

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

VOLUME 16 ISSUE 3

MAY, 2006

WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

CONTENTS

1 EMPLOYER DENIED CREDIT FOR MEDICAL PAID UNDER GROUP PLAN

Aurora East School District v. Don Dover,
No. 2-04-0979, dated March 21, 2006

2 PENSION BOARD HEARING MUST COMPLY WITH INDUSTRIAL COMMISSION FINDING BECAUSE OF COLLATERAL ESTOPPEL

Mabie v. Village of Schaumburg,
No. 1-05-2457, dated March 31, 2006

3 HOSPITAL DIRECTOR OF NURSES SUFFERS STROKE WHILE GIVING SPEECH AT PHYSICIAN'S RETIREMENT DINNER - HELD COMPENSABLE

Pinckneyville Community Hospital v. Industrial Commission
No. 5-05-0204WC, dated March 30, 2006

Wiedner & McAuliffe, Ltd
One North Franklin, #1900
Chicago, IL 60606
(312) 855-1105
wmlaw.com

EMPLOYER DENIED CREDIT FOR MEDICAL PAID UNDER GROUP PLAN

Don Dover, employed by the Aurora East School District, received an award which included TTD benefits of \$29,908.13, representing 59-6/7 weeks, and \$85,015.04 in medical expenses. Immediately after the Commission decision, the TTD benefits were paid to the claimant, along with interest. Instead of paying the medical expenses to the claimant, the employer's group insurance provider, HMO Illinois, paid to the medical providers the amount of the outstanding bills, as shown in the award. Apparently, since the group's insurance premiums were paid entirely by the employer, the employer assumed it would receive a type of Section 8(j) credit for these payments.

In response to the employer's motion to adjudicate the medical bills, the employee filed a Section 19(g) motion to reduce the award to a judgment. The employee contended that the employer had not paid the award in full and had refused to pay the remaining balance. The court found that the plaintiff was not due a credit as the Commission was without jurisdiction to grant such a credit, despite the fact that the employer had agreed to hold the employee harmless for any claims for medical bills. In addition, the trial court accepted an affidavit filed by the

employee's attorney that he had spent 165.5 hours and requested payment at a \$300 hourly rate. The court reduced the attorney's hourly rate to \$250 and entered judgment in the amount of \$127,701.25 (apparently including a 50% penalty on the unpaid medical expenses) and \$41,375.00 in attorney's fees.

What went wrong in this case? Why is the employer required to double pay the medical expenses and also pay a penalty and attorney's fees? This result is due to the fact that the employer did not follow the language of the award. Industrial Commission awards provide that the amount of all unpaid bills be paid to the employee and not directly to the medical providers. In other words, the medical benefits should have been paid to the claimant, along with the awarded TTD benefits.

The employer contended that the failure to pay had not been unreasonable and that it made numerous efforts to negotiate, all of which the court rejected. The most important factor was described by the court:

We reject plaintiff's argument that the Commission's decision leaves room for good-faith disagreement as to the amounts owed defendant. HMO Illinois, plaintiff's group insurance provider, apparently forwarded medical payments to defendant's medical providers in satisfaction of certain outstanding balances. However, plaintiff did not forward or have forwarded over \$85,000 in medical expense payments to defendant, as directed to do so in the Commission's order. It is therefore not the Commission's decision but, rather, plaintiff's actions that have created any confusion as to amounts still owed

defendant.

EDITOR'S NOTE: Your Editor has no way of knowing what the claimant will do with the reimbursement for medical expenses, which were never paid by him. Unless the HMO is able to obtain a return of its payments to the providers, the claimant will have the money and will not be pressed for collection. Other possibilities exist because it would appear that some strong feelings against the claimant's recovery may provide some type of reimbursement claim brought by the HMO.

PENSION BOARD HEARING MUST COMPLY WITH INDUSTRIAL COMMISSION FINDING BECAUSE OF COLLATERAL ESTOPPEL

Daniel Mabie, a fireman for the Village of Schaumburg, was injured on April 12, 1999, as a result of a fall down the fire station's stairs. In his workers' compensation claim, he was awarded benefits because he had suffered *a compensable injury arising out of and in the course of his employment.* The Village appealed to the Illinois Appellate Court but, while the Village's appeal was pending, the parties agreed to settle the workers' compensation claim. The settlement awarded the Plaintiff \$32,500 for medical services, permanent disability and interest. The parties agreed to dismiss the Village's appeal. No reference is made to the existence of any lump sum settlement contract.

