act shall cover all the employees and the entire compensation liability of the insured." This provision, when read with the requirement that insurance obtained for an employer's workers' compensation benefits liability must cover the entirety of its liability, leads to the conclusion that the Act prohibits the withdrawal of an individual employee from insurance coverage as well as prohibits an employer and its insurer from selectively omitting an employee from the coverage of a policy an insurer has issued to an employer. This conclusion is borne out by the Act's command, [a]ny provision in any policy, or in any endorsement attached thereto, attempting to limit or modify in any way, the liability of the insurance carriers issuing the same except as otherwise provided herein shall be wholly void."

In other words, the court stated that the Act contained two conflicting paragraphs and that it would regard any attempt at withdrawal under the Benefits Rejection Form as invalid.

In the Editor's Note following the *General Casualty Company's* opinion, your Editor pointed out that the case had been decided by the Second District Appellate Court and would be binding only on that Second District. In a recent case involving *Virginia Surety Company v. Bill's Builder, Inc. a corporation, and William R. Geigner*, the Third District Appellate Court indicated some disagreement with the conclusions reached in the *General Casualty Company* case. In the *Virginia Surety Company* case, a corporate officer also was alleged to have signed a Benefits Rejection Form. William Geigner, the injured claimant, and his wife, Kristina, were both listed as corporate officers and the business was described in the application as a one-man carpenter contractor business with no employees. While there is some confusion as to the terms utilized, the language appears to request that both Geigner and Kristina be excluded and the bottom of the page for the alleged signature of Geigner. Also attached to the policy was an endorsement prepared by Virginia Surety described as "Partners, Officers and Others Exclusion Endorsement."

Geigner suffered a spinal cord injury when he fell from a scaffold while working for the corporation. When a claim was made against the workers' compensation insurance, coverage was denied.

The insurance agent testified that he had provided different types of insurance to Geigner and Kristina but had dealt *exclusively* with Kristina. Kristina was familiar with the effective exclusion because of a similar decision on prior coverage. Geigner acknowledged that Kristina had conversations with the insurance agent regarding workers' compensation coverage for the corporation but asserted, however,

that he (Geigner), did not sign the application for insurance and that he did not know who did.

The Third District Appellate Court noted that the *General Casualty Company* case held that the form applied only to insurance coverage, did not mention withdrawal from the operation of the Act or rejection of benefits under the Act and was directed to a sole proprietor or business partner (the individual defendant was neither). However, the court in *Virginia Surety* made it quite clear that it did not agree with the analysis in *General Casualty*. The court stated:

In the case before us, Geigner allegedly indicated on an application for insurance that he wanted to be excluded from coverage of the insurance policy. If we assume for the purpose of this particular analysis that Geigner's signature is valid or authorized, and considering the election in the context of which it was made (an application for workers' compensation insurance), the application would be sufficient under the statute to exclude Geigner from coverage and to provide Virginia Surety with written notice of that election. No additional language is necessary. Nor is Virginia Surety required to take affirmative action to confirm that Geigner understood the consequences of his election. Considered in context, the application is sufficient to indicate an objective affirmative action to effectively withdraw Geigner from operation of the Act. If the alleged signature is not valid or not authorized, then there is no

evidence of a valid objective affirmative election to withdraw from the operation of the Act.

However, the case was remanded back to the trial court to determine whether Geigner, or someone authorized to act on his behalf, actually made the election. Geigner testified that he did not sign the application and that he does not know who did and that even Virginia Surety's underwriter acknowledged that Geigner's signature on the application for insurance may not have been genuine.

EDITOR'S NOTE: Whereas the *General Casualty* case held that despite the attempted withdrawal from the operation of the Act, the claimant continued to have coverage under the General Casualty Workers' Compensation Insurance policy. In other words, the attempted withdrawal was completely ineffective. However, the *Virginia Surety* case held that the claimant could be excluded from coverage of the insurance policy if the signature requirements were required. In some cases, insurance underwriters have not been sufficiently careful in making certain that the rejection of the Act is properly executed. In this case, the insurance agent testified that Kristina was familiar with the consequences of opting out of coverage because she and the claimant had opted out of coverage in a previous workers' compensation insurance policy. Nevertheless, the application was mailed to Kristina and, upon its return, the agent was not certain as to whether Geigner had actually signed the application.

