



Q U A R T E R L Y N E W S L E T T E R

APRIL 2007

2007 LEGISLATIVE UPDATE

CONTENTS:

- Page 1* 2007 Legislative Update
- Page 2* Exercise Caution
When Settling Claims
- Page 2-3* The Diminishing
Commute
- Page 4* Notes from the Firm

The Nebraska Legislature's 2007 session ends on May 31. As of the date this article went to print, no bills of interest to insurance carriers or employers have passed, with the exception of LB 255. Several bills of interest are pending, however, and Baylor Evnen continues to monitor their progress.

LB 255 clarifies that fringe benefits, other than accrued unused vacation leave, are not payable to the employee upon the employee's departure from employment. Commissions are payable following the employer's receipt of payment from the customer. The employer and employee may timely agree to alter the statutory definition of commission and when it is paid. This bill went into effect on April 3, 2007.

LB 588: Approximately two years ago the business group, Nebraskans for Workers' Compensation Equity and Fairness, under the leadership of the chair of the group, Baylor Evnen partner Dallas Jones, identified the hospital reimbursement system as a significant cost driver to the workers' compensation system. Currently, there is no statutory limit on the amount a hospital may charge in a workers' compensation case. The current fee schedule allows employers to reduce the billed charges by a relatively modest amount. LB 588 establishes a new hospital fee schedule for large hospitals. Its goal is to revise the fee schedule for at least 90 percent of all workers' compensation related hospital charges in the state.

The bill provides for compensation to large hospitals at the rate of 140 percent of Medicare. LB 588 also creates a prompt payment requirement for "compensable claims." Payors would have 15 days to request additional information and 30 days from receipt of all required information to make payment. Failure to pay by said time would obligate the employer to pay the hospital its "normal billed charges."

Since LB 588 is anticipated to result in a significant savings to Nebraska businesses, the Business and Labor Committee incorporated a benefit increase provision from LB 77. This portion of the legislation is designed to increase the compensation payable to employees who injure two or more members in one accident. In such cases, the employee would be entitled to compensation based upon his loss of earning capacity, rather than the schedule of benefits, if the payments per the schedule of benefits were, in the court's discretion, insufficient compensation and the employee shows he suffered at least a 30 percent loss of earning power.

From figures provided to the Business and Labor Committee by the larger hospitals, it appears that the savings derived from the revised hospital fee schedule will very likely be greater than any additional cost that may result from the benefit increase portion of the bill. The bill is a priority bill of the Business and Labor Committee and is presently on General File.

LB 564 is one of the bills introduced with the goal of reversing last year's Nebraska Supreme Court case which held that the Recreation Liability Act did not apply to political subdivisions. As a result, municipalities across the state have had to rethink their liability for activities in parks, playgrounds, and similar public amenities.

LB 564 would amend the Political Subdivisions Tort Claims Act to reinstate some immunity for municipalities and other political subdivisions. The bill is currently on Select File, the second debating and voting stage.

We will report on the status of these bills and any other bills of interest in our July Quarterly Newsletter. For questions regarding these bills, contact Dallas Jones, Gail Perry, or Darla Ideus.

**BAYLOR, EVNEN,
CURTISS, GRIMIT & WITT, LLP**
WELLS FARGO CENTER
1248 "O" STREET, SUITE 600
LINCOLN, NEBRASKA 68508
PHONE: 402.475.1075
FAX: 402.475.9515
EMAIL: INFO@BAYLOREVNEN.COM
WWW.BAYLOREVNEN.COM

EXERCISE CAUTION WHEN SETTLING CLAIMS

BY CHRISTOPHER M. FERDICO

A recent case decided by the Nebraska Supreme Court may open the door for further claims to be made in cases previously thought to be settled.