Following the settlement, the plaintiff filed suit to compel the Village to reinstate his sick leave and vacation benefits. The defendant filed a motion to dismiss, stating that the plaintiff has waived its right to ask

for additional benefits outside the settlement agreement. The appellate court reversed, stating that the agreement did not have any *res judicata* effect as to the plaintiff's claim.

On remand to the trial court, the plaintiff moved for summary judgment, which was granted by the court. The question then became is there any difference between the *line of duty wording in the Pension Code and the causation test in workers' compensation claims - that the injury "arose out of and in the course of employment?"* The court said there was not and stated:

There is no reason to require a firefighter to provide different proof that he was injured in the line of duty under PEDA than he would in a 'line-of-duty' pension case. Accordingly, we find the defendant is collaterally estopped from relitigating the issue of causation, based on the finding in the workers' compensation claim that plaintiff's injury arose out of the course of his employment.

EDITOR'S NOTE: Because the parties were not the same, the argument of *res judicata* would not apply but the court stated clearly that the intention in the compensation and pension statutes did not differ so that *collateral estoppel* would take effect.

The only unanswered question might concern the terms of the settlement contract with the terms not being spelled out in the court's opinion. However, your Editor reviewed the settlement contract and the terms do not overcome the decision of the circuit court which affirmed the similar interpretation and effect of the two statutes.

HOSPITAL DIRECTOR OF NURSES SUFFERS STROKE WHILE GIVING SPEECH AT PHYSICIAN'S RETIREMENT DINNER - HELD COMPENSABLE

Mary Downen, a Director of Nurses for the Pinckneyville Community Hospital, suffered an intracerebral hemorrhage and stroke while giving a speech at a dinner to honor a retiring physician. She had been employed by the hospital for 25 years and had served as the Director of Nurses for ten years. Her scheduled work load required her to work 6:30 a.m. to 4:30 p.m. Monday through Friday, with sometimes work on Saturdays and evenings, as well. When John Schubert became the hospital CEO in 1997, he instituted changes which increased her work load. He also switched the claimant from an hourly rate to a straight salary, causing the claimant's income to be decreased. This may explain why, for the first time in six years, she took a week off for vacation in November of 1997.

In 1998, Dr. Cawvey, a long-time member of the hospital staff, retired. Claimant and two other nurses made arrangements for a retirement dinner. The claimant testified that since she had worked longest for Dr. Cawvey, Schubert felt that it would be appropriate that she gave the speech as the Director of Nurses. Schubert disagreed, stating that once a decision had been made to have the retirement dinner, he handed the planning over to a nurse named Norma Gordon. Schubert testified that he did not create the agenda or order anyone to speak at the event and he did not direct or require any employees to attend the event.

The claimant testified that because the speech was given to members of the Hospital Board and other important guests,

it required more preparation than she had time to give. During this time she noted considerable stress. When she stood up to give her speech, her head hurt and she heard a roaring sound in her ears. About half way through the speech she collapsed, lost sight in one of her eyes and then lost consciousness.

Was the dinner a voluntary recreational activity specifically excluded from the Act?

Section 11 of the Act provides:

Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties[,] and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program.

The employer noted: 1) two nurses testified that they were not required to attend the dinner; 2) Schubert had testified that he did not tell the claimant to participate in the party preparation in any way; 3) aspects of the event indicated it was a voluntary recreational activity, as invitations were sent; and 4) the claimant was not paid overtime nor was there any evidence that any of the hospital's employees were paid for attending.

The arbitrator denied the claim noting that the claimant had not been ordered or assigned by the employer to speak at the dinner. It noted that:

Schubert testified that he was not involved in the day to day planning of Dr. Cawvey's retirement party, he did not create the agenda for the party, did not order, assign or direct anybody to make a speech at the party, he did not authorize any type of hourly pay for people attending the party and did not require employees to attend.

The Commission reversed the Arbitrator's Decision, stating that:

The Commission finds that Section 11 of the Act concerning voluntary activities does not apply to the matter at bar as Petitioner, a member of the management committee, helped plan this retirement dinner and worried that she would lose her job if she did not attend this dinner. The Commission finds that the management committee felt Petitioner was the most appropriate person to give the speech as she had worked the longest with Dr. Cawvey, the doctor who was retiring, and finds it credible that Schubert, Petitioner's boss and another member of the management committee, approved of Petitioner's selection as the person to give the speech.

In other words, the Commission accepted the claimant's statement about her selection as being credible despite the fact that it was completed unsupported by any other witness.

