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TRUCK DRIVER WHO SUSTAINED A HEART ATTACK WHILE DRIVING A TRUCK WAS DENIED COMPENSATION. WHAT EFFECT DOES THIS DECISION HAVE UPON THE *SISBRO* AND *TWICE OVER CLEAN* CASES?

You may recall that we previously reported on two cases where the appellate court had denied compensation where the accidental injury was caused by the employee's "normal daily activity." In *Sisbro*, the claimant allegedly aggravated the degenerative condition related to his diabetic condition when he twisted his ankle when disembarking from his truck. In *Twice Over Clean*, the claimant, who had a 90% occlusion of the right coronary artery was denied compensation because he was "basically a heart attack waiting to happen." Both cases were reversed by the supreme court, which contended there was no "limitations" or "exceptions" to compensation that can be imposed to defeat a right to recovery. In our last Newsletter, we suspected that a "normal daily activity" defense would be difficult to utilize before the Commission.

The recent *Swartz* case might lead to some optimism on this issue. The facts are similar to those in *Twice Over Clean*. Swartz was driving a truck when he suffered a cardiac event and died almost immediately. The evidence showed that the

decedent's physical condition was deteriorated by obesity, diabetes, enlarged heart and severe narrowing of his major artery in the range of 75 and 90 percent. The Commission further stated that decedent's condition was so far advanced that any physical exertion would have been an overexertion and "if there was any stress associated with decedent's driving, it was legally insufficient to warrant compensation." On appeal, the circuit court upheld the Commission's finding.

The appellate court affirmed the circuit court holding and reconciled *Swartz* with the supreme court's holdings in *Sisbro* and *Twice Over Clean* on a number of bases. First, the appellate court stated the Commission never found a causal connection existed between decedent's employment and his fatal cardiac event. Therefore, it was not acting to overturn the Commission's finding as the appellate courts did in *Sisbro* and *Twice Over Clean*. Second, in *Swartz*, the Commission did not attempt to inappropriately apply the "normal daily activity" or "greater risk exception" as a bar to recovery. Instead, the Commission considered the appropriate factors, weighed the evidence and found that compensation was not appropriate. Specifically, the Commission found that the decedent's heart condition was so advanced that a cardiac event was inevitable and could have occurred anywhere at anytime. It further found that the stress of driving was not unique to decedent's employment [a factor that distinguished the decedent's job requirements from those of the petitioner in *Twice Over Clean*]. In essence, the appellate court held that after weighing the factors set out by the court in *Sisbro*, the manifest weight of evidence was not against a finding that the decedent was so predisposed to the cardiac event that his physical condition made any causative factor at work legally insufficient.

EDITOR'S NOTE: As you will note that the appellate court did not attempt to apply the "normal daily activity" rule as such but sustained the Commission's finding as not being against the manifest weight of the evidence.

Two of the five justices dissented contending that the decision contradicted the findings of the supreme court in *Sisbro*. Most likely, the supreme court will have another opportunity to review this difficult question.

CAN THE EMPLOYER UTILIZE A COMPROMISE PAYMENT OF HOSPITAL AND MEDICAL EXPENSE AS A FULL RELEASE OF ALL LIABILITY?

The recent supreme court decision in the civil case of *Joyce Arthur v. Laurie Catour*, describes the application of the collateral source rule in a personal injury case where the decision may be extended to affect medical benefits in a workers' compensation claim. The plaintiff, Joyce Arthur, sustained a fall while attending an auction on the premises of the defendant, which fall resulted in a fractured leg, requiring hospitalization and surgery. Arthur incurred medical and hospital charges totaling $19,355.25. She had a private group insurance policy with Blue Cross through her husband's employer. Blue Cross negotiated a reduction of the charges by $5,777.28, thereby paying only $13, 577.97 to satisfy the total charge. The issue arises out of the plaintiff's claim that in the presentation of damages in the civil case, she is entitled to the entire $19,355.25

and not only the discounted amount of $13,577.97. The supreme court held that the plaintiff was not limited to the discounted amount paid by the insurer.

Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tort feasor will not diminish damages otherwise recoverable from the tort feasor. The court stated:

> *The rule is well established that damages recovered by the plaintiff from the defendant are not decreased by the amount the plaintiff received from insurance proceeds, where the defendant did not contribute to the payment of the insurance premiums.*

Both the majority and the minority opinion indicated that several additional problems were now raised. Plaintiff now cannot rest by introducing the full charge because the reasonableness of the charge is shown only if the entire bill is paid. Too, it is difficult to understand how the defendant could be prevented from questioning any witness as to whether the reasonable charge might be the amount actually paid to the provider, thereby revealing that the plaintiff recovered from a collateral source, thereby violating the rule.

