WHEN A SIMPLE CASE TURNS COMPLEX: BACK STRAIN TO WAGE DIFFERENTIAL TO PERMANENT TOTAL DISABILITY TO DEATH FROM UNRELATED CAUSE
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I. INTRODUCTION

In this section, we present a study of an actual case handled by the author which reflects many of the twists and turns a case may take from accident to resolution. At each step we will explore what was done and perhaps what should have been done to minimize the costs of this claim. We will also explore the law as it applies to unusual situations, including where an individual is laid off for economic reasons while on permanent restrictions, whether an individual who could not work for unrelated problems is entitled to TTD while under permanent work restrictions, and whether a claim under the man as a whole provisions of section 8(d)(2) survive the death of the petitioner prior to the entry of an award.

II. FACTS

Petitioner was a 59-year-old maintenance supervisor (birth date: September 26, 1947) when he was injured in the course and scope of his employment on January 16, 2007. A high speed door broke and came down on a machine the petitioner was driving, striking him on the head. The petitioner was knocked to the ground but did not lose consciousness. He was taken to the emergency room where x-ray noted an old C6-C7 spinous process fracture in his neck and what appeared to be non-displaced transverse process fractures at L1 and L3. Physical examination was normal to near normal, including full range of motion in the back and neck; however, the petitioner complained of bitter pain even after receiving morphine and was unable to sit up or even attempt to walk. Ultimately, he was released from the emergency room with a diagnosis of blunt trauma, left chest contusion, and left L1 and L3 transverse process fractures non-displaced. The petitioner had an average weekly wage of $1,005.94, a TTD rate of $669.96, and a PPD rate of $603.02. The petitioner had a prior history of workers' compensation injuries and settlements, including a fusion at L5-S1 in 1982 from which he had experienced ongoing back and right leg pain, but had been able to work prior to the accident of January 16, 2007. In addition, in 2006 he had experienced a work related right shoulder injury.
1. Based on these facts what investigation should be performed?

Answer:
Obtain complete medical records of all prior injuries with a focus on the 1982 fusion and the nature of the recovery.

Obtain copies of all prior workers’ compensation settlements from the Illinois Workers’ Compensation Commission.

2. What is the case value at this point assuming a good recovery?

Answer:
Section 8(d)(2) of the Illinois Workers’ Compensation Act sets the minimum for fractured transverse processes at three weeks each. A more probable value would be 5 percent loss of a person as a whole.

The petitioner continued to complain of back pain radiating down both legs, with the right leg being worse than the left, and ultimately underwent an MRI scan on February 23, 2007. The MRI scan revealed:

1. Mild central spinal stenosis at L5-S1;
2. Non-displaced healing transverse process fractures.

Following the MRI scan the petitioner was seen by an orthopedic surgeon who felt the spinal stenosis at L4-L5 was significant and recommended surgery in the form of a laminotomy at L3-L4 (where there was only slight narrowing) and L4-L5 (where the orthopedist opined that the canal was only one-third of its normal size, notwithstanding that the MRI findings indicated that this was only “a mild” finding. The petitioner’s complaints of leg pain radiating down the outside of his thigh and the outside of his calf around to the front of his leg were considered consistent with the L5 distribution (L4-L5).

The treating doctor noted he wanted to make sure he did not perform a surgery on the petitioner that made the scans look better without helping the petitioner’s symptoms.
1. What is the significance of the finding of mild “central” spinal stenosis?

2. What, if any, evidence is there that the surgical problem is causally related to the accident of January 16, 2007?

3. How might the employer/respondent respond to this surgical request?

Answer:
Section 12 IME with respect to the issues of causation as well as reasonableness and necessity of surgery.

Utilization review pursuant to section 8.7 to address the reasonableness and necessity of the surgery given the relatively minimal findings and the presence of significant pre-existing spinal stenosis.

On March 20, 2007, the petitioner underwent surgery in the form of a laminotomy at L3-L4 and L4-L5 for an admission diagnosis of “lumbar stenosis.”

Assuming a full recovery, what is the value of the case at this point?

Answer:
Approximately 25 percent loss of use of a person as a whole pursuant to section 8(d)(2).

III. POST-OPERATIVE COURSE

Post-operatively the petitioner continued to complain of pain radiating to his legs, as well as depression. A post-operative MRI scan of his lumbar spine in May 2007 showed that the lumbar spine was “now nicely opened.” It appears surgery did make the scans look better without relieving the petitioner’s symptoms. On June 11, 2007, he was released to return to work by his occupational medicine doctor with a 20-pound lifting restriction. He was to start working two hours per day for three weeks and build up until he was working full time.