The circuit court, and eventually the appellate court, agreed with the Commission's decision that Section 11

concerning voluntary activities did not apply because it was reasonable that the claimant felt she was obligated to attend the retirement dinner and give the speech during which she suffered the stroke.

Was the stroke caused by employment induced stress?

Both the claimant and her employer produced the testimony of two physicians who supplied opinions as to causal relationship. One of the claimant's witnesses was Dr. Fozard, the claimant's family physician, who was present at the dinner and personally witnessed the incident. He testified that the claimant had a headache before her speech began and the headache became progressively worse during the speech. He felt that the claimant did not enjoy public speaking but was still required to get up in front of the crowd and discuss the doctor's retirement and *all that together put too much pressure on a weak blood vessel in (claimant's) brain, at which time the (intracranial) bleed occurred.* Dr. Fozard admittedly is not an expert in the field of intracranial hemorrhage or its causation.

Dr. Schreiber, a neurologist, had reviewed medical records on claimant's behalf. After referring to the claimant's generalized work stress, and the speech requirement, *she became acutely anxious, and of course, that can elevate your systolic blood pressure and that is what happened to (claimant), she developed an acute elevation of the blood pressure that led to this hemorrhage.* Dr. Schreiber's testimony included the voice exchange:

Question: Is it your opinion that this hemorrhage would not have occurred had she not made the

speech?

Answer: Yes.

In other words, he eliminated the day-to-day work stress as a possible reason for the hemorrhage.

Dr. William Barnhart, an internist, had reviewed the claimant's medical records at the request of the employer and was of the opinion that claimant's intracerebral hemorrhage was more likely than not due to essential hypertension which appeared in her records as early as 1975. He concluded that a public speaking engagement would not have elevated claimant's blood pressure to the extent of causing the hemorrhage, that her condition was a natural progression and she would have had a stroke regardless of her activity at that time. Dr. Barnhart is an Assistant Professor of Medicine at the University of Chicago and spends 80% of his time teaching and 20% in private practice.

Dr. Cathy Helgason, a neurologist who is a Professor of Neurology at the University of Illinois, College of Medicine, reviewed the claimant's medical records, as well as the depositions of Drs. Barnhart, Schreiber and Fozard. She is a member of the Editorial Boards for the Journal of Neurovascular Disease, the Journal of Stroke and Cerebral Vascular Disease and the journal Stroke. She stated that small vessel disease, a condition that actually leads to intracranial hemorrhage, is associated with the indications of hypertension. She did not think that claimant's job was the cause of the hemorrhage.

In its reversal of the arbitrator's decision, the Commission opined *that the*

accumulated tension in (claimant's) life on February 22, 1998, contributed to her acute cerebral vascular accident and that all the stresses, combined with having to give the speech, put too much pressure on a weak blood vessel in her brain and the bleeding occurred.

The appellate court noted that the claimant had presented the testimony of the treating physician, Dr. Fozard, and an expert neurologist, Dr. Schreiber, and that both had found the stress of the speech to be a causative factor. Even though Dr. Fozard may have been biased, he was the only treating physician to testify and the Commission could determine his credibility. With reference to Dr. Schreiber, the court stated:

The employer's description of the testimony of Dr. Schreiber and the decision of the Commission is inaccurate. Dr. Schreiber opined that the anxiety over the speech was the defining event causing the hemorrhage. He explained the significance of the speech as a stressor in the context of the general demands being made of claimant at work. Dr. Schreiber stated claimant had ongoing problems, but it was his opinion that she had an acute elevation of blood pressure related to the stress of giving the speech.

In reviewing the contrary medical testimony provided by the employer, the court did not acknowledge the superior qualifications of Drs. Barnhart and Helgason, but stated:

The employer's position, in the words of Dr. Barnhart, is that claimant 'would have had a stroke at that time, regardless of the

activity she was undertaking at that time.' Underlying Dr. Barnhart's conclusion that the speech was not a causative factor was his opinion that a stressful incident could not sufficiently elevate blood pressure in a flight-or-fight reaction. The employer's other expert, Dr. Helgason, surmised, '[E]ither [claimant] had a stroke that started a week before, maybe she had a little leakage, I don't know, maybe [claimant] had a hemorrhage then and then she had another hemorrhage the night the massive one started.' The Commission correctly noted Dr. Helgason admitted that it was possible that a stressful event could have caused a release of adrenaline that would result in elevated blood pressure causing increase stress on blood vessels.

