

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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## SUPREME COURT REVERSES APPELLATE COURT DENIAL OF CARPAL TUNNEL SYNDROME CLAIM BECAUSE OF EMPLOYER'S DEFENSE OF LIMITATIONS

In our July, 2005 Newsletter, we reviewed the appellate court decision denying compensation to the claimant, Deana Durand, because the claim had been filed more than three years after the carpal tunnel syndrome condition manifested itself. In its opinion, the appellate court majority had relied on the *Peoria County Belwood Nursing Home* case wherein 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.*

### **Supreme Court Reverses Appellate Court**

In our Editor's Note at that time, we pointed out that the Appellate Court minority had filed a strong dissent and that the case might be accepted for hearing by the Supreme Court. Unfortunately, the case was accepted by the Supreme Court, which

found for the claimant even though the majority opinion acknowledged that the claimant had testified four times that she "might have heard of" carpal tunnel syndrome and knew people who had it and so surmised that she too had developed work-related carpal tunnel syndrome. The court suggested that this admission on her part was not sufficient in the absence of her receiving "an expert opinion" from a physician. In finding for the claimant, the Supreme Court stated:

*If Durand would have filed a claim in 1997, she certainly would have had difficulty proving her injury. Her description and understanding of the hand and wrist pain was sketchy and equivocal. At that time, it was not so constant or severe that it warranted medical treatment or reassignment to different work. ... The record strongly suggests that this doubt lingered until 2000, when Durand's pain finally necessitated medical treatment. A reasonable person would not have known of this injury and its putative relationship to computer keyboard work before that time, and it was against the manifest weight of the evidence to conclude otherwise. Durand's claim was timely. We decline to penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment.*

In this split decision, two of the Justices dissented, stating:

*Claimant is to be commended for continuing to work after the onset*

*of her symptoms. As the majority notes, claimant “diligently worked through progressive pain until it affected her ability to work and required medical treatment.” Claimant’s persistence, however, should not excuse her from her obligation to file a timely application for benefits. I fear the majority has allowed this equitable consideration to become the driving force behind its decision to reverse the judgment of the Commission, and that it has done so at the expense of obscuring the heretofore straightforward analysis used in reviewing the Commission’s determination of a manifestation date.*

**EDITOR’S NOTE:** The case was actually sent back to the Commission to determine whether the medical testimony would support the causal relationship finding. This issue is not likely to lead to a reversal as the employer’s best defense was based on the employee’s late filing. Based on this decision, the claimant’s limitation period would not begin to run until she obtained medical confirmation of her belief that the condition was work related.

### **DISPUTED AGGRAVATION OF SEVERE PREEXISTING KNEE CONDITION RESULTS IN FINDING OF DISABILITY**

In the *Certified Testing* case, the appellate court affirmed a finding of compensability in a highly disputed case. Despite the claimant’s impeachment by the history of his own physician and the supervisor’s denial of any accident notice, the case was found to be compensable.

Michael Nixon, a 51 year old sheet metal worker weighing 380 pounds testified that on November 22, 2002, he had backed down an extension ladder from the lower roof to the penthouse. On his descent while he was carrying 75 to 80 pounds of gear on his shoulders he felt a burning sensation in his right knee. He had difficulty in completing his descent and when his partner, Chuck Helms, arrived, he told Helms that he had injured his knee.

On January 11, 2001, nearly two years before the November 22, 2002 accident, the claimant had seen Dr. Michael Wall, his primary care physician for ten to twelve years, with complaints of right knee pain on and off for several weeks. Dr. Wall diagnosed internal derangement and the following month prescribed a knee brace. Claimant testified that he was able to work regularly, despite the right knee problem. He further testified that after discussing his injury with Helms, the claimant telephoned Dr. Wall for an immediate appointment. Dr. Wall’s notes of his initial examination indicated that the claimant’s chief complaint was **“right knee pain injured a long time ago but woke up this a.m. with terrible pain.”** The doctor’s notes further stated **“claimant presents today with complaints of right knee pain which had been a chronic problem for three years. Claimant states he injured it three years ago and since that time has had occasional flare ups of his knee. He states that over the past week he had been doing a lot of ladder climbing and over this week he has noted increased swelling and pain to his right knee. He denies any specific new injury to the knee.”** Dr. Wall recommended an MRI which revealed “an anterior cruciate ligament tear of indeterminate age, with prominent narrowing of the patellofemoral joint with

regional osteophyte formation consistent with severe changes of chondromalacia of the patella.” Dr. Wall referred claimant to Dr. Michael Trice, an orthopedic surgeon. As noted by the court: *Dr. Trice examined claimant on November 27, 2002. His notes indicate that on November 22, 2002, claimant felt a sharp pain in his knee while going up the ladder and the pain was worse going down. Dr. Trice diagnosed possible internal derangement and anterior cruciate ligament strain and recommended arthroscopic surgery. Claimant underwent surgery on December 9, 2002, which confirmed internal derangement and revealed a torn medial meniscus, patellofemoral chondromalacia, medial femoral chondromalacia, and a 50% tear of his anterior cruciate ligament. One of Dr. Trice’s records pertaining to claimant’s surgery lists November 22, 2002, as the date that claimant’s condition first appeared and states that claimant had not been treated for his condition within the past two years.*

