

Another Appellate Court Decision Creates New Challenges for Employers Trying to Limit Big Workers' Compensation Awards

Labor & Employment Law Update

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The Illinois Appellate Court's latest decision could make defending cases where an injured worker has permanent restrictions more challenging and costly. It increases the importance of co-opting with a trusted workers' compensation and employment attorney earlier in the overall process.

However, the same decision exemplifies why disputing certain cases can still yield good results if done properly. Over the years and at an increasing rate, we hear insured's and claims professionals wondering aloud if there is a point to litigating or denying and compromising questionable workers' compensation cases. This case provides hope.

In *Lenhart v The Illinois Workers Compensation Commission (USF Holland)*, 2015 1 App (3^d) 130743 WC, the third district sent a case back to the commission for a determination on wage differential, even though the claimant did not make an election to come within that provision of the WCA at the time of arbitration, instead asking for permanent and total disability. A company typically faces different litigation strategy (and exposure) decisions when a claimant seeks a wage differential award. Vocational rehabilitation and job placement to mitigate a potentially long-lasting and expensive wage loss award come into play. Before *Lenhart*, defense counsel could arguably rely upon the claimant's need to "elect" to come within the wage differential scenario. Essentially, this decision eliminates the informal "safe harbor" in which defense could focus on permanent total disability issues (for example: odd-lot, job search, employability) and not automatically have to seriously consider the costly prospect of vocational rehabilitation and job placement (while paying maintenance). Before *Lenhart*, the court previously held that if a claimant fails to present evidence regarding his entitlement to a wage differential award, then he implicitly waives his right to such an award.

While this presents new challenges, the same decision illustrates that there is still a positive cost-benefit to disputing a claim when you have obtained evidence that the claimant is exaggerating the subjective complaints to the treating physician. The claimant had convinced his treating medical providers that he was extremely disabled and sought permanent total disability at the IWCC. Surveillance showed otherwise and the commission found that much of the medical opinion testimony that the claimant relied on to meet his burden was based on his own subjective reporting of his capabilities to his medical providers. The commission found the opinion testimony of a physician to be “unreliable,” and found it significant that after the claimant’s treating psychiatrist viewed some of the surveillance video, he opined that the claimant appeared to be more mobile in the video than he was in his office. This doctor also noted that the claimant engaged in social interaction more than he reported being able to do.

What Does This Mean?

- Assess the wage differential early, particularly when making employment separation decisions and coordinate your workers’ compensation defense with the firm’s labor and employment counsel.
- Avoid surprises leaving you ill-prepared to defend on a last minute shift to wage differential claim/exposure by assessing it before the day of trial. It’s possible to obtain a needed trial continuance if you have prior written confirmation from the claimant attorney that wage differential is not at issue.
- Get good surveillance, provide it to the treating physician and remember that such contact typically requires permission from the claimant or attorney to avoid the risk of barred/excluded evidence/opinions. Continue to seek out anecdotal information about an injured worker’s home activities from co-workers, etc... that might reveal any exaggeration of subjective complaints.
- Anticipate job performance issues, obtain legal advice from workers’ compensation and employment counsel, aggressively confront exposure with either voluntary job separation or providing restricted duty, early vocational placement activity.
- After confirming exposure early on with job separation, consider avoiding costs of long term temporary /maintenance benefits and vocational expert costs with settlement or trial.

Remember, it is a constant battle requiring a pre-emptive approach combining workers’ compensation and employment law focuses, but it’s possible to achieve the most cost-efficient and risk-limiting results through proper steps.

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