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# Workers' Compensation Update

by Benjamin P. Wiborg

It is well known to those of us who practice in the area of Workers' Compensation that this field of law is in constant flux - the past few months have been no exception. Over the past several months Ohio courts have issued several significant Workers' Compensation decisions, including an \$860 Million dollar verdict; a contentious decision on what type of benefits an estate of a deceased injured worker can receive; and a clarification as to what evidence is necessary to show substantial aggravation of a pre-existing condition.

## A. \$860 Million Dollar Verdict For Ohio Employers.

On March 20, 2013, Cuyahoga County Common Pleas Judge Richard McMonagle ruled that the Bureau of Workers' Compensation ("BWC") owes Ohio employers \$860 million after determining that the BWC had overcharged employers.<sup>1</sup>

In 2007, a class action lawsuit was filed by Ohio businesses, including San Allen Inc. (d/b/a Corky and Lenny's) against the BWC.<sup>2</sup> The Plaintiff Class alleged that they had been overcharged as a result of Ohio's group rating system. A "group" is a collection of employers who join together under a single sponsoring organization in order to be viewed by the BWC as one large employer for the purpose of premium calculation. The Plaintiff Class alleged that the problem with the group rating system is that non-group employers were charged excess premiums.

Judge McMonagle found that the BWC had explicitly admitted to overcharging non-group employers. In fact, the Judge found that the former BWC Administrator, Marsha Ryan, had testified to the Ohio Senate Insurance Committee that non-group employers paid a premium. Furthermore, Judge McMonagle stated that the current BWC Chief Actuarial Officer, Christopher Carlson, had estimated that, in 2004 alone, the BWC imposed a "surcharge" to non-group employers in the amount of \$329 million. Moreover, the Judge found that as far back as 1991 the BWC knew that the group rating program would result in excess premiums to non-group members.

Additionally, Judge McMonagle ruled that the BWC had violated Ohio Revised Code §§ 4123.29 and 4123.34 by creating a prospective group rating system (as opposed to a retrospective rating system), and by creating a system that was inequitable. ORC § 4123.29 states that "the administrator shall consider an employer group as a single employing entity for purposes of *retrospective* rating." (Emphasis added). The statute does not contain language referencing *prospective* experience rating. Additionally, ORC § 4123.34 mandates that a rating system be equitable.

In the December 28, 2012 Partial Order and Opinion, the Court ruled that "the Defendant unlawfully charged the Plaintiff Class excessive premiums in violation of R.C. §4123.29 and §4123.34, and the Plaintiff Class is thereby

entitled to restitution for those overcharges.” However, the Judge ruled that the Plaintiff Class was not entitled to interest on the damages. In the March 20, 2013 Final Order and Opinion, Judge McMonagle awarded the Plaintiffs \$859,440,258.79 in restitution.

Both the Plaintiff Class and the BWC appealed Judge McMonagle’s ruling.<sup>3</sup> The parties have briefed the matter, and oral arguments are expected to take place in early 2014.

*B. Sziraki v. Admr., Bur. Of Workers’ Comp.*<sup>4</sup>

On September 18, 2013, the Supreme Court of Ohio affirmed the judgment of the Tenth District Court of Appeals, which had denied the estate of Dean Sziraki’s request for a writ of mandamus. The writ requested that the Industrial

Commission vacate its order for 104 weeks of scheduled loss benefits under ORC § 4123.57(B) and award 850 weeks of benefits for the loss of use of Dean’s arms and legs.<sup>5</sup>

Dean Sziraki had been involved in an horrific single car accident on May 14, 1991. Mr. Sziraki suffered numerous significant injuries, including brain and spinal cord injuries that rendered him a quadriplegic and caused him to live the remainder of his life in a near-vegetative state.

Several years later, in 1998, Dean’s mother and only next of kin, Marilyn B. Sziraki, applied for and was granted permanent total disability benefits based on the loss of use of Dean’s arms and legs, pursuant to ORC § 4123.58(C). The BWC withheld paying permanent total disability benefits because there was no guardian of Dean’s estate.

On January 8, 2007, Dean died, having left no surviving spouse or dependents. A probate court named Marilyn the administrator of his estate. The estate requested that the 850 weeks of accrued benefits be paid based on the scheduled loss of use for Dean’s arms and legs pursuant to ORC § 4123.57(B). The Industrial Commission granted only 104 weeks of benefits, reasoning that ORC § 4123.52(A) limits retroactive payment to two years.