After surgery, claimant continued to treat with Dr. Trice, attended three sessions of work hardening and was advised to continue a rehabilitation program. Dr. Trice released claimant to work, effective March 3, 2003. As further noted by the court: *In his May 22, 2002 notes, Dr. Trice opined that there was a causal relationship between claimant’s injury and the symptoms he developed and, while the accident did not cause the arthritis found in claimant’s knee, the injury resulted in damage to his ligament and cartilage.*

Dr. Watson examined the claimant as a result of claimant’s attorney and took a history consistent with the claimant’s version of intense pain only when he descended that ladder. He concluded that the knee condition was aggravated from climbing the ladder while bearing additional

weight.

Prior to the accident date, Chuck Helms had worked for the same employer and with the claimant on a job in Danville, at which time Helms noted the claimant walked with a limp. At that time, the claimant advised that he had a hard time getting up and down ladders. With reference to the accident in question, Helms denied that the claimant had reported any injury. Another fellow employee who had worked with the claimant on the prior Danville job, was told by the claimant about his leg bothering him and putting off having it treated. On the witness stand, claimant testified that he walked with a limp because his big toe on his left foot had been amputated in 1983 and denied any discussions about a prior condition to his knee.

How did the court deal with the apparent conflicts in testimony between Dr. Wall’s initial history and his present testimony? Claimant disagreed with Dr. Wall’s notes that he woke up with pain and that the injury had been a chronic problem for three years. With reference to the doctor’s report concerning the absence of a new injury, the claimant stated that he was referring to some incident more dramatic in nature, such as falling from a ladder.

Finally, with a direct conflict concerning his reporting of the claim to Helms, the court did not state that it disagreed with Helms but noted that the claimant and Helms were working on different sides of the roof and Helms might not have witnessed the injury. Finally, in a surprising comment, the court noted that the employer did not rebut the claimant’s statement that he limped due to an amputated toe rather than difficulty with the right knee. How could the employer rebut

information that it had never received?

**EDITOR'S NOTE:** Based on the reasoning of the court, it would seem impossible to reverse the Commission on a claim involving an aggravation of a previous injury. Even the records of the claimant's original treating physician, which specifically denied any new injury, were not enough to overcome the claimant's testimony.

### **EMPLOYER FAILS IN ATTEMPT TO AVOID ILLINOIS JURISDICTION**

As everyone in the compensation claims business knows, Illinois is one of the most liberal states in awarding workers' compensation benefits. Consequently, whenever possible, the claimant will attempt to obtain Illinois jurisdiction. In many cases, especially involving Illinois employment contracts, it is rather routine for the employee to obtain the maximum benefits awarded under Illinois law.

In the *P.I. & I. Motor Express* case, Tony Faulkenberry, employed as a truck driver, had signed a form by which he agreed to be bound by the workers' compensation laws of the State of Ohio and that the Ohio statute would be the exclusive remedy. Unfortunately for the employer, the form stated that the contract of hire had been entered into in the State of Illinois. On May 16, 2001, while driving his truck on an interstate highway in Pennsylvania, he was involved in a collision forcing his truck off the road. After emergency treatment, which did not require hospitalization, he returned to his home in East St. Louis, Illinois, where he complained of pain in his neck and back, which extended into his legs. Eventually, the claimant underwent a low back surgical

laminectomy and fusion.

The claimant originally applied for benefits in Ohio and received \$8,466.64 in "indemnity" benefits and \$12,666.64 in medical benefits. On November 19, 2001, the claimant attempted to obtain a rehearing before the Ohio Commission. The arbitrator in Ohio concluded that the surgery was not necessary as a result of the accident. Thereafter, the matter was set for a final hearing before the Ohio Industrial Commission but the record fails to indicate that the Ohio Commission ever rendered a final decision.

During the pendency of the Ohio claim, the claimant had filed a claim before the Illinois Industrial Commission. A dispute concerned the identity of the actual employer and additional benefits were awarded without making any reference to credits.