Simms v. Vicorp Restaurants involved an underlying claim by Mrs. Simms that she had been injured due to a slip and fall. Mrs. Simms settled her claim for these injuries and signed a “Release of All Claims.” Subsequently, Mrs. Simms’ husband made a claim for loss of consortium arising out of the slip and fall. Defendant Vicorp argued that the wife’s release barred her husband’s claim as the release extinguished all claims stemming from the accident, including her spouse’s loss of consortium claim. The Supreme Court disagreed, stating, “Although a loss of consortium claim derives from the harm suffered by the injured spouse . . . , it remains a personal legal claim which is separate and distinct from those claims belonging to the injured spouse.”

The *Simms* decision makes it clear that a settlement and release made by the injured party may be insufficient to end a dispute where there is potential for a loss of consortium claim. When settling claims, it is therefore crucial to consider the existence of potential loss of consortium claims and include spouses in any release signed as part of a settlement. In death cases it is more complicated because minor children are not bound by such releases. Special care must be taken in these cases to avoid further litigation.



Christopher M. Ferdico

THE DIMINISHING COMMUTE AND EXPANDING PREMISES

BY JAMES D. HAMILTON

For a workers’ compensation claim to succeed, the accident and injury must occur “in the course of” employment. Generally, an injury is “in the course of” employment if it takes place during normal work hours, at a place where the employee may reasonably be required to be, while the employee is performing work duties. Whether an employee can meet his burden of proof as to this element may become an issue if the employee is injured off the employer’s premises. In recent years, several appellate court decisions have made it easier for an employee to establish a compensable injury outside the employer’s doors.

The Shrinking Going and Coming Rule

Injuries sustained off the employer’s premises while the employee is going to and from work do not arise out of and in the course of employment unless it is determined that a *distinct causal connection* exists between an employer-created condition and the occurrence of the injury. This rule is referred to as the “going and coming” rule. The appellate court’s interpretation of what is necessary to show a *distinct causal connection* has broadened the scope of compensable injuries occurring while the employee is traveling.

The most notable exception to the “going and coming” rule is the **commercial traveler** exception. Where an employee, in the performance of his duties, is required to travel and an accident occurs while he is so engaged, the accident arises out of and in the course of

his employment. Commercial travelers are regarded as acting in the course of their employment during the *entire* period of travel on an employer’s business. Accordingly, an injury occurring while the commercial traveler is in his hotel room after work hours may still be compensable.

An employee may even be considered a commercial traveler when his trip serves a dual business and personal purpose. In such dual purpose cases, the key factor in determining whether the commercial traveler exception applies is ascertaining whether the trip involved a service to be performed on the employer’s behalf which would have occasioned the trip, even if it had not coincided with the personal journey. In other words, would the employee have made the trip to meet with Customer A, or Client B, even if Aunt Betty’s 80th birthday party did not coincide with the trip? If the answer is yes, an injury which occurs during the trip may be compensable.

When an employee makes an off-premises journey, an injury occurring during that journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making that journey, is itself sufficiently substantial to be viewed as an integral part of the service itself. The **special errand exception** applies when there is instruction, direction, requirement, or suggestion by the employer that the employee make the journey. Key in evaluating this



James D. Hamilton

(Continued on page 3)

(Continued from page 2)

exception to the “going and coming” rule is ascertaining the facts surrounding the employee's journey, such as, who requested the employee make the trip?

Another common exception to the “going and coming” rule is an injury which occurs when the employee is driving a vehicle furnished by the employer and/or under the control of the employer. Injuries sustained during a trip where the employee is using **employer-owned transportation** meet the “in the course of” requirement of the Nebraska Workers' Compensation Act.

The Expanding Premises of the Employer

The rule that injuries occurring on the employer's premises occur in the course of employment is well settled. Just as the various exceptions to the “going and coming” rule have made it easier for claimants to establish compensable injuries while on the road, recent cases broadening the concept of what constitutes the employer's premises have likewise expanded the scope of compensable injuries.