These issues frequently arise when the claimant sustains severe injury and is suddenly aware that he has no benefits available to him. Because of a possible exposure to such a claim, it would be my suggestion that more importance be given to the signing. The ideal situation would

require that corporate officers' signatures on the rejection be witnessed and notarized. In this case, Virginia Surety's underwriter learned after the policy had been issued that Geigner's signature on the application was not genuine. The court's opinion does not indicate whether this knowledge was acquired prior or subsequent to the accident.

PAYMENT OF WORKERS' COMPENSATION BENEFITS BY DEFENDANT DID NOT PREVENT PLAINTIFF FROM PURSUING CIVIL ACTION

Steve Townsend and his wife, Kristi Townsend, had a civil action against Fassbinder United Builders, Inc (United), owned by Jim Fassbinder, and Rainbow Painting Services, Inc. (Rainbow), owned by Mike Fassbinder, Jim's brother, as a result of Townsend's fall through an unguarded and unbarricaded hole in the floor while Townsend was working at a house that United had under construction. The court entered a verdict awarding Steve \$1,951,238 and Kristi \$250,000 for loss of consortium, both of which were reduced by 10% contributory negligence. Rainbow was dismissed from the action prior to verdict. United appealed on the basis that it was Townsend's employer at the time of the accident.

FACTS

On February 2, 1999, Townsend was a 47 year old painter who reported for work at Rainbow, where he had worked for the past five years, at approximately 40 hours per week. Each day he reported to the Rainbow shop where Mike Fassbinder, Rainbow's owner, told the painters where they would be working that day. The painters would then put the Rainbow equipment in the

Rainbow truck and drive to the work site which was customarily a home. Townsend was responsible for the equipment and for coordinating two to eight painters at the job site. When Townsend arrived at Rainbow, Mike ordered Townsend and a crew of painters to paint the drywall at a house under construction by United, a company owned by Jim Fassbinder, Mike's brother. Upon his arrival, Townsend met with Jim and noted an uncovered and unbarricaded hole in the floor. Jim told Townsend that he would cover or barricade the hole, but failed to do so and, shortly thereafter, Townsend fell approximately 15 feet to the floor below, thereby sustaining significant injuries.

After the accident, United's carrier paid Townsend's medical bills and approximately one year of temporary total disability benefits. The benefits were discontinued after the carrier believed that Jim had made misrepresentations on his insurance policy.

The records of the company reflected that Townsend was paid by Rainbow and did not reflect that Townsend was an employee of United. Instead, the records described the painters as subcontractors who did not have insurance certificates. Just prior to the termination of his compensation benefits from United, Townsend signed a statement that described him as being regularly employed by Rainbow but that on the day of the accident he was not working for Rainbow.

During the civil litigation, United contended that because Townsend collected some workers' compensation benefits from United, that United could invoke the exclusive remedy provisions of the Act, as described in Section 5. Based on a statement by United's attorney before the Industrial Commission that Townsend was

not United's employee, the court stated that United could not now take an inconsistent position that the exclusive remedy provided. The court failed to note that Townsend had also previously taken the position that on the day in question, he was not an employee of Rainbow. The court rejected United's argument on this point, stating:

(Townsend's) statement was conclusory and unsupported. It could not necessarily be relied upon, given that (Townsend) is a lay person with no legal training and that, at the time he signed the statement, he had an overall IQ of 75, and impaired ability to make decisions, and the impression that he would lose workers' compensation benefits.

The court was more inclined to rely upon a letter written by United's attorney that denied that United was Townsend's employer. In response, United complained that the attorney was not authorized to issue such a denial, that his testimony was not a factual admission by United, and that he was without authority to waive the attorney-client privilege. Nevertheless, after reviewing all of the testimony, it found for the plaintiff and the verdict was upheld.

