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Amanda A. Dutton

**SMART MOVE:**

What is the proper labor market from which to assess loss of earning capacity when an employee moves after an injury?

BY AMANDA A. DUTTON

*Giboo v. Certified Transmission Rebuilders,*  
275 Neb. 369 (April 4, 2008)

A recent Nebraska Supreme Court decision clarifies the labor market to be considered in assessing an employee's loss of earning capacity when he moves to a new community after a work-related injury. In *Giboo v. Certified Transmission Rebuilders*, the plaintiff, Donelle Giboo, injured her back while working for her employer. At the time of the injury, Giboo was both living and working in the Omaha area. After entry of an initial award, Giboo was released to return to work with restrictions. The agreed-upon vocational rehabilitation counselor determined that Giboo had sustained a loss of access to jobs in the Omaha and Council Bluffs labor market area, resulting in a 35 percent loss of earning power.

The employer then filed a petition to modify the prior award. At the hearing, Giboo presented evidence that since the accident, she had moved from the Omaha area to Dunlap, Iowa, a small rural community of approximately 600 residents, located about 50 miles east of Omaha. Giboo testified that she moved in order to live with her child's father, who owned a home in Dunlap. Giboo also presented testimony from a rebuttal vocational rehabilitation counselor, who testified that the agreed-upon counselor had underestimated Giboo's loss of earning power by basing the analysis on the Omaha/Council Bluffs labor market, instead of the Dunlap labor market. The trial court adopted the assessment of the agreed-upon counselor and concluded that Giboo had sustained a 35 percent loss of earning power.

Giboo appealed, and the case was ultimately decided by the Nebraska Supreme Court. The Supreme Court considered the issue of whether the relevant labor market from which to assess Giboo's loss of earning power was the labor market at the time of her injury, Omaha/Council Bluffs, or the labor market to which she had subsequently moved, Dunlap, Iowa.

The Court determined that the question before it encompassed two separate inquiries: 1) which community should serve as the "hub" area from which

to assess earning capacity, and 2) what other geographic areas may be considered along with the hub community in reaching a loss of earning capacity determination.

The Court surveyed three approaches used by other jurisdictions in determining how to define the hub community. These consisted of defining the hub community as: 1) the community where the injury occurred, 2) the community to which the employee had moved, or 3) a combination of both the prior and present communities. The Court declined to adopt approaches that would consider the community where the injury occurred, or a combination of the prior and present communities, because such approaches would include employment opportunities that are "not realistically available" to the employee. The Court refused to adopt a rule that would factor in employment opportunities that are not practically available, regardless of where the employee lived or was employed at the time of injury.

The Court determined that the employee's new community should serve as the hub community from which to assess loss of earning capacity, provided that the employee's move was not made for "improper motives." The Court explained that the employee must establish that the move was not made for the purpose of exaggerating the extent of the employee's difficulty in finding suitable employment. If the employee cannot show a legitimate motive behind his or her post-injury relocation, the community where the employee resided at the time the injury occurred will serve as the hub community.

The Court determined that Dunlap should serve as the "hub" community from which to assess Giboo's loss of earning capacity, and then turned to the question of what other communities around Dunlap should also be considered. The Court determined that a reasonable geographic area around the hub community may be considered in assessing loss of earning capacity. The Court adopted a reasonableness test, stating that communities surrounding the hub community should be considered as part of the employee's labor market "only to the extent that it would be reasonable for the claimant to seek work in that location." In making this

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determination, the totality of the circumstances should be considered, including the availability of transportation, duration of the commute, length of the workday the employee is capable of working, ability of the employee to make the commute based on the employee's physical condition, economic feasibility of a person in the employee's position working in that location, and whether others in the hub community regularly seek employment in the prospective area.

In *Giboo's* case, the Court determined that it was *possible* that Omaha/Council Bluffs may be taken into account in assessing *Giboo's* earning capacity, based upon the proximity to Dunlap, and not the fact that Omaha was the community where *Giboo* lived and worked at the time of her injury. The matter was remanded to the trial court to consider the "totality of the circumstances" and determine whether any communities around Dunlap should factor into the loss of earning capacity assessment.