The court finally concluded:

It is not difficult to accept the Commission's finding that claimant experienced stress in giving the speech. This stress could easily be seen as different from the stress generally experienced by the public. The record supports the conclusion that claimant had a preexisting condition of hypertension. The question, however, is whether the speech as a part of claimant's work was a causative factor that accelerated or aggravated claimant's condition. The Commission was presented with conflicting expert testimony on the subject. Its determination was not against the manifest weight of the evidence.

EDITOR'S NOTE: With reference to the

other issue regarding the degree of employer compulsion for the employee to attend the farewell party and give the speech, the court stated that *the record here supports a finding that claimant was 'ordered or assigned' to not only attend the event but also speak*. It does not appear that claimant's contention as to her attendance and speech was supported by any other witness. In fact, several of the nurses and her immediate supervisor testified to the contrary. The only testimony as to the claimant being *ordered or assigned* was that of the claimant. The other witnesses, including the claimant's supervisor who allegedly issued the order and the nurses who were present when the order was allegedly issued, testified to the contrary.

In this type of case, the arbitrator had occasion to hear the testimony from the witness stand and was in the best position to determine the credibility of the witnesses in a most conflicting factual situation. Yet, the decision was summarily discounted by the Commission, which, under our procedure, is described as the trier of the facts.

Your Editor would suggest that an employer, that may be in any way involved in a non-work event, prepare a written notice explaining why the event is covered by Section 11, that attendance at the event is strictly voluntary and that no employee is requested to participate in the program. The alternative, adopted by many employers, is to cancel all such events. Oral testimony to the voluntary nature of the activity was deemed not to be against the manifest weight of the evidence.

COMMISSION COMMENTARY

Recently, the Industrial Commission has exhibited a rather disturbing course of conduct which causes respondents considerable difficulty in winning cases on

appeal to the court system. In too many cases, when arbitrators find in favor of a respondent, the Industrial Commission will reverse the arbitrator's decision and, in support of its reversal, will emphasize only evidence submitted by the petitioner and omit evidence in favor of the respondent. Consequently, the circuit and the appellate court will have difficulty reversing the Industrial Commission on the basis that the decision is *contrary to the manifest weight* of the evidence. While we acknowledge that the Commission is the ultimate authority on factual issues, the courts will not have the benefit of all of the facts submitted by the respondent.

The recent *Pinckneyville Community Hospital* case is an example of this type of advocacy by the Industrial Commission. It is our position that the Commission's unequal presentation of the facts results in a tendency to favor petitioners. Examples of this course of conduct is best exhibited by using excerpts from the arbitrator and Commission decisions.

Although the repeated work stress was not used as the basis of the decision for the petitioner, the language of the two represents inequality in the selection of the facts by the Commission. A comparison of the arbitration and Commission decision would suggest that the Commission paid little or no attention to any of the reasons given by the Arbitrator for his decision.

Petitioner testified that she had worked for the respondent for 35 years and with the last 12 years as Director of Nursing. The arbitrator noted that she had headaches while at work and at home. Whereas the Commission amended that finding to state that the petitioner never had headaches at home.

In 1997, John Schubert became CEO.

At this time, petitioner stated that her work load increased. Schubert testified that he reduced petitioner's responsibilities and assigned another employee to assist her. In addition, he produced three documents which verified the fact that the work load was decreased. The Commission omitted any reference to the petitioner getting an assistant and further made no reference that the business records had confirmed Schubert's testimony.

The petitioner testified that Schubert's conduct caused her to be concerned about her employment and suggested that as a major cause of the stress. The arbitration decision produced a line of cases, indicating that concern about employment did not create a situation that was compensable. The Commission, while describing the petitioner's concern about employment, made no reference to the cases which would eliminate the compensability of this situation. Not one of the cases cited by the arbitrator's decision was mentioned by the Commission.

Both the arbitration and Commission decisions address the question of the petitioner being *ordered or assigned*. The arbitrator's decision includes this description of the meeting where the question of the retirement party was allegedly discussed:

In this case both the petitioner and the hospital administrator, John Schubert, confirmed that the petitioner was neither ordered nor assigned to participate in this event or to present the speech in question. Further testimony and evidence supports this. The invitation which was delivered to the petitioner established by its language that participation was optional and non-attendees were invited to write some sentiments in

lieu of their presence. Two co-workers of the petitioner testified that they did not feel compelled to attend and that participation in the event was voluntary. The petitioner testified that she took on the task of the speech at the suggestion of a coworker or coworkers and not upon the order or assignment of her supervisor or the hospital board of directors.