The question that had been certified by the trial court to the appellate court and eventually the supreme court stated as follows:

> *Whether the Plaintiff who was charged $19,355.25 in medical bills for medical services related to her injuries can present that amount of bills as medical expenses in the case or, whether the Plaintiff shall be limited to presenting only $15,577.97 in medical bills to the jury because that is the amount that was paid by the Plaintiff and Blue Cross/Blue Shield, who was an insurance carrier for the Plaintiff and who paid the Plaintiff's medical bills pursuant to insurance contracts at a substantially reduced rate with the medical providers and which the providers accepted as payment in full.*

The answer of the supreme court to the certified question is stated as follows:

> *Plaintiff may present to the jury the amount that the health-care providers initially billed for services rendered.*

EDITOR'S NOTE: The collateral source rule has never been as important in workers' compensation cases as in civil cases. Juries are not informed as to any evidence of insurance or as to methods of payment of expenses. In compensation cases, the arbitrator is fully aware of all insurance issues and, as a matter of fact, is frequently asked to decide the questions of insurance liability. What effect does this *Arthur* case have on the possible compensation liability of the employer to the claimant for the discount obtained by the health insurance carrier? A workers' compensation case could present one of a number of possible similar issues.

1. If the hospital bill is negotiated by the employer or the workers' compensation insurance carrier, the employer would clearly be entitled to the discount because the negotiated bill was accepted as

reasonable. The claimant is not entitled to this discount because he was not involved in the bill payment process. The same may be true if the employer contributed the entire premium to the union. If the employee had contributed the entire premium and the bill was discounted by the union health carrier, the employee may be entitled to receive the amount of the discount.

2. If the discount was negotiated by the union health program, was paid by the employer, either totally or partially, and the terms of the policy fit within the provisions of Section 8(j), then the employer would have a credit for the amount paid by that union plan.

3. If the matter was contested so that the claimant's bills were paid by his spouse's health carrier, then if the *Arthur* case were to be followed, the claimant could collect the entire charge and not the discounted amount paid by the spouse's health policy.

4. If the charges were to be paid by public aid, or some other public program, then any possible risk might be increased because those particular programs accept a small portion of the expended charge. Could then the claimant submit the entire bill to the arbitrator at the time of the hearing?

As stated before, the collateral source rule conceals from the jury the fact that the charge may have been paid by someone other than the claimant. This could include an employer's HMO, a union plan contributed to by both the employer and employee, an automobile medical payment plan or a workers' compensation benefit payment. The information on payment by these collateral sources would be inadmissible in the civil case but permissible in the workers' compensation hearing.

Keep in mind that the fact of their admissibility before the arbitrator does not automatically entitle the employer to credit. Only direct payments by the employer, or those made under Section 8(j) are certain to be credited.

Another factor to be considered is that, effective February 1, 2006, the commission shall establish a fee schedule which will describe the reasonableness of the medical charges. Conceivably, this could be greater than the amount paid by a health carrier. In such an event, could the claimant recover the discounted amount in the same fashion as the plaintiff in *Arthur*?

EVIDENCE OF COCAINE IN DRIVER'S SYSTEM AT TIME OF ACCIDENT, TOGETHER WITH COMMISSION FINDING THAT HIS TESTIMONY WAS NOT CREDIBLE, DID NOT PREVENT COURT FINDING FOR CLAIMANT

CLAIMANT'S ACCIDENT VERSION

On April 17, 1996, Thomas Mokos, who had been employed by McKernin Exhibits since 1990, reported to work at approximately 6:45 a.m., at the employer's place of business in Harvey, Illinois. At 7:30 a.m., his supervisor, Daniel McKernin, instructed the claimant to deliver a cardboard graphic to a company in Chicago.

McKernin suggested he use a company pickup truck, which was customarily used by McKernin as his personal vehicle, to make the delivery. According to the claimant, he was returning to McKernin Exhibits via southbound Route I-57. At approximately 9:30 a.m., the pickup truck that the claimant was driving struck the rear of an 18-wheel semi-truck as the vehicle traveled southbound in the right-hand lane on Route I-57, near 127th Street.

Claimant stated that he was traveling approximately 50 mph at the time of the collision. He stated that the pickup truck would shake at speeds of 55 to 60 mph.

Claimant further testified that as the semi-truck operated by Jackie Ray Edwards entered Route I-57 from the 127th Street ramp traveling at approximately 40 mph, it merged into the claimant's lane of southbound traffic without using any signals. The claimant was unable to stop his vehicle and struck the rear of the semi-truck. The claimant stated that he was dragged about 100 feet.

The claimant gave several versions of his recollection. At the hearing, he testified that he did not remember the facts of the collision for approximately one week because of the medication he was given. In a discovery deposition in the civil case, he testified that he could always remember the circumstances of the collision. However, his treating physician's records show that the claimant had no recollection of the events two months after the accident.

SEMI-TRUCK DRIVER'S VERSION

Jackie Ray Edwards, the driver of the semi-truck struck by the claimant, testified that he entered route I-57 from the 111th Street ramp and had been on the highway for several minutes prior to the collision. Edwards stated that he was traveling at approximately 45 miles per hour when his vehicle was struck in the rear by the claimant's pickup truck. According to Edwards, following the impact, the claimant's vehicle was dragged 250 to 300 feet. The employer's accident reconstruction expert had the claimant traveling 70 to 80 mph at time of impact.