Shortly after “returning to work” the petitioner sought treatment from a psychiatrist for depression and post-traumatic stress disorder and asked to be taken off work. The doctors, however, indicated that he should continue to work as previously outlined.

The petitioner underwent an independent medical evaluation on June 13, 2007 with an orthopedic surgeon due to his slow progress. Of interest, the petitioner gave a history that
subsequent to the 1982 lumbosacral fusion, he had constant low back pain running down his right lower extremity and that he estimated that surgery provided him with only 50 percent improvement. He acknowledged he continued to have constant low back and leg pain but was able to work and was not on medication. He claimed the problem was significantly exacerbated by the January 16, 2007 work accident.

Although there were objective findings, significant symptom magnification was detected. Specifically, there was an inconsistent response to straight leg raising between the sitting and supine positions, the presence of pain on simulated trunk rotation, and it was noted that the amount of quadriceps weakness demonstrated on manual testing was physiologically inconsistent with the petitioner’s ability to walk normally.

On August 21, 2007, the petitioner returned to his occupational medicine doctor, complaining of continued low back pain radiating down his right leg. Nonetheless, his restrictions were increased to 25 to 30 pounds lifting.

The petitioner was found to be at maximum medical improvement by his treating doctor on September 25, 2007, given a permanent lifting restriction of 25 to 30 pounds. No offer was made at that time as this particular carrier has a policy of soliciting a demand prior to extending an offer.

On October 31, 2007, the petitioner’s plant closed as his company was going out of business and he was laid off for economic reasons. He remained on restrictions of no lifting greater than 25 to 30 pounds.

**Is petitioner entitled temporary total disability when working with permanent restrictions at the time his employer goes out of business for economic reasons?**

**Answer:**

Probably. There is a line of decisions holding that the focus should be on the employee’s restrictions and inability to perform his or her usual employment, not the economic related layoff (Ford Motor Co. v. Industrial Comm’n, 126 Ill. App. 3d 739, 467 N.E.2d 1018, 81 Ill. Dec. 896 (1st Dist. 1984); National Lock Co. v. Industrial Comm’n, 166 Ill. App. 3d 160, 519 N.E.2d 1172, 117 Ill. Dec. 5 (2d Dist. 1988)). A recent decision, however, suggests that petitioner may need to show a failed job search in order to continue to receive TTD under these circumstances (Residential Carpentry, Inc. v. Illinois Workers’ Compensation Comm’n, 389 Ill. App. 3d 975, 910 N.E.2d 109, 331 Ill. Dec. 36 (3d Dist. 2009)).
On October 15, 2007, the petitioner completed a two-day functional capacity evaluation. It concluded that the petitioner was fully cooperative but would be limited to a “sedentary” position. Subsequent to the FCE, the petitioner followed-up with his occupational medicine doctor, who after reviewing the FCE placed permanent restrictions of 20 pound lifting occasionally, 15 pound lifting frequently, which he thought would be in the “light” category. The petitioner was told to follow-up prn. Again, the carrier did not extend an offer but a demand was solicited.

In November 2007, the petitioner who is now 60 years old, applied for social security disability.

On January 7, 2008, the petitioner’s counsel indicated the petitioner was, in their opinion, permanently and totally disabled, and extended a demand of $440,000.00 cash plus a Medicare Set-Aside. Petitioner has a G.E.D. plus a two-year associate’s degree in accounting from a junior college.

**IV. STRATEGY**

1. Verify permanent total disability calculation.

2. Take steps to reduce the claim to a wage differential under section 8(d)(1).
   
   a) A labor market survey was obtained which revealed the petitioner, who had previously earned approximately $25.00 per hour, could earn in the $10.00 to $12.00 per hour range.

   b) A rated age was sought from reputable insurance companies and revealed that although he was age 60 chronologically, physiologically the petitioner’s rated age would be between 62 and 68.

   c) The next step is to calculate the costs in purchasing a rated age annuity that would pay the petitioner weekly benefits based on the assumption that he could find a job for both $10.00 and $12.00 per hour for the duration of the disability.
What is the duration of disability under Illinois workers’ compensation law?

Answer:
“Life” not “work life.”

Why are we using a rated life annuity?
_________________________________________________________________________________________
_________________________________________________________________________________________
_________________________________________________________________________________________

After completing the labor market survey, obtaining a rated age, and pricing the value of the potential wage differential based on a rated age life expectancy, the lump sum value of the claim was determined to be between $200,000.00 and $230,000.00. A MSA was priced and came back at $54,000.00.