The estate argued that, given the incompetent nature of the injured worker, the BWC had the affirmative duty to pay the scheduled loss of use benefits even without a formal application. The Supreme Court disagreed, finding that a formal application was necessary even though the language of ORC § 4123.57(B) contemplates an application but does not mandate one.

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The decision contains a strong dissent from three of the Justices. The dissent argues that the BWC had an affirmative duty to act because the BWC has the authority to grant the scheduled loss and that the BWC knew Dean was incompetent. The dissent went so far as to call the BWC's actions a "dereliction of duty."

*C. Gardi v. Lakewood School Dist. Bd. of Edn.*<sup>6</sup>

On August 8, 2013, the Court of Appeals for the Eighth Appellate District provided clarification as to what evidence is necessary to prove substantial aggravation of a pre-existing condition in a workers' compensation claim. The plaintiff, Gary Gardi, slipped and fell and injured his left knee, low back, and left hip while in the course and scope of employment for Board of Education of the Lakewood City School District ("Lakewood").

Mr. Gardi filed a motion to amend his claim to include the diagnosis of substantial aggravation of pre-existing osteoarthritis of his left knee. The motion was denied at the Industrial Commission level; the matter was then appealed to the Cuyahoga County Court of Common Pleas.

The trial court granted Lakewood's motion for summary judgment finding that Ohio Revised Code § 4123.01(C)(4) requires that the condition a claimant asserts to have been substantially aggravated must be medically documented prior to the workplace injury. Mr. Gardi appealed the trial court's judgment.

The Eighth District reversed and remanded, holding that ORC § 4123.01(C)(4) does not require a pre-existing condition to have been medically documented prior to the workplace injury. Prior to the *Gardi* decision, there was confusion as to what

medical evidence was necessary to prove substantial aggravation as a result of a misinterpretation of *Smith v. Lucas Cty.*<sup>7</sup>

In *Smith*, the court held "that the claimant's application failed because she had not presented objective evidence of her symptoms preceding the injury and, therefore, could not establish substantial aggravation, as required by statute."<sup>8</sup> This language led many workers compensation practitioners to read *Smith* as requiring pre and post injury diagnostic tests, despite the *Smith* court noting that substantial aggravation would not necessarily require before and after objective findings.

The *Gardi* court found that what *Smith* actually said was that the medical evidence, which included an MRI, used in support of Smith's request for substantial aggravation, only showed that the condition existed, but did not establish that the condition had been substantially aggravated.

The *Gardi* court interpreted that *Smith* "merely stands for the proposition that to recover under 4123.01(C)(4), there must be some objective evidence of substantial aggravation of a pre-existing condition."<sup>9</sup>

Accordingly, the *Gardi* court makes it very clear that ORC § 4123.01(C)(4) does not require a pre-existing condition to be medically documented prior to the workplace injury. The decision in *Gardi* makes sense considering that many people have degenerative conditions that are asymptomatic - and one does not get diagnostic tests on asymptomatic body parts. ■

End Notes

1. A bench trial was conducted on August 20, 2012, and a ruling on liability was made on December 28, 2012. On March 14, 2013, a hearing was conducted to determine the amount of restitution. The Final Order and Opinion, dated March 20, 2013, determined the amount of restitution that was owed to the Plaintiff Class.

2. *San Allen Inc., et. al vs. Bureau of Workers' Compensation, et. al.*, Cuyahoga County C.P. No. 07- 644950.
3. *San Allen Inc., et al. vs. Bureau of Workers' Compensation, et al.*, 8th Dist. No. CA-13-099786.
4. *State ex rel. Estate of Sziraki v. Admr., Bur. Of Workers' Comp.*, Slip Opinion No. 2013-Ohio-4007.
5. The estate wanted 850 weeks of benefits paid pursuant to the BWC fee schedule for the loss of use of his arms (225 weeks each) and his legs (200 weeks each).
6. *Gardi v. Lakewood School Dist. Bd. of Edn.*, 8th Dist. No. 99414, 2013-Ohio-3634.
7. *Smith v. Lucas Cty.*, 6th Dist. Lucas No. L-10-1200, 2011-Ohio-1548.
8. *Gardi*, at ¶ 23.
9. *Gardi*, at ¶ 23.