TESTIMONY REGARDING COCAINE USAGE

The claimant was taken to a hospital where he remained for eleven days. A urinalysis test taken at the hospital on the day of the accident revealed cocaine in his system. The claimant admitted that he had used cocaine one to two weeks prior to the accident, but told Daniel McKernin that he had last used cocaine three weeks prior to the accident. Dr. Shaku Teas, who never examined or even spoke to the claimant, testified that a review of the claimant's records revealed no physical signs consistent with cocaine intoxication. She, therefore, opined that there was no evidence that the claimant was impaired or intoxicated at the time of the accident. With reference to the claimant's admission about his last use of cocaine, she stated that evidence of cocaine use customarily disappears in two to three days and may only be found for a maximum of six days. In effect, Dr. Teas' testimony did not overrule the employer's claim that the claimant was under the influence of cocaine at the time of the accident. Claimant additionally testified that he had been found guilty of three felony counts of delivery of cannabis and was on three-years felony probation at the time of the arbitration hearing. In effect, the claimant was a convicted narcotics distributor, commonly

known as a "dope dealer."

Incidental testimony was that of Daniel McKernin that he did not note on his observation of the claimant just prior to the accident that he was suffering from the effects of cocaine and James McKernin, his brother and fellow owner, stated that he had received a call from the claimant's wife shortly after the accident that the claimant had not come home the night before.

Some of the surprising aspects of this case are as follows:

1. The claimant described the semi-truck as entering I-57 at 127th Street without indicating a turn signal, turning into the claimant's lane. The driver of the semi-truck had actually been in that lane for two miles, having entered at 111th Street, before the semi-truck was struck by the claimant's vehicle. Most likely, the claimant's subsequent statement that he could not recall the accident was accurate. If Edwards' statement is true, there is no explanation for the accident except the claimant's lack of control due to the cocaine intoxication.

2. The court noted that the arbitrator had relied on Dr. Teas' opinion even though she had never treated or spoken to the claimant and where she had contradicted the claimant's information as to the most recent use of cocaine, that is, that the cocaine could have been ingested shortly before the accident and certainly no more than six days prior to the accident. The fact that the claimant did not come home the night before the accident could be explained by his episode with cocaine.

3. There was contradictory testimony between the claimant and the semi-truck driver in that the claimant stated his vehicle was dragged about 100 feet when the semi-truck driver described it as 250 to 300 feet. The defendant's accident reconstruction expert had the claimant's vehicle traveling between 70 to 80 mph at the time of impact. Based on the claimant's inaccurate information as to where the semi-truck was driving, the evidence suggests that he never saw the semi-truck. The claimant, in an attempt to show a low speed, described his pickup truck as shaking at 55 to 60 mph. Daniel McKernin, who drove the pickup truck on a regular basis, denied the existence of such a condition.

4. The felony conviction for narcotics distribution provided an evidentiary attack on the claimant's entire credibility. Since every aspect of his testimony was impeached by his own prior testimony or the testimony of other witnesses, no credibility should be given to the claimant's disputed accident version.

The arbitrator rendered a surprising decision where she stated that she gave "little, if any, weight to the testimony of the claimant as his testimony was inconsistent, evasive and not supported by the evidence." Nevertheless, she found the accident to arise out of and in the course of the employment, awarding TTD and PPD in addition to $145,000 in medical expenses. The appellate court adopted the Commission's finding that the claimant's testimony was "inconsistent, evasive and not supported by

the records" and acknowledged that the testimony of Dr. Teas did not support the claimant's position and yet found that the Commission decision was not against the manifest weight of the evidence.

Despite the fact that the Commission found that the claimant's testimony was not credible, that the claimant's testimony was subject to impeachment because of his narcotics distribution conviction and that no other evidence supported the claimant's condition, including the testimony concerning the circumstances of the accident, the Commission's finding of compensability was accepted.

The decision actually assumes that no cocaine intoxication was established and the testimony of Dr. Teas impeached the claimant and yet affirmed a substantial award. Against the weight of all of the evidence, the appellate court affirmed the decision for the claimant stating that it could not conclude that the decision was against the manifest weight of the evidence.

EDITOR'S NOTE: In the past, the courts have denied compensation when the driver exhibited evidence of substance abuse while driving a vehicle. This is the first driving substance abuse case that I can recall.

During the appellate court arguments, one of the Justices stated that the court should just accept the fact that claimants lie as a matter of course. The Justice noted that the claimants are simple people who feel that they must give an explanation for everything (when an explanation may not be necessary) so they lie. The court understood the reason for the lies and would not penalize the claimants for perjury.

On that basis, what value is the new Fraud statute that our elected representatives trumpeted as a weapon against fraud when the claimant's award, based on perjured testimony is affirmed by the appellate court?

I must disclose the fact that our office originally provided the defense in this case until the attorney in our office who was handling this case joined another firm. I believe, however, that the facts are so overwhelming against this decision and my opinion was not based on my prior involvement. The danger in this case is the sense that the Commission and the courts will find in favor of the claimant even when the claimant has been impeached and is without credibility on a highly contested case. Perhaps, the court feels that this type of questionable testimony may be prevalent when it is necessary for the claimant to be successful in this claim.

FRANK J. WIEDNER
Editor