What are the practical implications of the Court's decision? First, it is likely that when an employee moves to a smaller community following an injury, the employee will nearly always be able to prove that the move was not made

for improper purposes. As the Supreme Court noted, "It is difficult to envision a situation in which a claimant's move to a small community could not be justified on an economic basis." Thus, in cases where the employee relocates following an injury, the new community will likely almost always be regarded as the "hub" community. However, this does not necessarily mean that the employee's prior community is excluded from the analysis, as the *Giboo* decision illustrates. As a result, it will now be critically important to give special attention to the vocational evidence that is developed. Vocational counselors should take a broader approach to defining the relevant labor market, with consideration given to the factors identified by the Court as relevant in determining what communities, in addition to the "hub" community, are within that market.

## LEGISLATIVE UPDATE

The 100th Nebraska Legislature, Second Session adjourned on Thursday, April 17, 2008. Two bills that were the subject of that session which are of interest to employers and insurers are LB 1014 and LB 819.

**LB 1014:** LB 1014 changes the existing law to allow for mediation referrals and also changes the process for small claims court appeals.

LB 1014 allows a court to refer a civil case to mediation or other alternative dispute resolution, and permits the adoption of rules of practice and procedure for such referrals.

LB 1014 also changes the process by which cases are appealed from the small claims court to the district court. Previously, the district court had appellate review of errors appearing on the record in all county court cases other than appeals from the small claims court and the district court was to *retry* all cases appealed from the small claims court. However, LB 1014 changes the law to provide the district court with appellate review of errors appearing on the record in *all* county court cases, including appeals from the small claims court, and removes the district court's power to retry small claims court cases. Thus, Nebraska district courts will no longer act as trial courts when hearing small claims appeals, but will instead review small claims court decisions on the record.

While the purpose of these provisions of LB 1014 was to better manage the existing caseloads of all courts, the effect of these amendments is likely to simply shift the caseloads of the district courts to the regular county courts. Under the prior system, it was often beneficial for carriers to simply leave a case in small claims court and then appeal the decision to the district court if the

case was serious enough to warrant such. However, under the new law, in most situations, it is probably most efficient to immediately remove cases from small claims court to the regular county court docket.

The provision regarding mediation referrals becomes operative three calendar months after the adjournment of the most recent legislative session. Provisions regarding small claims appeals become operative on January 1, 2009.

**LB 819:** The Legislature passed a bill, LB 819, which, had it not been vetoed by Governor Heineman, would have provided, for the first time in Nebraska, that some mental injuries are compensable without the employee first showing that a physical injury occurred (often referred to as "mental-mental" claims). LB 819 provided that "first responders" whose employment conditions are "extraordinary and unusual in comparison to the normal conditions of the particular employment," may recover for mental injuries stemming from such conditions. "First responders" included firefighters, law enforcement officers, crime scene investigators and out-of-hospital emergency care providers. It is highly likely the Legislature will entertain this concept again next session. Although the bill had limited application to Nebraska businesses, a concern of opponents of the bill was that it would serve as a basis to further expand the scope of the Nebraska Workers' Compensation Act in future sessions to include a greater number of mental-mental claims. Direct further inquiry about this issue to Dallas Jones, who serves as the President of Nebraskans for Workers' Compensation Equity and Fairness, which organization strenuously opposed the bill.

## LB 586 – LESS THAN CLEAR CHANGES TO THE MEDICAL LIEN STATUTE

BY DEREK C. ZIMMERMAN



Derek C. Zimmerman

Medical providers charge one rate, but accept as full payment substantially discounted amounts pursuant to contracts with health insurance carriers or the government. If you are a third party liable for medical expenses, at what rate do you pay? This has been an unanswered question in Nebraska. A recent bill passed by the Nebraska Legislature attempted to answer this question. Unfortunately, some portions of LB 586, which took effect on March 10, 2008, are not a model of clarity.

LB 586 clearly adds chiropractors to the list of providers who can file medical liens. Beyond this, LB 586 appears to be somewhat contradictory. On the one hand, for persons covered by private medical insurance or other health benefit plans, LB 586 limits the amount of the medical lien to the amount the provider would have been able to submit to the patient's health insurance carrier. On the other hand, LB 586 goes on to state that "[t]he measure of damages for medical expenses in personal injury claims shall be the private party rate, not the discounted amount."