Injuries sustained in an **employer-owned parking lot** have generally been treated as compensable. However, recently the Nebraska Supreme Court in *Zoucha v. Touch of Class Lounge* found that a shopping center parking lot provided for the convenience of, and used by, employees of all businesses located within the strip mall (not just the claimant's employer) is considered part of the premises of an employer located in the center. This case represents a significant progression in the concept of employers' premises in that under *Zoucha*, injuries occurring in the areas over which the employer does not exercise ownership or control may be compensable.

Similarly, injuries occurring in **public areas** have been found compensable. In *Coffey v. Waldinger Corp.*, an employer encouraged its employees to use a fenced lot across the street from the employer's premises, where the employees were allowed to park for free. An employee was struck and killed by a motorist as he attempted to cross the street from the assigned parking lot to his work site. In finding the accident compensable, the Court in *Coffey* concluded that the employer created a condition under which its employees would necessarily encounter hazard while traveling to the premises where they worked. In the end, the Court held that there was a distinct causal connection between the employer's encouragement of its employees' use of the parking lot and the occurrence of the accident. *Coffey* points out the importance of investigating all the facts surrounding accidents that occur in such public places in order to

fully evaluate *any* possible connection between the employer and the injury.

Under certain circumstances, some acts will be deemed compensable even though they occur when the employee is tending to a matter of **personal convenience**, even if the incident occurs outside of the employer's premises. The incidences can include leaving the employer's premises to obtain food or drink. Where the employee is not acting in conflict with specific instructions from the employer and he is engaging in an activity which would normally be expected under the conditions of work, it is possible that the employee will be deemed to have remained in the scope of employment.

The Nebraska Supreme Court addressed this issue in *Misek v. CNG Financial*, where an employee was injured while walking to a convenience store to purchase soft drinks for herself as well as her co-workers and supervisors. The Court found that even though the injury did not occur on the premises of the employer, the injury was compensable. The Court's analysis in finding this injury compensable once again points out the importance of the specific facts surrounding the incident. For example, in *Misek*, soft drinks were not available on-site and obtaining soft drinks off-site was a matter of personal convenience and comfort. The Court also pointed to the fact that the employee obtained permission from her supervisor to obtain the soft drinks.

For several years, appellate court decisions have been broadening the exceptions to the “going and coming” rule. They have also been broadening the concept of what constitutes employer-owned premises. In both types of cases, the Courts' analyses stress the importance of a detailed fact investigation to determine whether there exists any *distinct causal connection* between the employment and the injury.

NOTES FROM THE FIRM

In March, **Gail S. Perry** was inducted into the American College of Trial Lawyers, one of the premier legal associations in America. Fellowship in the College is by invitation only, based on exceptional courtroom skills and experience as well as reputation for the highest ethics, professionalism and collegiality. Membership in the College is limited to one percent of the total lawyer population of any state or province.

Christopher M. Ferdico has been selected as "President Elect" of the Robert Van Pelt American Inn of Court. The Inns of Court is an international legal organization dedicated to professionalism and ethics in the practice of law. In this role Chris has been invited to attend a dinner at the United States Supreme Court to honor the annual achievements of the Inns of Court. Chris will attend the dinner with Judge Kenneth Stephen of the Nebraska Supreme Court.

In April, **Jill Gradwohl Schroeder** presented a Webinar for the National Association of Medicare Set Aside Professionals on analyzing and documenting "Zero" Set Asides in Medicare Cases. The Webinar focused upon ways for employees, employers, and insurers to identify and assert reasonable factual, medical and legal arguments to Medicare to reduce the need for future medical expenses to be placed in a Medicare Set Aside account when workers' compensation claims are settled.



WELLS FARGO CENTER
1248 "O" STREET, SUITE 600
LINCOLN, NEBRASKA 68508
PHONE: 402.475.1075
FAX: 402.475.9515
EMAIL: INFO@BAYLOREVNEN.COM
WWW.BAYLOREVNEN.COM