Subsequent to completing the above, in March 2008 authority was requested from the carrier based on the above calculation. Unfortunately, due to the value of the case and the organization of this particular carrier, authority was not rapidly obtained. In June 2008, a new adjuster was assigned to this case, and in October 2008 yet another new adjuster was assigned to this case. On October 20, 2008, the carrier’s home office asked if we would be entitled to take a credit from the prior man as a whole settlement from the 1982 back fusion.

Under the Illinois Workers’ Compensation Act, is a credit available for a prior man as a whole settlement under section 8(d)?

Answer:
No. The credit is available for prior settlements based on loss of use of a scheduled body part pursuant to section 8(e)(17). A credit is not available as to prior person as a whole settlements under section 8(d)(2) (Page Enterprises, Inc. v. Industrial Comm’n, 78 Ill. 2d 287, 399 N.E.2d 1312, 35 Ill. Dec. 784 (1980); Consolidated Freightways v. Industrial Comm’n, 237 Ill. App. 3d 549, 604 N.E.2d 962, 178 Ill. Dec. 439 (3d Dist. 1992)).

In November 2008, the petitioner’s condition deteriorated (according to him) and he commenced treatment for chronic pain and increased weakness. He was prescribed various pain medicines, ultimately including morphine. Later in October 2008, total authority was extended of
$284,200.00 and an offer was extended at $190,000.00 plus the $54,000.00 MSA, for a total of $244,000.00.

The petitioner’s counsel countered in December 2008 at a flat $400,000.00 plus the MSA. Although additional settlement authority was available, it was decided at that point to proceed with vocational rehabilitation, since the petitioner had a G.E.D. and a two-year associate’s degree in accounting. In addition, an independent medical evaluation was ordered to verify the current condition. The examining doctor concluded the petitioner should be able to work with a lifting limit of up to 25 pounds but indicated that based on his significant chronic and ongoing pain, he would not be able to work at any capacity until he was off all pain medicine. There were findings of symptom magnification, including discrepancies in straight leg raising tests when supine versus sitting, as well as the absence of muscle atrophy in the right leg (symptomatically), which one would expect if the radiating pain was significant.

The petitioner’s position in early February 2009 was that if the case could not be settled for $400,000.00, they would seek an award of permanent total disability at the time of arbitration. There was, however, a suggestion that they might settle the case for $300,000.00 if it was rapidly forthcoming. No counter offer was extended as the carrier wished to proceed with vocational rehabilitation.

During the Spring and Summer of 2009, the petitioner’s condition continued to deteriorate. He was not able to fully cooperate with the vocational consultant because he was on morphine to control his pain. He also restarted his psychiatric treatment for chronic depression and at one point threatened to harm both his attorney and counsel for the respondent. By the early Summer of 2009 he had requested a motorized wheelchair as he was no longer able to ambulate. An unrelated matter, no doubt affecting his mental status, was the death of his three-year-old granddaughter in early August 2009 from spinal meningitis.

In September 2009, an updated MSA was sought and the value, as expected, had increased from $54,000.00 to $76,407.00, primarily because of the increase in expected future pharmacy costs. After a fair amount of back and forth negotiations with significant input and activity by an annuity specialist, the case was settled in October 2009 for $290,000.00 ($160,000.00 cash and $130,000.00 structured) plus $76,407.00 for the Medicare Set-Aside.

After the agreement had been reached but before the contracts had been approved, the petitioner was diagnosed with metastatic terminal cancer. Medical records revealed a tumor had been detected as long as 18 inches and as wide as five inches, running upward from his testicles. He was given less than six months to live.
If the petitioner died from unrelated causes prior to the settlement, would his claim survive?

**Answer:**
Probably yes. Awards based on a percentage loss of use of a person as a whole under section 8(d)(2) survive an employee’s death when the death is unrelated to the accidental injury and shall be paid to the beneficiaries of the deceased employee as provided in section 7(g). This applies even if there was no award at the time of death (*Electro-Motive Div. v. Industrial Comm’n*, 250 Ill. App. 3d 432, 621 N.E.2d 145, 190 Ill. Dec. 276 (1st Dist. 1993). The claim shall proceed as if the death had not occurred and the award shall be distributed to the dependents of the deceased petitioner (*Freeman United Coal Mining Co. v. Industrial Comm’n*, 386 Ill. App. 3d 779, 901 N.E.2d 906, 327 Ill. Dec. 173 (4th Dist. 2008)).