The documents introduced during the hearing in Illinois established that the contract of hire was entered into in the State of Illinois and, on that basis, Illinois could apply its own workers' compensation statute, even though the claimant's injury occurred elsewhere. The Illinois court refused to be bound by the Ohio statute, stating:

*We believe, therefore, that any agreement between an employer and an employee which purports to divest the Commission of jurisdiction would otherwise exist as contrary to the public policy of this State and is, therefore, unenforceable.*

The employer contended that the full faith and credit clause of the United States

Constitution required each state to give full faith and credit to *the public acts, records and judicial proceedings of every other state*. The court in Illinois concluded that this clause did not compel a state to apply the conflicting statute of another state rather than its own statute that deals with a subject matter which it is competent to legislate. Nothing in either statute suggested that the employer could not claim credit in Illinois for payments made in Ohio.

The employer further argued that a final decision had not been made in Ohio on the question of medical causation and that its finding of fact should be accepted in Illinois. The court reviewed the Ohio proceedings and decided that Ohio had not reached a final decision as to the employer's obligation to pay for the surgery.

With reference to the employer's contention that Illinois was bound to give full faith and credit to the laws of another state, the Illinois court stated that any agreement between an employer and an employee which purports to divest the Commission of jurisdiction where it otherwise exists is contrary to the public policy of the State of Illinois.

**EDITOR'S NOTE:** Similar types of injuries in Illinois had generally provided a much greater recovery than that obtained by this claimant in Ohio. The best that the employer could hope for is that it would receive credit for payments made under the Ohio statute. This case is another example as to why Illinois jurisdiction is considered such an important element in obtaining major benefits for the employee.

**AMPUTEE EMPLOYEE CONTENDED THAT THE PAYMENTS PERTAINING TO REPLACING AND SERVICING HIS PROSTHESIS SHOULD NOT BE INCLUDED IN THE EMPLOYER'S**

## SUBROGATION CLAIM

In our September, 2006 Alert, we described the *Gallagher* case where the employee alleged that the employer had forfeited its workers' compensation lien by failing to specifically reserve it in its settlement contract. In describing the purpose of Section 5(b), the court stated:

*The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse it for its compensation outlay, and to give the employee the excess. This is fair to everyone concerned: the employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he or she would normally pay \*\*\*; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone."*

In the *Crispell* case, the employee contended that the employer's subrogation claim should not include "medical bills totaling \$31,786.63 for necessary maintenance, repair, and replacement of petitioner's prosthesis prior to arbitration; and similar prosthetic expenses in the future." The employee's argument placed a highly technical definition of the term "compensation" and alleged that this type of service was not included in that term. After a thorough review of the statutes and the present interpretation of the term "compensation," the court held as follows:

*If any employer unreasonably or vexatiously disobeyed a Commission order to pay prosthetic expenses, the aggrieved employee could seek penalties under section 19(k) of the Act - a*

*provision linking penalties to delayed or underpaid "compensation." Likewise, amounts of prosthetic payments are included in an employer's lien under section 5(b), a provision that also hinges on payment of compensation.*

**EDITOR'S NOTE:** It is ironic that the employee would claim and accept benefits under the Act and then attempt to make a double recovery by denying that the employer was entitled to reimbursement.

### **THE DIFFICULT TASK OF CALCULATING INTEREST ON WORKERS' COMPENSATION AWARDS**

Mark Matranga has undertaken to explain the difficult issues arising from calculating interest on workers' compensation awards. The method of calculation varies as the case progresses through the Commission and the courts. As Mark points out, the decisions are sufficiently conflicting so that future litigation will certainly follow.

The question of how one calculates interest on Compensation Commission awards is a vexing one which most practitioners thought was settled in *Ballard v. Industrial Commission*, a 1988 case. The *Ballard* rule calls for interest under section 19(n) of the Act to be applied to all compensation accrued as of the date of the arbitrator's award and interest under section 2-1303 of the Code of Civil Procedure, calculated from the date of the Commission's decision, on compensation which accrues after arbitration.

This method has been called into question in a recent case, *Radosevich v.*

*Industrial Commission*, where the majority held that the petitioner was entitled to section 19(n) interest (1.64%) on compensation accrued through the date of the arbitrator's award plus interest under the Code (9%) retroactively on all compensation which accrued after that date, calculated from the date of the arbitrator's decision. The concurrence/dissent stated the rule differently: interest is payable under section 19(n) for all sums accrued through the date prior to payment and interest under the code for all sums due as of the date of judgement in the circuit court.

**EDITOR'S NOTE:** Calculation of interest on Commission awards is unnecessarily complex, and the majority opinion in *Radosevich* does nothing to simplify matters. The concurrence is at least a plain interpretation of section 19(n), which calls for interest to be paid "on all accrued compensation due the employee through the date of payments." Considering the split in this three-judge panel, we advise continuing to use the *Ballard* method until the Industrial Commission Division of the Appellate Court provides guidance.

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