The Commission version is as follows:

The Commission finds that Section 11 of the Act concerning voluntary activities does not apply to the matter at bar as Petitioner, a member of the management committee, helped plan this retirement dinner and worried that she would lose her job if she did not attend this dinner. The Commission finds that the management committee felt Petitioner was the most appropriate person to give the speech as she had worked the longest with Dr. Cawvey, the doctor who was retiring, and finds it credible that Schubert, Petitioner's boss and another member of the management committee, approved of Petitioner's selection as the person to give the speech. Based on these facts, the Commission finds it was reasonable that Petitioner felt she was obligated to attend the retirement dinner and give the speech during which she suffered a stroke. The dinner was not a voluntary recreational event. Rather, Petitioner was designated or assigned to give the speech, meaning her attendance was necessary.

Keep in mind that the *suggestion* described by the Commission refers to a fellow member of petitioner's Administrative Team Member Committee (ATM). The Committee member who allegedly made that suggestion is not identified and, most importantly, would merely be a fellow member and not a supervisor of that committee. At best, it is reported only as a suggestion and not an order. The suggestion of this ATM member was due to the fact that the petitioner had the longest personal relationship with Dr. Cawvey. The Commission then states that Schubert felt this would be appropriate because she was Director of Nursing and had worked the longest with Dr. Cawvey. Not a single reference is made to Schubert's unequivocal denial of any such conversation and, even the Commission statement that he felt it would be appropriate would hardly be an order for her to attend.

The Commission further omits any reference to the fact that the invitations indicated that participation was optional and non-attendees were invited to write some sentiments in lieu of their presence. Finally, the petitioner's two co-workers did not feel compelled to attend saying that participation in the event was voluntary. None of this appears in the Commission decision which the appellate court stated was not against the manifest weight of the evidence.

The remaining issue concerns the medical causation. Initially, the petitioner argued that the stroke was caused by the work stress or the giving of the speech. The petitioner's medical testimony was that of Dr. Fozard, who relied on the petitioner's testimony as to work stress, but who had no medical expertise in this field. The petitioner also produced the testimony of Dr. Schreiber, a neurologist, who reviewed the petitioner's records. He relied on the petitioner's contention of additional work

stress and concluded that the hemorrhage was caused by the giving of the speech.

To counter this testimony, the records were reviewed by the Director of Internal Medicine at Weiss Hospital, Dr. William Barnhart, an Assistant Professor of Medicine at the University of Chicago, who concluded that the petitioner's long-standing hypertension was the cause and she would have had a stroke at that time, regardless of the activity she was undertaking, and to Dr. Cathy Helgeson, Director of the Cerebrovascular Service at the University of Illinois, as well as a Member of the Editorial Boards for the Journal of Neurovascular Disease, the Journal of Stroke and Cerebrovascular Disease, and the journal: Stroke. Dr. Helgeson concluded:

Dr. Helgason concluded that the petitioner was a time bomb in terms of the likelihood of the hemorrhage and, literally, any spike in arterial pressure in the deteriorated blood vessel, for any reason or no reason, could have increased the risk of the cerebrovascular accident. One cannot state with reasonable medical certainty that any particular event was the cause since a spike in pressure for any or no reason could occur and could have caused the hemorrhage.

The arbitrator's decision found the respondent's lay witnesses credible and the medical testimony of the respondent medically superb. The Commission found only one lay witness credible, that being the petitioner, who most certainly had a strong interest in the proceedings. By ignoring all the respondent's evidence, the Commission decision hardly was based on the facts in this case. Reliance on Dr. Fozard, who admitted his lack of qualifications and a

record review by a neurologist who conceded the severity of the pre-existing condition in lieu of the acceptance of the respondent's clearly superior medical witnesses suggests a pre-existing willingness to accept the best evidence.

The petitioner's further statement that she baked a cake for Dr. Cawvey's party would again suggest that her participation was voluntary and had no bearing on her employment. One might anticipate that if the petitioner had stated that she baked the cake at her fellow employee's suggestion she could have also made a claim if she sustained a stroke while baking the cake instead of giving the speech.

In summary, the arbitration denial of compensation was clearly based on the consideration of all of the evidence and was reached by the hearing officer who heard that evidence. The Commission relied only on the petitioner's testimony and clearly placed no reliance on the remaining evidence. Your Editor believes that the Commission decision did not fairly represent the Commission's responsibility as the trier of the facts. Based on the above, the appellate court should have reversed the Commission decision as being against the manifest weight of the evidence.

FRANK J. WIEDNER
Editor