The petitioner’s position was the settlement was done and we should proceed with the approval as soon as possible. Our position was that no settlement is final until the arbitrator has stamped his or her approval and that this information changed the value of the case.

1. **How would the petitioner’s diagnosis of a terminal disease affect the value of the case?**

2. **Is an employee who has permanent restrictions which the employer cannot accommodate entitled to temporary total disability benefits where they are also unable to work as a result of unrelated health conditions (e.g.; cancer, Parkinson’s)?**

3. **Would it change the petitioner’s entitlement to temporary total disability benefits if the employer could have accommodated the restrictions but the petitioner was not working due to the unrelated health conditions?**

**V. FINAL RESOLUTION**

An offer of $200,000.00 was extended as even if the petitioner lived only six months, no doubt the case could be arbitrated in that timeframe. The case was ultimately settled for $235,000.00 cash.
VI. POTENTIAL ISSUES AND LESSONS

1. Serious consideration could have been given as to whether the petitioner’s deteriorating condition and chronic pain during the prior 12 months was related to the metastatic cancer as opposed to his chronic low back pain. No doubt that would have required another IME.

2. Claims of this sort do not get better with age. Note this individual was paid TTD at almost $670.00 per week from August 2008 until the Spring 2010. For many months these payments were made while the carrier was endeavoring to obtain appropriate authority. During that time frame, not only were the payments made, additional medical was incurred, and the petitioner’s condition deteriorated. Often it makes sense to pay a little bit more upfront and get the case closed, rather than run the risk of the case value exploding.
Bruce is the immediate past Chair of our state-wide workers' compensation practice group and has spent his entire legal career with Heyl Royster beginning in 1982 in the Peoria office. He concentrates his expertise in the area of workers’ compensation, third-party defense of employers, and employment law. He served as a technical advisor to the combined employers group in the negotiations which culminated in the 2005 revisions to the Illinois Workers’ Compensation Act.

Bruce was recently appointed by Amy Masters, Acting Chairman of the Illinois Workers’ Compensation Commission, to a committee of attorneys who will be reviewing and making recommendations for revisions to the rules governing practice before the Illinois Workers’ Compensation Commission.

With extensive experience before the Illinois Workers’ Compensation Commission, Bruce has defended employers in thousands of cases during the course of his career. As a result of his experience and success, his services are sought by self-insureds, insurance carriers, and TPAs.

Bruce is an adjunct professor of law at the University of Illinois College of Law where he has taught workers’ compensation law to upper-level students since 1998.

Bruce has co-authored a book with Kevin Luther of the firm’s Rockford office entitled Illinois Workers’ Compensation Law, 2009-2010 Edition, which was recently published by West.* The book provides a comprehensive, up-to-date assessment of workers’ compensation law in Illinois.

Bruce is a frequent speaker on workers’ compensation issues at bar association and industry-sponsored seminars.

Bruce has served as Vice-Chair of the ABA Committee on Employment, Chair of the Illinois State Bar Association Section Council on Workers’ Compensation, and currently serves on the Employment Law Committee of the Chicagoland Chamber of Commerce and the Illinois Chamber of Commerce Workers’ Compensation Committee. He has been designated as one of the “Leading Lawyers” in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Record; another survey published recently by Chicago Lawyer Magazine named Bruce one of the “Best Lawyers in Illinois” for 2008.

Public Speaking
- “Impact of the New Medical Fee Schedule” SafeWorks 14th Annual Work Injury Conference 2006
- “Penalties, Penalties and More Penalties, The Changes to Section 19 and Strategies for Minimizing Penalties Exposure” CCMSI 2008

Professional Recognition
- Martindale-Hubbell AV Rated
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the 2010 Illinois Super Lawyers list. The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

Professional Associations
- American Bar Association (Past Vice-Chair of Employment Law Committee)
- Illinois State Bar Association (Past Chair Workers’ Compensation Law Section Council)
- Champaign County Bar Association
- Illinois Association of Defense Trial Counsel (Member, Workers’ Compensation Committee)
- Defense Research Institute
- Illinois Self-Insurers Association

Court Admissions
- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit

Education
- Juris Doctor, Washington University School of Law, 1982
- Bachelor of Arts-Finance, University of Illinois, 1979

* For more information, visit the West website at: http://west.thomson.com/productdetail/159286/40843543/productdetail.aspx

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