The decision was rendered on a two-to-one basis. A strong dissenting opinion emphasized the contradictory steps taken by Townsend. The court noted as follows:

Approximately three months after his accident (Townsend) filed for workers' compensation benefits against United. While it is not clear what, if any, benefits he received prior to filing his claim, it is clear he was paid and accepted benefits for 12 months after he filed his claim. It is also clear that

(Townsend) took additional affirmative steps in the Commission to assure his ongoing receipt of benefits when he dismissed his claim against Rainbow for the admitted purpose of pursuing his claim against United. (Townsend), therefore, took the express position that the injury was compensable under the Act and accepted benefits, thereby barring him from recovery in tort. At the time of trial, (Townsend) was still taking the position that his injury was compensable under the Act. He tried to reinstate his claim against Rainbow in the Commission, and that case was still pending in the Commission.

EDITOR’S NOTE: The majority opinion makes no reference to the possibility that this case involved a “loaning-borrowing” set of facts. The dissenting opinion points out that the majority concludes that if Rainbow was not Townsend’s employer, then United could not have borrowed Townsend from Rainbow. Until Townsend dismissed his claim against Rainbow, saying Rainbow was not his employer, United did not dispute that Townsend was covered under the Act.

**IN A WAGE DIFFERENTIAL CLAIM,
THE COURT FOUND THAT WAGES
OF CLAIMANT’S REPLACEMENT
WERE TOO SPECULATIVE**

Thomas Taylor, a 44 year old truck driver was unloading groceries at a stop on his pre-determined route. While pushing a two-wheel cart loaded with groceries, he slipped on a ramp and ultimately underwent surgery on his knee. He was then assigned to duties as a dispatcher and received an award of \$121.49 per week, which equaled two-thirds of the difference between the claimant’s average weekly wage for the year

preceding the injury and his current earnings. The claimant appealed contending that he should receive two-thirds of the difference between his dispatcher’s average weekly wage and the present earnings of the truck driver who had replaced Taylor in the truck driver’s job.

Senior drivers are entitled to the most lucrative routes and have the option of selecting their co-drivers, who were paid by the same method. Routes were re-bid every six months. Immediately prior to his injury, the claimant was picked as a co-driver by Roger Jones, the senior driver on his route. After the claimant was injured, Jones picked Wes Trosper as the claimant’s replacement. The claimant testified that Jones intended to replace Trosper in the next bid, which would thereby result in a reduction of Trosper’s earnings thereafter.

The claimant sought to use Trosper’s wages as an accurate reflection of what the claimant would be earning but for his injury. The employer maintained that, in light of the frequent bidding process and in light of the claimant’s relative lack of seniority, it was speculative to assume that the claimant would be earning the same amount as Trosper. The court agreed with the Commission decision that Trosper’s earnings were too speculative to be used as a basis for the claimant’s wage loss claim.

The court stated:

Here the question is not only the rate of pay the claimant would have made, but whether he would have continued to be chosen to work the more lucrative routes. The Commission found that it would be too speculative to assume that the claimant would have continued to work the more lucrative routes. This called for the Commission to make inferences

from the undisputed facts. We cannot say that the inferences drawn by the Commission in determining that it was too speculative to use Trosper's earnings to determine what the claimant's earnings would have been were against the manifest weight of the evidence.

EDITOR'S NOTE: In our August, 2006 Newsletter, your Editor described a different result obtained in the *Morton's of Chicago* case where the court permitted the claimant to use the difference between the claimant's current salary and the current salary of a fellow employee who had worked with the claimant prior to the accident. In that case, a waitress was unable to resume her former job and became a paralegal earning \$34,000 per year. The claimant attempted to utilize the present earnings of Ralph Lotspeich, a fellow server who was presently earning \$50,000 per year. Other servers reported similar increases. The court agreed with the claimant that the earnings of the fellow server were not too speculative, stating:

Based on Lotspeich's wage increase and the average wage increase for servers at Morton's, we conclude that the Commission could reasonably infer that the claimant's salary would have increased 13% from 1998 to 2000. Accordingly, the Commission's decision to award the claimant wage differential benefits was not based upon conjecture or speculation and is not against the manifest weight of the evidence.

The different finding in the two cases is based on speculation versus certainty. Thomas Taylor testified that his replacement was certain to be replaced and as a result his wage loss claim needs to be based on his actual earnings before versus those after the

accident. With reference to the *Morton's* waitress, she could point to a fellow server whose earnings were identical to hers before the accident and in two years had increased to \$50,000.