This new bill appears to attempt to answer a long-disputed issue, that is, in personal injury claims, is the third party liable for the amount the medical provider charges or the amount the provider commonly accepts? Defendants have long argued that the fairness and reasonableness of a plaintiff's medical expense is a factual question for the jury and the amount that the provider typically accepts is the fair and reasonable amount. LB 586 seems to say that argument is no longer available. Plaintiffs may argue that under LB 586, the medical provider is only entitled to the amount it would have otherwise been paid by the private carrier, and that the injured party is entitled to the difference between that amount and the amount originally charged. For example, if the provider charges \$10,000 but, pursuant to its contract with the patient's private carrier, accepts \$6,000 as full payment, the plaintiff could argue that the defendant is liable to the provider for \$6,000 and to the injured party for the remaining \$4,000.

LB 586 does not define what it means by "private party rate," nor does it define "discounted amount." The legislative history of LB 586 does not further clarify this terminology. LB 586 seemed to be geared towards preventing situations where health providers used the lien statutes to avoid the prohibition on so-called balance billing. Specifically, providers often negotiated a lower rate

with an insurance provider, but if the provider wished to recover the full amount of the billed charges the provider would file a lien against the patient instead of billing the insurer. As a result, the patient could end up being responsible for the full amount of the bill, as opposed to the lower negotiated rate. The Legislature determined this practice was a deprivation of the benefit of the insurance contract the patient was entitled to receive as a result of the patient's premium payments.

However, the purpose of LB 586 described in the legislative history does not explain why the statement regarding the measure of damages was included. The legislative history indicates that this language was included to "[clarify] that amendments to the lien law do not change the measure of damages in personal injury claims. That measure remains the private-party rate. That's simply a clarification to make sure that the language in LB 586 is not interpreted as some kind of an endorsement of something other than the private-pay rate, which is the law in Nebraska." The legislative history also suggests that the word "private" was inserted to clarify that LB 586 only applies to situations involving private health insurance plans and not to Medicare or Medicaid.

LB 586 does not explain why it defines the medical lien amount differently than it defines the measure of damages. The lack of definition for the terms "private party rate" and "discounted amount" leaves open the door for different interpretations of the LB 586 term "private party rate." The legislative history at least raises the possibility that "private party rate" can still be interpreted to not limit the inquiry to what the medical provider charges, but that fairness and reasonableness of a plaintiff's medical expenses is still something that can be presented to the jury in a personal injury case.

## WALT ZINK RETIRES FROM THE MILITARY AFTER 38 YEARS OF SERVICE TO OUR COUNTRY



Walter E. Zink, II

Walt Zink, a partner at Baylor Evnen, retired from the Nebraska Army National Guard at the end of February 2008, as a Major General after more than 38 years of military service. During his career, Walt has served as the Assistant Adjutant General for the Nebraska Army Guard and concurrently as the Assistant Division Commander for the 75th Division (Training Support) headquartered in Houston, Texas.

During 2003, Walt was mobilized at Ft. Riley, Kansas, in support of Operation Enduring Freedom where he supervised the mobilization, training, and deployment of Reserve Component units to Iraq and Afghanistan. In late 2003, Walt was released from active duty, but was recalled again in April of 2004 to Ft. Hood, Texas, where for nearly 10 months he commanded a Tactical Command Post for Fifth United States Army with responsibility for the mobilization, training, and deployment of Army National Guard Brigade Combat Teams to Iraq. During this latter deployment, Walt split some of his time between Ft. Hood, Texas, Kuwait, and Iraq.

Upon being released from active duty in January 2005, he was first assigned as the Deputy Commanding General (Reserve Component) for Fifth Army in San Antonio, Texas, and then in April of 2006, he was selected to command the first Operational Command Post of the newly-formed United States Army North headquartered at Ft. Sam Houston, Texas. Walt retired from this latter assignment in February of this year. For the past five and a half years, he was also assigned as a member of the Reserve Forces Policy Committee on the Secretary of the Army's staff.

Baylor Evnen thanks Walt for his years of service to our country.



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### NEW RATES

Effective January 1, 2008, the maximum weekly workers' compensation indemnity benefit in Nebraska was increased to \$644. Our January Quarterly Newsletter incorrectly identified the maximum rate as \$664.

### NOTES FROM THE FIRM

**Jill G. Schroeder** served as a presenter at the 2008 ALFA International Workers' Compensation Practice Group seminar in Baltimore, Maryland in early April. Jill, along with Maine attorney Doris Champagne, gave a presentation on the topic "Medicare Set Aside Update," which covered recent Medicare legislation and practical suggestions as to how to most effectively handle coordination of past and future benefits when Medicare has a potential interest in workers' compensation claims.

To find additional newsletter articles, go to our website at [www.baylorevnen.com](http://www.baylorevnen.com).

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