COURT UPHOLDS CLAIM FOR RETALIATORY DISCHARGE

In the case of *Siekierka v. United Steel Deck*, the claimant contended that United Steel had wrongfully discharged him in retaliation for his assertion of his rights under the Workers' Compensation Act. United Steel contended that the discharge was based on a company policy and not because of a pending worker's compensation claim. The factual situation can be described chronologically as follows:

- | | |
|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 05/11/01 | The claimant was injured and two days later was placed on temporary total disability. |
| 05/21/01 | Dr. Delheimer, a neurosurgeon, found him to be totally incapacitated. |
| 06/04/01 | Dr. Delheimer scheduled the claimant to undergo surgery on June 11, 2001, with the doctor estimating that the claimant would be off work four to eight weeks. |
| 07/11/01 | At the request of the employer, Dr. Shenker performed a neurological evaluation to obtain a second opinion. Dr. Shenker noted that the severity of the pain had diminished since the injury and he was |

improving and recommended that the claimant take a “wait and see” approach for a month before considering whether to have surgery. Dr. Delheimer agreed to wait.

07/31/01 Kristine Paul, a Human Resources Manager with United Steel, wrote the claimant advising that since he had been off work since May 14, 2001, that his 12 weeks of family leave would end on August 6, 2001 and that United Steel was willing to extend his leave until the end of August. Paul further informed the claimant that if he was unable to return to work by that time, he would be terminated and offered “COBRA” coverage.

08/14/01 The claimant met with Paul and Ron Grant, the plant manager, and advised that he was to have surgery on August 15 and since it would take him four to eight weeks to recover, he could not possibly return to work by the end of August. Paul admitted that the claimant did not request to be put on the Family Medical Leave Act. After the meeting with the claimant, Paul and Grant considered that an additional two-month extension would be excessive in light of the

company consistency to discharge employees who did not return to work after the completion of the FMLA period. Paul admitted that before a decision is made to extend a leave, she looked at the different company policies, including the FMLA, Workers’ Compensation, Short Term Disability and the Americans With Disabilities Act. She admitted that a person under leave through ADA would be granted more time to return to work because the law mandated it.

08/31/01 Correspondence was forwarded to the claimant that he was terminated but that his workers’ compensation benefits would continue until he recovered.

11/15/01 The claimant was released for full duty. He contacted United Steel about re-employment and was told it was not hiring at that time. The TTD benefits continued until November 19.

As a part of the trial preparation, the claimant had testified that he did not know that the 12-week FMLA could apply to a work-related injury. He further testified that he was under the impression until he was terminated that he was going to be allowed to return to work after he recovered from his injury. Since Dr. Delheimer felt that he

could return the claimant to return to work in eight weeks if he knew that the claimant's job was at stake, the claimant noted that this eight-week period would place him within the termination date which occurred at the end of August. Paul stated that the Federal FMLA policy mandated up to 12 weeks of leave and that she and Grant decided whether to extend the leave for a particular worker. Grant further stated that he spoke to the Vice President of United Steel, who endorsed the decision not to extend the claimant's leave. Grant admitted that under the company's operating policy that if any employee took longer than four months to recover from a work-related injury, he would be terminated. No employee had ever received an extension beyond one month, which had been given to the claimant as well.

Following a hearing, the trial court granted United Steel's Summary Judgment Motion. The claimant appealed from the trial court decision, arguing that the facts were controverted and that there existed a genuine issue of material fact as to whether there was a connection between the claimant's discharge and the exercise of his rights under the Act. The appellate court agreed with the claimant and the matter was referred back to the trial court for further proceedings.

The appellate court reviewed the pertinent portions of the Statute and also the finding in the *Kelsay* case, the leading case interpreting the Statute.

*Under section 4(h) of the Act, it is unlawful for "any employer, individually or through any insurance company or service of adjustment company, to discharge or threaten to discharge *** an employee because of the exercise of his or her rights or remedies granted to him or her by [the]*

Act." Because the workers' compensation law replaced common-law rights available to employees and employers, the court in Kelsay v. Motorola, Inc., carved out an exception to the federal rule that an employer may fire an at-will employee for any reason or for no reason at all. The Kelsay court reasoned that the sound public policy underlying the Act dictated the recognition of an employee's cause of action for retaliatory discharge. An underlying principle of the retaliatory discharge exception to the general rule of an at-will employment is the recognition that an employer may not present the employee with a choice between his job and his legal entitlement to compensation. Kelsay prohibits an employer from utilizing an employee's job as leverage to condition his exercise of rights under the Act.

The court further noted that United Steel had chosen to come forward with a valid non-pretextual basis for termination of the claimant's employment and had fellow employees testify in support of this assertion. However, the court also noted that United Steel had not advised the claimant that the FMLA statute would be utilized or that the claimant expected that he would be returned to work after he recuperated from his injury.

United Steel's actions served to delay Siekierka's surgery at the same time he was left uninformed that the delay had the potential to cost him his job. When Siekierka was finally made aware of the possible consequence of his continued absence from work, he was faced with the option of pursuing his workers' compensation right to have the surgery or attempting to return to work without

it. This is the kind of choice prohibited under Kelsay and if United Steel's intent was to create this dilemma, its motive was retaliatory.

EDITOR'S NOTE: Over the years, some collective bargaining agreements have provided that the claimant would be automatically discharged if he was off work for a specific period of time, even though the employee remained away from work as a result of his injury. However, the employer could argue that the employee, through the collective bargaining agreement had agreed to the circumstances of such a termination. To my knowledge, none of these cases ever reached the courts. In this case, the claimant did not suspect that the FMLA would be utilized to provide a basis for the termination when his ability to return to work within a 12-week period became impossible because of the employer's handling of the claim.

WORKERS' COMPENSATION SUBROGATION DENIED BECAUSE OF TERMS OF SETTLEMENT CONTRACT

In our April, 2005 Newsletter and the January, 2007 Newsletter, we reported on the issues being created because of the terminology, or lack thereof, in the settlement contract. In the *Borrowman* case decided by the Fourth District Appellate Court, the settlement contract constituted a full release of all causes of action resulting from the industrial injury and concludes that the employer failed to reserve its right even though it knew of a pending malpractice case.

The *Gallagher* case, which arose in the First District, noted that most settlement contracts contained no reference to subrogation and that the *Borrowman* opinion

was unsupported by case law.

In the *Burgess* case, the Fifth District Appellate Court agreed with the *Borrowman* case and also contended that the employer had explicitly waived any rights to subrogation, relying on the language in the settlement agreement providing: *Each party waives any right to ever re-open this claim under any section of the Act.*

Unfortunately, parties frequently fail to read carefully the terms of the settlement with unhappy results. As stated previously, from the employer's viewpoint, the terms should clearly provide that the rights under Section 5(b) are being retained and not waived. Presumably, the Illinois Supreme Court will eventually resolve the apparent dispute.

RECENT COURT DECISIONS DENIED A NUMBER OF DISPUTED CLAIMS CONCERNING ADDITIONAL MAINTENANCE OR TEMPORARY TOTAL DISABILITY BENEFITS

1. In *Consolidated Freightways* case, the Commission had awarded maintenance payments for 58-5/7 weeks of additional benefits and further ordered Consolidated to provide the claimant with *meaningful vocational rehabilitation*. This finding was reversed by the appellate court which held: *that the Commission's order for vocational rehabilitation is inappropriate because there is no evidence in the record that such services will increase the claimant's earning capacity.*
2. *Mota v. Griffin Wheel Co.* case is only at the Commission level but has relied on two appellate court cases with the same issue. In *Mota*, the claimant's treating physician released the claimant

to light duty in September, 2004. In December, 2004, the claimant retired and did not continue to look for work. In September, 2005, claimant found work within his restrictions. The court found that the claimant was not entitled to TTD beyond December 2004, on the date of his retirement, because he had not sought employment after that date.

The *Beuse* case, which is cited in *Mota*, involved a policeman released for light duty which was not available by the Village of Franklin Park. The claimant was only permitted to return to full duties as a policeman. The claimant was held not to be entitled to TTD during the light-duty period because he did not seek any employment within his restrictions.

The *Granite City* case also cited in , the claimant police officer believed that the City would eventually seek his termination as a police officer and did not accept the light duty offered. The court held that the claimant was not entitled to TTD after he rejected the light-duty assignment.

FRANK J. WIEDNER
Editor